



Recognizing the Complexities of E-Discovery Preservation

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For litigants and their counsel, e-discovery preservation can be a complex and difficult area of litigation to navigate. Although judicial decisions on the subject of preservation are becoming commonplace, publicized orders and opinions do not generally compliment clients and their counsel. In fact, most decisions cause attorneys to reflect on whether their clients could be at risk of creating similar unfavorable decisions, and what preemptive steps must be taken and costs incurred to eliminate such risks. As companies, counsel and the judiciary are confronted with the intricacies of e-discovery preservation, the potential for missteps becomes evident. When allegations of such missteps occur, a party's ability to develop a succinct and understandable defense in this tech-driven area, while challenging, is key to helping the Court with the difficult task of weighing the reasonableness of a party's e-discovery efforts.

A Litigant's Preservation Responsibilities

As parties and counsel are required to navigate the complex preservation landscape, they must be cognizant of their responsibilities and vigilant that those responsibilities are fulfilled. Because the scope of e-discovery is subject to divergent opinions, and the existence and location of relevant information within a complex computing architecture may be difficult to reasonably identify without well thought-out investigatory efforts, parties and counsel must understand the steps necessary to fulfill their preservation obligations as well as when those efforts fall short. This is not easy. According to Kroll Ontrack's "Fourth Annual ESI Trends Report," the preservation and the collection of data were survey respondents' biggest discovery concerns, followed by changing technology platforms, compliance with discovery obligations and unforeseen costs. See Kroll Ontrack, *Fourth Annual ESI Trends Report* (2010) at 10. While Southern District of New York Judge Shira Scheindlin, in the *Zubulake* and *Pension Committee* decisions, elaborated extensively on litigants' preservation obligations, both decisions left many readers with the conclusion that the steps to comply with preservation obligations are not easily accomplished, and that noncompliance can be costly. See *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Pension Comm. of the Univ. of Montreal Pension Plan v. Bank of Am. Sec., LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

The *Pension Committee* decision provides an excellent example of the in-depth look Courts may take when analyzing whether a party's preservation and collection obligations have been met and demonstrates several potential pitfalls parties can encounter. While Judge Scheindlin prefaces the opinion with the statement that "Courts cannot and do not expect that any party can meet a standard of perfection," the framework set forth in that opinion, when applied to today's technology standards, in no way suggests easy application absent the costly decision to preserve very broadly and collect thoroughly. At the outset, the Court admits that the continuum of conduct from what's acceptable through what's unacceptable cannot be measured with exactitude. The Court stresses that the

imposition of sanctions is a judgment-call and a "gut reaction" based on experience as to whether a party complied with its discovery obligations and—perhaps more interestingly—how hard it worked to comply. See *Pension Comm.*, 685 F. Supp. 2d at 471. As a baseline, *Pension Committee* held that the failure to meet contemporary discovery standards, such as issuing a litigation hold, identifying key players, and ensuring that their records are preserved and ceasing the deletion of email, should be considered gross, rather than ordinary negligence. In contrast, the Court found that the failure to collect records from other employees constituted ordinary negligence. Bearing this in mind, the *Pension Committee* decision turns on measuring to what extent certain parties' conduct was unreasonable and the extent to which the innocent parties were harmed. This subjective determination guides the Court's assessment on the type and degree of sanctions warranted under the circumstances.

Once the obligation to preserve exists and relevant evidence is alleged to have been destroyed, lost or simply not produced, the *Pension Committee* analysis is consulted in weighing the spoliating party's culpability as well as the prejudice imposed upon the innocent party. Because negligence results even from a "pure heart and empty head," and managing technology is a complex and constant process, the line between reasonably prudent and negligent can be vague. See *id.* at 464. By the time hindsight sheds light on potential gaps in preservation, it may be too late. This uncertainty makes meeting the required standard of care dependent on skilled employees, knowledgeable in their defined preservation duties that have the foresight to understand the scope of information to be preserved and where such information is located.

The facts in *Pension Committee* gave the Court plenty of reason to engage in an in-depth discussion of the parties' preservation efforts. In that case, it was defendants who sought sanctions against multiple plaintiffs for discovery violations. With multiple plaintiffs and co-defendants involved in the action, defendants' cross-referenced the other parties' productions and found evidence that certain documents should have been produced by particular plaintiffs, but were not. This discovery failure provided sufficient support for defendants to investigate whether plaintiffs had met their preservation obligations as of the day when they reasonably anticipated litigation and the duty to preserve arose. Despite attempts by plaintiffs to justify the preservation steps they undertook, the Court found that they failed to fulfill their responsibilities.

