Judge Scheindlin's Recent *Pension* Decision

Guidance for Corporate Counsel

Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, No. CIV. 05-9016, 2010 U.S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 15, 2010).

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About the Authors

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Analysis of Judge Scheindlin's Recent *Pension* Decision and Guidance for Corporate Counsel

SNAPSHOT

Judge Scheindlin, in an 86 page opinion, imposed sanctions even though the "case did not present any egregious examples of litigants purposefully destroying evidence" because "the plaintiffs failed to timely institute written legal holds and engaged in careless and indifferent efforts after the duty to preserve arose."

On January 15, 2010, Judge Shira A. Scheindlin issued an "Amended Opinion and Order," imposing adverse inference and monetary sanctions on thirteen plaintiffs in *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC,* 05 Civ 9016 (S.D.N.Y. January 15, 2010), finding that they had failed to comply with the obligation to properly preserve, collect, and produce electronic evidence. As Judge Scheindlin noted in her 86 page opinion, she imposed sanctions even though the "case did not present any egregious examples of litigants purposefully destroying evidence." She concluded that "the plaintiffs failed to timely institute *written* legal holds and engaged in careless and indifferent efforts after the duty to preserve arose. As a result, there can be little doubt that some documents were lost or destroyed." In her view, those failures led to discovery being "conducted in an ignorant and indifferent fashion."

Judge Scheindlin's conclusion to impose sanctions was based, in part, on her view that, at least in the Southern District, "definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." (Emphasis in original.) (Footnotes omitted.)

"Failure to issue a *written* litigation hold constitutes gross negligence"

1. Background

The thirteen companies whose conduct was sanctioned were among a group of investors in February, 2004, who had filed an action to recover losses of $550 million from the liquidation of two hedge funds in which they held shares. Earlier, in late 2003, before filing the complaint, the attorneys for plaintiffs distributed memoranda instructing plaintiffs to begin document collection and preservation, noting that the documents were necessary to draft the complaint. As described in her opinion, external counsel did not "direct employees to *preserve* all relevant records — both paper and electronic" — nor did they "create a mechanism for *collecting* the preserved records" (Emphasis in original) so that they can be searched by someone other than the employee. The directions from the attorneys "place[d] total reliance on the employee to search and select what [the] employee believed to be responsive records without any supervision from Counsel." (Footnote omitted.)

After a lengthy discovery stay pursuant to the Private Securities Litigation Reform Act, to brief and decide motions to dismiss, defendants made their document requests and started depositions. The depositions revealed that there were gaps in the document production by plaintiffs. The Court then ordered plaintiffs to submit declarations regarding their efforts to preserve and produce documents and granted defendants' request to depose the declarants and other individuals regarding the preservation and collection process. By cross ref-

erencing the productions by plaintiffs, defendants, and the Receiver in a separate SEC action, defendants identified 311 documents that should have been produced by plaintiffs but were not.

In moving to dismiss the complaint for plaintiffs' failure to comply with their preservation and production obligations, defendants cited the 311 documents that were not produced, and "ask[ed] [the] Court to assume that each plaintiff also received or generated documents that have not been produced by anyone and now presumed to be missing." In response, plaintiffs called the request for such an assumption "'absurd'" and argued that any such inference "would be based on no more than 'rank speculation'."

Judge Scheindlin did not agree and concluded that the defendants' "argument is by far more compelling."

2. The Opinion

In her opinion, Judge Scheindlin, broadly following the EDRM for discovery, and for the first time in a discovery matter, defined in great detail the concepts of negligence, gross negligence and willfulness in the preservation, collection and review of information.[1]

She concluded that, after the fifth Zubulake opinion, and certainly by July 2004, "the failure to issue a written litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information."

The Court also found that the following "failures" constituted gross negligence or willfulness:

- Not to issue a *written* legal hold.
- Not to identify the key players and to help establish that their electronic and paper records are preserved.
- Not to stop deleting email.
- Not to preserve the records of former employees.
- Not to preserve backup tapes when they are the sole source of relevant information or relate to key players, if the relevant information maintained by those key players is not obtainable from readily accessible sources.
- The intentional destruction of e-mail, backup tapes after the duty to preserve has attached.

