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With the proliferation of electronic records comes the proliferation of electronic discovery, and when it's not produced, the proliferation of spoliation charges. ''The judiciary increasingly will be asked to resolve spoliation allegations over electronic discovery,'' say attorneys John W. Woods Jr., Lisa J. Sotto and Jonathan M. Wilan in this Analysis & Perspective.

Zubulake V—the fifth of Judge Shira Scheindlin's opinions addressing electronic discovery issues—''will supply few well-deserved gifts but many a lawyer with a bomb and a bullet to wield in spoliation disputes,'' the authors say.

Courts need to recognize ''that relevant electronic records inevitably will be lost in large cases and that sanctions are not appropriate every time this occurs,'' the authors say. Judges ''should focus on the reasonableness of the process undertaken by the litigants and their counsel to preserve potentially relevant electronic evidence.'' *Zubulake V* ''is a nod in this direction,'' the authors acknowledge, but the ''contradictory standards'' of the decision ''will limit its usefulness.''

The Obligation to Preserve Electronic Evidence: Is *Zubulake V* a Gift or a Bomb?

BY JOHN W. WOODS JR., LISA J. SOTTO, AND JONATHAN M. WILAN

With increasing frequency, litigants are raising spoliation charges alleging the failure of their opponents to adequately preserve electronic evidence. In this era of corporate reform, corporate leaders and in-house counsel must take the potential for such charges seriously, not only to avoid substantial legal risks (including obstruction of justice charges), but also the reputational damage that accompanies even an allegation that a litigant destroyed evidence. Counsel who seek to ''do the right thing'' in preserving electronic evidence find that the inevitable disagreement

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between litigants over what was "relevant," coupled with the quantity and dynamic nature of electronic evidence, often means that even the best advanced planning cannot ensure that all relevant electronic evidence is preserved.

The judiciary increasingly will be asked to resolve spoliation allegations over electronic discovery. Courts will need to strike a balance between the need to preserve relevant evidence and the reality that not all potentially relevant electronic material can be preserved without significant cost, if indeed it can be preserved at all. In light of this reality, when faced with a spoliation allegation, courts should focus less on whether a single e-mail was lost and more on whether there was a good faith effort, pursuant to a reasonably well-crafted plan, to comply with the preservation obligation. Moreover, in cases where relevant electronic evidence includes records that would require a significant effort and burden to preserve, litigants and courts should consider early-on in a case whether cost-sharing is warranted.

Until recently, there has been limited judicial guidance on these issues or on key questions such as when the preservation obligation arises, the scope of materials that must be preserved or how to properly balance the costs. Into this void of analysis has jumped Judge Shira Scheindlin of the Southern District of New York. Judge Scheindlin has devoted scholarly research to the subject of electronic evidence, addressed the issue in a series of published opinions,[1] and spoken widely on these matters. Indeed, her first three opinions in *Zubulake v. UBS Warburg LLC*, a gender discrimination and retaliation lawsuit, have become the centerpiece in the debate about whether and when to shift the cost of electronic discovery to the requesting party. In her fourth *Zubulake* opinion, Judge Scheindlin directly addressed the question of when a company needs to begin preserving electronic evidence. Her opinion, applying longstanding legal precedent, placed the time for the preservation of "relevant" electronic evidence at the moment " 'the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.' " *Zubulake IV*, 220 F.R.D. at 216 (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423 (2d Cir. 2001)). In her court, at least, the obligation begins once there are sufficient facts to put a party on notice that litigation over an issue is likely.

Now, in the fifth installment of the *Zubulake* discovery dispute, Judge Scheindlin has taken on the issues of what electronic materials must be preserved, what steps must be taken to preserve them, and the consequences of the failure to adequately preserve electronic evidence. *Zubulake v. UBS Warburg LLC*, 02 Civ. 1243, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) ("*Zubulake V*"). In *Zubulake V*, Judge Scheindlin held that counsel's failure to adequately communicate with employees and the additional failure of both the company and counsel to adequately monitor employee compliance with a litigation hold on document destruction resulted in the willful deletion of relevant e-mails. As a result, the court crafted an adverse inference instruction to be read to the jury regarding the missing e-mails.

The lasting legacy of *Zubulake V*, however, will not be the imposition of an adverse inference instruction. Rather, it will be passages that appear throughout the opinion that likely will be cited and quoted in sanction and spoliation motions for years to come—words that, if read literally, impose an almost impossible burden on companies and their counsel. Picking up where she left off in her prior opinion in *Zubulake IV*, Judge Scheindlin reiterates the strong language from that decision regarding the obligation to preserve electronic records, and adds the following equally strong language:

- "the central question implicated by this motion is whether [defendant] and its counsel took *all necessary steps to guarantee* that relevant data was both preserved and produced."
- "Counsel must take affirmative steps to monitor compliance so that *all sources* of discoverable information are identified and searched."
- "counsel has a duty to effectively communicate to her client its discovery obligation so that *all relevant information is discovered, retained, and produced*."
- "counsel *must identify* sources of discoverable information."
- "Counsel *must oversee* compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."
- "Unless counsel interviews each employee, it is *impossible* to determine whether *all* potential sources of information have been inspected."

The words used in these passages—"guarantee," "must," "impossible" and "all"—are unyielding in their admonition and unlimited in their scope. While Judge Scheindlin quotes Philip Roth in her opinion, noting "[w]ords aren't only bombs and bullets—no, they're little gifts, containing meanings," by using words like those noted above, this fifth *Zubulake* decision will supply few well-deserved gifts but many a lawyer with a bomb and a bullet to wield in spoliation disputes.

