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LITIGATION ADVISORY

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GUIDELINES FOR PRESERVING AND PRODUCING ELECTRONIC DISCOVERY MATERIALS: *ZUBULAKE V. UBS WARBURG LLC*

The federal court in New York City recently issued an extensive opinion in *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243(SAS), 2004 WL 1620866 (S.D.N.Y. July 20, 2004) ("Zubulake V"), detailing the obligations of counsel and clients to preserve relevant discovery embedded in electronic formats. The case established guidelines for inside and outside counsel in communicating discovery obligations to their clients and the clients' employees. This opinion (and earlier opinions in the case) is likely to become the benchmark for discovery disputes pertaining to the production of e-mails. *Zubulake V* established the following guidelines:

- Counsel has a duty to communicate to the client its discovery obligations so that all relevant information is uncovered, retained, and produced. The "duty to preserve" attaches when litigation is reasonably anticipated.
- Once the duty attaches, counsel must identify and speak directly with sources of discoverable information, including the "key players" in the litigation and the client's information technology personnel.
- Once the duty attaches, counsel must put in place a "litigation hold" and communicate that fact directly to all relevant employees. The litigation hold instructions should be updated as necessary and reiterated regularly and compliance must be monitored.
- Counsel must call for employees to produce copies of relevant electronic evidence. Further, counsel must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that may contain relevant information.

BACKGROUND

Commenting on the importance of speaking clearly and listening closely, Phillip Roth memorably quipped, "The English language is a form of communication! . . . Words aren't only bombs and bullets – no, they're little gifts, containing meanings!" What is true in love is equally true at law: Lawyers and their clients need to communicate clearly and effectively

> with one another to ensure that litigation proceeds efficiently. When communication between counsel and client breaks down, conversation becomes "just crossfire," and there are usually casualties.

Zubulake V, 2004 WL 1620866, at *1.

Judge Shira Scheindlin in the United States District Court for the Southern District of New York begins her opinion in *Zubulake V* with the above-quoted paragraph. After reading the *Zubulake V* opinion, one can surmise that the "casualties" to whom Judge Scheindlin refers are the defendant investment bank and its counsel. In awarding sanctions to the plaintiff, the court sets forth minimum duties regarding the extent to which parties must preserve, retain, and produce electronic discovery, specifically e-mail – both in readily retrievable and archival formats.

Zubulake V is the latest in a series of discovery-related opinions arising out of over two years of litigation and discovery disputes between the parties in an otherwise routine employment discrimination suit. Laura Zubulake ("Zubulake") sued her former employer, UBS Warburg ("UBS"), under federal, state, and city law for gender discrimination and illegal retaliation. Although Zubulake filed an initial charge of gender discrimination with the EEOC on August 16, 2001, as early as April 2001 UBS employees were on notice of Zubulake's impending court action. *See Zubulake V*, 2004 WL 1620866, at *2. Thus, the court found that the duty to preserve attached in April 2001 – "at the time that litigation was reasonably anticipated." *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) ("Zubulake IV").

In August 2001, immediately after Zubulake filed her EEOC charge, UBS's inside lawyers gave oral instructions to employees not to destroy or delete potentially relevant material and to segregate such material into separate files. *See Zubulake V*, 2004 WL 1620866, at *2. This warning, however, did not pertain to "backup tapes" maintained by UBS's information technology department. *See id*. Also in August 2001, UBS's outside counsel met with a number of "key employees" in the litigation and reminded them to preserve relevant documents, including e-mails. *See id*. These instructions were also memorialized in subsequent e-mails. In August 2002, after Zubulake served a document request for e-mails stored on backup tapes, UBS's outside counsel instructed information technology personnel to stop recycling backup tapes. *See id.* Thus, as even Judge Scheindlin noted, UBS's counsel "came very close" to satisfying their obligations. *See id.* at *11.

In an earlier opinion issued in the *Zubulake* litigation, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I"), the court addressed Zubulake's claim that relevant e-mails had been deleted from UBS's active servers and existed only on backup tapes. UBS sought to have the cost of backup tape restoration shifted to Zubu-

lake. After setting forth a seven-factor test for the appropriate cost-shifting analysis,[1] the court ordered UBS to bear the cost of restoring a sample of the backup tapes. *See Zubulake I*, 217 F.R.D. at 324.

Subsequent opinions in the litigation also touch on the issue of preservation of electronic evidence. In *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III"), the court ordered UBS to pay for restoration of certain backup tapes because Zubulake demonstrated that the tapes were likely to contain relevant information. *See Zubulake III*, 216 F.R.D. at 289. In the restoration effort, the parties discovered that several backup tapes were missing, and they discovered several e-mails on the backup tapes that were missing from UBS's active files, confirming Zubulake's suspicion that relevant e-mails were being deleted or were otherwise lost. *See id*. at 287.

In *Zubulake IV*,[2] Zubulake moved for sanctions as a result of UBS's failure to preserve all relevant backup tapes and UBS's deletion of e-mails. In *Zubulake IV*, the court analyzed the extent to which parties must go to retrieve potentially relevant information from backup tapes. The court held as follows:

> The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does 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. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.
>
> However, it does make sense to create one exception to this general rule. If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key

[1] The seven factors are as follows:

(1) the extent to which the request is specifically tailored to discover relevant information;

(2) the availability of such information from other sources;

(3) the total cost of production, compared to the amount in controversy;

(4) the total cost of production, compared to the resources available to each party;

(5) the relative ability of each party to control costs and its incentive to do so;

(6) the importance of the issues at stake in the litigation; and

(7) the relative benefits to the parties of obtaining the information.