In addition, she identified the following failures as negligence:

- Not to obtain information from all employees (some of whom might have had only a passing encounter with the issues in the litigation), as opposed to key players.
- Not to take all appropriate measures to preserve ESI.
- Not to assess the accuracy and validity of selected search terms.

Regarding self-collection by custodians, Judge Scheindlin found that plaintiffs had not implemented a "mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee. Rather the directive places total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel."

Turning to the process of collection and review, she found that "the sloppiness of the review" or "the failure to collect records – either paper or electronic – from key players constitutes gross negligence or willfulness as does the destruction of email or backup tapes after the duty to preserve has attached." Expanding on her opinions in the *Zubulake* case, she found 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), as opposed to key players, likely constitutes negligence as opposed to a higher degree of culpability. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category."

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[1] Judge Scheindlin also discussed important legal issues involving the burden of proof on the question of prejudice and shifting that burden. These issues will not be discussed in this paper.

Confirming the "well established" duty to preserve evidence when a party "reasonably anticipates litigation." the Court referenced the duty of a plaintiff to preserve information. Consistent with the position taken by other judges, in the Court's view, "[a] plaintiff's duty is more often triggered *before* litigation commences, in large part because plaintiffs control the timing of litigation." (Emphasis added.) (Footnotes omitted.) Shortly after being retained in the fall of 2003, counsel for plaintiff "telephoned and emailed plaintiffs" to begin document collection and preservation "indicat[ing] that the documents were necessary to draft the complaint." The complaint was filed on February 12, 2004.

3. Practice Tips

As one of the most influential federal judges writing on discovery issues, Judge Scheindlin's opinion should cause companies with potential litigation exposure, as either plaintiff or defendant, to examine closely their practices and processes for preserving and collecting potentially responsive information in response to any "reasonable anticipation of litigation." The opinion is notable, among many other reasons, because the Court concluded that the case did not present any evidence that "litigants purposefully destroy[ed] evidence." At most, there was "careless and indifferent collection efforts after the duty to preserve arose." As noted earlier, defendants were able to identify 311 documents that had not been produced. (The court did not describe the total number of documents produced.) Thus, even in the absence of evidence of the deliberate destruction of evidence, the Court imposed both adverse inference and monetary sanctions on plaintiffs.

Even in the absence of evidence of the deliberate destruction of evidence, the Court imposed both adverse inference and monetary sanctions on plaintiffs.

Reasonable Anticipation of Litigation

Judge Scheindlin made clear that the reasonable anticipation standard for issuing *written* legal holds to preserve information applies equally to plaintiffs and defendants and that "[a] plaintiff's duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation." (Footnote omitted.) In this case, the duty was triggered when counsel had been retained and information was being collected to draft the complaint. Thus, two of the most significant sanctions cases in the last few years, *Qualcomm* and *The Pension Committee*, involved sanctions on plaintiffs who controlled the fact and timing of the litigation. For companies involved in IP litigation, especially those that look to file declaratory judgment actions, their discovery process should include robust procedures for instituting legal holds when external counsel is retained to advise on litigation options.

Written Litigation Hold

Judge Scheindlin wrote that "definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information." (Footnotes omitted.) (Emphasis in original.) Your firm's preservation process should commence quickly and include an iterative scoping process so that a *written* litigation hold notice is issued to every custodian with potentially relevant information. Companies with an information inventory, active retention management program and access to current and historical organization information will be more agile in scoping their holds and most able to defend the choices made in determining the sources of potentially relevant information.

The process should be robust enough or rely on technology to require and monitor responses from every recipient as well as an escalation process to alert supervi-

sors or the legal team to non-respondents or potential custodians with questions about the scope of the hold or their preservation obligation. The scope of notification and preservation should include stewards of records and systems who may not have knowledge of the dispute but who may have relevant information in their custody; the language of the notice may need to be *written* in terms easily understood by these stewards given their absence of context. In addition, the scoping and publishing process should be iterative, adding (and subtracting, if possible and appropriate) other potential custodians and information as the issues shift over the course of the litigation. For plaintiffs, the scope of the preservation obligation should include information, as was true in *Qualcomm*, relevant to a defendant's defenses and counterclaims.