Judge Scheindlin addressed these complex issues in the context of a relatively narrow discovery dispute involving the electronic documents of a relatively small group of "key players" who had direct knowledge of the plaintiff's issues. But how would these standards apply in a less clear-cut case? Suppose Ms. Zubulake had filed her case as a class action, alleging a "pattern or practice" of discrimination or sexual harassment over an extended period of time. In that example, what is the "relevant" evidence? Is the source of such evidence potentially found in the e-mail boxes of every management-level employee at the company? What about the electronic documents of every person in the company who might be a victim of a hostile work environment? Recall the language that Judge Scheindlin uses—counsel must take "all necessary steps to guarantee" that relevant evidence is preserved.

If Judge Scheindlin were a lesser student in the e-discovery arena, she might have stopped with these passages. But having studied this issue in depth, Judge Scheindlin understands that the broad standards articulated in her opinion are simply unattainable, especially

[1] *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (addressing cost allocation for production of e-mails contained on backup tapes) ("*Zubulake I*"); *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243, 2003 U.S. Dist. LEXIS 7940 (S.D.N.Y. May 13, 2003) ("*Zubulake II*") (addressing *Zubulake*'s reporting obligations); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) ("*Zubulake III*") (allocating backup tape restoration costs); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) ("*Zubulake IV*") (ordering sanctions against defendant for violating its duty to preserve evidence).

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in the type of case hypothesized above. She explicitly acknowledges as much in passages appearing immediately after those that set forth these broad obligations:

- ''This is not to say that counsel will necessarily succeed in locating all sources [of relevant information].''
- ''counsel and client must take *some reasonable steps* to see that sources of relevant information are located.''
- ''While these precautions [against the destruction of evidence] may not be enough (or may be too much) in some cases, they are designed to promote the continued preservation of potentially relevant information in the typical case.''
- ''Above all, the requirement [that counsel continually remind her client of its retention obligation] *must be reasonable*.''

In a particularly clear example of the cognitive dissonance exhibited by Judge Scheindlin in *Zubulake V*, on the one hand the opinion states that *all* employees with potentially relevant information must be interviewed to understand how they store data. But only one paragraph later, she recognizes that, depending on the case, such interviews may not be ''feasible.'' *Zubulake V*, 2004 U.S. Dist. LEXIS 13574, at *34. In such instances, Judge Scheindlin directs counsel to become ''creative.'' The problem of the potential scope of the preservation obligation articulated by Judge Scheindlin is brought home most clearly by examining the ''creative'' solution Judge Scheindlin provides:

> It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each ''hit.'' Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents.

Id.

This is a fine suggestion in theory but, in the hands of a skilled adversary, could be devastating to the preserving party. Turning back to the hypothetical case describes above, Judge Scheindlin's proposed solution assumes that a company can plug in some search terms and search its entire system. In our experience, this assumption does not hold true for many large companies with multiple sites and servers. In fact, costly electronic discovery consultants frequently must be retained to index and search the data.

Even assuming that such a capability existed, however, using ''key word'' searches, as Judge Scheindlin suggests, is itself fraught with pitfalls. By its nature, using key words is simply a proxy for identifying relevant evidence. Regardless of the number of search terms used, it is nearly impossible to capture ''all relevant data'' using key words. Use of search terms as a method by which to identify relevant records results in an under-inclusive collection—only those documents that contain the key words would be preserved. It is almost guaranteed that, even using the thorough protocol suggested by Judge Scheindlin, some relevant data will not be saved. When that fact comes to light during a deposition, an enterprising lawyer will quote the passages identified above to bring a spoliation motion—after all, there was some relevant document that was not found. Moreover, Judge Scheindlin's suggestion that the parties agree on the search terms ahead of time to avoid this problem is not feasible where litigation has not yet been filed or counsel appointed. *Id.* at *35, n.75.

What is missing from *Zubulake V* is a balance between the obligation imposed and the cost of retention. While the Federal Rules of Civil Procedure contain a balancing approach in evaluating the benefits versus the costs of discovery, and shifting the burden if a variety of factors dictate it, there does not appear to be any such consideration given to the retention of electronic data under *Zubulake V*. In an earlier opinion, Judge Scheindlin noted that ''[t]he more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.' '' *Zubulake I*, 217 F.R.D. at 311 (quoting *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)). But the same is true with regard to the scope and process of data retention itself, a fact which *Zubulake V* does not adequately consider.

As recognized in another recent federal decision, *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004), it is important to strike a balance when determining which materials must be preserved. In *Capricorn*, the court considered whether to issue a preservation order with regard to both hard and electronic documents. In denying the request, the court developed a three-part test for determining when to issue such a preservation order. The third prong of this test requires the court to consider the ability of a person or company to maintain and preserve the evidence. The court found that ''[c]ertain circumstances may impose burdens upon those parties and non-parties possessing evidence which may be unfair or oppressive to the point that a judicially imposed allocation of the burdens between the parties to the civil action may be required.'' *Id.* at 436. Judge Scheindlin's opinion in *Zubulake V* stops short of addressing the appropriate balance, possibly inuring to the detriment of corporate litigants in years to come.

In the near future, courts will need to come to grips with the fact that relevant electronic records inevitably will be lost in large cases and that sanctions are not appropriate every time this occurs. Rather, the judiciary should focus on the reasonableness of the process undertaken by the litigants and their counsel to preserve potentially relevant electronic evidence. While *Zubulake V* is a nod in this direction, the contradictory standards articulated in the decision will limit its usefulness. Courts and parties seeking to rely on the gift-wrapped words of the opinion should proceed with caution.