

# UPDATEDISCOVERY

## SUMMARY OF JUDGE SCHEINDLIN'S PENSION COMMITTEE DECISION

Recently, Judge Shira Scheindlin of the Southern District of New York issued a follow-up opinion to her landmark decision in *Zubulake v. UBS Warburg* ("Zubulake"). The follow-up opinion is *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, LLC, et al.* ("Pension Committee").

Six years after the Zubulake case, Judge Scheindlin once again finds herself restating the rules that must be followed when applying litigation holds to cases. In summary, Judge Scheindlin states the following:

- "The failure to issue a WRITTEN litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information"
- "Parties 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"
- "By now, it should be abundantly clear the duty to preserve means what it says and that the 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"

## CHECKLIST FOR PROPER LEGAL HOLDS

- 1) **The legal hold MUST be written. It has been decided time and time again that a verbal legal hold is not acceptable.** The failure to issue a written legal hold is "gross negligence"
- 2) **The legal hold MUST be timely.** Timely is decided by a "trigger event". A trigger event can be anything from a lawsuit being filed or notice that a claim is likely to be followed. In essence, it is when litigation is reasonably anticipated.
- 3) **The legal hold should identify the key personnel involved.** Typically this involves employees who are most likely to have relevant information.
- 4) **There must be an affirmative response for recipients of a legal hold.** Sending a legal hold without requiring a response or acknowledgement has been ruled to be completely insufficient
- 5) **There must be clear and direct instructions on how to preserve records.** Vague or overbroad instructions on what to do with relevant data will not be tolerated.
- 6) **Periodic reminders must be disseminated. Sending a notice one time is not sufficient.** You are required to remind the custodians of their duty to preserve periodically, i.e. every three months or six months.
- 7) **The custodians themselves cannot be supervising the collection process.** The collection must be overseen by in house or outside counsel or a representative of the firm. Additionally, the process of collection of data must be documented.

- 8) **Suspension of automatic deletion and back-up media is required if that is the sole source of the data.** One of the first steps to be undertaken is to confirm that relevant electronic data is not destroyed. If the data is maintained only on servers or back-up tapes and there is no other way to obtain the data from readily accessible sources, automatic destruction must be halted.

## **CONCLUSION**

Based on the Zubulake and the Pension Committee case, it is clear there will be serious ramifications if the above steps are not followed. The consequences of non-compliance with these established rules can result in negative inference instructions to jurors, monetary sanctions, reputational damage and in extreme cases directed verdicts. Judge Scheindlin emphasizes the frustration of courts having to spend their time dealing with discovery disputes related to preservation and document destruction.