Litigation holds should be maintained even in the absence of active discovery. In the *Pension Committee* litigation discovery was stayed for about three years. Even in a matter where discovery has not been stayed, conduct and actions that seemed reasonable at the start of a matter can look much different years later in the harsh light of judicial review during a motion for monetary or terminating sanctions. It should not be lost on counsel that Judge Schiendlin in *Zubulake* and others previously pointed out the necessity and issued sanctions for failure to issue reminders over the course of the matter life. (*In re NTL Securities* 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)).

Counsel should consider the information life-cycle and nature of data on hold to define reminder periods that best enable awareness of and compliance with legal hold duties (i.e., rapidly changing data environments may require 90 day reminders whereas data that is natively retained may warrant bi-annual reminders). Technologies can simplify the determination and management of reminder cycles, making it feasible to tailor the reminders to the data environment.

For companies with a dynamic or high-volume litigation environment and those with short email retention periods, providing employees with access to their specific, current legal holds via the intranet combined with ethics or records training helps to establish that employees know their obligations and how to access their current notices at any time can significantly reduce inadvertent destruction and improve the defensibility of counsel's actions.

For companies that outsource their data or e-mail platforms, the Master Service Agreement's governing that outsourcing should provide for prompt steps to preserve information, including support at night, on weekends, and during holidays.

Backup Tapes

Judge Scheindlin concluded that the "destruction of email and certain backup tapes after the duty to preserve has attached" is "gross negligence or willfulness." The "certain" backup tapes to which she refers are tapes that "are the sole source of relevant information or when they relate to key players if the relevant information maintained by those players is not obtainable from readily accessible sources."

Her opinion begs the question whether backup tapes themselves should be considered "readily accessible sources" of information. In most circumstances, given the cost and burden involved in restoring tapes and searching for relevant information, a strong argument can be made that backup tapes should not be considered "readily accessible." Since the responding party has the right to identify "readily accessible," companies should be consulting counsel and making those determinations prior to any litigation, so that the decisions can be made outside of the emergency reactive mode. Furthermore, it highlights the need to revise your policies now to provide for prompt rotation of backup tapes and to undertake a tape remediation process if you are storing tapes or using them as an information archive.

Since it is difficult, if not impossible, in the early stages of litigation to know whether backup tapes are the "sole source of relevant information" or contain information relating to key players that is not otherwise obtainable, it

is an unacceptable risk not to preserve backup tapes. The only solution is to use backup tapes for their intended purpose – disaster recovery – and to rotate them on as short a time period as is possible given your IT environment, preferably fewer than seven days. In the spirit of cooperation supported by the Sedona Conference and to avoid unexplainable surprises, engage in early discussions on the scope of preservation and production with the other party.

It is equally important to specifically identify the holds that apply to a tape and the specific custodians and data set on the tape subject to the hold as well as the total data and custodian set on the tape. The tapes on hold should be managed with the same thoroughness with which the custodian list is managed and the release process should be thorough and accurate. A critical step includes promptly releasing the hold at the conclusion of a matter and cross referencing the tape with other matters involving the same tape, custodians and data set so that the backup tapes can be returned to their normal rotation. Tape release from holds should include a cross check to see if the tape or data contained on it is subject to other holds; only companies with an index of their holds and tapes and a robust process can effectively do this (and without it, tapes accumulate and add tremendous expense to discovery).

The tapes on hold should be managed with the same thoroughness with which the custodian list is managed and the release process thorough and accurate.

Departed and Departing Employee Process

Judge Scheindlin also found that it would constitute gross negligence to fail "to preserve the records of former employees that are in a party's possession, custody, or control." For that reason your company's information preservation effort must include a process for preserving the information of employees who have left the company and may have e-mail, or lost or orphaned data on file shares. In addition, the process has to be robust enough to capture relevant information of employees who depart during the litigation. Very often existing legal hold processes do not account for departing employees and fail to capture information that may reside on laptops or desktops before the equipment asset has been repurposed.

Your company's information preservation effort must include a process for preserving the information of employees who have left the company.

Check that your scoping process enables you to identify, incorporate and catalog terminated employee assets in the legal hold. Much like back-up tapes, legacy employee assets subject to hold should be carefully catalogued and release processes should be in place so that they are fully and defensibly dispositioned at the earliest opportunity. Monitor for employee transfers to help establish that data on hold that may be passed to successor employees is handled properly and these successors receive hold notices.

