

CLIENT ALERT: Recent Opinion by Renowned Judge in E-Discovery Area Addresses Preservation Obligations and Sanctions

Last month, Judge Shira Scheindlin of the United States District Court for the Southern District of New York, a frequent contributor to the jurisprudence related to the production of electronically stored information in discovery, issued an 87-page opinion which may increase the risk of sanctions for failure to collect and preserve electronic documents relevant to ongoing litigation.

In *Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC*, 2010 WL 184312 (S.D.N.Y. Jan. 15, 2010), the Court sanctioned parties whose “gross negligence” resulted in their failure to properly preserve electronic documents, even though their failure was neither egregious nor in bad faith. In such instances, according to Judge Scheindlin’s opinion, it may also be presumed that the missing documents are both relevant and favorable to the other side. The decision also identified certain circumstances which would support a finding of “gross negligence,” including failure to issue a written litigation hold instruction; failure to identify key players and ensure that their electronic and paper records are preserved; failure to cease routine deletion of email and destruction of business records; and, in certain instances, failure to preserve back up tapes.

This case will likely prove influential in the e-discovery area, given Judge Scheindlin’s reputation and influence in the field. The case further emphasizes that parties must approach their obligation to collect and preserve all documents, including electronic documents, both seriously and diligently, or face potentially costly and harsh penalties for their failure to do so.

For more information on your obligation to preserve electronic records, please contact your MBJ attorney.

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