

Further Light

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Litigators should view the principles expanded upon in *Pension Committee* as an integral part of a sound offensive and defensive discovery playbook.

Revisiting Discovery “Best Practices” and Penalties

The Honorable Shira A. Scheindlin, United States District Court Judge for the Southern District of New York, recently issued a detailed opinion addressing document preservation and production practices that all federal and

state court litigators must read. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), the court confronted certain plaintiffs’ multi-year, inattentive, and haphazard paper and electronic document discovery efforts. Judge Scheindlin’s decision provides a useful framework for devising best practices to help clients navigate the often rocky shoals of modern discovery.

The *Pension Committee* decision, subtitled by Judge Scheindlin, “*Zubulake* Revisited: Six Years Later,” articulates electronically stored information (ESI) responsibilities and other discovery matters and marks an evolution of principles that Judge Scheindlin established in ground-breaking opinions issued from 2003 to 2004. See, e.g., *Zubulake v. UBS Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Zubulake v. UBS Warburg*, 229 F.R.D. 422 (S.D.N.Y.

2004) (*Zubulake V*). In *Zubulake IV*, the court held that the duty to issue a written litigation hold arises when a party reasonably anticipates litigation. *Zubulake IV*, 220 F.R.D. at 218. The written hold directive, however, is just the beginning of complying with contemporary discovery duties: “Counsel must [also] take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” *Zubulake V*, 229 F.R.D. at 432.

The electronic discovery issues that the court addressed comprehensively in *Zubulake* soon received considerable attention. In particular, Congress subsequently amended Federal Rules of Civil Procedure 16, 26, 33, 34, 37, and 45. Most notably, Federal Rule of Civil Procedure 26(f) was amended to require that parties discuss ESI during the early stage discovery-planning conference, and Rule 37 was amended to create a “safe harbor” for inadvertent alteration or destruction of electronic files result-



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ing from routine and good-faith operation of a litigant's electronic information systems. Further, courts across the country began referencing the document preservation principles announced in the *Zubulake* decisions—including counsel's critical role in monitoring and supervising the process—in a number of decisions addressing motions seeking sanctions for spoliation. See, e.g., *Swofford v. Eslinger*, 671 F. Supp. 2d 1274 (M.D. Fla. 2009); *School-Link Techs., Inc. v. Applied Resources, Inc.*, No. 05-2088-JWL, 2007 WL 677647 (D. Kan. Feb. 28, 2007); *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614 (D. Col. 2007).

Building on those earlier pronouncements of modern discovery duties, *Pension Committee* delineates a host of potential sanctions resulting from negligent, grossly negligent, or willful failures to preserve or collect documents. As discussed below, Judge Lee H. Rosenthal issued a decision shortly after *Pension Committee* articulating a different approach to imposing severe discovery sanctions. See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010). Regardless of how a court may evaluate potential discovery sanctions, counsel should incorporate *Pension Committee*'s teachings into their practices and advise clients accordingly.

Pension Committee Decision Background

In *Pension Committee*, a group of 96 plaintiffs commenced litigation in February 2004 to recover approximately \$550 million in aggregate losses that they allegedly suffered in connection with the liquidation of two hedge funds based in the British Virgin Islands. Although the plaintiffs filed the action in the Southern District of Florida, the case was transferred to the Southern District of New York in 2005 on the defendants' motion to change venue.

The plaintiffs asserted claims against the funds' former directors, administrators, auditor, and prime broker-custodian under New York law and federal securities laws. During protracted discovery, the defendants contended that the plaintiffs' deposition testimony indicated that numerous documents were missing from certain plaintiffs' document productions. As a result, Judge Scheindlin ordered those

plaintiffs to submit declarations detailing their respective efforts to preserve and produce documents. The requested declarations, generally described attempts to (1) locate and preserve documents when the parties first retained counsel in 2003–2004; and (2) comply with specific document requests received in 2007–2008, after a Private Securities Litigation Reform Act of 1995 (PSLRA) discovery stay was lifted. See 15 U.S.C. §78u-4(b)(3)(B).

