

## Constantine Cannon e-Discovery Practice Group Client Alert

### Update on Evolving e-Discovery Law: Managing the Legal Hold and Preservation Process in the post-*Pension Committee* Landscape

“By now, it should be abundantly clear that the duty to preserve means what it says and that a 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.”

[Judge Shira A. Scheindlin, *Pension Comm. of the Univ. of Montreal Pension Plan, et al. v. Banc of America Securities*, 2010 WL 184312, \*1 (S.D.N.Y. Jan. 15, 2010).]

**What is the Legal Hold Duty and When Does it Attach?** The legal hold duty requires a party to suspend its routine document retention and destruction policies for potentially relevant data and systems and institute a written litigation hold to ensure the preservation of relevant documents. The duty attaches when a party *reasonably anticipates litigation*. A plaintiff's duty to preserve is often triggered before the litigation commences. Examples of legal hold triggers include pre-suit letters threatening litigation, investigation notices, EEOC charges and the filing of a lawsuit.

#### What Makes for a Defensible Litigation Hold Notice and Procedure?

- A proper notice is transmitted to *all relevant employees*, including those with likely knowledge of each claim or defense, as well as Human Resources and Information Technology departments.
- The notice must make clear that preservation includes both hard copies and electronic data (including legacy or archival data).
- Counsel must supervise document preservation and collection.
- Counsel must periodically reissue the hold to remind employees of the continuing obligation to retain data.

**Practice Tip:** It is ill-advised to allow employees to search and collect responsive records without counsel's supervision. *Pension Comm.*, at \*8. While not every employee requires hands-on attorney supervision, Judge Scheindlin notes that attorney oversight is important. Each search's adequacy is evaluated case-by case.

**Evidence Requiring Preservation:** The duty to preserve is broad, including all evidence that a party "knows, or reasonably should know is relevant to the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request." *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72 (S.D.N.Y. 2001). A party need *not* preserve multiple identical copies of a document.

**Practice Tip:** after *Pension Committee*, the failure to preserve backup tapes may be considered gross negligence if they are the sole source of relevant information or relate to key players and the relevant information maintained by those players cannot be obtained by a readily available source.

**Principle of Proportionality -- Fed. R. Civ. P. 26(b)(2)(C):** Judge Scheindlin frequently admonishes attorneys for not invoking Rule 26(b)(2)(C) more often to address the burdens and costs of discovery.

- The balancing test: the court may limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount of the controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." Fed. R. Civ. P. 26(b)(2)(C).

**Breach of the Duty to Preserve and Resulting Spoliation of Evidence:** **Spoliation** is the destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

**Degrees of Culpability in Spoliation:** A court may impose sanctions for negligence, gross negligence or willfulness in failing to collect, preserve and produce documents. A failure to preserve evidence that results in the loss or destruction of relevant information will always be either negligent, grossly negligent or willful, depending on the circumstances. Other examples:

#### **Negligence**

- Failure of counsel to properly supervise employees' collection of documents (may also be gross negligence).
- Failure to take all appropriate measures to preserve electronically stored information ("ESI").
- Reliance on search terms without assessing their accuracy.

#### **Gross negligence**

- Failure to use a *written* litigation hold instruction.
- Failure to identify or to collect records from key players or to ensure that their electronic and paper records are preserved.
- Failure to cease deletion of email.
- Failure to preserve records of former employees.
- Failure to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if not otherwise obtainable from readily accessible sources.

**Willfulness**

- The intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached.
- Failure to collect records from key players (may also be gross negligence).

**Burden-Shifting:** When the spoliating party's conduct is sufficiently egregious to justify a court's imposition of a presumption of relevance and prejudice, or when it warrants permitting the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The errant party may rebut the presumption with proof that the evidence's loss has not prejudiced the innocent party.

**Remedies for Harm caused by Spoliation:** The determination of an **appropriate sanction** for spoliation, if any, is in the trial court's discretion and is assessed case-by-case. Examples include:

- For *negligence*, courts may impose **monetary sanctions** including costs and legal fees associated with motion practice and discovery regarding the spoliation issue.
- For *gross negligence*, courts may impose **monetary sanctions**, an **adverse-inference instruction** (instruction that party failed through gross negligence to preserve evidence, and that jury *may* presume that the lost evidence was relevant and would have favored the other side), or an order to **search backup tapes** at the wrongdoer's own (considerable) expense.
- For *willfulness or other serious misconduct*, such as perjury, tampering with evidence or intentionally destroying evidence, courts may impose **monetary sanctions**, **terminating sections** (dismissal for plaintiffs, default judgment for defendants), **preclusion of evidence**, and **instructions that the jury should deem facts admitted**.

**Practice Tip:** Discovery efforts are discoverable in a proceeding for sanctions. Counsel may inquire "[w]hich files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision..." *Pension Comm.*, at \*10.

**Data Collection:** Counsel (inside or outside) should supervise employees' collection efforts. Counsel should also document the reasonable steps taken to comply with discovery demands to protect against challenges by an adversary. Parties may use vendors to facilitate the collection, restoration and preservation of data, but vendors must be supervised by attorneys or management personnel familiar with the matter.

**Summary:** A proper preservation plan, which dictates defensible protocols for the drafting, dissemination and implementation of the legal hold notice, will greatly reduce the risk to the company of spoliation claims and sanctions.