

Preservation duties after 'Pension Committee'

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U.S. District Court Judge Shira Scheindlin of the Southern District of New York issued an opinion in January 2010 that is certain to leave a long-standing impact on the legal industry. The decision, *Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities, LLC*, provides parameters around conduct and culpability levels in the context of evidence spoliation that may result in sanctions.

Despite these parameters, many practitioners are left confused and wondering how, as a practical matter, corporate litigants can get it right. This article will provide a brief background into. This landmark decision and guidance to attorneys and corporate clients regarding proper: data management and preservation practices.

Case background

A group of investors filed a securities action in February 2004 seeking recovery of \$550 million in losses resulting from the liquidation of two hedge funds. As a result of additional declarations regarding the plaintiffs' production efforts, the defendants identified at least 311 responsive documents absent from 12 of the 13 plaintiffs' productions. Using this information following the close of discovery, the defendants sought sanctions citing the plaintiffs' failure to preserve and produce documents. There were 96 plaintiffs in the original action, but only 13 plaintiffs' actions were the subject of this discovery opinion.

Judge Scheindlin found six of the 13 plaintiffs grossly negligent for failing to issue a written hold and imposed a permissive adverse inference sanction, and determined all 13 plaintiffs were subject to monetary sanctions since they "conducted discovery in an ignorant and indifferent fashion."

Proactive data management

Commentators widely believe this opinion raises the bar of acceptable conduct for parties within the discovery process. However, merely understanding the details discussed in this case is not enough to meet this heightened bar. Instead, proactive data management practices, such as archiving and creating an application inventory and data map must be instituted to successfully navigate litigation response.

Archiving enables efficient records management that facilitates business and storage efficiency, and can also ensure compliance with legal and regulatory requirements. An e-mail and filing archiving solution provides an effective means to appropriately preserve, manage, locate and produce relevant electronically stored information.

This solution will also allow for quick enforcement of the company's document retention policy and enables legal holds to immediately be put into place, preventing liability for preservation issues. Nonresponsive data to the investigation, compliance or litigation can also be released easily, decreasing data stores that may eventually progress to the next phases of the e-discovery process.

An application and inventory map provides organization to IT environments, allowing for a quick identification of pertinent data and custodians that are key to the fulfillment of preservation obligations. This tool also prevents the need to conduct searches for electronic information on an organization-wide basis, which saves valuable time and decreases the strain on IT employees. Once the application inventory and data map is in place, periodic updates should be made to account for the constant fluctuation in an organization's technology environment. When applications or systems are retired, information should be included as to where the final set of data is kept and what process will be required to restore if necessary. Maintaining this information and checking with the pertinent parties prior to requiring a restoration will save time, cost and effort down the road.

Preservation best practices

Proactive data management will help ensure data is preserved appropriately. A challenge remains, however, regarding the exact moment the duty to preserve arises and the *Pension Committee* ruling leaves this mystery largely unsolved.

The Federal Rules of Civil Procedure also provide little guidance as to a party's preservation obligation and when the duty to preserve arises. Thus, litigants must rely on case law to determine the proper course of action in these modern digital times, although cases often are at odds with exactly when the duty arises.

For example, in *Green v. McClendon* from the Southern District of New York, the court found the duty to preserve arose no later than the lawsuit's filing. In the District of Maryland, the court found in *Goodman v. Praxair Services, Inc.* that the duty to preserve arose when a plaintiff sent a letter informing the defendant that he had consulted attorneys regarding the matter. Another case, *KCH Services, Inc. v. Vanaire, Inc.* from the Western District of Kentucky, held that notice of litigation was established after a phone call from the plaintiff and the filing of a complaint.

These cases, despite referencing different points when the preservation duty arises, demonstrate that it is better for parties to be safe than sorry by implementing a written legal hold sooner rather than later if litigation appears to be on the horizon.

Know when to hold them

Once litigation is reasonably anticipated, issuing a timely written legal hold is absolutely essential.

Counsel can avoid a fate similar to the *Pension Committee* plaintiffs by issuing written legal holds and communicating them appropriately to employees of the organization.

The hold issuance should include the purpose for the hold, a description of the lawsuit or investigation and the guidelines for determining what data should be preserved and by whom.

Once a legal hold letter is issued, counsel should actively monitor internal suspension measures and ensure compliance. This includes sending update notices to keep key players and new employees informed, reminding them of their preservation obligations. Counsel must also avoid releasing the legal hold until final judgment, a settlement or dismissal -and until no related claims remain outstanding.

As reiterated by Judge Scheindlin in *Pension Committee*, perfection is not required. Rather, courts expect necessary steps to be taken to properly preserve relevant records for collection, review and production. Counsel can demonstrate appropriate measures were taken by investing resources in proper preservation and litigation hold management from the outset. This investment will payoff in the long run by ensuring discovery practices withstand judicial scrutiny in the unfortunate event opposing counsel files a motion seeking spoliation sanctions.

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