(Tick, Tick, Tick, Tick) Wake Up! The Clock's Running on Evidence Retention

This article first appeared in *Corporate Counsel,* March 31, 2010.

by Wayne Matus and David Stanton

Wayne Matus
Litigation
+1.212.858.1774
wayne.matus@pillsburylaw.com

David Stanton
Litigation
+1.213.488.7271
david.stanton@pillsburylaw.com

The Jan. 15, 2010, opinion of Judge Shira Scheindlin in Pension Committee of the University of Montreal Pension Plan et al., v. Banc of America Securities, LLC (Pension Committee) *is potentially the most significant e-discovery decision affecting counsel and litigants in six years.*

Prior decisions, such as those of Judge Scheindlin in *Zubulake v. UBS Warburg* and Judge Barbara Major in *Qualcomm Inc. v. Broadcom Corp.,* have made clear that inside counsel's conduct in supervising e-discovery, interfacing with outside counsel, and assuring internal corporate compliance with discovery obligations is potentially subject to judicial review. Yet those decisions did not address all of the applicable standards and obligations relating to the electronic discovery process.

In *Pension Committee,* Judge Scheindlin does exactly that, and, while ostensibly merely synthesizing existing standards "set by years of judicial decisions," appears, in fact, to increase compliance requirements and increase the risk of noncompliance by applying enhanced sanctions for gross negligence and willfulness to discovery misconduct.

The detailed decision is a must read for those involved in litigation as it is likely to be persuasive to other courts because of Judge Scheindlin's reputation. It is of particular significance for in-house counsel, as many of the litigation-related obligations it imposes arise prior to the retention of outside litigators and the penalties for noncompliance could be particularly harsh.

First, *Pension Committee* markedly advances when the obligation to preserve relevant information commences. The plaintiffs were investors in two British Virgin Islands-based hedge funds that filed for bankruptcy in April 2003.

Two of the plaintiffs retained counsel at that time and one began to communicate with a number of the other plaintiffs. In the summer of 2003, a group of investors formed an ad hoc "policy consultative committee" to monitor court proceedings and retain counsel as necessary. Prospective counsel was interviewed in September 2003, retained in "October or November 2003," and a complaint was filed in February 2004.

Many experienced lawyers might have thought that the duty to preserve for each plaintiff only arose either when litigation was commenced by that plaintiff or when the plaintiff decided to bring suit. Others might have thought that the duty arose when the client first sought

counsel or retained counsel. Still others might conclude that the reasonable anticipation of litigation only arose when counsel advised that the plaintiff had a viable claim. Judge Scheindlin, however, found that the duty to preserve for all plaintiffs arose when the hedge funds first declared bankruptcy.

Second, *Pension Committee* expands on from whom a litigant need collect, stating that "the failure to obtain records from all employees (some of whom may have had only a passing encounter with the issues in the litigation) ... likely constitutes negligence," and the failure to collect the records of key employees constitutes "gross negligence."

The court further states that "the failure to take all appropriate measures to preserve ESI" is likely to be negligence. Previously, lawyers might not have considered the collection obligation to extend to employees with only a passing involvement, and the court provides no prior authority for this proposition. Previously, lawyers might have considered reasonable efforts to preserve to be sufficient—not "all appropriate measures," which implies a higher standard.

Third, *Pension Committee* addresses how collection must be undertaken. Judge Scheindlin rejects the concept of self-collection, even though many trial lawyers have advised their clients that self-collection is appropriate in certain, if not most, cases. The court explicitly states that the process of collecting relevant information must be overseen by an attorney who can "review, sample or spot-check the collection effort."

Pension Committee also defines negligence, gross negligence and willfulness within the context of electronic discovery.

In particular, the court finds that (i) the failure to issue a written litigation hold constitutes gross negligence; (ii) the failure to identify and collect information from key players is either gross negligence or willfulness; (iii) the destruction of e-mail or backup tapes after the duty to preserve has attached is either gross negligence or willfulness; (iv) the failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached constitutes gross negligence; (v) the failure to obtain records from all employees, as opposed to key players, is negligence; (vi) the failure to take all appropriate measures to preserve ESI is negligence; and (vii) the failure to assess the accuracy and validity of selected search terms is also negligence.

Of paramount concern to corporate counsel is the court's conclusion that the concept of "gross negligence" applies to failures that occur very early in the litigation process. While the penalties for negligence might be as little as an order of further discovery or cost shifting, the penalties for gross negligence or willfulness might be as harsh as "fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions)." Not only could such penalties affect the outcome of a crucial case, but a determination of "gross negligence" would most certainly have a deleterious effect on a general counsel's long-term career.

The first lesson of *Pension Committee* is the importance of properly identifying the trigger date and promptly placing a written litigation hold in place. Plainly, a litigation hold obligation may arise long before outside counsel is retained to investigate the advisability of bringing an action or making a claim.

The second lesson is that counsel needs to be involved very early in the preservation effort to assure all available steps are taken to preserve evidence and locate custodians. This too might well occur long before trial counsel is selected. The third lesson is the need for counsel to be involved in the collection effort itself, again a task that may take place before trial counsel is retained.

In view of these lessons, in-house legal departments may find that retaining e-discovery counsel to advise the company generally in this area is the wisest course, rather than waiting for advice until matter-specific trial counsel has been engaged. Without question, the obligation to preserve will arise in many instances where a claim is never brought. Paying trial attorneys to learn about how corporate records are maintained, what the retention policies are and where the servers and archives are located, and then to use them no further, is wasteful.

E-discovery is a repetitive business process. The subject matter of the lawsuits may differ, but the underlying activities of holding, collecting, sorting, and producing electronic data remain constant and can benefit from centralized oversight.

Instead of training a new group of lawyers about the company's systems every time there is a potential new case, companies can utilize e-discovery counsel to maintain consistency across matters, achieve economies of scale, reduce wasteful repetition, lower transaction costs and obtain important strategic advantages. Further, by developing a systematic, rather than an ad hoc approach to e-discovery, the company is better able to achieve defensible results that balance the costs and risks to the organization as a whole.

Not surprisingly, it was Judge Scheindlin herself who stated in Zubulake that electronic discovery should be delegated to competent legal counsel "fully familiar with the client's document retention policies, as well as the client's data retention architecture." To not heed the judge's advice could prove costly.

Wayne Matus and David Stanton are partners in Pillsbury Winthrop Shaw Pittman's e-discovery practice, Matus in New York and Stanton in Los Angeles.

Earlier this year, Pillsbury launched PEARL, a first-of-its-kind, strategic alliance of leading e-discovery vendors, consultants, technicians, translators, processors and first-tier review firms that can reduce in-house law departments e-discovery spend by as much as 50 percent and ensures the entire process can be fully defensible and certified to the courts.

For more information, please contact wayne.matus@pillsburylaw.com.

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Pillsbury Winthrop Shaw Pittman LLP