



Avoiding Digital Disasters: Preservation & Spoliation

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You've read the headlines . . .

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- The *Zubulake* saga:
 - failure to preserve backup tapes
 - adverse inference instruction
 - \$29M verdict (\$20M in punitives)
 - Morgan Stanley
 - failure to preserve and produce from backup tapes
 - burden of proof shifted
 - counsel sanctioned and fired
 - \$1.4 BILLION verdict





Now hear the whole story . . .

Recent survey of ediscovery case law

- Factors:
 - culpability
 - prejudice
- Frequency:
 - Defendants 4x as often as plaintiffs
 - For destruction of edata - 84% of the time

Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-first Century*, 11 Mich. Telecomm. Tech. L. Rev. 71 (2004)





What's a Zubulake (and how do I pronounce it)?

Zubulake Post Mortem

- Single plaintiff gender discrimination and retaliation case
- Request #28: “All documents concerning any communication by or between UBS employees concerning plaintiff”
- UBS produced 100 pages of email BUT plaintiff produced 450 pages of UBS documents including a “smoking gun” email



Zubulake Post Mortem

- UBS issued oral litigation hold after EEOC Charge in August 2001
- UBS claimed that it had collected and produced “all existing responsive email sent or received between 1999 and 2001”
- BUT UBS did not preserve back up tapes until August 2002



Zubulake: Key Holdings

- **Trigger:** Obligation to preserve is triggered upon notice of anticipated litigation
 - Testimony indicated that UBS anticipated litigation at least as early as April 2001, 4 months before the EEOC charge
- **Scope of Preservation:** UBS had an obligation to preserve back up tapes to capture *deleted* email



Zubulake I

- Zubulake I:
 - Scope of preservation obligation
 - Active online data - yes
 - Near line data -yes
 - Offline storage/archives -yes
 - Backup tapes - possibly
 - Erased fragmented or damaged data - rarely
 - Cost Shifting - 7 factor test



Zubulake: III

- Zubulake III: Cost Shifting
 - No cost shifting for accessible data
 - Application of 7 factor test for restoration of inaccessible data
 - No cost shifting for review and production



Zubulake: IV

- Zubulake IV: Duty to Preserve
 - Trigger:
 - notice of anticipated litigation
 - testimony and evidence may be used to establish trigger date
 - Scope:
 - General Rule: no obligation to preserve inaccessible data
 - Exception: **inaccessible data must be preserved if information is not otherwise available, such as when potentially relevant records may have been deleted**



Zubulake V: counsel's ongoing obligations

- A lawyer's obligations go beyond the drafting and issuance of a litigation hold
- An attorney's obligations continue throughout the "holding period"
- Counsel has a duty to effectively communicate to the client its discovery obligations so that all relevant information is discovered, retained and produced.
- Once the duty to preserve attaches, counsel must identify sources of discoverable information, such as
 - Key players
 - IT personnel



Zubulake V: counsel's ongoing obligations

- When the duty to preserve attaches, counsel must put in place a litigation hold *and* make the fact of the hold known to all relevant employees.
- The instructions must be reiterated regularly.
- Compliance with the instructions must be monitored and, when needed, corrective action taken.
- In addition, when it comes to electronic media
 - Counsel must also call for employees to produce copies of relevant electronic evidence.
 - Counsel must arrange for the segregation and safeguarding of any archival media that the party has a duty to preserve.



Zubulake: The Result

- Held:
 - UBS failed to preserve all potentially discoverable data
 - Counsel failed to communicate litigation hold to all key players
 - Counsel failed to understand key players' document management habits
 - Employees defied preservation obligation
- Result: Adverse Inference Instruction and costs
- Jury Verdict: \$9 Million Compensatory Damages; \$20 Million Punitive Damages





What have we learned here?

Repeat after me: trigger & scope . . . trigger &
scope . . . trigger & scope . . .

Trigger

- “The obligation to preserve evidence arises when 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*.



