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Client Alert

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Preservation and Production of Electronically Stored Information

On January 11, 2010, Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York issued a lengthy opinion in *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Securities, LLC*, again discussing the obligations of litigants to preserve and produce electronic information.[1] Indeed, the court titled its own opinion with the caption "*Zubulake* Revisited: Six Years Later" and admonished that "'those who cannot remember the past are condemned to repeat it.'"

In *Montreal Pension Plan*, Judge Scheindlin sanctioned a group of plaintiffs who failed to take sufficient steps to preserve and produce electronically stored information ("ESI"). As a result, the court imposed severe sanctions, including an adverse inference jury instruction, attorney's fees and costs, and additional discovery at the expense of certain sanctioned plaintiffs.

Most significantly, Judge Scheindlin explicitly found gross negligence for the failure to issue a formal, *written* litigation hold at the time litigation is reasonably anticipated. Reasoning that the absence of a litigation hold will "inevitably result" in the spoliation of evidence, the court found that the failure to issue a written litigation hold is indicative of a high level of culpability, and that potentially severe sanctions are warranted.

The following general guidelines should be considered as part of the issuance of a litigation hold and other document preservation efforts:

- Develop a pre-litigation action plan of steps to take in the event of a potential investigation, regulatory inquiry or litigation that necessitates preserving documents or ESI.
- Issue a litigation hold at the time litigation is reasonably anticipated. That point will, in most cases, fall earlier for plaintiffs than for defendants. However, a defendant who is the target of threatened litigation should issue a litigation hold immediately; do not wait for commencement of a lawsuit.
- Re-issue the litigation hold periodically to ensure that its requirements are fresh in the minds of employees and known to new hires.
- Designate a manager with knowledge of the firm's document retention practices and policies to supervise the process of identifying and preserving potentially discoverable documents and ESI. Employees searching for relevant documents should be supervised by the designated manager and counsel.
- Suspend routine overwriting and data destruction procedures that would affect relevant evidence. Turn over relevant backup tapes or other media containing

[1] The full citation for Judge Scheindlin's opinion is *The Pension Comm. of the Univ. of Montreal Pension Plan, et al. v. Banc of Am. Securities, et al.*, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. Lexis 1839 (S.D.N.Y. Jan. 11, 2010).

relevant evidence to counsel, or keep such materials stored in a segregated location, away from other materials available for use in the ordinary course.

- Identify all "key players," and provide their names to counsel. Search for and retain all files for key players, including computer systems, emails, backup servers or tapes containing files of key players, and hard copy documents.
- Keep a log of specific actions taken to identify and preserve potentially relevant documents. This log should be labeled "created at the request of counsel for use by counsel." Litigants are often called upon by the court or opposing parties to recount their efforts to comply with discovery obligations, and the ability to provide all relevant information and witnesses is crucial.
- A party need only preserve relevant evidence. Making the determination of what sources may or may not contain relevant information involves subjective judgment. In determining what sources of ESI may contain relevant evidence and whether to preserve, consider the usually inconsequential cost in preserving evidence against the usually high consequences in failing to preserve it.

Finally, the preservation obligation of potential litigants may extend to relevant documents or ESI held by third parties where the litigant has the legal right or practical ability to obtain the material. Accordingly, document preservation efforts should include relevant materials in the hands of third parties — particularly, former employees, document storage or management providers or banks — and ensure such third parties do not dispose of documents or ESI after the duty to preserve has attached. It may be prudent to advise the third party in writing of its obligations to preserve relevant evidence.

Above all, litigants should note that their specific obligations with respect to document preservation and production depend on the unique facts and circumstances of each case. Counsel owes a duty of competence to the court and his or her client in all things including electronic discovery. It is the duty of both clients and counsel — in-house and outside — to comply with discovery obligations. Guided by counsel, a party must familiarize themselves with location and format of all potentially relevant documents.

Please feel free to contact any of the partners listed below or any partner with whom you work if you would like to discuss the development of a pre-litigation preparedness plan or the duty to preserve.

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