

FEBRUARY 2010

Required Reading – Federal Court Clarifies Discovery Obligations for Pre-dispute and Litigation Matters

A recent decision from a federal court in New York, authored by Judge Shira Scheindlin, is required reading for everyone involved in a lawsuit or thinking about bringing one. This decision, *Pension Committee of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 U.S. Dist. LEXIS 1839 (January 15, 2010), provides a comprehensive overview of the requirement to preserve and produce all relevant documents and electronic information in a legal dispute and the potential, and significant, consequences for failing to do so.

This decision is especially significant because it was written by the same judge who has rendered some of the most influential decisions in the country on electronic discovery issues and because she is so clear about the types of conduct that constitute negligence and gross negligence.

Judge Scheindlin's opinion states in clear and unequivocal language that those involved in a lawsuit, and those that reasonably anticipate one, have a duty to preserve information.

“By 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 [destruction] of evidence.” This obligation is not one that can be avoided by a stated ignorance of the duty to preserve information and the standard of acceptable conduct. In the judge’s words, “[a] failure to conform to this standard is negligent even if it results from a pure heart and an empty head.”

After *Univ. of Montreal Pension Plan*, it should be clear to all parties and their counsel what the “duty to

preserve” paper and electronic information means, and what the potentially severe consequences are for failing to take this duty seriously.

When a party reasonably anticipates litigation depends on the facts in a particular situation, but this question must be evaluated with such other issues as placing an insurance carrier on notice, sending or receiving a demand letter, or claiming attorney work product. The duty can arise even before a client seeks the advice of counsel.

A written litigation hold must be issued once a party reasonably anticipates litigation.

“[T]he failure to issue a written litigation hold constitutes gross negligence because the failure is likely to result in the destruction of relevant information.” Judge Schendlin ruled that a company-wide e-mail to employees to search their records for related documents “is insufficient to constitute a written litigation hold.”

The litigation hold must clearly and specifically state what preservation duties are required, including the suspension of document destruction.

At a minimum, a litigation hold must identify key individuals and ensure that their paper and electronic records are preserved. It must also provide instructions to cease the deletion of relevant e-mail and current electronic records, preserve the records of former employees, and preserve backup tapes when they may contain relevant information not accessible elsewhere. “[P]arties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions.”

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The search for documents and electronic information in response to a discovery request must be comprehensive and properly supervised.

The conduct of the plaintiffs in *Univ. of Montreal Pension Plan* was reviewed by Judge Scheindlin and found to be grossly negligent for some plaintiffs and negligent for others, “because they failed to execute a comprehensive search for documents and/or failed to sufficiently supervise or monitor their employees’ document collection.” The court was very critical of the unsupervised delegation of document preservation or search responsibilities to “ill-equipped” employees with no experience or instruction on conducting document search efforts, who did not have contact with counsel, and were unsupervised by management. Similarly, plaintiffs were found to be negligent because they restricted the search for electronic information to selected employees or files. Routine searches of backup tapes may not be required, but they must be searched once it has been shown they may contain relevant information.

A duty to preserve may require the suspension of normal document deletion and backup practices.

One plaintiff’s failure to suspend its practice of overwriting the data contained on backup tapes, which would have preserved the relevant records of key employees, coupled with the withholding of other information, was found to be gross negligence.

There are significant consequences for those who fail to adequately preserve and produce electronic information.

While parties “are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation.” Among the consequences for those who fail to “act diligently,” are monetary sanctions (often reasonable costs, including attorneys’ fees), fines against parties, executives, or their counsel, an adverse inference instruction to the jury concerning the lost evidence, and dismissal of claims in the lawsuit.

Judge Scheindlin’s decision confirms that it is essential to have a comprehensive plan to manage, preserve, and recover electronic information once a party reasonably anticipates litigation. An upfront investment in creating the necessary capacity and procedures to respond to discovery requests is crucial and significantly less expensive than the consequences of being unable to effectively preserve and produce electronic information during litigation.

While Judge Scheindlin’s rulings were based on procedures applicable in federal courts, we believe that the impact of her opinion will likely have broader application, especially given her findings as to what constitutes negligence and gross negligence in the preservation and production of records.

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