Perhaps in contrast to the plaintiffs' indifferent preservation and production endeavors, the court's decision indicates that the plaintiffs and their counsel expended a "huge amount" of time preparing the requested declarations, including "attempting to locate documents that had not yet been produced." *Pension Committee*, 685 F. Supp. 2d at 474, 2010 WL 184312, at *21. Concerning the content of the plaintiffs' discovery compliance declarations, Judge Scheindlin observed that for one, the declarants uniformly claimed that they had "located, preserved, and produced 'all'" relevant documents. *Id.* The court granted the defendants' request to depose certain declarants. The defendants parsed the proffered declarations, reviewed the declarants' deposition testimony, and cross-referenced different plaintiffs' document productions only to conclude that first, substantial omissions from the plaintiffs' document productions remained, and second, "all of the declarations were false and misleading and/or executed by a declarant without personal knowledge of its contents." *Pension Committee*, 685 F. Supp. 2d at 475, 2010 WL 184312, at *21.

At the close of discovery, it was clear that the plaintiffs had not produced "all" relevant documents as they claimed in their respective declarations. Certain defendants, therefore, moved for sanctions against 13 of the 96 plaintiffs for failing to preserve and produce, and therefore, spoliating, relevant documents and ESI, as well as for submitting false and misleading declarations. The defendants requested that the court dismiss the plaintiffs' claims or impose any other sanction that it deemed appropriate in light of the alleged pattern of misconduct. In determining the appropriate sanctions, Judge Scheindlin reviewed various plaintiffs' discovery actions and inactions, which ranged from negligence

to willful misconduct. The perceived egregiousness of a particular plaintiff's transgressions dictated the sanction that Judge Scheindlin imposed.

Discovery Misconduct and Culpability

Judge Scheindlin acknowledged that the conduct at issue in *Pension Committee* did not involve purposeful evidence destruc-

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tion, and she did not "expect" parties to "meet a standard of perfection" in addressing discovery issues. 685 F. Supp. 2d at 461, 2010 WL 184312, at *9. Rather, the court explained that the record revealed "flawed" discovery efforts that clearly offended the court's expectation "that litigants and their counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party." 685 F. Supp. 2d at 461–62, 2010 WL 184312, at *9. Failing to take these required measures, the court concluded, would compromise the integrity of the judicial process and "inevitably result in the spoliation of evidence." 685 F. Supp. 2d at 462, 2010 WL 184312, at *9.

Judge Scheindlin conceded that determining whether to impose sanctions on the plaintiffs, and the severity, if warranted, depended on the degree of the plaintiffs' culpability in their discovery failures. The court further noted that traditional tort definitions provided some guidance, but that no specific framework for defining dis-

covery misconduct existed. For that reason, Judge Scheindlin recognized that other courts could view her “judgment call[s]” about the plaintiffs’ conduct as imprecise. 685 F. Supp. 2d at 463, 2010 WL 184312, at *10–11. Similarly, she acknowledged that she relied on “gut reaction” in selecting sanctions appropriate to the plaintiffs’ misconduct and that all requests for sanc-

The standard of proof

on the importance of unavailable evidence should not be so demanding that it enabled negligent parties to benefit from spoliation.

tions connected with alleged discovery misconduct were “inherently fact intensive” inquiries that “must be reviewed case by case.” 685 F. Supp. 2d at 471, 2010 WL 184312, at *18.

Before directly addressing individual plaintiffs’ conduct—a detailed discussion of which is beyond the scope here—the court provided some broad general observations concerning levels of culpability in failing to fulfill discovery obligations. According to the court, a party that fails “to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding” is negligent, even if the shortcomings result from “a pure heart and an empty head.” 685 F. Supp. 2d at 464, 2010 WL 184312, at *11. Grossly negligent discovery-related conduct, however, proved more difficult to encapsulate. Consistent with Judge Scheindlin’s explanation that pigeonholing the degree of discovery misconduct is mostly a judgment call, she indicated that acts or omissions “likely to result in the destruction of relevant information” can constitute gross negligence. 685 F. Supp. 2d at 465, 2010 WL 184312, at *11. (emphasis added).