Decisions By Internal Counsel Not to Preserve and Produce Information

One of the plaintiffs provided counsel only with documents that it "understood to be responsive." Certain files "were never searched because [in the opinion of the plaintiff] any documents [in those files] would be 'duplicative.'" In addition, the plaintiff "never altered its practice of overwriting backup data to preserve the records of key players." Even though the plaintiff eventually produced some of the documents it had originally withheld on the grounds that they were not responsive, Judge Scheindlin found that decision to be "independent and arbitrary" and in combination with the failure to preserve records and misleading and inaccurate declarations to amount to gross negligence. It seems clear from the opinion that by an independent decision, the Court meant that the company had decided not to produce documents without vetting that decision with external counsel. Judge Scheindlin's view is consistent with an earlier decision from a federal court in California that imposed sanctions on the defendant for failing to conduct a reasonable search for responsive documents but concluding that external counsel was not responsible because it was merely negligent in relying on representations by its client. *Finley v. Hartford Life & Accident Ins. Co*., (N.D. Cal. Feb. 22, 2008). Internal counsel and IT should work collaboratively with their external counsel and vendors participating in the collection of information to help establish that all relevant information is identified and preserved. Some companies have been excluding counsel from these decisions and arbitrarily limiting the scope of the collection. Such practices should be re-examined in view of Judge Scheindlin's opinion.

Collecting Preserved Records for Review

At several points in the opinion, with respect to collections performed by certain plaintiffs, Judge Scheindlin criticized the "total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel." Elaborating on that view, Judge Scheindlin explained "that not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to review, sample, or spot check the collection efforts is important." Discussing the actions of one plaintiff, the Court noted that the employee who conducted the search "had no experience, conducting searches, received no instruction on how to do so, had no supervision during the collection, and no contact with Counsel during the search." (Footnote omitted.)

"Not every employee will require hands-on supervision from an attorney. However, attorney oversight of the process, including the ability to review, sample, or spot check the collection efforts is important."

In Judge Scheindlin's view, given the employee's level of experience, the employee "should have been taught proper search methods, remained in constant contact with Counsel, and should have been monitored by management."

Legal hold and discovery workflow software can enable efficient, full collection oversight including training, monitoring, sampling and spot checking.

Judge Scheindlin's opinion raises the risk for companies that do critical components of the e-discovery process in-house, increasing the risk of sanctions on the company and any internal lawyers who oversee the process. Companies that do bring their process in-house should consider having it reviewed by counsel and process and technology professionals to see if their process is robust enough to withstand scrutiny by plaintiffs looking for gaps (in for example exception processing), to exploit in inflating the settlement value of a weak case or supporting a motion for monetary or terminating sanctions. In addition to consulting outside counsel on the process design, discovery process management tools should enable internal *and* external counsel to precisely present collection criteria, use the method of collection best suited to the data and its stewards, efficiently coordinate and collect data, audit the data collected by custodian and source using objective and subjective tests, monitor the process and document a complete audit trail of activities and data collected.

Retention Program Enables Rapid, Efficient Compliance

Companies with a vital retention management practice and a network of records liaisons may be able to collect less data more defensibly. They can either rely on their knowledge of the issue and the nature of the data during collection or define and constrain the collection through negotiations in discovery conferences based on their expert knowledge.

Use Caution Even in Delegating to IT Staff

Companies that broadly delegate data collection to disparate IT staff or outside service providers should help establish that counsel has visibility to whom the collection was assigned and can monitor the process, particularly since it may take many days and many passes to complete and several people may work on the task. The collection record should be reviewed as should the data itself, ideally during or shortly after the collection is completed. Resist the temptation to assume that all IT personnel automatically understand how to collect data for discovery simply because they work in IT!

Note that collecting data outside the United States raises special concerns and considerations in jurisdictions where employee consent is required and where data protection laws prohibit processing or transport of data. Custodian-assisted collections may be required, and pre-collection search of custodians' data may be prohibited by local law.

Any party should consider broadly preserving data and identifying as early as possible the key players and custodians and their assistants. Make preserving their information a priority. Availability of the data when production is contested will greatly minimize risk and cost.

Keywords

In the category of the negligent conduct of preservation and collection, Judge Scheindlin placed "the failure to assess the accuracy and validity of selected search terms …." Especially in connection with the preservation of potentially relevant information, the use of key words is fraught with risk that relevant information is not preserved. A failure to timely produce discoverable information can be remedied if it has been properly preserved. However, a failure to preserve relevant information can not be remedied.

