





YOU'VE GOT TO KNOW WHEN TO “LITIGATION HOLD” ’EM

The Dangers of Failing to Preserve and Produce Electronically Stored Information

BY KHRISTI DOSS DRIVER

Beginning with the landmark decisions handed down by the Southern District of New York in *Zubulake v. UBS Warburg*,¹ and following the proposal and adoption of the recent amendments to the Federal Rules of Civil Procedure,² electronic discovery (“e-discovery”) is the topic *du jour*. Throughout the nation, federal and state courts alike are addressing e-discovery more and more frequently, as parties are routinely requesting electronically stored information (“ESI”) during discovery, particularly in high-stakes litigation.

The groundwork for e-discovery was laid by the *Zubulake* court in a series of decisions regarding ongoing discovery disputes in an employment discrimination case. In the numerous opinions, the *Zubulake* court considered the discoverability of “accessible” and “inaccessible” data, analyzed and imposed a cost-shifting approach for production of backup information, and determined the scope of the duty to preserve ESI as well as the consequences of failure to preserve. In *Zubulake V*, the former employee contended that

the employer prejudiced her case by failing to produce certain relevant e-mails and by producing other e-mails in an untimely manner. Ultimately, as a sanction against the defendant for its failure to produce the e-mails, the employee received an adverse inference jury instruction that read as follows:

You have heard that UBS failed to produce some of the emails sent or received by UBS personnel in August and September 2001. Plaintiff has argued that this evidence was in defendants’ control and would have proven facts material to the matter in controversy.

If you find that UBS could have produced this evidence, and that the evidence was within its control, and that the evidence would have been material in deciding facts in dispute in this case, you are permitted, but not required, to infer that the evidence would have been unfavorable to UBS.

In deciding whether to draw this inference, you should consider whether the evidence not produced would merely have duplicated other evidence already before you. You may also consider whether you are satisfied that UBS’s failure to produce this information was reasonable. Again, any inference you decide to draw should be based on all of the facts and circumstances in this case.³

Recently, the Federal Rules of Civil Procedure were amended to specifically address ESI and the issues unique to e-discovery. The parties in a federal civil case are required to “discuss any issues relating to preserving discoverable information” including ESI at the meet and confer conference, and parties must present to the court in their discovery plan their proposals regarding ESI.⁴ The rules limit the scope of discoverability of ESI to that which is “reasonably accessible” unless the court orders production upon motion by the requesting party.⁵ Further, the rules provide

protection for inadvertently produced privileged materials⁶ and provide a “safe harbor” from sanctions where a party fails to produce ESI because the ESI was lost because of the routine, good-faith operation of the party’s electronic information system.⁷ Finally, the rules specifically authorize discovery of ESI, allowing the requesting party to “specify the form in which electronically stored information is to be produced”, while giving the responding party an opportunity to object.⁸

Key to the *Zubulake* decisions and the amended Federal Rules is the concept of a “litigation hold”, meant to preserve potentially relevant ESI for the duration of the litigation. As Judge Scheindlin stated in *Zubulake*, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” When a party “reasonably anticipates” litigation is determined on a case by case basis.⁹

In the following cases decided after the effective date of the amended Federal Rules, courts have continued to define the parameters under which ESI must be preserved and to determine the circumstances under which sanctions may be appropriate when ESI has not been properly preserved and produced.


Recent Sanction¹⁰

In an employment discrimination suit arising in the Western District of North Carolina, *Teague v. Target Corp.*,¹¹ the defendant moved for sanctions against the plaintiff and dismissal of plaintiff’s claim for back pay for spoliation of evidence, where the plaintiff disposed of her home computer after filing an EEOC claim against the defendant. It was revealed during discovery that plaintiff used her home computer to search for a job online after being terminated by the Defendant.

During her online search for a job, plaintiff submitted online employment applications and exchanged e-mails with prospective employers. She also used the home computer to send and receive e-mails regarding her termination from defendant’s employment and regarding her claims of gender discrimination. Plaintiff claimed that she disposed of her computer after the hard drive crashed and was unable to be repaired by her brother, who “dabbled” with computers.