Based on its examination of six of the plaintiffs’ discovery practices, the court concluded that the following conduct aris-

ing after litigation was reasonably anticipated and constituted gross negligence in the litigants’ duties to preserve, collect, and produce relevant information:

- Failing to issue a prompt, written, and detailed litigation hold directive
- Neglecting to suspend routine document destruction policies that may impact potentially relevant information
- Failing to take steps to preserve the electronic and paper records of all “key players” likely involved in the transactions or occurrences at issue
- Deleting relevant e-mail or other electronically stored information
- Neglecting to preserve records of former employees likely involved in the transactions or occurrences at issue that are within a party’s possession, custody, or control
- Failing to preserve backup tapes when they are the sole source of relevant information or relate to key players, assuming the information is not otherwise obtainable from more readily accessible sources.

Id. at *7, 12–17.

In addition to the discovery failures noted above, Judge Scheindlin cautioned that a lawyer-drafted litigation hold directive that “places total reliance on the employee to search and select what the employee believe[s] to be responsive records without any supervision from Counsel” could potentially constitute gross negligence if that employee is not reasonably capable of carrying out the necessary measures. 685 F. Supp. 2d at 473, 2010 WL 184312, at *19–20; *see also* 685 F. Supp. 2d at 473 n.68, 2010 WL 184312, at *19–20 n.68.

The *Pension Committee* decision does not pinpoint a clear border between grossly negligent and negligent discovery conduct, and a bright-line test would likely prove unworkable. Nevertheless, the timing of certain plaintiffs’ written litigation hold directives appeared to divide discovery conduct that the court deemed negligent from that discovery conduct deemed grossly negligent.

In particular, Judge Scheindlin observed that each of the plaintiffs that she concluded merely had been negligent in fulfilling their discovery obligations had instituted written litigation holds by 2007. The court afforded “lenity” to these plaintiffs because the duty

to issue a written litigation hold in early 2004, while the case was pending in federal court in Florida, was “on the borderline between a well-established duty and one that was not yet generally required.” 685 F. Supp. 2d at 488–89, 2010 WL 184312, at *33. Even that demarcation, however, was admittedly imprecise. Indeed, the judge noted that her conclusion was based, in part, on her belief that instituting the required written litigation hold following transfer to the Southern District of New York in 2005 “may not have made any difference” because electronic records that existed in 2003 would very likely have been “lost or destroyed” by 2005. 685 F. Supp. 2d at 489 n.179, 2010 WL 184312, at *33–34 n.179.

In examining the conduct of the seven other plaintiffs that were subject to the defendants’ sanctions motion, the court observed that the following practices were negligent:

- Providing insufficient detail in written litigation hold directives and failing to periodically remind relevant persons of the need to preserve and collect information
- Neglecting to delegate preservation and collection duties to a knowledgeable person or failing to supervise persons responsible for searching for paper and electronic records
- Permitting employees to conduct their own unsupervised document searches or relying on such employees’ unsubstantiated representations that all relevant sources were included in such searches
- Neglecting to search for relevant documents and ESI in all the places that they were likely to exist
- Failing to search the records of all employees who may have had relevant information
- Overlooking back-up tapes in document search efforts when a party was aware that relevant material existed, or should have existed on such tapes, but had not yet been produced
- Excluding relevant persons’ personal data devices and home computers from preservation and collection efforts
- Failing to produce relevant information once it was located and preserved.

Id. at *18–23. Reflecting the reality that a bright-line standard for assigning degrees

of culpability in discovery misconduct is impracticable, the conduct that the court viewed as negligent was substantially similar to the conduct that the court determined was grossly negligent.