See Zubulake I, 217 F.R.D. at 322.

[2] *Zubulake IV,* 220 F.R.D. 212.

> 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.

Zubulake IV, 220 F.R.D. at 218 (emphasis in original).

The court in *Zubulake IV* went on to order UBS to pay for the re-deposition of several key employees.

During the re-depositions ordered in *Zubulake IV*, Zubulake learned about more e-mails and about the existence of e-mails preserved on UBS's active servers that were never produced. Finally, in *Zubulake V*, Zubulake presented evidence that UBS employees deleted relevant e-mails, some of which were ultimately produced after recovery from backup tapes and some of which were lost altogether. *See Zubulake V*, 2004 WL 1620866, at *3. There was also evidence that some UBS personnel delayed production of responsive documents to counsel, thus depriving Zubulake of the documents for almost two years. *See id*.

Zubulake moved for discovery sanctions as a result of UBS's purported discovery failings, including a request that an adverse inference instruction be given to the jury. After discussing the specific facts surrounding the missing or delayed documents, the court addressed counsel's obligations to ensure that relevant information is preserved.

LEGAL STANDARDS AND GUIDELINES

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." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999). With regard to the remedy for spoliation, the *Zubulake* court noted the following:

> The spoliation of evidence germane "to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." A party seeking an adverse inference instruction (or other sanctions) based on the spoliation of evidence must establish the following three elements: (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) 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 a claim or defense.

Zubulake V, 2004 WL 1620866, at *6 (citations omitted).

The court found that the central question implicated by Zubulake's motion was whether UBS and its counsel took all necessary steps to guarantee that relevant data was pre-

served and produced. In answering this question (ultimately in the negative), the court set forth the duties of counsel to monitor, locate, and preserve relevant information.

The Duty to Monitor Compliance

As noted above, in *Zubulake IV* the court held that once a party reasonably anticipates litigation, it must put in place a "litigation hold" to ensure the preservation of relevant documents. In *Zubulake V*, the court elaborated on this duty as follows:

> A party's discovery obligations do not end with the implementation of a "litigation hold" – to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents. Proper communication between a party and her lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered, (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced to the opposing party.

Id. at *7.

The Duty to Locate Relevant Information

Counsel must identify all sources of potentially relevant information. To do so, counsel must become familiar with the client's document retention policies and data retention architecture. *See id*. at *8. This duty requires meeting with information technology personnel and the key players in the litigation.[3] *See id*. The court summarized the duty to locate relevant information by stating that "it is not sufficient to notify all employees of a litigation hold and expect that the 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." *Id*.

The Continuing Duty to Ensure Preservation

After stating the general premise that the continuing duty to preserve must be reasonable, the *Zubulake* court set forth several steps that counsel should take to ensure compliance with preservation obligations.

First, as mentioned above, counsel should issue a litigation hold whenever litigation is reasonably anticipated. The litigation hold should be updated and re-issued periodically. *See id*. at *9.

Second, counsel should communicate directly with key employees, i.e., the people identified in a party's initial disclosure and any subsequent supplementation thereto,

[3] If it is not feasible to meet with every key employee, the court offered suggestions, such as preserving "hits" from key word electronic searches, to ensure that all data is retained. *See Zubulake V*, 2004 WL 1620866, at *8.

regarding their discovery obligations. The key employees should be reminded that they are under a continuing duty to preserve information. *See id*.

Third, counsel should instruct all employees to produce electronic copies of their relevant active files. This should also entail a segregation and storage of relevant backup media to avoid inadvertent or intentional recycling of this media. *See id*. at *10.

SANCTIONS

Despite finding that UBS's counsel, both inside and outside, advised UBS personnel repeatedly of the discovery obligations and "came very close to taking the precautions laid out above," the court held that counsel failed to properly oversee UBS, both in terms of its duty to locate and its duty to preserve and timely produce relevant information. *See id*. at *11. With regard to UBS, the court held that it willfully destroyed potentially relevant information. Because UBS's spoliation was willful, the lost information was presumed to be relevant. *See id*. at *12.

Based on these findings, the court awarded sanctions against UBS. Sanctions were not granted as against counsel because the court found that the client had ignored or failed to heed counsel's instructions. Specifically, the court (1) awarded Zubulake an adverse inference jury instruction with regard to deleted or lost e-mails, (2) ordered UBS to pay the costs of any depositions or re-depositions required by the late production of e-mails, and (3) ordered UBS to pay the costs of the instant motion. *See id*. at *13.

The court's opinion contains an interesting "Postscript." The court noted that at the outset of the case, more than two years ago, there was little guidance as to the standards for electronic discovery. Since that time, much has been written on the subject by the judiciary, professional groups, and attorneys. Of particular note, the Standing Committee on Rules of Practice and Procedure has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure to address electronic discovery issues.[4] After discussing the various resources now available, the court closes with the following:

> Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court's limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources

[4] *See* http://www.kenwithers.com/rulemaking/civilrules/report051704.pdf for the proposal.

> and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.

Id. at *16.

Zubulake V makes clear that inside and outside counsel have to do more than send the initial document preservation e-mail to fulfill the discovery duties to monitor, locate, and preserve relevant information. The guidelines set forth in *Zubulake V* should be the starting point for any document retention endeavor and should be consulted as soon as litigation is anticipated. To avoid the casualties that result from "just crossfire" communication, counsel must be armed with the ammunition to satisfy a court that he or she has taken all the necessary steps to avoid spoliation.

This *Litigation Advisory* was prepared by John Cambria in New York and Jessica Corley in Atlanta and is published by Alston & Bird to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. The material may also be considered advertising under the applicable court rules. If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

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