

September 9, 2013



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## Judge Scheindlin Sanctions Party for Pre-Litigation Destruction of Electronic Documents

Judge Shira Scheindlin is well known as one of the preeminent authorities on electronic discovery, commonly known as e-discovery. Her groundbreaking opinions in the Zubulake v. UBS Warburg line of cases addressed such hot-button topics as the scope of a party's duty to preserve electronic evidence, counsel's duty to monitor its client's compliance with preservation requirements through a litigation hold, and sanctions for spoliation of electronic data. In a subsequent, controversial, decision, she held that the failure to issue a written litigation hold and to collect records from key players constituted gross negligence. See Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456 (S.D.N.Y. 2010), abrogated in part by Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135 (2d Cir. 2012). More recently, in Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency, 811 F. Supp. 2d 713 (S.D.N.Y. 2011), she held that metadata is an "integral part" of electronic data and is "presumptively producible."

Judge Scheindlin recently issued another groundbreaking decision, in which she reversed the decision of the Magistrate Judge and issued sanctions against a plaintiff for failing to preserve electronic documents. Sekisui Am. Corp. v. Hart, No. 12 Civ 3479, 2013 WL 4116322 (S.D.N.Y. Aug. 15, 2013).

The plaintiff in Sekisui sent the defendants a notice of intent to sue in October 2010, but did not actually commence litigation until May 2012. The plaintiff failed to implement a litigation hold until January 2012, over 15 months after issuing the notice of intent to sue, and did not notify its outside computer operations vendor of the need to preserve electronically stored information ("ESI") until July 2012. In 2011—prior to the commencement of litigation, but after issuance of the notice of intent to sue—the plaintiff authorized the destruction of certain ESI, including all of the email folders of one of the defendants, purportedly to free up space on an overloaded server.

Based on the destruction of evidence (known as spoliation), the defendants sought sanctions in the form of an adverse inference jury instruction and reimbursement for costs associated with seeking sanctions. Magistrate Judge Maas found that the defendants had failed to show that they were prejudiced by the electronic deletion and denied the motion for sanctions. Judge Scheindlin reversed, concluding that **prejudice may be presumed** when evidence is destroyed willfully or through gross negligence. Her ruling holds that once ESI is willfully destroyed, the spoliating party bears the burden of proving that the missing information will not prejudice the innocent party. Id. at \*7.



While the opinion is noteworthy in many respects, potential litigants should take special note of the following admonitions:

- A good faith explanation for destruction of ESI is insufficient to defend against claims of impermissible destruction (“even a good faith explanation for the willful destruction of ESI when the duty to preserve has attached does not alter the finding of willfulness.”).
- Failure to implement appropriate document retention policies when faced with potential litigation may constitute gross negligence, although such failure “does not constitute gross negligence per se.”
- In the event of willful or grossly negligent destruction of evidence, the innocent party is presumed to have suffered prejudice (“Prejudice is presumed for the purposes of determining whether to give an adverse inference instruction when, as here, evidence is willfully destroyed by the spoliating party.”)

This decision further underscores the risks associated with any document destruction, no matter how well-intentioned, when litigation is in the picture. As always, once the threat of litigation arises, be sure to contact counsel to institute appropriate measures to capture and preserve ESI and other documents and evidence.

### ***Questions or Assistance?***

If you have questions about this alert, please contact Vaughan Finn at 860-251-5505, Alison Baker at 203-324-8184 or Diane Polletta at 203-324-8179.

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