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RULING OFFERS LESSONS FOR COUNSEL ON ELECTRONIC DISCOVERY ABUSE

by

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In what may be the final pre-trial discovery opinion in the ongoing saga of the *Zubulake* case, Federal District Court Judge Shira Scheindlin has concluded that the conduct of certain employees with regard to their e-mail warrants the issuance of an adverse inference instruction at trial after their employer was unable to produce copies of deleted e-mails because of the recycling of backup tapes. *Zubulake v. UBS Warburg, LLC*, No. 02 Civ. 1243 (SAS), 2004 U.S. Dist. LEXIS 13574, 2004 WL 1620866 (S.D. N.Y. July 20, 2004). The court was careful to point out that the sanctions were not imposed because of the recycling of the tapes, but because of the primary conduct of the employees in the “willful” deletion of their e-mail after being notified of a litigation hold.¹

The result is an application of the U.S. Court of Appeals for the Second Circuit opinion in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 243 F.3d 93 (2d Cir. 2002), which involved the imposition of sanctions for a willful failure to meet discovery obligations, also known as “spoliation.” Three conditions must be satisfied to support sanctions for spoliation: (1) the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed; (2) it must be destroyed with a “culpable state of mind” and (3) the missing information must be relevant to the claim in such a way that a reasonable trier of fact could find it would support that claim. *Zubulake*, 2004 U.S. Dist. LEXIS 13574 at *27, 2004 WL 1620866 at *6. The *Zubulake* court first meticulously demonstrated that the missing e-mail at issue in the case must have been deleted after counsel had warned of the need for preservation, thus satisfying the first prong. The *Residential Funding* court established the “culpability” prong because the “culpable state of mind factor is satisfied by a showing

¹This distinction has implications for the Safe Harbor provisions under Proposed Rule 37(f) of the Rules of Civil Procedure. See the Report of the Civil Rules Advisory Committee to the Standing Committee, reproduced at <http://www.uscourts.gov>, especially the Committee comments regarding Rule 37(f), reproduced at Amendments, 31-37. The distinction applied by Judge Scheindlin in *Zubulake* suggests that an entity could be sanctioned for the conduct of employees with regard to deletion of their active e-mail accounts while the safe harbor would still immunize the entity from sanctions for its treatment of disaster recovery tapes containing duplicate copies of that deleted information.

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that the evidence was destroyed knowingly, even without intent to breach a duty to preserve it, or negligently.” *Residential Funding*, 243 F.3d at 108 (internal quotations omitted) (emphasis in original). The court held that the employee conduct warranted a finding that UBS had acted “willfully” in destroying potentially relevant information, thereby invoking a presumption that the missing information was relevant.

The *Zubulake* opinion is particularly noteworthy because of its clear expectation that all corporate employees will faithfully and accurately implement steps necessary to preserve discoverable information under their control once they have notice of the need to preserve electronic information. There is no room for error, carelessness or preoccupation with other responsibilities in this regard. *Zubulake*, 2004 U.S. Dist. LEXIS 13574 at *48, 2004 WL 1620866 at *12 (it is “unknown” why some of the instructions of counsel were ignored). In the opinion’s key ruling, the court held that “the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril.” *Id.*

At least two important observations can be made about this approach. First, placing this burden on all employees emphasizes that preservation obligations do not solely apply to a party and its agents. While the court was somewhat critical of the acts of counsel for the party supervising the process, it noted that more diligent actions on the part of counsel would only have mitigated some of the damage, since “UBS [employees] deleted the e-mails in defiance of explicit instructions not to.” *Id.*, 2004 U.S. Dist. LEXIS 13574, at *48-49, 2004 WL 1620866, at *12. Since the sanctions were meted out for the conduct of those employees, not the procedural issues involving the counsel or the backup tapes, the opinion can be interpreted to hold that the common law duty of preservation is a part of employment contracts with all employees. This reinforces the notion that preservation obligations are part of the general duty of compliance an employee owes to its employer. Previously, that might have been regarded as a stretch in some cases. For example, the actions or inactions of employees not personally involved in a dispute traditionally do not carry the same moral or legal weight as those of an employee whose conduct is more directly involved and who may, for example, have very personal reasons to wish to avoid disclosing information.² In key cases heretofore, the conduct in question was often that of counsel and the executives, and the issue was whether or not those individuals, *in their corporate representative capacity*, had adequately discharged their duty. *See, e.g., Keir v. Unum Provident*, No. 02 Civ. 8781, 2003 U.S. Dist. LEXIS 14522, *17-*18, 2003 WL 21997747, at *7 (S.D.N.Y. Aug. 22, 2003) (discussing the actions of “senior staff, including ... the director of enterprise security architecture.”); *Danis v. USN Communications*, 53 Fed.R.Serv.3d 828, 200 U.S. Dist. LEXIS 16900, *16, 2000 WL 1694325, *6 (N.D. Ill. Oct. 23, 2000) (holding that Chief Executive Officer had “the authority and responsibility to implement a suitable document preservation program”).