Parties' Burdens When Information Is Unavailable

Spoilation of information exists when evidence has been destroyed, materially altered, or otherwise inadequately preserved for another's use in pending or reasonably foreseeable litigation. An innocent party is normally entitled to an adverse inference when spoliation has occurred only after demonstrating, among others, that the evidence at issue was relevant to the party's claim or defense and that the party suffered real prejudice as a result of the spoliation. In *Pension Committee*, Judge Scheindlin noted that an innocent party's required showing is particularly complicated when documents are no longer available because it may not be possible to ascertain what the missing information conveyed: "Who then should bear the burden of establishing the relevance of evidence that can no longer be found?" 685 F. Supp. 2d at 466, 2010 WL 184312, at *13. Responding to that question, Judge Scheindlin promulgated a novel burden-shifting test—directly pegged to a spoliating party's level of culpability.

Harkening back to *Zubulake V*, Judge Scheindlin first made clear that a party seeking an adverse inference or other sanction in connection with alleged spoliation of information must establish that (1) the spoliator had control over the evidence and was obligated to preserve it at the time it was lost or destroyed, (2) the spoliator acted with a culpable state of mind in connection with the alleged loss or destruction, and (3) the lost evidence was relevant to one or more claims or defenses. 685 F. Supp. 2d at 467, 2010 WL 184312, at *14. According to the court, "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner." *Id.* (emphasis added). If, however, the spoliating party is merely negligent, "the innocent party must prove both relevance and prejudice to justify a severe sanction." 685 F. Supp. 2d at 467–68, 2010 WL 184312, at 14. The innocent party can prove relevance and prejudice by presenting evi-

dence supporting an inference that the lost or destroyed information would have been favorable to that innocent party's case.

Judge Scheindlin noted that even though requiring the innocent party to demonstrate both the relevance of unavailable information and resulting prejudice may "seem unfair," imposing a burden was necessary to prevent litigation from becoming a "gotcha" contest that fell short of addressing the merits of the underlying dispute. 685 F. Supp. 2d at 468, 2010 WL 184312, at *15. However, the standard of proof on the importance of unavailable evidence should not be so demanding that it enabled negligent parties to benefit from spoliation. To balance all the concerns, Judge Scheindlin set forth the following burden shifting test:

When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when the spoliating party's conduct warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party's claims or defenses. If the spoliating party demonstrates to a court's satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

685 F. Supp. 2d at 468–69, 2010 WL 184312, at *15. (emphasis in original).

The Sanctions Imposed

The appropriate sanction for discovery misconduct or spoliation is a matter for a court's discretion and depends on the facts and circumstances of each case. Judge Scheindlin observed that any sanctions imposed on the *Pension Committee* plaintiffs should (1) deter them from spoliating information, (2) transfer the risk of an erroneous judgment to the offending plaintiffs, and (3) restore the prejudiced defendants to the position that they would have occupied absent the plaintiffs' spoliation misconduct. 685 F. Supp. 2d at 469, 2010 WL 184312, at *15. While egregious conduct

warrants severe sanctions, "a court should always impose the least harsh sanction that can provide an adequate remedy." 685 F. Supp. 2d at 469, 2010 WL 184312, at *16.

As noted above, the defendants had requested the sanction of dismissal. Judge Scheindlin observed that a "terminating sanction is justified only in the most egregious cases," and did not grant dismissal. *Id.* Based on the plaintiffs' conduct, the court instead concluded that the appropriate sanctions would be an adverse inference instruction. For the plaintiffs that she had determined had engaged in grossly negligent discovery conduct, Judge Scheindlin found that defendants had

'adduced enough evidence' that plaintiffs have failed to produce relevant documents and that [the defendants] have been prejudiced as a result. Thus, a jury will be permitted to presume, if it so chooses, both the relevance of the missing documents and resulting prejudice to [the defendants], subject to the plaintiffs' ability to rebut the presumption to the satisfaction of the trier of fact.

685 F. Supp. 2d at 478, 2010 WL 184312, at *24.

In the detailed jury instruction regarding the grossly negligent plaintiffs' failure to preserve evidence that she set forth at the end of the opinion, Judge Scheindlin made clear that if the jury did not presume that the missing evidence was relevant, then the inquiry ended, and the jury could not draw an inference from the lost evidence. 685 F. Supp. 2d at 497, 2010 WL 184312, at *41.

