

**JUDGE SCHEINDLIN AMENDS NEW OPINION,
MOVES AWAY FROM CATEGORICAL APPROACH
TO DISCOVERY OBLIGATIONS**

January 20, 2010

To Our Clients and Friends:

Last week, we circulated a memo to clients discussing an opinion issued by Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York, discussing litigants' duties to preserve and produce electronic evidence. After our update, Judge Scheindlin amended her decision. The superseding opinion in *Pension Committee v. Banc of America Securities, LLC*, still holds that it constitutes gross negligence not to issue written hold notices at the outset of litigation. However, Judge Scheindlin did soften two rules on which our memo commented.

First, whereas the prior opinion in *Pension Committee* also characterized as gross negligence the "failure to preserve backup tapes when they are the sole source of relevant information or relate to key players," the new opinion says instead that backup tapes must be preserved only when "they 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*" (emphasis added).

Second, while the prior decision disapproved categorically of allowing employees to decide for themselves what documents are relevant, without allowing that this may be appropriate depending on the particulars of a case, the new opinion softens that stance in a footnote. The footnote states "I note 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. The adequacy of each search must be evaluated on a case by case basis."

Even as amended, *Pension Committee* still characterizes as sanctionable negligence a host of practices in which litigants previously, in appropriate cases, thought they may have safely engaged. These preservation and collection issues, now more than ever in light of Judge Scheindlin's new opinion, should be considered carefully at the earliest stages of any litigation.

Please feel free to call us with any questions.

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