This approach resembles that which the U.S. Court of Appeals for the Fifth Circuit applied in *United States v. Arthur Anderson*, where the conduct of lower level employees who engaged in destruction of information was attributed for criminal purposes to the entity for which they worked

²There is some language in the opinion to suggest that the problem in *Zubulake* was not just that employees destroyed documents, but that so-called “key players” who were directly involved in the litigation destroyed documents. If that is the intended holding, it would be consistent with the traditional differentiation along the lines suggested. This language is overshadowed, however, by broader language that speaks of the responsibility of employees in general.

regardless of their knowledge or perceptions. 374 F.3d 281 (5th Cir. 2004). As noted earlier, this is consistent with an expanded view of the corporate compliance responsibilities which could be addressed proactively by entities.

A second comment about the *Zubulake* court's approach is that it should not be read as rejecting the principle that the degree of diligence required from uninvolved employees will vary with the complexity of the case. The opinion is quite precise in detailing an exact procedure while emphasizing the need to personally communicate with the key employees. However, a fair reading of *Zubulake* suggests that it may, in fact, be a unique case where it was possible to focus on a relatively limited number of sources of discoverable information. The opinion suggests that only ten key individuals were involved in the circulation of relevant e-mail and the larger controversy is described in the first paragraph as "a relatively routine employment discrimination" matter. *Zubulake* at *1. In cases where there is much uncertainty about the timing and nature of disputes and the individuals involved, a sliding scale approach, balancing the type of the case involved with the number of sources of potentially discoverable information, is often applied in good faith and with satisfactory results. Thus, the *Zubulake* opinion should not be read as imposing an absolute standard of conduct on all employees in all cases. For example, the Civil Rules Advisory Committee, in connection with the proposed Federal Rules on E-Discovery, has referred to the obligation of a party "[to take] reasonable steps to preserve [] information." Proposed Fed. R. Civ. P. 37(f)(1). The proposed Committee Note explains that "in most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order." Proposed Fed. R. Civ. P. 37 Committee Note. (emphasis added). This approach is in line with the results of many courts, which require only reasonable efforts to preserve electronic evidence. See, e.g., *Nutrition Management v. Harborside Healthcare Corp.*, No. Civ. A. 01-CV0902, 2004 WL 887401, *1-2 (E.D. Pa. Mar. 19, 2004) (refusing to sanction defendants despite routine deletion of e-mails where there was no evidence that the deleted e-mails were relevant); *McPeck v. Ashcroft*, 202 F.R.D. 31 (D. D.C. 2001) (noting that "[t]here is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case").

Accordingly, *Zubulake* usefully emphasizes the responsibilities of counsel — both inside and outside — to provide practical and timely advice to their client on preservation means and methods that will preserve discoverable information contained in e-mail. The opinion deserves careful study for its practical analysis of the relationship between counsel and their client, as well as the types of options available to businesses which must meet preservation obligations regarding e-mail. Whatever the requirements of preservation obligation in individual cases, an effective effort by management, inside counsel and outside counsel is necessary to achieve the standard of preservation of discoverable information, especially e-mail.

Thus, the following suggestions are worth considering as potentially productive ways to address the issues highlighted:

- Inside counsel should be certain that employees are routinely advised of the significance of preservation obligations. Consideration should be given to addressing this issue in a company's Code of Conduct, as well as in the training and auditing of employee compliance with internal policies.

- Outside counsel should become more directly involved in the initial planning for preservation in specific cases and should be prepared to affirmatively offer to oversee the ongoing preservation efforts of inside counsel while candidly commenting on any noted deficiencies.
- At the first hint of a controversy that may ripen into litigation, both outside and inside counsel should assess the practicality and necessity of identifying and sequestering copies of backup tapes which may contain communications by “key actors,” bearing in mind any alternative opportunities to achieve the same effective result.
- Considerable thought should be given to the expertise of employees who have responsibility for dealing with active e-mail accounts and backup systems. It may not be advisable to rely solely on the aid of overworked internal, technological employees whose expertise lies in addressing the business needs of the organization, and not its legal needs. Instead, a company may have to hire qualified individual consultants to address complex preservation obligations. As a minimum, counsel should, apart from the pressure of specific cases, convene internal review panels with the benefit of relevant expertise in other litigation to determine what types of approaches are feasible and workable.

Judge Scheindlin is correct to note in her “Postscript” that counsel now has available many useful resources to address the preservation, production and spoliation issues. As a supplement to the reference to the ABA Standards of Civil Discovery, one should note the August 2004 Amendments, which now reflect a more neutral stance on preservation and production issues. The amendments may be found at <http://www.abanet.org/litigation/documents/home.html>. In addition, the Sedona Working Group has now issued (with this author’s participation), *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* (Sept. 2004 Public Comment Draft). The Guidelines may be found at <http://www.thesedonaconference.org/publications.html>.

Finally, as already noted in footnote 1, *supra*, the Final Report to the Standing Committee and the proposed Federal Rules may now be found at <http://www.uscourts.gov>. The Standing Committee seeks public comment and has scheduled three hearings in January and February, 2005, with the public comment period closing on February 15, 2005.

Also Available from Washington Legal Foundation

A Corporate Counsel’s Guide To Discovery In The Information Age

By **David E. Dukes, James K. Lehman, Michael W. Hogue, and Jason Sprenkle**, attorneys with the South Carolina law firm Nelson Mullins Riley & Scarborough, LLP. Foreword by **The Honorable Shira A. Scheindlin** of the U.S. District Court for the Southern District of New York. Introduction by **Thomas Y. Allman**, Senior Vice President and General Counsel, BASF Corporation.
MONOGRAPH, November 2001, 61 pages

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