



# Information Law Webinar Series

February 11, 2010

*Pension Committee*: The latest decision on legal holds related to e-discovery by United States District Judge Shira Scheindlin (SDNY) and what this means for you

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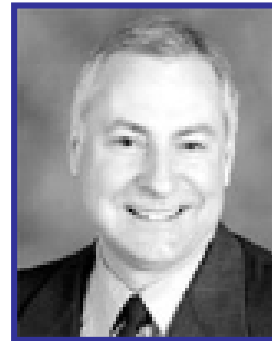
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# The *Pension Committee* Decision

*Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC* (S.D.N.Y. Jan. 15, 2010)

Citation: 2010 WL 184312; 2010 U.S. Dist. LEXIS 1839

Judge: Judge Shira Scheindlin

Background: Hedge fund litigation in which a group of investors is seeking to recover losses of \$550 million.

Procedural Posture: Defendants filed motion for discovery sanctions against thirteen individual plaintiffs.

# The *Pension Committee* Facts

- Failure to timely issue written legal hold notices
- Failure to supervise the preservation and collection of employee records
- Failure to collect records from key players
- Failure to preserve backup tapes containing data from key players
- Submitting false and misleading declarations regarding document collection and preservation efforts

# The *Pension Committee* Holdings

- The court found each of the thirteen individual plaintiffs to have acted with either negligence or gross negligence by failing to adhere to “contemporary standards” for discovery behavior.
- The court imposed monetary sanctions on all thirteen plaintiffs.
- For the seven plaintiffs found to be grossly negligent, the court imposed a special jury instruction that permitted the jury to presume that the lost evidence was relevant or would have been favorable to the defendants.
- The court also required one plaintiff to continue to search backup tapes for additional discovery productions.

# Teachings from *Pension Committee*: Legal Holds

It is clear that organizations must have a water-tight legal hold process and, in the event that a written legal hold was not issued, there should be a demonstrably defensible reason why.

# Teachings from *Pension Committee*: Legal Holds

## Key considerations:

1. issuing written legal hold notices as soon as possible following “reasonable anticipation of litigation”
2. continually reviewing the scope of the hold notice as additional potential custodians’ and responsive information is identified and issuing updated holds as necessary

# Teachings from *Pension Committee*: Legal Holds

## Key considerations (*continued*):

3. implementing an appropriate system to track the legal hold notice distribution and acknowledgments
4. documenting the legal hold process so that the organization can respond to the question of “who received what notice when?”

# Teachings from *Pension Committee*: Legal Holds

## Key considerations (*continued*):

5. being prepared to meet and confer with opposing parties (and the court) regarding legal hold issues (including distribution and related preservation efforts)
6. identifying if there is a special circumstance where a written legal hold notice is not feasible (or appropriate) and documenting the preservation measures employed that reflect a reasonable, good faith effort to preserve relevant information

# Teachings from *Pension Committee*: Collection as a Preservation Tool

The *Pension Committee* language must be read reasonably and should be understood as a clear warning that simply sending out a hold notice by itself is not sufficient, and relying solely on custodians to select and collect information for the litigation is also not sufficient.

Instead, parties need to have a process in place that demonstrates that they effectively executed the preservation directives, ensured that the pertinent custodians received appropriate direction and oversight in complying with directions, and, as necessary, that the organization reached out and collected information from key players and others to ensure its preservation.

# Teachings from *Pension Committee*: Collection as a Preservation Tool

## Key considerations:

1. providing instructions to custodians that are sufficient to effectively communicate what must be done to preserve potentially relevant information;
2. making good faith efforts to identify key players and others who may have potentially responsive information so that they can receive a hold notice and appropriate collection steps can be undertaken;
3. utilizing a process by which relevant information can be collected from key players and others if necessary at the outset of a matter;

# Teachings from *Pension Committee*: Collection as a Preservation Tool

Key considerations (*continued*):

4. utilizing a process by which forensic images of hard drives and other storage devices can be made and preserved if necessary; and
5. ensuring that the organization will be able to competently discuss with opposing parties (and the court) the contours of what is, and is not, being done with respect to preservation and collection to identify and resolve any disputes early in the litigation.

# Teachings from *Pension Committee*: Backup Media

“I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (e.g., the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” See Fed. R. Civ. P. 26(b)(2)(B).

*Id.* at 43, fn. 99.

# Teachings from *Pension Committee*: Backup Media

## Key considerations:

1. developing and documenting a good working understanding of all backup systems so that timely and defensible decisions can be made to assess whether any such media needs to be taken out of ordinary rotation and preserved;
2. establishing a process for moving quickly to identify and preserve backup tapes that the organization believes contain unique and relevant information from key custodians in any given case;
3. being prepared to discuss with opposing parties (and the court) the organization's backup systems and what, if any, steps should be taken to preserve and/or produce such data;

# Teachings from *Pension Committee*: Backup Media

## Key considerations (*continued*):

4. being prepared to defend, with a developed factual record, decisions made not to retain backup data; and
5. developing the factual support for any argument that the restoration, processing, and production of content from retained backup media imposes an “undue burden or cost” such that the data is “not reasonably accessible” and thus should not be discovered (or, alternatively, even if good cause would warrant such production then there should be an allocation of the costs of such discovery).

# Teachings from *Pension Committee*: Prejudice and Burden of Proof

Once it has been determined that the spoliating party has failed to comply with a discovery preservation duty, the court must assess whether:

- the spoliating party “acted with a culpable state of mind upon destroying or losing the evidence; and
- the missing evidence is relevant to the innocent party’s claims or defenses.

*Id.* at 15.

# Teachings from *Pension Committee*: Sanctions

- *Dismissals and default judgments* should only be imposed in cases of intentional bad faith conduct.
- *Issue preclusion* stops short of a full dismissal or default judgment, but is still to be reserved for egregious intentional conduct.
- *Special jury instructions* may be imposed across a continuum — “allowing the jury to consider both the misconduct of the spoliating party as well as the proof of prejudice to the innocent party.” *Id.* at 23.
- *Monetary sanctions and cost shifting* are appropriate to punish the spoliating party’s conduct and deter future similar conduct while also compensating the innocent party for the costs and burdens associated with the imposition of unnecessary discovery expenses and disputes.

# From East to West: *Pension Committee's* Impact on Litigation beyond the S.D.N.Y.

Assessing “contemporary standards” regarding:

- issuing a written legal hold;
- identifying all of the key players and ensuring that their electronic and paper records are preserved;
- for former employees, failing to cease deletion of their e-mail and/or other records that remain in the responding party’s possession, custody, or control;
- preserving backup tapes when they are the sole source of relevant information; and
- preserving backup tapes when they relate to key players (and the relevant information regarding those key players is not available from readily accessible sources).

# CLE Information

**Attendance CLE Verification CODE:**

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# Questions?



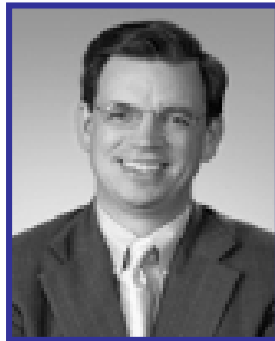
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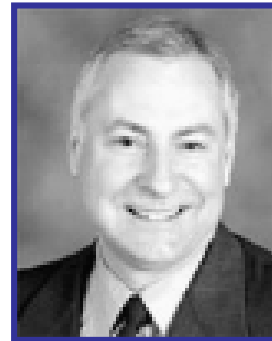
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## Next Information Law Webinar:



*Managing Costs in Responding to Government Investigations*  
Thursday, February 18, 2010  
12 noon to 1 p.m. (Eastern)

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