Addressing counsel's initial notification to plaintiffs explaining plaintiffs' preservation obligations, the Court found that it failed the standard for a proper litigation hold—it was deficient in directing employees to preserve relevant records—and, perhaps more noteworthy, also failed to provide a mechanism for the *collection* of the preserved records, suggesting an immediacy to both obligations. The Court likewise found that the directive's reliance on employees to identify relevant documents, without supervision from counsel, was deficient. The eventual institution of a written litigation hold four years later was similarly unacceptable and did nothing to cure the earlier deficiency. Other discovery violations by specific plaintiffs were noted, including use of deficient searches, delegating search efforts to inexperienced personnel and destroying backup data potentially containing responsive information not otherwise available. See *id.* at 479.

After learning of the discovery violations, the Court ordered plaintiffs to provide declarations discussing their efforts to preserve and produce documents. Plaintiff's candor towards the Court in this regard fared no better than its deficient litigation hold efforts, with the eventual revelation that almost all of the declarations were false and misleading and/or executed by a declarant without personal knowledge. Considering these findings, the Court accepted defendants' argument that the lack of records discussing substantive matters that certainly would have been documented by plaintiffs lead inexorably to the conclusion that relevant records were lost or destroyed, although no direct proof of such records existed.

Regarding culpability, the Court found that plaintiffs' pre-2005 conduct ranged from negligent to grossly negligent. With respect to plaintiffs who were grossly negligent, the Court found that prejudice existed such that an adverse inference jury instruction was warranted. The jury was permitted to presume the relevance of the missing documents and the resulting prejudice to defendants, subject to plaintiffs' ability to rebut the presumption. The Court also awarded monetary sanctions. For plaintiffs that were

guilty of ordinary negligence, the Court found that monetary sanctions alone were appropriate. Interestingly, the Court opined that had defendants demonstrated that plaintiffs destroyed documents after 2005—when the matter was transferred to this Court—such conduct would have justified more severe sanctions.

The *Pension Committee* decision provides a number of practice pointers to litigants. As the decision demonstrates, contemporary discovery standards represent the *minimum requirements* litigants must achieve to avoid allegations of discovery misconduct. While the decision provides examples of such standards, litigants are well-advised to stay abreast of new developments affecting those standards to update once-acceptable procedures that may now fall short. It also shows that resolving motions relating to the spoliation of evidence can be time-consuming, distracting, and expensive to the parties and the Court. Finally, with respect to substantive matters, the decision shows that a spoliation finding can jeopardize a party's prosecution or defense of its case. Considering the complex technical foundation on which e-discovery rests, parties are well-advised to formally develop and re-evaluate procedures to fulfill their litigation responsibilities and—importantly—be open and candid with the Court and opposing counsel if relevant information is lost or destroyed.

Cooperating to Meet Preservation Obligations

While decisions like *Pension Committee* help guide litigants along the path of proper preservation, cooperation can be an important tool in meeting preservation responsibilities. Because Courts encourage parties to reach agreement on solutions to e-discovery issues, having the scope of e-discovery defined early in the litigation can help identify the expectations each party has with respect to the scope of e-discovery. Conversely, a failure to cooperate can provoke a Court's ire. For instance, in *Home Design Services, Inc. v. Trumble*, the Court admonished plaintiff for its dilatory discovery and pointed out that a litigator has an equally important role as a case manager. No. 09-cv-00964, 2010 WL 1435382 (D. Colo. Apr. 9 2010) at *5. The Court noted that counsel's case management responsibilities should not be seen as antithetical to the role of advocate, because a well-managed case progresses through discovery more efficiently and cost-effectively. See *id.* Citing to "The Sedona Conference Cooperation Proclamation," the Court reminded counsel that while they are "retained to be zealous advocates for their clients, they bear a professional obligation to conduct discovery in a diligent and candid manner." *Id.* (citing *The Sedona Conference® Cooperation Proclamation* (2008) at 1.)

Parties that demonstrate considerable recalcitrance in cooperating may be ordered do so by a disgruntled judge, as Courts have a responsibility towards case management. See *id.* at 5. In *Burt Hill, Inc. v. Hassan*, the Court found that defense counsel unethically retained a document provided by an anonymous source that, on its face, was privileged. No. Civ. A. 09-1285, 2010 WL 419433 (W.D. Pa. Jan. 29, 2010). Besides requiring that defendants return the documents (along with the imposition of other measures to protect plaintiffs), the Court required that the parties promptly meet and confer to determine whether the scope of one of defendants' Requests for Production could be narrowed, and whether agreement could be reached on the use of search terms. See *id.* at 10. A similar result occurred in *Ross v. Abercrombie & Fitch Co.*, where, after granting plaintiffs' Motion to Compel, the Court ordered that the parties meet-and-confer on ways in which the information plaintiff was seeking could be obtained, and how much in terms of time and money any electronic search might cost. No. 2:05-cv-0819, 2010 WL 1957802 (S.D. Ohio May 14, 2010) at 4. Finally, in *Multiven, Inc. v. Cisco Systems, Inc.*, the Court found that the dilatory review process the parties put in place was far too slow and a new method for review and production was needed. In that regard, the Court ordered the parties to retain a third party vendor to assist with "the further collection, search, review and production of documents" and that the parties split the costs. No. 5:08-cv-05391, 2010 WL 2813618 (N.D. Cal. Jul. 9, 2010) at 3. The Court also ordered that the Special Master's duties be expanded to include "full authority to choose a third party vendor, craft a search protocol, establish deadlines and otherwise resolve any future discovery disputes or objections." *Id.*

