



SEARCH AND RESCUE: Corporate Counsel Guidelines for Preserving Electronic Data in Anticipation of Litigation

Most corporate counsel are aware of the duty to preserve relevant documents when litigation looms. But the lines defining when the preservation duty begins, as well as the full scope of items that must be preserved, can sometimes become blurry – especially in the largely uncharted waters of electronic data files. To survive in the brave new world of electronic discovery, corporate counsel must be prepared to engage in tactical “search-and-rescue” missions to save potentially relevant data from destruction when the storm clouds of litigation start to gather.

The latest word on these new duties comes from a recent federal district court decision in New York City, *Zubulake v. UBS Warburg LLC*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) (“Zubulake V”). The decision provides a strong warning to corporate counsel to act swiftly and decisively to preserve relevant electronic data files as soon as litigation becomes “reasonably anticipated.” It also suggests specific guidelines to help corporate and litigation counsel steer clear of court-imposed sanctions.

Zubulake V: Corporate Counsel Beware

Zubulake was an employment discrimination case. The electronic data issue was an allegation that certain relevant emails were never produced by the corporate defendant UBS during discovery. The district court imposed discovery sanctions on UBS, including deposition costs and a “spoliation” jury instruction (i.e., an instruction that the jury may draw an adverse inference about the contents of documents that are lost). The reasons were (a) certain potentially relevant emails were never gathered at the point when it was clear that litigation was imminent, and (b) other emails were

irretrievably deleted after counsel for the company had supposedly initiated a “litigation hold” on document destruction.

Particularly troubling in *Zubulake* is the fact that sanctions were imposed despite significant good-faith efforts by in-house and outside counsel to preserve relevant information at the appropriate time. For example, immediately after Ms. Zubulake filed her initial charges with the EEOC, UBS’s in-house attorneys gave oral instructions to the employees with knowledge of the matter not to destroy or delete material potentially relevant to Ms. Zubulake’s claim (including electronic data) and to segregate such materials into separate files for review by counsel. Soon thereafter, UBS’s outside litigation counsel met with a number of key corporate personnel and reminded them orally of their duty to preserve all information relevant to the case. In-house counsel later repeated these oral instructions in writing.

Despite the foregoing measures, the district court judge chided UBS’s in-house counsel because the initial “litigation hold” instructions “did *not* specifically pertain to so-called ‘backup tapes,’ maintained by UBS’s information technology personnel.” In addition, the judge took UBS’s in-house and outside counsel to task for not asking enough follow-up questions of key personnel about the company’s document retention practices – an oversight that caused late production to plaintiff of an important email from an “archive” file that the attorney assumed was preserved on permanent backup tapes (the only place the attorney searched for the relevant files) when in fact it was simply on the employee’s computer. In short, the judge imposed strict duties on in-house and outside counsel to be vigilant at

the outset of the dispute and held them responsible for not living up to these standards.

The *Zubulake V* opinion is particularly significant for the duties it imposes on attorneys from the moment litigation becomes “reasonably anticipated.” Because the duties attach at such an early time – when corporate counsel may still be handling the matter alone without litigation counsel on the scene – it is important for in-house attorneys to be aware of the requirements.

What Steps Should You Take?

As soon as litigation becomes “reasonably anticipated,” the following checklist provides important steps to be taken by corporate counsel to search and rescue electronic data files that may be relevant to the matter:

1. Identify sources of discoverable information:

- Speak directly with the key players with knowledge of the matter to (i) identify what documents are potentially relevant, including all hard copy and electronic files, (ii) ascertain the document and email management habits of the relevant personnel (that is, find out how and where they store or file everything), (iii) determine whether any potentially relevant information already has been lost or destroyed, and (iv) locate any other personnel who may have potentially relevant information.
- Speak directly with your information technology personnel to learn (i) how electronic data files are stored, (ii) whether backup tapes or discs exist, and (iii) whether deleted files can be retrieved.

2. Put an effective “litigation hold” in place:

- Communicate directly *in writing* with all relevant personnel instructing them to (i) identify and segregate *all* documents and electronic data files relating to the matter, being careful to err on the side of overinclusion, (ii) continue to segregate such documents and data

files as new ones are discovered, (iii) not destroy or delete any documents or electronic files relating to the matter, and (iv) contact corporate counsel if they have any questions concerning the relevancy of any documents or data files.

- Instruct your information technology personnel to avoid recycling any backup tapes or discs that might contain potentially relevant information.

3. Locate, segregate and safeguard all potentially relevant information:

- Talking to your personnel may be enough to identify the sources of relevant electronic files in a simple case; it may be necessary to undertake a formal electronic data search in a complex case.
- Instruct personnel to print a hard copy *and* make a permanent electronic copy of any relevant electronic data files (including emails) that are not already stored in a permanent archive.
- Protect any archival media (backup tapes, discs, etc.) which might otherwise get recycled, erased or lost.
- Keep the gathered materials in safe place, such as your own office. In a complex case it may be necessary to find outside storage space.

4. Review the information gathered. Ask follow-up questions to try to identify and preserve all potentially relevant documents and data files.

5. Periodically remind personnel of the “litigation hold” and the duty to preserve any documents and electronic files relating to the matter.

Of course, no two disputes are alike. Some of the above guidelines from *Zubulake V* may or may not apply in certain circumstances. In general, however, they can be employed for any potential litigation and adapted to fit the particulars of the matter so that you can avoid the judicial landmines awaiting the uninformed.

If you would like to discuss these issues further, please contact **Frank J. Silvestri, Andrew B. Nevas** or **Robert Laplaca** of our office at (203) 222-0885.