For the plaintiffs whose discovery conduct that she found merely negligent, Judge Scheindlin held that the defendants were required to demonstrate that "any destroyed documents were relevant and the loss was prejudicial." 685 F. Supp. 2d at 478, 2010 WL 184312, at *24. The court further held that *all* the plaintiffs included in the defendants' sanctions motion would face monetary sanctions, including the defendants' costs and fees connected with filing the motion, to be allocated among the plaintiffs. 685 F. Supp. 2d at 497, 2010 WL 184312, at *41.

"Best Practices" in Light of Pension Committee

Litigation is diverse. Proper and practicable discovery conduct, including the steps that an attorney takes to preserve and pro-

duce ESI, will turn on the facts and circumstances of each case. In this regard, Judge Scheindlin recognized that modern discovery presents infinite “varieties of efforts and failures.” 685 F. Supp. 2d at 465, 2010 WL 184312, at *12. Nevertheless, *Pension Committee’s* reiteration and further development of many of the discovery duties set forth in the *Zubulake* opinions,

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as well as in subsequent rule amendments and case law, provides a basis for litigators to “revisit” their own efforts to help clients avoid the potentially severe consequences of discovery missteps. Indeed, Judge Barbara L. Major’s recent decision in *Qualcomm, Inc. v. Broadcom Corp.*, confirms that extraordinarily costly and time-consuming complications can result from poorly executed discovery measures. See *Qualcomm, Inc. v. Broadcom Corp.*, No. 05-cv-1958-B (BLM), 2010 WL 1336937 (S.D. Cal. Apr. 2, 2010) (finding fundamental discovery failures, but denying sanctions); see also *Merck Eprova AG v. Gnosis S.P.A.*, No. 07-cv-5898 (RJS), 2010 WL 1631519 (S.D.N.Y. Apr. 20, 2010) (applying *Pension Committee* framework while imposing a \$25,000 fine for discovery failures stemming from grossly negligent failure to preserve documents); *Passlogix, Inc. v. 2FA Tech., LLC*, No. 08-cv-10986 (PKL), 2010 WL 1702216 (S.D.N.Y. Apr. 27, 2010) (same in imposing \$10,000 fine).

First, a comprehensive written litigation hold directive must be issued as soon as litigation is reasonably anticipated. Plaintiffs and their counsel may be required to issue hold directives earlier than defendants and their counsel. *Pension Committee*, 685 F. Supp. 2d at 466, 2010 WL 184312,

at *13 (“plaintiff’s duty is more often triggered before litigation commences because plaintiffs control the timing of litigation.”). Defense counsel should fully explore these issues in discovery, including when deposing the persons most knowledgeable about a plaintiff’s document preservation, collection, and production efforts.

Counsel should ensure that a litigation hold directive is circulated broadly to a client’s personnel, which must include all “key players.” In *Pension Committee*, counsel for certain plaintiffs provided e-mails, memoranda, and telephonic advice encouraging and reminding their clients to preserve and collect relevant documents. The court determined that these instructions were inadequate. 685 F. Supp. 2d at 473, 2010 WL 184312, at *19. At a minimum, a hold directive should (1) specify that all relevant paper and electronic must be preserved; (2) provide a means for collecting all preserved information for future searches that can be conducted efficiently by persons other than the collectors; and (3) contain a clear instruction that all destruction, routine or otherwise, of relevant paper or electronic data must be suspended immediately. A litigation hold directive requires specificity: it should be as precise as possible. Additionally, a litigation hold directive should not “place total reliance on the employee to search and select what the employee believe[s] to be responsive.” *Pension Committee*, 685 F. Supp. 2d at 473, 2010 WL 184312, at *20.

Second, counsel should directly supervise client document preservation and collection efforts. It goes without saying that a client’s primary contact person at your firm should be an attorney, bolstered by information technology staff, who is fully familiar with data systems generally, and the client’s data systems in particular. The designated point person should also know the respective roles that a client’s personnel played, or may have played, in the transactions and occurrences that provoked a plaintiff’s allegations to make sure that searches are complete and all potentially relevant custodians are covered. Knowledgeable in-house counsel should be directly involved throughout these efforts.

