

# The Dangers of Mishandling ESI

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# What is Spoliation?

- “Spoliation is the destruction or significant alteration of evidence, or
- the failure to preserve property for another’s use as evidence
- in pending or reasonably foreseeable litigation.”  
*In re NTL Sec. Litig.*, 244 F.R.D. 179, 191 (S.D.N.Y. 2007).
- Under both federal law (FRCP 37) and state law (MCR 2.313, IRTP 37), the court may enter sanctions against a party that has lost or changed potentially relevant ESI.

- **ESI = Evidence**. “Evidence” includes electronically stored information or ESI.
- ESI is anything potentially relevant and stored in an electronic medium. ESI includes:
  - Emails
  - Business documents (Word, Excel, PP)
  - Texts
  - Contents of databases
  - Proprietary documents
  - Hidden data and metadata (Internet search history, time and location of access to computers, printer queues, event directory, more)
  - Contents of the “the cloud”
  - Geo-location information
  - Contents of Facebook pages and social networking sites

- Therefore, the failure to preserve and produce all potentially relevant ESI is spoliation.
- To avoid spoliation sanctions, companies need a system in place for:
  - Identifying when a lawsuit is foreseeable
  - Identifying which ESI within the company is potentially relevant; and
  - Preserving the ESI (no over-writing, altering or deleting) to make available to counsel *without disrupting the business*.

# Spoliation Sanctions

- A state or federal court may enter the following sanctions for spoliation:
  - An award of attorneys' fees
  - Penalties paid directly to the court clerk from party or its attorneys'
  - Adverse inference jury instruction
  - Striking pleadings
  - Dismissal
  - Default judgment
  - Contempt of court and jail (*Victor Stanley*)

# Unintentional Spoliation Will Still Lead To Sanctions

- In a majority of jurisdictions, spoliation need NOT be intentional to lead to sanctions.
- In other words, **negligence** can still lead to severe sanctions. See *PML v. Hartford Underwriters Ins. Co.*, 2006 WL 3759914, \*4-\*5 (E.D. Mich. 2006).
- A failure to preserve ESI is “negligent even if it results from a **pure heart and an empty head.**” *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of Am. Securities, LLC*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

An important recent case:

*Pension Committee v. Banc of  
America Securities*

## *Pension Committee v. Banc of Am.*

- Released January, 2010.
- Written by Shira Scheindlin, one of the most influential federal judges on the topic of e-discovery.
- This is the most important case on e-discovery since her earlier *Zubulake v. UBS Warburg* opinions from 2003.
- Not good news for businesses.

# Facts & Background

- 96 unsuccessful hedge fund investors sued the hedge fund administrators.
- Plaintiffs produced e-discovery twice.
- Defendants argued that production was incomplete.
- Plaintiffs signed declarations describing their process for identifying and preserving ESI.

## E-Discovery Efforts Were Not Sufficient

- Based on the declarations and later depositions of plaintiffs, the court concluded that the plaintiffs. . .
- . . . conducted e-discovery in an “ignorant and indifferent fashion”
- Judge Scheindlin was especially concerned with the failure to issue litigation holds when the lawsuit was clearly foreseeable.

# New Burden Shifting Test

- Judge Scheindlin applied a new test for culpability.
- In the past, a party could only get the most severe sanctions (dismissal or default judgment) if they could prove that the ESI destroyed was important to the case.
- Now, according to Judge Scheindlin, if the moving party can prove that the party who destroyed ESI was “grossly negligent,” then
  - the **burden shifts** to the party who destroyed or lost the evidence to prove it was NOT important.

## What Is E-Discovery Gross Negligence According to *Pension Committee vs. Banc of Am?*

- Failure to issue a litigation hold.
- Failure to identify key players and the locations of relevant evidence early on in the case.
- Failure to effectively oversee custodians & individuals gathering ESI
- No system for identifying, preserving and producing potentially relevant ESI in place as soon as the lawsuit becomes foreseeable

*Pension Committee v. Banc of America* – What Happened?

- For the grossly negligent plaintiffs,
- Judge Scheindlin held that she would read an adverse inference jury instruction; and
- Also awarded monetary sanctions against them.
- Although the instruction told the jury it “may” presume that the missing evidence would have changed the outcome,
- This was equivalent to entering an order that the plaintiffs should lose the case.

# E-Discovery & Cloud Storage

- Cloud storage is basically storing YOUR documents on SOMEONE ELSE'S COMPUTER.
- YOU CAN BE LIABLE FOR CLOUD STORER'S MISTAKES:
  - Most judges take a practical “right to access and control” approach to third-party cloud storage.
  - If you have the right and practical ability to access your documents that reside on a third-party's servers, then you have to preserve them when litigation becomes foreseeable.
  - This causes problems: do you really control the third-party.
- YOU MAY NOT BE ABLE TO PREVENT CLOUD STORER FROM HANDING OVER YOUR ESI DUE TO THIRD-PARTY SUBPOENAS AND WARRANTS:
  - Stored Communication Act provides only limited protection.
  - No protection for criminal subpoenas or warrants.
  - Watch the terms and conditions. You may have already given them the right to hand everything over.

# E-Discovery & Social Networking

- A Facebook page is like personal cloud storage: YOUR documents on SOMEONE ELSE'S COMPUTER.
- YOU HAVE A DUTY TO PRESERVE CONTENTS OF SOCIAL NETWORKING PAGES:
  - As with cloud storage, you have the right and practical ability to access your documents so you must preserve them when litigation becomes foreseeable.
  - This causes problems: do you really control over Facebook, LinkedIn, Twitter.
- YOU MAY NOT BE ABLE TO PREVENT FACEBOOK FROM HANDING OVER YOUR ESI DUE TO THIRD-PARTY SUBPOENAS AND WARRANTS:
  - Stored Communication Act provides only limited protection.
  - No protection for criminal subpoenas or warrants (WikiLeaks).
  - Watch the terms and conditions. You DID ALREADY given them the right to hand everything over.

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