COURT DECISION CLARIFIES DUTIES OF PARTIES IN LITIGATION TO PRESERVE ELECTRONIC DATA

Business Litigation Alert
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The Southern District of New York issued a decision on January 15, 2010, clarifying the duties of parties involved in actual or anticipated litigation to preserve electronic information. In *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, Judge Shira Scheindlin further defined the standards governing the preservation, collection, review, and production of discovery materials, as well as the remedies available for discovery abuse. (In 2003-04, Judge Scheindlin wrote the landmark *Zubulake* decisions that were among the first to articulate e-discovery obligations.)

University of Montreal provides a comprehensive survey of other electronic discovery decisions and defines standards of negligence, gross negligence, and willful misconduct. For example, issuing a litigation hold deficient in scope was determined to be negligent, while grossly negligent conduct includes failure to issue any written litigation hold, failure to stop the routine destruction of backup tapes after their discovery obligation arises, failure to understand the recordkeeping policies of the employee responsible for preserving documents, and failure to preserve backup tapes that are the sole source of relevant information.

Remedies for Destruction of Electronic Information

Judge Scheindlin emphasized that sanctions are evaluated on a case-by-case basis, and courts have broad discretion to impose appropriate sanctions against a party who has failed to preserve or has destroyed electronic information. The *University of Montreal* decision explains that sanctions are meted out on a "sliding scale." Sanctions include:

- Shifting the costs for e-discovery and additional discoverymotions and depositions
- Fines
- Special instructions to the jury to presume that the missing evidence would have been detrimental to the spoliating party's case
- The issuance of default judgment or dismissal of claims for the most serious conduct, like tampering with evidence or intentionally destroying evidence by

burning, shredding, or wiping out computer hard drives

Discovery to Do List

Parties considering making a claim or defending against a claim should promptly consult with experienced counsel and:

- Immediately issue a comprehensive litigation hold that reaches all of the people who may have relevant evidence relating to the claims or defenses
- Reissue the litigation hold periodically to ensure compliance
- Suspend routine document retention and destruction practices while relevant evidence is identified and preserved
- Meet with the people directly involved in the controversy to determine what information they have and how it is stored
- Explain to witnesses what information is sought and the search terms that would likely gather pertinent information
- Understand the information technology systems and procedures that are currently in place so that relevant information can be safeguarded
- Gather the relevant information and segregate it so that it can be produced in a useable form

Hodgson Russ's litigation attorneys and full-time litigation IT specialists have extensive experience creating and successfully carrying out risk-minimizing e-discovery plans for clients in a wide range of industries. Our e-discovery professionals work with clients and their IT personnel in the early stages of disputes or investigations, designing a custom plan for the identification, review, and analysis of documents that minimizes disruption to a client's business and keeps costs reasonable.