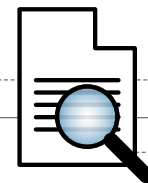


## Should You Trust Your Employees to **PRESERVE + PRODUCE** Discovery?



Identifying and preserving relevant data is a constant and enduring struggle. Failure could be disastrous.

Meeting the basic duty to preserve documentary evidence is a challenge for most organizations. Since the Amendments to the Federal Rules of Civil Procedure took effect in 2006, most well-advised business organizations started routinely issuing written litigation hold notices to their employees and other relevant document custodians at the outset of litigation or potential litigation. Too often, the task ends here.

In addition to issuing a timely written litigation hold notice, the current or prospective litigant, together with counsel, must also diligently oversee the execution of the litigation hold in good faith. Under evolving jurisprudence, the good faith execution of a litigation hold may require more than simply turning off an e-mail auto-delete feature or stopping the recycling of back-up tapes. It requires proactively managing and preserving data – which often involves the cooperation of employees.

In a January 2010 opinion, Judge Shira Scheindlin, author of the landmark *Zubulake* decision, warned that organizations should not delegate preservation and collection efforts to employees who are ill-equipped to effectively manage the process. *Pension Comm. of Univ. of Montreal Pension Plan v Banc of America Securities (Montreal Pension)*.

In *Montreal Pension*, Judge Scheindlin determined certain plaintiffs had committed gross negligence by placing too much reliance on their employees to identify, preserve, and collect electronic data. These employees had no experience conducting searches, received no instructions concerning how to identify relevant data, and were not supervised during the collection process. Employees also failed to follow up on supplemental requests for documents and did not seek assistance in collecting or preserving documents. These and numerous other deficiencies in the plaintiffs' approach to discovery cumulatively resulted in adverse jury instructions, monetary sanctions and, for certain plaintiffs, an order to conduct further discovery at the plaintiffs' own expense.



*Montreal Pension* set the stage for a host of other opinions in 2010 criticizing corporate defendants' customary reliance on their employees for document retention and collection. Indeed, employees familiar with the subject matter of the litigation are the most logical sources for preserving and producing the most relevant data. After all, they are presumably the most knowledgeable with respect to the content and location of their own documents. Nevertheless, employers who allow their employees to make their own determinations on the substantive and technical adequacy of their preservation and collection efforts are significantly exposed to greater risk in litigation.

While courts do not expect perfection, both litigants and their counsel must conform to higher standards when conducting discovery. As more courts take Judge Scheindlin's lead, sanctions will be increasingly harsh and litigants will be forced to turn to new methods of preserving and collecting electronic data. Most organizations will find meeting these heightened preservation and collection standards increasingly daunting. Organizations need to develop proactive data management practices by implementing a Litigation Readiness Plan.

### A Litigation Readiness Plan Typically Includes

- An updated and accurate inventory and understanding of an organization's data sources
- Policies and procedures requiring immediate, consistent, and documented discovery preservation and collection steps

The plan should also include employee training so that designated personnel know how to identify where potentially relevant data is located and understand how to preserve and produce that data in a timely fashion.

Without training, organizations will inevitably experience inconsistent execution among different employees, incur substantially higher discovery costs in collecting and producing data, and assume additional and avoidable discovery-related litigation risk.

Give us a call if you'd like help developing a Litigation Readiness Plan for your organization.

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