

# New York Law Journal

## Technology Today

Tuesday, August 10, 2004

### Zubulake V

#### Latest Decision Offers Guidance on Preserving Data

**E**merging national standards have put litigants on notice: The bar is set high should their efforts at compliance with electronic discovery requests be subjected to court scrutiny.

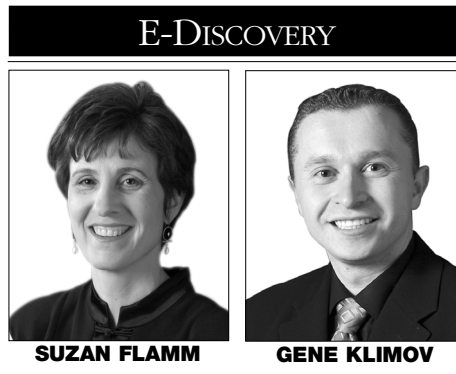
Those that need reminding of this trend will find it stated unmistakably in *Zubulake v. UBS Warburg*, 02 Civ. 1243, (*Zubulake V*), a decision arising out of an employment discrimination matter pending in the U.S. District Court for the Southern District of New York.

In *Zubulake V*, the court examined the actions that led to the defendant's destruction of various e-mail messages and the late production of others. Measuring those actions against expectations in the area of e-discovery, the court found that the defendant failed in its obligations and imposed sanctions. That result would have been avoided had an appropriate sequence of steps been taken to preserve data, beginning at the time litigation was anticipated.

Every time a computer is turned on, subtle changes occur to information stored within it. Operating systems and applications can cause the automatic deletion of e-mail and other data at regular intervals. IT archive protocols for recycling backup tapes vary widely among companies — daily, weekly, monthly, and even yearly rotation schedules are possible. The archive protocols themselves may be clear, but adherence can be more a matter of theory than practice.

Finding responsive discovery material is itself a challenge. Relevant data might be located within a single laptop or spread out and duplicated over desktop hard drives,

**Suzan Flamm**, a former New York state assistant attorney general, is a senior litigation consultant at DOAR, a litigation support and trial services firm. **Gene Klimov** is chief technology officer and director of e-discovery at DOAR.



multiple servers, shared files, CDs, personal digital assistants, and backup tapes. Some computer files are fragmented and unreadable, but susceptible to sophisticated restoration techniques — making them currently unavailable and unreviewable, yet not really “gone.”

Also troubling is the sheer volume of potentially discoverable electronic data that is routinely saved, and the impact of that phenomenon on litigation costs. Adding to the confusion, a shared language does not yet exist to facilitate communication among the different players in a typical lawsuit: senior partners, junior associates, house counsel, IT staff, and corporate employees — all with different levels of technical proficiency.

As evidenced in *Zubulake V*, misunderstandings can, and do, result in sanctions when relevant electronic data is destroyed. Lawyers who only recently lived in a world of tangible and finite paper records are now operating in a different environment.

In *Zubulake V*, the fifth written decision concerning an e-discovery dispute in the matter, Judge Shira Scheindlin addressed sanctions for “spoliation”: “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.”<sup>11</sup>

A party’s obligation to preserve evidence,

including electronic data, “arises when the party has notice that the evidence is relevant to the litigation or when a party should have known that the evidence may be relevant to future litigation.”<sup>12</sup>

Among the discovery breakdowns in *Zubulake*, relevant e-mails were deleted after counsel’s issuance of a “litigation hold” advising UBS employees to retain pertinent electronic data. Some of the deleted items proved impossible to recover. Additionally, a few employees failed to produce files, resulting in the late discovery of material germane to the litigation.

The court attributed much of the debacle to flaws in lawyer-client communication. In one telling episode, an employee explained to counsel that she kept documents related to the plaintiff in a separate “archive” file. Whereas the employee was referring to an active computer file, counsel misunderstood her use of the word “archive” to mean backup tapes. A year elapsed before the mistake was discovered and the file produced.

The court found the deletion of e-mails, and the late production of discoverable material, to be willful behavior on the part of UBS. The sanction was severe: Should the case go to trial, the jury will hear an “adverse inference” instruction, permitting it to infer that the missing e-mails would have been unfavorable to UBS. Also, the court ordered UBS to pay the costs of any depositions or re-depositions required by the late production of other e-mails, as well as the costs of plaintiff’s motion for sanctions.

The judge also faulted UBS’ lawyers, noting their failure to properly oversee their client in its efforts to locate, preserve, and timely produce relevant data:

[I]t 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.

The implication is clear: Counsel must establish proactive protocols with their clients in advance of litigation, and must also follow-up after the initial notice of a litigation hold.

