

Legal Alert:

Zubulake Court Issues Opinion on Duties of Counsel and Litigants to Preserve and Produce E-Mails

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Earlier this week, in the course of ruling on a motion for sanctions relating to deletion of some e-mails and delayed production in discovery of others, a federal district court judge discussed the obligations of parties and counsel with respect to the preservation of electronic records once litigation is anticipated. *Zubulake v. UBS Warburg LLC, et al.*, 02 Civ. 1243 (S.D.N.Y. July 20, 2004). Recognizing that this area of law is evolving, Judge Shira A. Scheindlin of the Southern District of New York identified steps that she believed should be taken to ensure compliance with evidence preservation obligations. Her opinion provides one of the more detailed judicial discussions of these issues to date, particularly as to the duties of counsel. While other judges may develop varying views on these issues, her decision is likely to be the subject of as much attention and discussion as her earlier rulings in the same case with respect to allocating electronic discovery costs.

Judge Scheindlin stated that counsel have a continuing duty to ensure that relevant information is not lost, a duty that does not end with the issuance of a "litigation hold" at the outset. She also expressed the view that relevant records are sometimes lost because of a failure of communication by counsel and a resulting lack of understanding on the part of the key employees and information technology personnel as to the scope of their duty to preserve and produce records. With these concerns in mind, she identified the following steps as ones that she expected counsel to take:

- 1) "*Litigation Hold*": When litigation commences or is reasonably anticipated, a party should suspend its routine document retention policy and counsel should issue a "litigation hold"¹ to ensure preservation of relevant documents. The

¹ In one of her prior decisions, Judge Scheindlin stated that as a general rule, the "litigation hold" would not apply to "inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003). However, "[I]f a company can identify where particular employee documents are stored on the backup tapes, then the tapes storing the documents of 'key players' to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to *all* backup tapes." *Id.* (emphasis in original).

litigation hold should be periodically reissued in order to notify new employees and remind existing employees. Counsel should oversee compliance with the litigation hold, monitoring the party's efforts to maintain and produce relevant documents "so that all sources of discoverable information are identified and searched."

- 2) *Communication with "Key Players"*: In order to make sure the preservation duty is effectively communicated, understood, and implemented, counsel should communicate directly with the "key players" in the litigation to explain the duty and to learn how and where those persons maintain their records. By way of illustration, the court explained that where some employees may store e-mails electronically and others print and save them as hard copies, it would not be possible to know whether all potential sources of relevant information had been inspected without talking to employees. Key players should be reminded periodically of their duty to preserve relevant records. Judge Scheindlin defined "key players" to be "the people identified in a party's initial disclosure and any subsequent supplementation thereto," citing Fed. R. Civ. P. 26(a)(1)(A).
- 3) *Communication with Technology Personnel*: Counsel should "become fully familiar with her client's document retention policies, as well as the client's data retention architecture," which will "invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy." Counsel should further communicate with the information technology personnel to ensure that all back-up tapes that the party is required to retain are identified, stored in a safe place, and segregated from other tapes that might be recycled.
- 4) *Instruction to Produce Electronic Copies*: In addition to making sure that employees preserve relevant electronic records, counsel should also make sure that all employees produce electronic copies of their relevant active files where required in discovery.

Judge Scheindlin recognized that requirements imposed on counsel must be reasonable and that appropriate steps will vary depending on the circumstances. For example, she explained that "[t]o the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each 'hit.'" She added that "[i]t might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used."

In ruling on the sanctions motion, Judge Scheindlin found that while counsel came very close to taking the precautions she had outlined, there were some specific failings that resulted in deletion of some e-mails she found to be relevant to the litigation. Specifically, she found that:

- Counsel failed to adequately communicate with one of the “key players” with respect to where she stored her records and consequently failed to produce all of her relevant files.
- Counsel erred by failing to ask one of the “key players” to produce her files although counsel had told her to maintain her files.
- Counsel failed to take steps to preserve relevant back-up tapes which were destroyed after litigation was reasonably anticipated. While counsel had informed employees to retain their e-mail soon after litigation was anticipated, counsel did not inform its client to preserve backup tapes until after receipt of a document request specifically requesting relevant e-mails from backup tapes.

Judge Scheindlin also found, however, that while further steps by counsel would have mitigated some of the damage resulting from the deletion of e-mails, the deletions were contrary to explicit instructions and thus willful. Based on these findings, she ordered as sanctions (i) an adverse inference jury instruction as to certain deleted e-mails; (ii) the costs of depositions or re-depositions required by the late production of certain e-mails; and (iii) the costs associated with the sanctions motion.

As Judge Scheindlin recognized, the subject of electronic discovery is “rapidly evolving,” with many more opinions to be issued and guidance coming from other sources as well. For example, some federal courts have already adopted local rules addressing the subject, and the Advisory Committee on Civil Rules has recently approved for publication and comment proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronically stored information. Even in the absence of more definitive guidance, however, it is clear that electronic discovery is and will be a significant issue in many cases, and the earlier and the more thoroughly a party addresses that issue, the better protected the party will be against claims that relevant electronic evidence has not been properly preserved.

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