KIRKLAND & ELLIS LLP

KIRKLAND ALERT

January 2010

New eDiscovery Opinion Offers Broad View of Companies' Duty to Preserve Information

On January 15, 2010, Judge Shira Scheindlin of the Southern District of New York issued an extensive opinion holding that companies may be ***presumed*** to have spoliated evidence if they did not take certain steps in preserving or collecting documents. *Pension Comm. of the Univ. of Montreal Pension Plan, et al., v. Banc of Am. Sec., LLC, et al.*, No. 05-9016 (S.D.N.Y. Jan. 15, 2010) ("*Pension Committee*"). While the opinion is not precedential outside of Judge Scheindlin's court, it is likely to be persuasive in other courts, as Judge Scheindlin wrote the influential *Zubulake* opinions and is a leading authority on electronic discovery issues.

Judge Scheindlin laid out the standard definition of spoliation: the destruction of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. *See Pension Committee* at 82. To prove spoliation, an innocent party must show that: (1) the spoliating party had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) the spoliating party acted with a culpable state of mind upon destroying or losing the evidence; and (3) the missing evidence is relevant to the innocent party's claim or defense. *Id.* at 15.

In *Pension Committee*, Judge Scheindlin held that the critical third element of this test — a showing of relevance and prejudice — may be presumed if the spoliating party acted willfully or with gross negligence. *Id.* In such a case, the burden shifts to the spoliating party to rebut the presumption (for example, by showing that the innocent party had access to the allegedly destroyed evidence). *Id.* at 18. But if the spoliating party was merely negligent, and not grossly negligent or willful, then the innocent party has the burden of proving that the allegedly destroyed documents were actually relevant. *Id.* at 16-17.

While noting that each case will turn on its own facts, Judge Scheindlin indicated that the following actions supported a finding of either willfulness or gross negligence — and thus a presumption of spoliation — once a company has a duty to preserve:

- Failing to issue a written litigation hold that directs employees to preserve all relevant records. *Id.* at 9, 24.
- Failing to identify all of the "key players" and preserve their electronic and paper records. *Id.* at 24.
- Failing to preserve former employees' files that are in the company's possession. *Id.* at 24.
- Designating an employee to supervise preservation of records who is not familiar with the company's record-keeping policies. *Id.* at 9 n.14.
- Deleting backup tapes either (1) "when they are the sole source of relevant information;" or (2) "when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible source." *Id.* at 24-25.
- Failing to "create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee," *id.* at 28 (original emphasis), which should include "attorney oversight of the process, including the ability to review, sample, or spot-check the collection efforts." *Id.* at 28 n.68. Directing

employees to search their own records is not sufficient. *Id.* at 74.

- Intentionally destroying documents. *Id.* at 9.[1]

Accordingly, to meet the standards described by Judge Scheindlin, once a company has a duty to preserve documents, in consultation with experienced outside counsel, the company should:

- Issue a broad litigation hold that directs employees to preserve documents relevant to the litigation;
- Identify the "key players" in the litigation;
- For these "key players," suspend automatic deletion of their emails and of backup tapes containing their records;
- For any "key players" who are former custodians, identify and preserve their paper and electronic documents within the company's custody and control; and
- Designate an employee to supervise both document preservation and eventual document collection and production who is familiar with the company's preservation policies — and anticipate that this employee may be a deposition witness.

While none of these measures is specifically required by the Federal Rules, and may not be viewed as necessary in all courts, these appear to be the minimum steps that a company would have to take to avoid the presumption of spoliation under *Pension Committee*. Additional steps may also be required depending on the facts and circumstances of the case, including, potentially, suspending the recycling of backup tapes.

Further, because a company's duty to preserve documents arises when it "reasonably anticipates litigation," *Pension Committee* at 12, companies must be proactive in determining when litigation may be reasonably anticipated. Given the potential dangers of not preserving documents in the face of a duty to do so, companies should generally act sooner rather than later. *See Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 433, 436 (2d Cir. 2001) (party has duty to preserve "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation").

In sum, *Pension Committee* underscores both the need for companies to be quick and thorough in preserving documents and also the risks that companies face if they do not. If a company adequately preserves documents, it can later litigate the extent to which it should produce them, including issues of relevance, privilege, accessibility, cost, and cost-shifting. But if a company does not adequately preserve documents at the start of litigation, *Pension Committee* makes clear that the company faces a real risk of presumptive spoliation.

---

[1] Judge Scheindlin also indicated that it might be merely negligent — and thus not presumptively spoliative — to (1) obtain records from only "key players" rather than ***all*** employees; (2) fail to choose accurate or valid search terms; or (3) fail to take ***all*** appropriate measures to preserve electronically stored information. *Pension Committee* at 10-11.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland authors or your regular Kirkland contact.

James H. Mutchnik, P.C.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654
www.kirkland.com/jmutchnik
+1 (312) 862-2350

Jennifer M. Selendy
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/jselendy
+1 (212) 446-4958

Andrew R. Dunlap
Kirkland & Ellis LLP
601 Lexington Avenue
New York, NY 10022
www.kirkland.com/adunlap
+1 (212) 446-4879