## Preservation Checklist

Following is a checklist of practical steps to take:

- Have a litigation hold and preservation plan in place.

Similar to a disaster recovery plan, clients need a "litigation reaction plan" that can be quickly executed. The time to consider the costs and disruption to business of such a plan is before litigation begins. This can include the suspension of document-destruction protocols, requiring the acquisition of supplementary computer servers; the segregation of relevant backup tapes, which then need to be replaced and stored; the retention of a consultant, which may be necessary to obtain forensically sound mirror images of hard drives or performing key-word searches across various sets of data.

- Communicate the litigation hold and preservation duty.

Once litigation is anticipated, it is counsel's responsibility to instruct the client to preserve all relevant data. A good start is a document preservation letter to all employees, instructing them not to delete anything pertinent, be it an existing document, or data created after the date of the preservation letter. Also, a separate "systems preservation memo" to IT personnel should describe the responsibilities of the system administrators, and include specific examples of the information to be preserved. Likewise, individual communication with IT staff and any employees reasonably believed to have relevant information is crucial. These are the data gatekeepers, and they must understand their preservation responsibilities if the hold is to be effective.

- Identify the relevant information.

This will require extensive communication with those employees directly implicated by the litigation, and with the client's IT personnel. The objective will be to learn what electronic data germane to the litigation has been created and where it is stored. E-mail messages may be the most notorious, but other forms of e-communication also exist, including instant messaging and voicemail messages. Lawyers also should

inquire about system information, computer databases, and typical business files, such as word processing documents and spreadsheets. Detailed information about the nature of the client's business, and the details of the litigation, will help counsel customize the inquiry. Carefully tailored keyword searches will also help counsel find the relevant data. Be alert to employees who have moved within an organization as they create particular challenges — different departments will be linked to different computer servers and backup tapes. Be careful to identify the time-frames these employees were in each department.

- Preserve the relevant information.

This, again, requires careful communica-

---

*The court found the deletion of e-mails to be willful behavior on the part of UBS.*

*The sanction was severe: Should the case go to trial, the jury will bear an "adverse inference" instruction, permitting it to infer that the missing e-mails would have been unfavorable to UBS.*

---

tion with IT staff to understand the company's document destruction policies — policies that should be suspended until preservation has been effected. To insure preservation, and establish the chain of custody, forensic imaging technology can be used to take "snapshots" of computer hard drives. Also, all employees should be instructed to produce electronic copies of their relevant active files to a limited-access central location. Simply forwarding e-mails to counsel is inadvisable, as that will alter the meta-data associated with the communications. Such meta-data would include the date and time the e-mail was originally created and sent. Forwarding the e-mails will also add the attorney's name to the communications as a recipient. This could have the unintended consequence of causing the documents to be categorized as privileged attorney-client communications.

- Segregate relevant backup tapes.

*Zubulake V* is consistent with most courts and commentators in not requiring that parties automatically include backup tapes — created for the purpose of disaster

recovery — within the litigation hold.<sup>3</sup> Nonetheless, it is good practice to segregate any backup tapes containing relevant data by taking them out of the backup rotation. The tapes should be stored in a secure, temperature-controlled environment to preserve their contents and insure they can be found when needed.

- Communicate the litigation hold and preservation duty — again.

Periodically recirculate notices about the litigation hold and preservation duty to reach new employees, and to remind others.

In *Zubulake V*, the court comments on the time and tedium associated with establishing the facts relevant to the discovery dispute. Addressing the parties, as well as other litigants and counsel generally, the court wrote:

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

Hope is eternal. Nonetheless, the standards for electronic discovery, emerging nationally, and now fine-tuned in *Zubulake I* through *Zubulake V*, should go a long way toward providing the direction needed to navigate this difficult terrain.

1. *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *Zubulake V*, at pg 20.

2. *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423,436 (2d Cir. 2001).

3. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 at 218 (S.D.N.Y. 2003) (*Zubulake IV*); The Sedona Conference, "The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production," (January 2004), Principle No. 5, available at [www.these-donaconference.org/publications\\_html](http://www.these-donaconference.org/publications_html); Proposals of the Civil Rules Advisory Committee to the Standing Committee on Rules and Procedures regarding proposed revisions to the Federal Rules of Civil Procedure, page 20-70, available at <http://www.kenwithers.com/rulemaking/civil-rules/report051704.pdf>.

Reprinted with permission from the August 10, 2004 edition of the NEW YORK LAW JOURNAL. © 2004 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact American Lawyer Media, Reprint Department at 800-888-8300 x6111. #070-08-04-0022