A failure to preserve relevant information can not be remedied.

Preparing Your 30(b)(6) Witness

Judge Scheindlin was also highly critical of plaintiffs' failure to properly prepare 30(b)(6) witnesses. In the Court's view, "plaintiffs had a duty to adequately prepare knowledgeable witnesses" with respect to a number of topics, including:

- Which files were searched for responsive information.
- How the search was conducted.
- Who was asked to search their files.
- What the people who were doing the search were told.
- Whether and to what extent the search for responsive documents was supervised by management and counsel.

In connection with this discussion of knowledgeable witnesses, the Court stated that "all" the plaintiffs failed in their duty to provide knowledgeable witnesses by claiming that "all" documents had been produced. Much like attempting to prove a negative, representing that "all" information has been produced is an over-representation.

There is no reason not to identify and train an appropriate corporate representative on information management and your discovery process before litigation. That person, in addition to being trained as a witness, should have the knowledge and experience to describe your discovery process in simple, non-technical language.

Part and parcel of this preparation is the importance of having the record of who was identified, what was collected how and when, and what instructions were issued and when. Companies that use legal holds and discovery process software can often document these facts without extra effort and automatically capture a defensible record of activities shared by internal and external counsel. Corporate counsel may want to promote that the legal department has standards for how much, how and where this information is tracked across attorneys and paralegals; there are often significant disparities in record hygiene, and re-creating the fact trail is a painful and expensive exercise.

Companies that use legal holds and discovery workflow software can often document these facts without extra effort and automatically capture a defensible record of activities shared by internal and external counsel.

30(b)6 Preparation

- Avoid all-inclusive assertions that "all" documents have been identified or produced
- Train and prepare your witnesses on ediscovery and your process
- Capture a complete record of all discovery activities from start to end of the case; legal hold and discovery workflow software can automate this record keeping for internal and external counsel

Discovery About Discovery

The *Pension Committee* litigation increases the already substantial risk that your adversary will focus substantial discovery efforts on your company's internal discovery process, from when the legal hold was published, through scoping of the hold, collection, and review. Having described specific practices that are objectionable, Judge Scheindlin goes one step further, identifying specific failures and discovery practices (such as producing information from limited custodians) as negligent, grossly negligent and even willful.

Roadmap for Counsel and Its Opposing Counsel

The opinion is a road map for litigants to take extensive discovery of discovery to create opportunities to enhance the settlement value of their case by uncovering and exploiting preservation and collection failures. It is also a roadmap for counsel on the level of detail, supervision, rigor, and record keeping required to eliminate the risk and cost of these process challenges. Use caution in assuming that notifications alone satisfy the duty to preserve and develop a substantive, well-considered process.

Consider notifying your adversary that you intend to comply with the Sedona Conference Cooperation Principles and build a record of transparency and cooperation. A rigorous legal holds and discovery process, information inventory, active retention program with knowledgeable business liaisons, and integrated workflows across legal and IT provide counsel with greater assurance and enable counsel to use early discovery conferences to define advantageous agreements on the scope of preservation and production. Conversely, companies without these elements are ill prepared, as are their outside counsel. Cooperation and preparation for discovery conferences are two relatively easy and cost effective ways of avoiding discovery problems and even containing ordinary costs.

Analyzing Your Adversary's Production

Although it is difficult in the frantic mode of discovery response, some thought should be given to analyzing your adversary's production to help establish whether all information has been preserved and produced. Even individuals or small companies are responsible for preserving and producing relevant information.

4. Summary Guidance for Corporate Counsel

The New Zubulake Checklist

Hold Notices

- ☐ Issue notices and require confirmations from all custodians, not just key players.
- ☐ Iteratively scope (add and subtract) custodians, including records and system stewards who may have data in their custody without knowledge of the issue in dispute.
- ☐ An information inventory (data map from IT combined with business information map from business groups) and an active retention program will enable more reliable, defensible and timely scoping of holds.
- ☐ Issue reminders at intervals suited to data velocity and throughout periods of matter dormancy.
- ☐ Help establish that holds are issued to and properly addressed by data service providers and that contracts stipulate the appropriate levels of responsiveness.
- ☐ Identify and communicate legal holds to periphery custodians, such as IT staff and records coordinators, in terms that they understand without context of the issue in dispute.