A client’s preservation and collection efforts should also extend to former employees to the extent possible, as well

as the home computers and personal data devices of persons likely to have relevant information. Preserve backup tapes when they are believed to be the sole source of relevant information or when the data that they contain is the most accessible source of certain data pertaining to key players. Counsel should also ensure that critical data preservation and collection tasks are not delegated to inexperienced persons and that individuals performing those tasks follow instructions to prevent client designees from making their own, potentially uninformed, determinations about which information the client should preserve, collect, and produce.

Third, an attorney should fully record and update the “who, what, when, and where” of a client’s preservation, collection, and production efforts. If an opponent later questions or challenges a client’s efforts, knowing when the client took certain steps to preserve information, who took the measures, the scope of searches performed by the client, and where a client has preserved the results will prove valuable. Although opponents need little encouragement to probe the adequacy and completeness of your client’s discovery efforts, *Pension Committee* provides further invitation. Whether maintained as a preservation and production log, or in another form that counsel deems informative and accessible, counsel should have a ready resource reflecting the status and scope of document preservation and production efforts at all times after the duty to preserve begins.

Fourth, counsel should consistently remind a client that discovery obligations are ongoing, even if discovery is temporarily stayed. In *Pension Committee*, counsel for certain plaintiffs admitted that they “did not focus” on discovery while a Private Securities Litigation Reform Act discovery stay was in place. *Pension Committee*, 685 F. Supp. 2d at 474, 2010 WL 184312, at *20. That was a huge mistake. Playing catch-up in discovery is difficult, contentious, imprecise, and expensive. Counsel should work proactively to prevent lulls in document preservation and collection efforts. Moreover, in light of an opponent’s increased focus on your client’s discovery measures that will likely result from *Pension Committee*, counsel should revisit the adequacy of an initial litigation hold direc-

tive throughout the life of a case. As Judge Scheindlin instructed in 2004, “[t]he litigation hold should be periodically re-issued so that new employees are aware of it, and so that it is fresh in the minds of all employees.” *Zubulake V*, 229 F.R.D. at 433.

Fifth, make sure that a client’s representatives are thoroughly prepared to face detailed questions from opposing counsel on all material details of the preservation, collection, and production process during a Federal Rule of Civil Procedure 30(b)(6) deposition or a deposition under a similar state procedural rule. In connection with the deficient client declarations attesting to the plaintiffs’ discovery efforts in *Pension Committee*, Judge Scheindlin stated, “plaintiffs had a duty to adequately prepare knowledgeable witnesses with respect to these topics. Which files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision are all topics reasonably within the scope of the inquiry.” *Pension Committee*, 685 F. Supp. 2d at 477, 2010 WL 184312, at *23. The above quote from *Pension Committee* articulates the likely minimum “scope of the inquiry,” and you should frequently remind a client that an opponent will assuredly ask such questions down the road, and that a client must answer them under oath.

Rimkus: Another Look at Discovery Sanctions

A reader could consider *Pension Committee* a decision issued by an “activist” judge clearly frustrated with certain parties’ conduct and conclude that the opinion provided guidelines and penalties based on the judge’s “gut reaction” but limited to the facts at hand in that case. That interpretation would be understandable because only in unusual circumstances will a decision of a single federal district court judge directly affect litigation practices in federal and state courts across the country. While *Pension Committee* provides prudential guidelines for the preservation, collection, and production of paper and electronic documents, the decision *is not* the final word on the specific sanctions that parties and their counsel could face for misconduct resulting in spoliation.

Approximately one month after Judge Scheindlin issued an amended opinion and

order in *Pension Committee*, Judge Lee H. Rosenthal handed down the *Rimkus* decision, which also addressed spoliation sanctions. See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, No. H-07-0405, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010). Judge Rosenthal, the current chair of the Federal Judicial Conference Advisory Committee for Federal Rules of Civil Procedure, was directly involved in developing the 2006 e-discovery amendments to the Federal Rules of Civil Procedure. In other words, Judge Rosenthal is a recognized authority on modern discovery issues.

