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Assigning Value to E-Discovery's Unknown

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Gutman: Mr. Spade, have you any conception of how much money can be got for that black bird?

Spade: No.

Gutman: Well, sir, if I told you -- if I told you half, you'd call me a liar.

Spade: No, not even if I thought so. But you tell me what it is and I'll figure out the profit.

Gutman: (chuckles) You mean you don't know what that bird is?

Spade: Oh, I know what it's supposed to look like. (Coldly) And I know the value in human life you people put on it.

-- "The Maltese Falcon"

In the marvelous Dashiell Hammett novel and John Huston film, "[The Maltese Falcon](#)," private detective Sam Spade, bad guys Kaspar Gutman and Joel Cairo and various others spend money and the lives of others in pursuit of the "black bird," a statuette of a falcon which, according to Gutman, is encrusted from head to toe with jewels hidden from sight by a thin, black enamel coating. The bird had acquired the coating to mask its true value. As readers and moviegoers, we never learn whether the falcon actually existed, much less its true value.

The courts, in two recent, prominent e-discovery decisions, were presented with the same problem Sam Spade initially had: how does one value the unknown?

For Spade, the unknown was a jewel-encrusted statuette that may or may not exist.

For U.S. District Judge for the Southern District of New York Shira A. Scheindlin, who authored the Jan. 15 decision in [Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities](#), and U.S. District Judge for the Southern District of Texas Lee H. Rosenthal, who authored the Feb. 19 opinion in [Rimkus Consulting Group, Inc. v. Cammarata et al.](#), the question was how to value discovery that may never have existed, i.e., data that should have been preserved to determine whether it needed to be produced as e-discovery but, due to the actions of the producing parties, was destroyed.

This article looks at the approach taken by Scheindlin [in Pension Committee](#).

BACKGROUND -- 'PENSION COMMITTEE'

In February 2004, a group of 96 investors named the Pension Committee of the University of Montreal Pension Plan brought an action in the Southern District of Florida to recover losses of \$550 million stemming from the liquidation of two British Virgin Islands-based hedge funds in which they held shares.

The matter was transferred to the Southern District of New York in October 2005. But during a "four year hiatus," from 2004 through 2008, many plaintiffs did not collect discovery and failed to preserve data properly while motions were litigated. The

defendant, Bank of America Securities, sought sanctions against 13 of those plaintiffs for discovery violations.

Scheidlin noted that while the matter did not present "egregious examples of litigants purposefully destroying evidence," certain plaintiffs failed to "timely institute written litigation holds" and engaged "in careless and indifferent collection efforts after the duty to preserve arose" that undoubtedly resulted in "some documents" being "lost or destroyed."

Scheidlin found the plaintiffs counsel's litigation hold memo deficient for several reasons.

First, it did not "direct employees to preserve all relevant records -- both paper and electronic." Second, it failed to "create a mechanism for collecting the preserved records so that they can be searched by someone other than the employee." Third, monthly updates by the plaintiffs counsel "never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents."

Moreover, Scheidlin ruled, plaintiffs counsel failed to issue written litigation holds until 2007 -- three-and-a-half years after the complaint was filed. During that time, plaintiffs focus was on motions. Scheidlin found that "most of the evidence" was lost before 2005 and ascribed that data loss "to the failure to institute written litigation holds."

Scheidlin also found plaintiffs preservation efforts could be "best characterized as either grossly negligent or negligent because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees' document collection." Scheidlin noted "several plaintiffs failed to collect and preserve documents of key players." Scheidlin faulted plaintiffs "2M, Hunnicutt, Coronation, the Chagnon Plaintiffs, Bombardier Trusts, and the Bombardier Foundation" as "grossly negligent" (more on the significance of this finding later) because their "2003/2004 Searches were severely deficient" and "one or more of these plaintiffs failed to collect or preserve any electronic documents prior to 2007."

In addition, plaintiff Coronation assigned an employee to produce e-discovery who was "ill-equipped" and "inexperience[d]." The court wrote that the employee "should have been taught proper search methods, remained in constant contact with Counsel, and should have been monitored by management."

Examples of this employee's errors included searching only one network drive, permitting employees to conduct their own searches, delegating one office's search "without follow-up" and not searching backup tapes, although the employee knew they existed. As well, plaintiff Bombardier Foundation failed to conduct a search "for electronic documents or emails;" instead, it "gave Counsel only those documents the Foundation 'understood to be responsive.'"

Other plaintiffs made similar mistakes.

BACKGROUND --'RIMKUS'

The plaintiff in *Rimkus* was a corporation, Rimkus Consulting Group, for which the defendants had worked. The defendants started a rival corporation and brought a declaratory judgment action against Rimkus in Louisiana, seeking to nullify the non-competition, non-solicitation agreements, along with other provisions, they had signed with plaintiff. Rimkus brought suit against the defendants in Texas, alleging a breach of those agreements. The Louisiana action was consolidated with the one in Texas.

Summarizing the evidence, Rosenthal noted that the "extensive record includes evidence that the defendants intentionally deleted some emails and attachments after there was a duty to preserve them. ... The individuals who deleted the information testified that they did so for reasons unrelated to the litigation. But the individuals gave inconsistent testimony about these reasons and some of the testimony was not supported by other evidence. The record also includes evidence of efforts to conceal or delay revealing that emails and attachments had been deleted. There is sufficient evidence from which a reasonable jury could find that emails and attachments were intentionally deleted to prevent their use in anticipated or pending litigation."

