

# The Duty to Preserve E-Data When Litigation Threatens

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In a continuing saga which has lasted more than two years and resulted in five separate opinions, Southern District Judge Shira A. Scheindlin has again considered the responsibility of client and counsel to preserve and produce information relevant to a litigation. *Zubulake v. UBS Warburg LLC*, S.D.N.Y., No. 02 Civ. 1243 (SAS), 7/20/04.

Plaintiff Zubulake sued UBS on a federal employment discrimination claim based on gender discrimination, failure to promote, and retaliation. Claiming that several persons at UBS had electronic data relevant to her claims, Zubulake made several document requests. Despite instructions from in house and outside counsel to retain all relevant electronic information, several UBS employees deleted relevant emails and other employees never produced information they knew to be relevant. "As a result, many discoverable emails were not produced to Zubulake until recently, even though they were responsive to a document request propounded on June 3, 2002." In her request, Zubulake had defined "document" to include "electronic or computerized data compilations."

In an opinion which quotes from several modern literary sources, Judge Scheindlin imposed sanctions against UBS. The opinion is important, however, not so much for the court's response to the conduct of UBS employees as for its discussion of the responsibility of counsel in finding, preserving and producing electronic data relevant to a litigation.

Both in house and outside counsel participated in the response to Zubulake's claims. In house counsel responded first by giving oral instructions to UBS employees not to destroy or delete material relevant to the claims and to segregate the material into separate files for review by UBS lawyers. The instructions did not include any reference to backup tapes maintained by UBS IT personnel.

Subsequently, outside counsel met with key UBS personnel and repeated the same instructions, reminding them to preserve relevant emails as instructed by house counsel.

The instructions were reduced to writing and distributed via two emails. Because none of the instructions dealt with backup tapes, UBS IT personnel continued to recycle backup tapes until Zubulake asked for all email stored in these tapes. At that point, outside counsel instructed IT personnel to stop recycling backup tapes. Eventually, every UBS employee important to the litigation except one either spoke to outside counsel about the duty to preserve all emails, or received one of the emails distributed by in house counsel.

Despite these clear and repeated warnings from counsel, Zubulake's evidence showed that six key UBS employees had failed to retain emails relevant to her claims. Although some were restored by backup tapes, one was irretrievably lost and others may also have been lost. Also, although it was UBS policy to retain backup tapes for three years, many of the relevant backup tapes were missing.

Further, a number of emails were deleted or destroyed, although they were vital to proof of Zubulake's claims. "Some of these emails were recovered (Zubulake has pointed to at least 45), but some and no one can say how many were not. And even those that were recovered were produced to Zubulake well after she originally asked for them."

Several of the emails which were not produced resided in the active computer files of at least two UBS employees. "Indeed, these emails were not produced until after Zubulake had conducted thirteen depositions and four redepositions." One of these UBS employees testified that she was never asked to produce the files, but only to retain them. "The obvious inference to be drawn is that, subsequent to the deposition, counsel for the first time asked Kim to produce her files."

After a discussion of the legal standards defining spoliation of evidence, Judge Scheindlin seized the opportunity to consider this central question: Had UBS and its counsel taken all the necessary steps "to guarantee that relevant data was both preserved and produced?" In answering this question, the court reviewed the steps UBS counsel had taken and those they had failed to take.

### **Counsel's Duties Enumerated**

The court's review of counsel's duty constitutes a primer for the steps required of litigation counsel with respect to the client's electronic files and records:

1. As soon as litigation is threatened, counsel should impose a "litigation hold" and direct all personnel with knowledge of the facts to preserve all files and all email.
2. Repeat the "hold" periodically through email and other communications.
3. Communicate directly with key personnel having knowledge of the facts, especially employees identified as relevant by the other party, and instruct them personally to identify, retain and produce all relevant data. Repeat these instructions periodically.
4. Instruct all employees of the client to identify and produce all relevant data.
5. Review the client's policy for document retention, as well as the structure of the client's data retention system with respect to both active and stored data. This requires contact with the client's IT personnel, who can explain system wide backup procedures and the client's recycling policy.
6. Speak with "key litigation players" to determine how they store information do they create separate files containing relevant information or do they download and print hardcopy. This will educate counsel into the sources of relevant data.
7. If the client is too large to permit individual contact with every key employee, counsel "must be more creative." For example, counsel can design a system wide key word search (e.g., name of claimant), that will help identify all relevant data. Counsel should ensure that all this data is retained.
8. Fulfill the continuing duty to ensure that all information is retained and made available to the other party. FRCP Rule 26 imposes a continuing duty to supplement discovery responses. This duty should be construed reasonably. "A lawyer cannot be obliged to monitor her client like a parent watching a child. At the same time...a party cannot reasonably be trusted to receive the 'litigation holds' instruction once and to fully comply with it without the active supervision of counsel."

Judge Scheindlin found that UBS counsel had come "very close" to taking all the precautions recited in her list. "On the other hand, counsel are not entirely blameless." Counsel had failed to oversee UBS in a number of important ways, both in the duty to locate relevant information and in the duty to preserve and reproduce that information in a timely way.

Specifically, counsel had failed to communicate with one employee about her method for storing data. They made no effort to determine what the employee meant when she said that she "archived" her data. A few simple questions would have disclosed that she meant that she kept her data in an active file on her computer.

Further, counsel had failed to communicate the litigation hold to one key employee who was significantly involved in Zubulake's termination; had never asked another key employee to produce her files; had failed to protect relevant backup tapes; and had failed to produce relevant data communicated to them by another employee.

Judge Scheindlin concluded: "At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear...the party is on notice of its obligations and acts at its own peril." The court found that UBS had acted willfully in destroying potentially relevant information and imposed sanctions on UBS, including an adverse inference instruction to the jury with respect to emails deleted by UBS employees and "in particular, with respect to emails that were irretrievably lost when UBS's backup tapes were recycled."