

***First Wednesday — A Monthly Discussion of Employment Law  
Issues and Other Hot Topics for Management***

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***By Jeffrey A. Snyder - Issue No. 26: September 1, 2004***

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**Electronic Discovery Is Here**

Over 90% of all corporate communication is electronic and less than 30% is ever printed. Courts are catching up to this phenomenon and setting strict standards for “electronic evidence” that must be preserved and produced in litigation and regulatory matters. Plaintiffs’ lawyers have already caught up. Some leading plaintiffs’ firms are focusing extensively on compelling defendants to produce all discovery in its “native” electronic form, including metadata. But what happens when a defendant comes into court claiming that all e-mails created over 30 days ago, and other potentially relevant evidence, have been deleted or discarded as part of “our routine computer recycling and document retention policies?” Disastrous results can occur in court, as outlined in the recent case of *Zubulake v. UBS Warburg, et al.*

The *Zubulake* case was decided July 20, 2004 by United States District Judge Shira A. Scheindlin of the Southern District of New York. This influential ruling will likely set the standards governing every litigant’s duty to identify, preserve and ultimately produce all potentially relevant evidence, including electronic information residing in active files and, if reasonably available, legacy materials such as backup tapes.

Companies and other organizations (and their counsel) cannot simply wait and react once a lawsuit or claim has been filed. Instead, the duty to preserve evidence

begins at the time litigation is reasonably anticipated, which will typically precede the filing of any lawsuit or formal notice of claim.

As held in *Zubulake*, once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policies and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, the litigation hold will not apply to inaccessible backup tapes (for example, those typically maintained for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. If backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes would also be subject to the litigation hold.

The *Zubulake* facts and ruling highlight the need for companies to work closely with their counsel to identify and preserve electronic data at the earliest point in time. Laura Zubulake was an equities trader who sued her former employer, UBS Warburg, for gender discrimination, failure to promote and retaliation. The court called the case a “relatively routine employment discrimination dispute.” However, when UBS Warburg produced to Ms. Zubulake’s counsel only hard copies of then-existing e-mails, the case became interesting. Ms. Zubulake’s counsel was able to show that relevant e-mails had been deleted from UBS’s active servers and existed only on archival backup tapes. Because these e-mails were missing from active files, UBS had to restore backup tapes. It was then discovered that certain backup tapes (as well as a number of e-mails on those backup tapes) were missing, confirming Ms. Zubulake’s suspicion that relevant e-mails were deleted or lost, not necessarily intentionally, but in routine document destruction. The court ultimately sanctioned UBS heavily by ordering an adverse inference jury instruction with respect to deleted e-mails, by requiring UBS’s employees to be re-deposed at UBS’s cost, and by levying other monetary fines and sanctions. Altogether, a bad result for what should have been a “relatively routine” employment discrimination case.

Judge Scheindlin outlined three essential steps for clients and their counsel regarding electronic information in the typical case:

First, the organization must issue a “litigation hold” at the outset of litigation or as soon as litigation is reasonably anticipated. In *Zubulake*, the court found that litigation was anticipated by the company four months before the discrimination charge was filed and nearly a full year before the lawsuit was filed. The litigation hold must be re-issued periodically so that new employees are aware of it and it is fresh in the minds of all employees.

Second, counsel should communicate directly with the “key players” in the litigation. Because these key players are the ones most likely to have relevant information, the preservation duty must be communicated clearly to them. They will need to be occasionally reminded in the course of litigation that the preservation duty is still in place.

Third, counsel should instruct all employees to produce electronic copies of their relevant active files, including any personal or “unofficial” files. All backup media which the parties are required to retain must be identified and safely stored. By taking possession of, or otherwise safeguarding, all potentially relevant backup tapes, the company reduces the possibility that such tapes will be inadvertently recycled.

Judge Scheindlin recalled the famous words of the prison captain in the movie *Cool Hand Luke*: “What we’ve got here is a failure to communicate,” referencing the lack of communication between UBS Warburg and its counsel over the failure to maintain the company’s electronic data. Thus, to avoid turning a routine case into a disaster, clients and counsel must discuss and identify potential claims early and take action to preserve potentially relevant evidence, which includes notifying key personnel and putting document retention/recycling/destruction policies on hold during litigation.

The decision ends with a cautionary postscript, stating that parties are now on notice of the developing “national standards” governing this rapidly-evolving subject. Most of the “standards” appear in *Zubulake* and its predecessor cases. The postscript also makes reference to the Ninth Circuit’s proposed Model Local Rules on Electronic Discovery, concerning electronic data preservation and searching, required disclosures and production, and cost responsibilities. The American Bar Association and The Sedona Conference have also developed influential guidelines.

There is much more to come in this emerging area. The best risk management practices will require the implementation and use of defensible retention and document management policies that make business sense (because it is also a mistake to routinely retain too much data), best practices for the use (and non-use) of e-mail, and litigation response preparedness strategies. Companies and their counsel should also be using offensive strategies for electronic discovery in litigation, such as requiring that computer data be produced in native form (as opposed to paper printouts) and using keyword search terms to quickly retrieve the most relevant data in a particular case. Not only will these practices be calculated to avoid sanctions and other problems with the judge, they should also lead to huge time and cost savings over traditional paper-based methods.

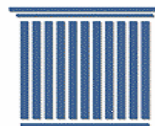
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