The court noted that parties have an affirmative duty to preserve material evidence, a duty that arises “long before the filing of an initial pleading in litigation.” The court found that sanctions in the form of an adverse jury instruction were appropriate because plaintiff had an obligation

to preserve her home computer when it contained material evidence, noting that



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plaintiff had already hired counsel and filed an EEOC charge at the time that she disposed of the computer.

In a breach of contract case arising in the Eastern District of Missouri, *Claredi Corp. v. SeeBeyond Tech. Corp.*,¹² Plaintiff asserted that defendant breached a software production and marketing agreement between the parties by entering into agreements with plaintiff’s competitors that undermined the contract between the parties. During lengthy and contentious discovery, the plaintiff requested from the defendant all communications and agreements between defendant and the competitors.

Counsel for defendant vehemently denied the existence of any e-mails or agreements with third parties in numerous hearings held on motions to compel, and defendant refused to search its systems or archived databases. The plaintiff ultimately obtained e-mails and other records from the third-party competitors, which revealed that the defendant had communicated with the third-party competitors and contemplated agreements with them. Accordingly, the plaintiff moved for sanctions against the defendant for discovery misconduct. The court agreed and awarded the plaintiff \$54,000 for its attorney’s fees and costs related to bringing the motion to compel. The court also ordered the plaintiff to pay the clerk of court \$20,000 as a sanction for unnecessarily prolonging and increasing the expense of this litigation.

Reaching its decision, the court noted that the case was filed almost two years prior to the ruling, yet the defendant “ha[d] yet to run appropriate searches on its archived database for responsive documents, a search that should have been completed long ago.” Further, the court found that the “Federal Rules of Civil Procedure [do not] grant a party the ability to independently determine which documents it believes are material and produce only those documents.”

In *Padgett v. City of Monte Sereno*,¹³ the court imposed monetary sanctions against the defendant for spoliation of evidence and reserved ruling on whether to enter the more severe penalties of default judgment or terminating sanctions. The plaintiff alleged civil rights violations and infliction of emotional distress in part due to receipt of an anonymous, threatening letter from city

employees that enclosed a newspaper article downloaded from the internet that reported plaintiff's conviction of a crime. A city employee admitted to having authored and sent the letter, but claimed she did so of her own accord without notifying any other city employee.

Plaintiff requested inspection of the city's computers, printers and backup tapes, to explore the origins of the downloaded article and the authors and reviewers of the letter. The court initially denied the plaintiff's motion to compel the inspection, but ordered the defendant to "continue to preserve everything", making it clear on the record that the court intended to allow the inspection within some narrowing parameters. A few months later, one of the potentially relevant hard-drives "crashed" and was destroyed or discarded by the defendant. When the court later ordered production of the requested items, the defendant explained the "inadvertent" destruction of one of the computers. Oddly, at a later hearing before the court, the city claimed that it had located the computer, with no explanation provided to the court other than that the computer had appeared.

Finding that the defendant discarded the laptop with notice of its potential relevance, the court awarded monetary sanctions against the defendant for causing delay and additional expense to the plaintiff, including all costs associated with the filing of the motion for sanctions, travel costs for same, time spent researching and gathering evidence, the cost of plaintiff's expert, and the cost of

the special master appointed by the court to manage the discovery process.

In a trademark infringement and libel case arising in federal court in Colorado, *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*,¹⁴ the plaintiff sought relief for alleged discovery violations. While the defendant had produced various electronic documents and implemented a litigation hold after the complaint was filed, the plaintiff claimed that the defendant's litigation hold should have started at least two years before the lawsuit was filed, when the plaintiff first began sending correspondence to the defendant regarding the trademark infringement issues.

Examining the conflicting authorities on when litigation should be reasonably anticipated, and acknowledging that each case must be examined individually to determine when a litigation hold should have gone into effect, the court held that under the particular facts of the case, the duty to preserve did not begin until the lawsuit was filed. In reaching that conclusion, the court recognized the difficulty of stopping the routine operation of computer systems. Of importance was the court's finding that plaintiff's correspondence in the years before the lawsuit was filed failed to threaten litigation and did not demand preservation of relevant materials. Instead, the correspondence suggested working matters out with a business solution and solicited a compromise proposal from defendant. Accordingly, the court applied no sanctions for failure to preserve ESI prior to the filing of the lawsuit.

