



ELECTRONIC DISCOVERY UPDATE:

NEGLIGENCE, GROSS NEGLIGENCE AND WILLFULNESS IN LOST OR DESTROYED INFORMATION

In *Pension Comm. of the Univ. of Montreal v. Banc of America Sec.*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), Judge Shira A. Scheindlin, architect of the *Zubulake* opinions foreshadowing many of the E-Discovery changes to the Federal Rules, issued what may be another watershed opinion. Judge Scheindlin sets forth possible standards for negligence, gross negligence and willfulness in the context of the failure to produce electronically-stored information (“ESI”). Accordingly, even in a case that does not involve “egregious examples litigants purposefully destroying evidence,” “where documents are destroyed, a failure to preserve evidence resulting in loss or destruction of relevant ESI is surely negligent, and, depending upon the circumstances, may be grossly negligent or willful.” *Id.* at *2, *3.

Each case will turn on its on facts, and, although not a “definitive list,” the following guidelines may apply:

- ▶ **All Appropriate Measures:** The failure to take all appropriate measures to preserve ESI likely falls in the negligence category. *Id.* at *3.
- ▶ **Written Litigation Hold:** The failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information. *Id.*
- ▶ **Key Players and Former Employees:** The failure to collect records from key players constitutes gross negligence or willfulness. *Id.* at *3. The failure to collect information from the files of former employees that remain in the party’s possession, custody or control after the duty to preserve has attached may constitute gross negligence. *Id.*
- ▶ **Search Terms:** The failure to assess the accuracy and validity of selected search terms may constitute mere negligence.

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Importantly, once it is established that ESI has been destroyed, the state of mind (negligence, gross negligence or willfulness) may determine who has the burden of proving that the loss prejudiced the requesting party.

- ▶ **Gross Negligence Creates Presumption:** Relevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner. *Id.* at *5.
- ▶ **Mere Negligence Does Not Create Presumption:** However, when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction. *Id.*
- ▶ **Presumptions Are Rebuttable:** No matter what level of culpability is found, any presumption is rebuttable, and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the loss of the ESI.