Pension Committee: A Catalyst for a Change in the Federal Rules?

By Maura R. Grossman, Wachtell, Lipton, Rosen & Katz

Before the opinion in Pension Committee was issued, it was sometimes a challenge to convince attorneys, or their clients, that preservation obligations – which can be onerous and costly at times – were serious business. No longer is that the case. The shift in attitude has been noticeable. Since January 2010, the legal community has been placing a far greater emphasis on preservation activities.

The question no longer is, “Should we send out a legal hold?” Now, litigants are asking, “Have we sent out the hold yet?” Judge Francis recently took the position in Orbit One that a written legal hold may not be necessary in every case. While there can be exceptions to the general rule, in the vast majority of civil litigation, a corporate litigant would likely be hard pressed to walk into a federal court today and state that it was unaware that it had an obligation to implement a legal hold when it reasonably anticipated litigation.

Pension Committee may have dictated the standards applicable to legal holds for much, if not all of the U.S., because most corporations operate in multiple jurisdictions and do not typically know in advance where they will be sued, so the safest course may be to apply the strictest standard, which is the standard in the Southern District of New York. Moreover, Judge Scheindlin is a highly prominent and influential jurist in the area of e-discovery and courts in other jurisdictions have looked to her for leadership in this area.

One of the things we observed in 2010 is that the Circuits were all over the map on the applicable standard for the imposition of sanctions, a point that was brought home in Judge Grimm’s Victor Stanley II opinion. Similar to the preservation context, the impact on a multi-jurisdictional company is often that it is impossible to know in advance exactly which standard will apply. As a practitioner, it is challenging to know how to advise a client when you don’t know where the litigation may end up.

It seems fairly obvious at this point that the most likely consequence of this inconsistency and uncertainty is that there will be some changes to the Federal Rules, most likely to Federal Rule of Civil Procedure 37. What the revised rule will say, however, and how far it will go remains to be seen, but there is clearly a growing cry for movement in the direction of uniformity, driven by the desire for greater predictability. This will take time because the rules process requires careful consideration and the opportunity for dialogue and feedback. It would probably be fair to say that Pension Committee and its progeny – particularly, Rimkus and Victor Stanley II – have served as the catalyst for this change.

The continuum of views on the necessity of prejudice to the requesting party in spoliation opinions by lower courts, even in the same jurisdiction, has ranged from Judge Scheindlin’s rejection of the “pure heart, empty head” defense, to the “no harm, no foul” approach taken by Judge Francis in Orbit One. These cases are obviously very fact-dependent, and naturally, the law can vary by jurisdiction, but all of this variability has led some lawyers (and their clients) to throw up their hands in frustration. One option in situations where there has been a willful effort to destroy evidence, but where has not been prejudice to the requesting party, would be to shift the punitive consequence away from spoliation sanctions, per se, towards contempt. That way, the courts can differentiate the “mistake-makers,” where case management may be the more appropriate response, from the “wrongdoers,” where a more punitive and deterrent approach may be warranted.

Regardless of how the judiciary or Rules Committee chooses to resolve these thorny issues, the impact today is that expectations – and those actions that constitute basic competence – have irrevocably changed. Until any revision to the Federal Rules is made, organizations and their outside counsel need to take a hard look at preservation issues because
the stakes are much higher than they were merely a year ago.

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**Lessons from the Frontlines**

By John J. Jablonski, Goldberg Segalla LLP

To the uninitiated the focus on litigation holds in 2010 seems overblown. For those in the trenches, 2010 certainly added to the collective angst highlighting the risks and consequences litigants face whenever a litigation hold is contemplated. Cases like *Pension Committee* and *Rimkus* confirmed that a defensible litigation hold business process is more important now than at any other point in the United States. 2010 is also notable because there is a very real possibility that help may be on its way in the form of a new federal rule addressing preservation. The specific form of help, however, is still in the works and likely years away.

As an author, commentator and practicing attorney devoted to helping organizations with litigation hold issues I was able to participate in all aspects of litigation holds in 2010 – from helping companies struggling with developing a defensible preservation business process; helping implement litigation holds; defending litigation holds during litigation; explaining emerging case law to judges, practitioners and clients; and authoring two significant submissions to the Federal Rules Advisory Committee seeking a preservation amendment to the Federal Rules of Civil Procedure. I am drawing from these experiences to offer a few lessons for companies, attorneys and judges.

**COMPANIES**

The number one lesson for companies is simple. Be sure to document the good faith efforts taken to preserve evidence. The best way to do this is to issue a written litigation hold and then memorialize the steps taken to enforce the litigation hold. An email, memorandum or litigation hold software notice is a valuable first step toward avoiding sanctions. Developing even a basic litigation hold business process will create a significant return on investment. The process does not need to be complex, merely repeatable. Accusing a company of spoliation is a common tactic. The costs associated with defending against spoliation accusations can eclipse any actual sanctions. Spending a little time, effort and money early should take this argument away from your opponents.

**ATTORNEYS**

Two important lessons gleaned for attorneys. First, attorneys need to understand what it means to their clients to implement a litigation hold. For companies with complex computer systems, it is not as simple as flipping a switch to preserve “any and all ESI related to the facts and circumstances relevant to the Smith case.” Be sure to speak with your clients about any internal processes already in place and work with your clients to efficiently implement a