Rosenthal, however, further noted that the defendants' efforts did not prejudice the plaintiff as badly as they could have. While "much of what was deleted" was "no longer available ... some of the deleted emails were recovered from other sources," and of those recovered, deleted e-mails, some "were adverse to the defendants' positions" but others "were favorable to the defendants." Furthermore, "despite the deletions of emails subject to a preservation duty," plaintiff had available to it "extensive evidence ... to prosecute its claims and respond to the defenses."

DIFFERENT APPROACHES

While the plaintiffs in *Pension Committee* did not purposefully delete data, as did defendants in *Rimkus*, the plaintiffs' actions in the former case were, at best, so grossly indifferent to their obligation to preserve discovery materials as to warrant sanctions.

What is interesting in *Pension Committee* is that Scheindlin did not simply confine her ruling to the facts, but that she also felt compelled to set forth a schema under which a court can determine whether a party has breached its duty of preservation and, depending upon how egregious the breach, what the remedy should be. As Rosenthal makes clear in *Rimkus*, Scheindlin's analysis prompted Rosenthal to provide a counter-analysis of how duty, breach, and remedy should be approached regarding discovery preservation. It is worthwhile to examine the two approaches the courts took.

Pension Committee posits that, in discharging their duty to preserve and properly search data, the actions of producing parties can be "acceptable" or, if unacceptable, "negligent, grossly negligent, or willful." Quoting from Prosser & Keeton on Torts, the court defines negligence as conduct that "falls below the standard established by law for the protection of others against unreasonable risk of harm." Negligence is caused by "heedlessness or inadvertence." Gross negligence is "a failure to exercise even that care which a careless person would use" and differs from mere negligence in degree only. The court observes that a "failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful."

In giving examples of mere and gross negligence, the court makes a remarkable pronouncement: that after July 2004, when the final opinion in *Zubulake v. UBS Warburg* was issued, "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

It provides as further examples of gross negligence or willfulness "the failure to collect records -- either paper or electronic -- from key players ... after the duty to preserve has attached," and the failure to preserve a former employee's files "that remain in a party's possession, custody, or control after the duty to preserve has attached." As examples of mere negligence, the court points to "the failure to obtain records from all employees," only "some of whom may have had only a passing encounter with the issues in the litigation," "the failure to assess the accuracy and validity of selected search terms," and the general "failure to take all appropriate measures to preserve" data. The court does not offer these examples as "a definitive list," as every matter "will turn on its own facts and the varieties of efforts and failures is infinite."

The court further posited that the burden of proving that the producing party had breached a duty to preserve "differs depending on the severity of the sanction. For less severe sanctions -- such as fines and cost-shifting -- the inquiry focuses more on the conduct of the spoliating party than on whether documents were lost, and, if so, whether those documents were relevant and resulted in prejudice to the innocent party." However, "for more severe sanctions -- such as dismissal, preclusion, or the imposition of an adverse inference -- the court must consider, in addition to the conduct of the spoliating party, whether any missing evidence was relevant and whether the innocent party has suffered prejudice as a result of the loss of evidence."

The court's next pronouncement is perhaps more remarkable than its finding that a failure to issue a written litigation memo is gross negligence per se.

In its decision, the court found that "[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner."

Left with the problem inherent in every spoliation case -- how do you value what you do not know? -- Scheindlin, who appears to be fond of literary reference (in *Zubulake v. UBS Warburg*, supra, she quoted Philip Roth from "Portnoy's Complaint"), here followed Hammett when she reasoned that if the data were important enough for the producing party to destroy or go to lengths to avoid collecting until other forces destroyed it, it is presumed to have been relevant and its loss is presumed to prejudice the requesting party. The presumptions are rebuttable and, diverging from the Spade approach, no presumption arises "when the spoliating party was merely negligent." Instead, "the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction."

Such proof would consist of "extrinsic evidence tending to show that the destroyed" e-discovery would have been favorable to its case.

By creating or, given the case law cited by the court, recognizing a presumption of relevance and prejudice when the spoliating party acts in bad faith or grossly negligently, while not when the spoliating party was "merely" negligent in not preserving the data, the court tried to balance two concerns.

The first, a concern of requesting parties, was that "placing any burden at all on the innocent party to demonstrate the relevance of information that it can never review may seem unfair." The second concern, of producing parties, was that, if sanctions could result from the "completely inadvertent" failure to preserve data not even shown to be responsive, such

would turn litigation into "a 'gotcha' game rather than a full and fair opportunity to air the merits of a dispute," as "the incentive to find such error and capitalize on it would be overwhelming."

The court understatedly concluded that such a result "would not be a good thing."

To prevent either of these results, the court reasoned, "the line ha[d] to be drawn somewhere," and so the court drew it between merely negligent behavior, which warranted no presumption of prejudice, and grossly negligent or bad faith actions, which did. The court's schema, then, while admittedly arbitrary in some way, allows a court to place a value on lost and, by definition, unknowable data.

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