Additionally, the plaintiff complained the defendant failed to preserve computer hard drives that had been used by defendants' former employees, who were "key players" in the case and who left the company after the lawsuit commenced. Admittedly, the defendant continued its practice of expunging the hard drives of former employees, even though the lawsuit was ongoing. The court held that the company should have taken adequate steps to insure preservation of the hard drives of employees who played a significant or decision-making role in the events giving rise to the lawsuit.

As sanctions, the court ordered defendant to pay plaintiff \$5,000 to compensate plaintiff for some of the additional expenses incurred in litigating the matter as a result of the failure to preserve the relevant hard drives. The court also faulted counsel for defendant for their failure to undertake a reasonable investigation and to take affirmative and effective steps to monitor the client's compliance with discovery obligations.

The plaintiff in *Quantum Comm. Corp. v. Star Broad, Inc.*,¹⁵ the prospective buyer of a radio station, brought an action against the sellers alleging breach of the asset purchase agreement and seeking specific performance. After several instances of misconduct by the defendant sellers during the course of discovery, the plaintiff moved for sanctions and default judgment based in part on the defendant's failure to produce key "smoking-gun" e-mails during discovery. The plaintiff ultimately was able to obtain third-party discovery including a

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number of the e-mails that defendants failed to produce. Also of interest, the defendants produced one e-mail without the corresponding relevant attachment, which attachment directly contradicted the testimony of the corporate representative of the defendants.

Finding by clear and convincing evidence that the defendants deliberately failed to produce key documents to the detriment of plaintiff, the court ordered monetary sanctions and *default judgment* against the defendants because of the discovery misconduct and other bad faith actions. In reaching that result, the court noted that the withheld e-mails “hampered the ability of plaintiff to present its claim on the central issue of this case.”

In a class action case involving federal securities law violations, *In re NTL, Inc. Sec. Litig.*,¹⁶ the plaintiffs moved for sanctions against the defendant, alleging that the defendant deliberately destroyed and allowed spoliation of e-mails and other ESI. The defendant company declared bankruptcy before suit was initiated and emerged from bankruptcy as two new companies conducting the business of the predecessor company. During the bankruptcy and transition into a new existence as two companies, pertinent e-mail and other ESI was lost or destroyed. The plaintiffs argued that the new entities had a duty to preserve and produce ESI created during the previous company's existence.

The court concluded that defendant's duty to preserve began when litigation was anticipated by the former company even though most of the documents and ESI ended up in the physical possession of new companies. The court found that the defendant should have known to preserve all documents from the parent company and issue a proper litigation hold spanning across the companies, both old and new. The court held that the defendant's failure to preserve relevant documents and ESI was at least grossly negligent and imposed sanctions consisting of an adverse inference instruction to the jury, as well as plaintiff's attorney's fees and costs.

In *Thompson v. Jiffy Lube Int'l, Inc.*,¹⁷ a putative class action alleging nationwide violations of the Consumer Protection Act, the defendant moved for sanctions against the plaintiffs for spoliation of important documents and information

concerning plaintiffs' interviews and communications with former employees of the defendant. The plaintiffs, under an order compelling them to produce names and contact information regarding the former employees, represented without explanation that the addresses and telephone numbers of the former employees were “unknown”. Upon further inquiry, plaintiffs' counsel claimed that the information was formerly known, but was lost when the hard drive used by plaintiff's counsel crashed without backup.

While the court found the plaintiffs' failure to use a backup system was troubling, the court found that the issue of spoliation need not be reached at that time, as discovery at this stage in the litigation was limited to class certification issues rather than the merits of plaintiffs' claims. Accordingly, the court reserved ruling as to whether spoliation had occurred and whether sanctions were appropriate. The court did however, allow defendant to submit written deposition questions to plaintiffs' counsel regarding how and when the counsel communicated with the former employees, regarding what type of communications were lost, and further regarding the inconsistencies between plaintiffs' arguments on the motion for sanctions and the plaintiffs' prior discovery responses.