Back Up Tapes

- ☐ Preserve tapes at the outset of litigation and until agreement is reached or it becomes clear that the tapes are not the sole source of potentially relevant data.
- ☐ Establish or revive tape rotation immediately.
- ☐ Identify and catalog tapes on hold, carefully noting the custodians, the data set on the tape subject to the hold, and the total data set on the tape.
- ☐ Release tapes at the close of the matter, cross checking to help establish that the data set is not subject to another hold.

Employee Termination and Transfer Processes

- ☐ IT should be able to independently recommend whether employee data is on hold at any time. If employee turnover and matter volume are high, monthly termination lists may not be sufficient to preserve needed data.
- ☐ Create a single catalog of all legal holds and applicable custodians (with transparency between legal and IT) that is a reliable source for action.
- ☐ File share and shared drive space allocated to an employee must be addressed in the termination process so that it cannot be over-written after the employee leaves, and legal can effectively collect the data when necessary.
- ☐ Legal should be immediately alerted to departing employees who are involved in active matters. Sophisticated legal hold software can minimize the burden of monitoring by alerting legal staff to only those employees involved in their specific matters.
- ☐ Terminated employee drives and shares should not be used as records retention vehicles.
- ☐ HR, legal and IT should understand their respective responsibilities and roles.

Collection Review

- ☐ Ask experienced discovery counsel to review your collection process if you choose to do it internally. Establish that internal and external counsel supervise collections as they are performed; discovery workflow software can enable effective *and* efficient supervision.
- ☐ Establish that the method of collection is appropriate for the skill and knowledge level of the person conducting the collection, whether that is a custodian, records manager or IT person.
- ☐ Don't assume IT staff understand e-discovery because they are in IT – the person conducting the collection may be a third-tier delegate with even less understanding than a custodian with knowledge of the issue in dispute.
- ☐ Provide very clear instructions and training. Some companies provide video instructions with their collection instructions to employees.
- ☐ Counsel should know who intends to perform and who actually performs the collection of data, and establish that questions are quickly identified and addressed and in-process decisions by collectors are well made.
- ☐ Counsel should require a full record of the collection and visibility to IT staff performing the collection, monitor or supervise the collection process, and audit the data collected for completeness.
- ☐ International collections may preclude certain methodologies such as search, require custodian consent, or may be prohibited entirely. Identify the location of custodians, data and jurisdiction requirements prior to agreeing to produce the data and prior to its collection.

Keywords

- ☐ For production, thoroughly consider and test your keywords and get agreement from the other party whenever possible.
- ☐ For preservation, carefully consider the efficacy and defensibility of keywords for hold implementation. An error is virtually impossible to correct later.

30(b)6 Preparation

- ☐ Avoid all-inclusive assertions, such as "all" documents have been identified or produced.
- ☐ Train and prepare your witnesses on ediscovery generally and your internal processes specifically.
- ☐ Capture a complete record of all discovery activities from start to end of the case; legal hold and discovery workflow software can automate this record keeping and provide transparency for internal and external counsel.

Process Challenges

- ☐ Judge Schiendlin has provided a road map for challenging your discovery process; its inverse is a road map for precluding and defending such claims.
- ☐ Sedona Cooperation Principles can help you define and establish a spirit of transparency.
- ☐ Rigorous legal holds and discovery processes combined with an information inventory and retention program can help counsel use early discovery conferences to their greatest advantage, reducing the scope of data to be preserved and produced.
- ☐ Defensible disposal of data lowers data volumes, discovery cost and discovery complexity. A clean house greatly reduces the risk of discovery failure.

PSS Systems helps companies eliminate unnecessary legal risk, and discovery and data management costs. Its Atlas Suite is the recognized leader in legal information governance with customers like Abbott, BASF, BP, Citigroup, ConocoPhillips, Devon Energy, First Data, GE, Merrill Lynch, Pfizer, and Williams.

PSS Systems is the innovator that started the legal holds market in 2004 and has the largest concentration of customers and domain experts anywhere. PSS is a trusted business partner to its customers, offering expert insight, best-in-class software, and continuous innovation to address emerging challenges. PSS founded and sponsors the Compliance, Governance and Oversight Council (CGOC) as a part of its commitment to advancing corporate retention and preservation practices.

For more information, visit www.pss-systems.com.

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