

COMPLIANCE WEEK

“Zubulake” Decisions Raise Expectations For E-Records

By Paul J. Martinek — November 15, 2005

A series of rulings by a federal judge in New York have significantly raised expectations for corporations and their lawyers when it comes to preserving electronic evidence in the face of threatened litigation, experts tell Compliance Week.



Kotler

The often-cited rulings by U.S. District Court Judge Shira A. Scheindlin came in an employment discrimination suit called *Zubulake v. UBS Warburg LLC*. In her opinions, Scheindlin established “a number of duties and obligations on the part of [companies] and attorneys,” notes Meredith Kotler, a partner with Wilson Sonsini Goodrich & Rosati in New York.

Much of the attention on *Zubulake* has focused on the judge’s seven-part test for determining when corporate defendants can be required to turn over electronically stored information as part of a discovery request during litigation. But another important aspect of *Zubulake* is the court’s requirement that corporations and their lawyers take affirmative steps—through imposition of litigation holds and communication with employees—to ensure that electronic evidence isn’t destroyed, whether accidentally or intentionally.

Zubulake is part of “a growing trend by the federal courts to be very strict about the retention of electronic data and documents,” says Joseph Click, a partner with Blank Rome in Washington. “[Courts] have a lower level of tolerance for such documents being lost or destroyed.”







Lange

Although the *Zubulake* rulings were issued by a trial judge and are not technically binding on any other court, they have been “absolutely influential in every jurisdiction,” notes Michele Lange, a staff attorney in the Legal Technologies department of Kroll Ontrack, a Minnesota-based company offering electronic discovery, paper discovery and computer forensics for corporations, law firms and others.

Steve Reich, a partner with Manatt, Phelps & Phillips in New York, calls *Zubulake*, “a wake-up call to companies and their outside counsel [that] establishes a baseline standard of what companies should do in litigation.”

Although *Zubulake* involved private litigation, Reich says the same standards “could well apply in the context of a government litigation.” Although Reich is not aware of any case that has



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applied these standards to a government investigation, he says he “wouldn’t be surprised at all” if that were to happen.

The Five Steps

Reich The *Zubulake* case was filed in New York federal court in 2002 by a female equities trader who claimed that she was discriminated against. During the course of the lawsuit, the parties battled over a number of crucial discovery issues—including which side should have to pay for producing email that was contained on computerized backup tapes, and whether the company or the employee should bear the cost of restoring backup tapes.

Ultimately, Judge Scheindlin found that the employer willfully deleted relevant emails and, on that basis, allowed jurors to assume that the missing emails would have been damaging to the employer. In April 2005, the jury ruled in favor of the plaintiff and awarded her more than \$29 million, an unusually large sum for an employment discrimination case.

In two of the most important rulings issued in the case (referred to as *Zubulake IV* and *Zubulake V*), the judge discussed five steps that corporations and their lawyers should take at the outset of litigation to meet their duty to preserve electronic documents:

1. As soon as litigation is reasonably expected, attorneys should issue a litigation hold directing all employees to preserve documents and data that may be relevant to the litigation.
2. Once a hold is issued, corporate lawyers should determine all sources of potentially relevant information and speak with the company’s IT department about its document retention policies, data retention architecture, backup procedures and the recycling policies actually implemented for backup tapes.
3. The lawyers should interview all of the key employees involved in the case to determine how they store electronic data such as emails and evaluate their compliance with company document retention policies and, at the same time, clearly communicate to these employees the litigation hold and their document retention and preservation responsibilities.
4. Employees should be instructed to produce electronic copies of their relevant active files and ensure that all backup data that the company is required to retain is safely stored to avoid the risk that backup tapes will be recycled.
5. The lawyers should take affirmative steps to monitor compliance with the litigation hold and periodically re-issue the hold so that new employees are aware of it and that it remains fresh in the minds of other employees.

A Burden And An Opportunity

In the event of litigation, Blank Rome’s Joseph Click says it’s crucial for lawyers to meet with information technology staffers as soon as possible. “It is a step that should be taken and should


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Click

be taken early," he says. "Once a company gets wind that there is going to be litigation, cover all your bases; get a hold of the IT people and work with them as much as possible. According to Click, it's critical to understand the capabilities of the IT staffers and their IT systems, particularly backup systems. Counsel should also understand the company's electronic-document retention policy, as well as "what can be done to preserve evidence and [the] extent that they are recycling backup tapes."


Kotler of Wilson Sonsini says companies should not wait until litigation is looming to prepare. "Have your litigation hold plan in place so, as soon as litigation hits, you're ready to go," she says. "Get a plan in place so you could acquire extra computer servers or extra backup tapes if you have to start storing them. Know what kind of consultants you want to have if you need to take mirror images of hard drives."

ZUBULAKE CHECKLIST

Information retention and preservation specialists PSS Systems in Mountain View, Calif., have published a "Zubulake Checklist." According to the firm, "Judges in many jurisdictions assess companies' preservation and production effectiveness against this checklist:"

1. Enable your "discovery liaison" to readily describe information custodians, systems, storage, and your retention policies;
2. Affirmatively and repeatedly communicate legal holds to all affected parties;
3. Integrate your retention policies and coordinators with discovery challenges and responsibilities;
4. Actively manage and monitor document collections;
5. Interview affected employees to determine sources of information;
6. Monitor compliance with legal holds on an ongoing basis;
7. Thoroughly document and demonstrate the efficacy of your process;
8. Prepare to take responsibility for ensuring that information is preserved, collected, and produced.

Source:

 The "Zubulake Checklist," As Published At The Web Site Of PSS Systems, An Information Retention And Preservation Firm In Mountain View, Calif.

Kotler emphasizes the obligations imposed on companies and lawyers are subject to a reasonableness requirement. "My main approach is to tell people to be aware of their responsibilities and obligations—to know that they're going to get document requests—but to have some common sense."

What the *Zubulake* case makes clear is that "it's not enough to just send out a litigation hold at the beginning of the case," says Manatt's Reich. "Yes, you still have to do that, but you also have to update it periodically during the course of litigation, which is something different than had been done in the past."

What courts expect in the handling of backup tapes is also new. "Backup tapes have to be taken out of circulation or [companies need] to run a keyword search and then make sure the hits are taken out and saved," Reich notes.

Lange, of Kroll Ontrack, says that—despite the extra burdens being imposed by the courts—there is a potential silver lining for corporate defendants. "While electronic discovery does seem somewhat burdensome or complicated, it provides a great opportunity to gain a strategic edge in litigation—to handle it appropriately, avoid sanctions and maybe even locate important documents that could change the course of the litigation. For those companies that grasp the complexities, it really can help them win their case."

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