

Zubulake V: Emerging Trends In The Duties Regarding Electronic Evidence

The now commonly held fact that information in the 21st Century is transmitted almost exclusively through electronic media is becoming a reality in the insurance industry. Even Lloyd's of London, perhaps the most notorious insurance



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provider in terms of its use of outdated communications infrastructure, has made recent announcements regarding enhancements in electronic transactions. See "Lloyd's goes electronic as Willis places first risk through Kinnect," a press release published December 16, 2003 at <http://www.lloyds.com/index.asp?Itemid=7112>. At the same time, judges, lawyers and their clients are wrestling with questions about how discovery rules created to deal with paper files are applied to electronic files, data and metadata. In large part, the standards for electronic discovery in insurance-related litigation is being determined in current everyday cases.

Enter Judge Shira Scheindlin and the two-year discovery saga that is *Zubulake v. UBS Warburg, LLC*. *Zubulake* is an otherwise typical gender discrimination case by an equity salesperson against a large financial trading institution. Through five decisions on various discovery issues presented in this case, Judge Scheindlin has led the charge in defining parties' obligations with respect to conducting and paying for discovery in the electronic age.

Zubulake I-IV

In its first four decisions, the *Zubulake* Court considered a number of discovery disputes arising out of the defendant's failure to produce e-mails and other electronic information potentially existing on back-up tapes. After restoration of a sampling of the tapes demonstrated that they contained relevant information, the Court ordered that additional restoration be conducted, additional depositions of the defendant, and that the defendant be responsible for much of such costs.

Zubulake V

During the re-depositions, it was discovered that the defendant's employees had deleted at least 45 e-mails relevant to the case – all of which occurred after the defendant's legal counsel had instructed it to retain all such e-mails and electronic data. The plaintiff also learned that many back-up tapes had been lost, destroyed or not produced to the plaintiff. Based on this new information, the plaintiff

moved for sanctions against the defendant on the grounds of spoliation. Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." 2004 WL 1620866 at *6. To warrant an adverse inference instruction based on spoliation, a party must demonstrate: (i) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (ii) that the records were destroyed with a "culpable state of mind"; and (iii) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. *Id.* The Court noted that a "culpable state of mind" can include ordinary negligence, as well as the intentional or willful destruction of documents. *Id.*

The critical issue was whether the destruction of the electronic evidence was done with "a culpable state of mind." In answering this question, the Court considered whether the defendant and its outside counsel had undertaken all steps necessary to prevent spoliation, and described the responsibility of counsel to supervise the location and preservation of such documents, which the *Zubulake* Court termed as the "duty to monitor compliance." The Court noted that these obligations are incumbent upon in-house and outside counsel alike.

I. Duty to Locate Data

The Court summarized a lawyer's duty to locate pertinent information as follows: "it is *not* sufficient to notify all employees of a litigation hold and expect that a party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." The "steps" to be undertaken by counsel necessarily will vary depending on each client and case, but must be reasonable in their effort to locate relevant materials.

The Court determined that attorneys must become familiar with a client's document retention policies and computing infrastructure. To be effective, the Court further advised, counsel need to speak with the client's information technology personnel and all "key players" in the litigation, and should specifically inquire as to how and where such persons store their documents and advise them of their preservation obligations. In the absence of such interviews by counsel, the Court believed that "it is impossible to determine whether all potential sources of information have been inspected." *Id.* at *8. Where the size of a corporation prevents counsel from interviewing all relevant persons, counsel are not relieved of their responsibilities, but should be "more creative" in ensuring that steps are taken to locate pertinent information.

2. Duty to Preserve Data

Once located, attorneys and clients are under a duty to ensure that such information is retained for possible production in the matter. Such preser-

vation generally requires the suspension of a document retention or destruction policy and placing a "litigation hold" on potentially relevant sources of data. This duty is on-going, and does not end once relevant materials are initially located and preserved.

The more difficult question, as the Court observed, is what steps shall be taken by counsel to ensure the further retention of relevant information. In this regard, the court outlined three steps: (i) counsel must ensure that a "litigation hold" is implemented whenever litigation is reasonably anticipated, and periodically re-issue future notices; (ii) counsel should communicate directly with key players; and (iii) counsel should instruct all employees to produce responsive electronic files, and ensure that relevant back-up tapes are safely stored. *Id.* at *9-10. Ultimately, however, the Court recognized that whatever requirements are imposed upon legal counsel, they must be reasonable: "A lawyer cannot be obligated to monitor her client like a parent watching a child. At some point, the client must bear responsibility for the failure to preserve. At the same time, counsel is more conscious of the contours of the preservation obligation. . . ." *Id.* at *9.

Sanctions Imposed

The Court concluded that the defendant and its counsel had not taken all steps to fully comply with their discovery obligations. The Court made clear that "at the end of the day, however, the duty to preserve and produce rests on the party." *Id.* at *12. If a party is advised of its preservation duties either by counsel or the Court,

the party is "on notice" and "acts at its own peril." The Court held that the defendant acted in a willful manner in destroying, or attempting to destroy electronic evidence and awarded the plaintiff sanctions, including an adverse inference instruction to the jury, and various costs.

Conclusion

All businesses – including the insurance industry – are becoming increasingly reliant on electronic media, and ordinary cases like *Zubulake* are developing the standards for electronic discovery when those businesses end up in litigation. It is important to be aware that key documents sought in litigation might include not only saved but deleted emails; not only documents on hard drives but those on backup tapes, and not only electronic versions of documents, but also the metadata that accompany them. Moreover, both in-house and outside counsel are well-advised to keep in mind the responsibilities identified in *Zubulake V* regarding the identification and preservation of such data that are relevant to litigation.

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