Trigger

- Duty applies to all potential litigants
 - *See Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 286-87 (E.D. Va. 2004) (plaintiff, knowing that it was likely to commence patent litigation, could not institute systematic destruction of records during so-called “Shred Day”)
 - *See Institute for Motivational Living, Inc., et al. v. Doulos Inst. For Strategic Consulting, Inc.*, 2004 WL 2241745 (3d. Cir. 2004)(pro se litigant)



Trigger

- Duty exists in the absence of preservation order or discovery request.
 - *Keir v. Unumprovident Corp.*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003)(observing that parties have obligation to preserve even while negotiating preservation orders and scope of discovery)
 - *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004)(denying cross motions for preservation order).



Scope: F.R.C.P. 26 (b)

(b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations.

By order, the court may alter the limits on the number of depositions and interrogatories or the length of oral depositions or Rule 30. By order or local rule, the court may also limit the number of depositions under Rule 36. The frequency or extent of use of the discovery methods described in these rules and by any local rule shall be limited by the court if (i) the discovery sought is unreasonably cumulative or duplicative, (ii) the party seeking discovery has had ample opportunity to obtain the information sought, or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the importance of the issues at stake in the action, the resources, the needs to produce discovery, and the proposed discovery plan. A party may initiate after response.

Parties may obtain discovery regarding *any matter, not privileged, that is relevant to the claim or defense of any party . . .*



Scope

“While a litigant is under no duty to keep or retain every document in its possession . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.” (*Zubulake IV*).





Now hold it!

The Litigation Hold

Design your “litigation hold” with the following questions in mind:

- Whose documents must be retained?
 - Who are the key players?
 - Which business units, locations, departments have information relevant to the claims or defenses of any party?



The Litigation Hold

- What time period is implicated by the hold?
 - Documents extant at the time the obligation is triggered
 - Newly created materials



The Litigation Hold

- What kind of information is likely to be implicated?
 - Hard-copy documents?
 - Computerized or other digital data?
 - Voice, video data?
- Is this data accessible?



The Litigation Hold

- Key Components:
 - Subject
 - Directive regarding preservation of potential discovery materials and electronic data
 - Description of Scope
 - Define potentially relevant information
 - Explain breadth of definition
 - Caution re: underinclusive v. overinclusive
 - Definition of “Document”
 - Expansive meaning includes hard-copy paper, electronic data, email and attachments, databases, drafts, notes, calendars, etc.



The Litigation Hold

- Specific Instructions to Halt routine destruction of each document type as appropriate: paper, email, text files, databases, etc.
- Instructions highly contingent on:
 - Sophistication of client's IT infrastructure
 - Client's IT resources
 - volume of implicated data
 - amount at stake in litigation
 - likelihood of discovery dispute
 - agreement of parties



The Litigation Hold

- Distribution list:
 - all “key players”
 - others with potentially relevant records
- Sender – someone with “corporate heft”
 - GC or in-house counsel
 - Company’s compliance officer
 - Other
- Identify who the employees can call for help
 - In-house contact
 - Morgan Lewis contact





It's not over yet . . .

Beyond the Hold: Counsel's Affirmative Obligations

Counsel no longer has the right to rely on the client to comply with proper instructions and advice.

- **Counsel** has a duty to communicate effectively to the client its discovery obligations so that all relevant information is discovered and retained, and that all relevant, non-privileged information is produced.
- Once the duty to preserve arises **counsel** must identify sources of discoverable information, such as that in the possession of key company personnel or in the possession of IT staff.



Beyond the Hold: Counsel's Affirmative Obligations

- When the duty to preserve attaches, **counsel** must put in place a litigation hold *and* make the fact of the hold known to all relevant employees.
- **Counsel** must reiterate the hold instructions on a regular basis.
- **Counsel** must actively monitor the instructions and, when needed, corrective action must be taken to ensure continued compliance.



Beyond the Hold: Counsel's Affirmative Obligations

- When dealing with electronic media, **counsel** must communicate to all relevant persons that the obligation to preserve information includes electronic data.
- **Counsel** must arrange for the segregation and safeguarding of any archival media that the party has a duty to preserve.





Now it's over . . .

But first, some final thoughts . . .



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