

January 26, 2010

Earlier this month, Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, and author of the landmark *Zubulake* decisions regarding electronic discovery, issued an 88-page decision detailing issues on document preservation, spoliation, discovery conduct, and sanctions. *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*¹ *Pension Committee* is not a tale about litigants who intentionally destroyed evidence. Rather, the Court found the plaintiffs to be "careless and indifferent" about preservation and collection. Judge Scheindlin started the opinion by declaring: "[b]y now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records – paper or electronic – and to search in the right places for those records, will inevitably result in the spoliation of evidence."² The detailed opinion offers a framework for handling electronically stored information in litigation.

Background

Plaintiffs were investors who sued to recover losses from the liquidation of two hedge funds. In 2003, they retained counsel who advised them to begin collecting documents for the purposes of drafting a complaint. Suit was filed in 2004, and the case stayed until early 2007. A written litigation hold was not sent until 2007. Depositions revealed gaps in plaintiffs' document productions, and the Court ordered plaintiffs to provide declarations regarding preservation and production. Additional depositions revealed more gaps in production, and defendants were able to identify missing documents. Ultimately, the court imposed monetary sanctions on 13 plaintiffs and ordered some of the parties to process and produce backup tapes at their own expense.

Lessons from Pension Committee

Pension Committee outlines what courts and litigants should consider regarding litigation holds and preserving information. Significantly, Judge Scheindlin stressed that these issues are fact-dependant and circumstance-specific. With that in mind, the opinion provides some guideposts:

- Plaintiffs' duty to preserve was triggered before suit was filed.³
- Litigation holds should be written and specifically refer to preservation of records.⁴
- Litigants need to preserve records from key players.⁵
- Relying on employees to search and collect documents may not be sufficient.⁶
- Counsel must "supervise or monitor" preservation and collection efforts.⁷

Judge Scheindlin specifically emphasized this latter point and found the initial instructions to search and collect deficient where "the directive places total reliance on the employee to search and select what that employee believe to be responsive records without any supervision from Counsel. Throughout the litigation, Counsel sent plaintiffs monthly case status memoranda, which included additional requests... But these memoranda never specifically instructed plaintiffs not to destroy records so that Counsel could monitor the collection and production of documents."⁸

Take action

Pension Committee amplifies the need for organizations to have reasonable litigation hold procedures before litigation or an investigation hits.

1. Create litigation hold procedures to follow when a duty to preserve arises. The procedures should include ways to notify counsel when incidents trigger the need to implement a litigation hold.
2. Create an inter-departmental litigation hold team that will help issue and monitor litigation holds and preservation efforts. Include members from Legal, IT, Records, HR and other business units on the team.
3. Issue written litigation hold notices and instructions. Monitor litigation holds and employees' preservation efforts.
4. Link the organization's litigation hold procedures to any document retention policies to ensure the company stops any auto-deletion or other regular destruction practices when the duty to preserve attaches

and the company implements a hold.

5. Focus on documentation and tracking. One important component to any hold process is the company's ability to demonstrate what reasonable steps it took to preserve information.

To preserve evidence the company may need and to safeguard against sanctions, companies need to have clear procedures. Documenting the steps followed to preserve is also critical. Although a one-size-fits-all set of procedures does not exist, effective procedures—tailored to a company's specific needs—are within reach with good planning. If you would like to discuss your existing litigation hold process, please contact us.

Notes

1 *Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 93124 (S.D.N.Y. Jan. 11, 2010), as amended by, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010).

2 *Id.* at 2.

3 *Id.* at 12.

4 *Id.* at 36.

5 *Id.* at 10.

6 *Id.* at 28.

7 *Id.* at 37.

8 *Id.* at 28-29 (footnotes omitted).

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