Conclusion

The crucial lesson is that counsel must impress upon their clients the significance of the failure to properly preserve and produce ESI. Indeed, *Zubulake V* and its progeny affirmatively place the responsibility to ensure preservation on the shoulders of lawyers.¹⁸ Once litigation is reasonably anticipated, “a party and her counsel must make certain that all sources of potentially relevant information are identified and placed ‘on hold’ . . .”¹⁹ ■

Endnotes

1. “*Zubulake V*,” 229 F.R.D. 422 (S.D.N.Y. 2004); “*Zubulake IV*,” 220 F.R.D. 212 (S.D.N.Y. 2003).
2. The amendments to the Federal Rules of Civil Procedure became effective on December 1, 2006. To date, several states have adopted rules regarding discovery of ESI, including California, Idaho, Illinois, Kansas, Mississippi, New Hampshire, New Jersey, and Texas.
3. *Zubulake V*, 229 F.R.D. at 432.
4. See Fed. R. Civ. P. 26(f) and committee notes.

5. See Fed. R. Civ. P. 26(b)(2) and committee notes.
6. See Fed. R. Civ. P. 26(b)(5)(A) & (B); 26(f)(4) and 16(b)(6).
7. See Fed. R. Civ. P. 37(f)(1) & (2) and committee notes.
8. See Fed. R. Civ. P. 33(d); 34(a)(1) & 34(b). See also Fed. R. Civ. P. 45 (recognizing that ESI may also be obtained from third parties).
9. See *Indiana Mills & Manufacturing, Inc. v. Dorel Industries, Inc.*, 2006 WL 1749410, *4 (S.D. Ind. 2006) (defendant could not reasonably anticipate litigation after receiving a letter which referred to the claims and the possibility of a negotiated solution, but made no further threat of a lawsuit); *Claude P. Bamberger International, Inc. v. Rohm and Haas Co.*, 1997 WL 33768546, *3 (D.N.J. 1997) (defendant had not anticipated litigation, where plaintiff's pre-filing correspondence had not threatened litigation); *Washington Alder, LLC v. Weyerhaeuser Co.*, 2004 WL 4076674 (D. Or. 2004) (letter from plaintiff threatening to sue put defendant on notice of possible litigation and triggered a duty to preserve).
10. In the past, significant sanctions have been awarded for spoliation of ESI. See, e.g., *United States v. Philip Morris, USA, Inc.*, 3727 F.Supp.2d 21, 25-26 (D.D.C. 2004) (imposing fine of \$2,750,000 and barring witness testimony for violation of preservation order and company's document retention policy).
11. 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007)
12. 2007 WL 735018 (E.D. Mo. Mar. 8, 2007)
13. 2007 WL 878575 (N.D. Cal. Mar. 20, 2007)
14. 2007 WL 684001 (D. Colo. Mar. 2, 2007)
15. 2007 WL 445307 (S.D. Fla. Feb. 9, 2007)
16. 2007 WL 241344 (S.D.N.Y. Jan. 30, 2007)
17. 2007 WL 608343 (D. Kan. Feb. 22, 2007)
18. See, e.g., *Sexton v. United States*, 2001 WL 649445 (M.D. Fla. 2001).
19. *Zubulake V*, 229 F.R.D. at 432 (emphasis added). It is important to note that the duty to preserve under a litigation hold is broader than the duty to produce. The amended Federal Rules limit the scope of *production* to what is “reasonably accessible.” The responding party to e-discovery can identify information it deems not “reasonably accessible,” meaning data that “cannot be retrieved without undue burden or cost.” Fed. R. Civ. P. 26(b)(2)(B). It is important to note that the Court may, upon motion, order the production of data that is not “reasonably accessible.”



Khristi Driver

Khristi Driver, who practices in Birmingham with Haskell Slaughter Young & Rediker LLC, was awarded full scholarships to both the University of Alabama and Cumberland School of Law. In law school, she was active in both trial advocacy competitions and the *Cumberland Law Review*. Driver is a member of the Birmingham Bar Association, serving as a member of the Medical Liaison Committee and as chair of the Projects Committee of the Women Lawyers' Section. In 2006, she received the Distinguished Service Award from the Women Lawyers' Section of the BBA.