Cooperation can be an important consideration in obtaining greater certainty that a party's preservation obligations have been met and establishing before the Court that e-discovery responsibilities have been addressed. By working with the opposing party to define the scope of the information sought, a

party can better define its preservation obligations in line with key individuals and information systems. Also, by establishing adequate boundaries for e-discovery, the parties can address any issues that arise within a pre-determined framework, militating against unfair accusations of spoliation.

Clarifying Preservation Responsibilities under the Federal Rules

Recognizing the breadth of e-discovery in litigation, companies have expressed their reservations about their ability to consistently comply with their preservation obligations. The difficulties inherent in meeting such obligations have not gone unnoticed by the bench and bar. According to Fulbright's "7th Annual Litigation Trends Survey," 68% of respondents indicated that the duty to preserve is not sufficiently clear. See Fulbright & Jaworski L.L.P., *Fulbright's 7th Annual Litigation Trends Survey Report* (2010) at 54. In an Executive Summary by the E-Discovery Panel at the Duke Conference on Civil Litigation (comprised of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby), the panel urged the Federal Rules Advisory Committee to consider a rule addressing preservation and spoliation. See Memo from Gregory P. Joseph to Hon. Richard G. Koeltl Re: Executive Summary: E-Discovery Panel, Duke Conference on Civil Litigation, May 11, 2010. The purpose of such a rule would be to better define the principles governing when the preservation duty attaches (when a party reasonably anticipates litigation) and the scope of that duty (relevant evidence within a party's control). See *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) and *Treppel v. Biovail*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008).

The E-Discovery Panel's Executive Summary provides an outline of potential provisions to be included in a preservation rule. All panel members agreed that such a rule should treat large cases with enormous discovery differently. Provisions suggested, but not necessarily agreed to by all panel members, include specific triggers defining when the preservation obligation attaches and specific parameters defining the scope of a party's preservation obligations with respect to timeframe, subject matter, data types and data sources. The panel suggested considering whether presumptive limits should be applied to the key custodians and the types of data or sources that must be searched, as well as whether duties should be different for parties and non-parties. The proposal offered that dissemination of a litigation hold notice should be evidence of due care on the part of the party issuing it, and that consideration should be given as to whether actions taken in furtherance of the preservation duty are privileged. Finally, the proposal suggested that the consequences for non-compliance and the procedures to be taken by parties involved in a discovery dispute be specifically set forth.

Considering the general standards offered to litigants on when the duty to preserve arises and its scope, as compared to the complex considerations often necessary to meet those standards, the development of a Federal Rule on the duty to preserve would be a welcome step. However, without doubt, the provisions of such a rule will be hotly debated. Specifics regarding what must be preserved, what sanctions are acceptable for different degrees of non-compliance and when a party must disclose that it has reason to believe that relevant information might have been lost may be difficult to define. Efforts to balance the concept of reasonable preservation and collection costs against the inherent power of the Courts to preserve the integrity of a judicial process, working to uncover the truth and Rule 26's standard for relevant evidence, may be a narrow tightrope to walk. See *Pension Comm.*, 685 F. Supp. 2d at 466.

Conclusion

Meeting preservation obligations remains a difficult road for parties. Although Court rules and decisions provide a framework for such compliance, effectively fulfilling the obligations set forth inevitably falls to the litigant who must effectively apply its duties to the practices of the organization. The information technology platforms utilized by companies can be varied and complex. Determining whether e-discovery obligations are being satisfied requires a thorough understanding of the litigant's organization, including what information they store, the destruction policies applicable to them, and their capability to preserve and export relevant information in a reasonably-useable form. Because each case may raise its own specific preservation and collection issues, and the parties may have different ideas of what constitutes relevant information, meeting and conferring on preservation is an

important step in clarifying expectations. Finally, litigants should recognize the sometimes painful necessity of bringing preservation disagreements to the Court before spoliation issues arise.

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