While certain commentators have remarked that several principles set forth in *Pension Committee* and *Rimkus* are at odds, the discovery duties and obligations recounted in *Rimkus* are largely consistent with those in *Pension Committee*. The two judges confronted different facts, as Judge Rosenthal explicitly acknowledged: “The spoliation allegations in the present case are different. They are allegations of willful misconduct: the intentional destruction of emails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation.” *Rimkus*, 688 F. Supp. 2d at 607, 2010 WL 645253, at *13; see also 688 F. Supp. 2d at 611, 2010 WL 645253, at *16 (“Unlike *Pension Committee*... this case involves allegations of intentional destruction of electronically stored evidence.”). Of course, sanctions for spoliation will largely depend on the conduct at issue. *Pension Committee*, 685 F. Supp. 2d at 471, 2010 WL 184312, at *18. *Rimkus* reflects this truism—with one particularly significant difference based on the law as interpreted by the Fifth Circuit.

In *Rimkus*, the parties subject to the sanctions motions intentionally deleted e-mails and attachments after the duty to preserve arose and attempted to conceal the destruction. *Rimkus*, 688 F. Supp. 2d at 611, 2010 WL 645253, at *16. Judge Rosenthal concluded that the appropriate sanction under the circumstances was to permit the jury to hear evidence of the misconduct, including (1) evidence of the deletion of electronic information, and (2) the discovery responses in which parties distorted the truth concerning the deletions. The court further determined that it would instruct the jury that if it “finds that the de-

fendants deleted emails to prevent their use in litigation... it may, but is not required to, infer that the content of the deleted lost emails would have been unfavorable to the defendants.” 688 F. Supp. 2d at 646, 2010 WL 645253, at *46.

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in bad faith or in a grossly negligent manner.” *Pension Committee*, 685 F. Supp. 2d at 467, 2010 WL 184312, at *14. (emphasis added). Judge Rosenthal, however, did not believe that she could award an adverse inference instruction based on anything less than intentional misconduct: “In the Fifth Circuit and others, negligent as opposed to intentional, ‘bad faith’ destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial.” *Rimkus*, 688 F. Supp. 2d at 615, 2010 WL 645253, at *20. Judge Rosenthal further observed that the “*Pension Committee* approach” to sanctions could conflict with United States Supreme Court precedent, which “may also require a degree of culpability greater than negligence.” *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991)).

Finally, while Judge Scheindlin’s jury instruction in *Pension Committee* included informing the jury that plaintiffs’ discovery failures “resulted from their gross negligence,” Judge Rosenthal left the determination of bad faith to the jury: “[T]he jury will not be instructed that the defendants engaged in intentional misconduct.

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Instead, the instruction will ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation.” *Rimkus*, 688 F. Supp. 2d at 620, 2010 WL 645253, at *25. Judge Rosenthal’s observations concerning the potential degree of prejudice that the moving party suffered directly influenced her sanction determination. Specifically, the court noted that the moving party had “extensive evidence to use in this case,” and the facts indicated that some of the deleted information was “helpful” to the spoliators’ positions. 688 F. Supp. 2d at 646, 2010 WL 645253, at *46.

Moving Forward

Regardless of the standard that a court may apply in issuing severe sanctions in a particular jurisdiction, ignoring *Pension Committee*’s preservation, collection, and production guidelines may well amount to rolling the dice with your clients’ discovery obligations and your professional responsibilities. An erosion of credibility with a court is sanction enough. Given Judge Scheindlin’s demonstrated influence on modern discovery in general, and electronic discovery in particular, litigators should view the principles announced in *Pension Committee* and *Zubulake* as an integral part of a sound offensive and defensive discovery playbook.

Litigation is rarely inexpensive, and discovery costs often consume the vast majority of counsel’s most carefully crafted budgets. The best time to discuss litigation and discovery costs with clients is, appropriately, when counsel provide their initial written litigation hold directives. Complying with the principles of *Pension Committee* will likely increase the time and resources that clients devote to discovery. Counsel must help clients understand that the costs of adhering to *Pension Committee* are likely far less than those that potentially await if they do not. 