

When the Computer Destroys the Evidence

The courts now demand that lawyers go beyond the usual common-sense approach to preserving and retrieving electronic records.

Nothing is new about a lawyer's ethical obligation to take reasonable steps to avoid spoliation of evidence. Typically, lawyers can meet this obligation through reasonably straightforward and common-sense measures.

But the intricacies and variations in the storage of electronic data can dramatically increase the complexity of carrying out that duty. The greatest uncertainty stems from the routine operation of

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computer systems that automatically discard or overwrite data, and whether a lawyer must take steps to interfere with such operations to try to ensure that electronic evi-

dence is not irretrievably lost.

In one recent eye-opening case, the lawyers' conventional efforts to collect and preserve evidence, in the form of e-mails, was found inadequate. This led to harsh sanctions, including a jury instruction on spoliation which could impact the outcome of the case. In *Zubulake v. UBS Warburg*, 2004 U.S. Dist. LEXIS 13574, involving allegations by a UBS employee of gender discrimination and retaliation, the Southern District Court of New York imposed a surprisingly rigorous standard on the lawyers and parties to take a proactive and hands-on approach to preserving electronic evidence.

What is a bit scary about the ruling in *Zubulake* is that the

lawyers for UBS, a multinational financial services company, had taken the steps normally deemed sufficient to preserve relevant evidence. As soon as the complaint was filed with the Equal Employment Opportunity Commission, in-house provided oral instructions to all UBS employees to avoid destroying or deleting any relevant evidence, including e-mails, and to segregate such materials so they could be reviewed by counsel.

DON'T DELETE THE E-MAILS

These instructions were promptly reinforced by outside counsel, who met with some of the key witnesses and reiterated in-house counsel's instructions. Then, when suit was filed, in-house counsel sent e-mails to all UBS employees again instructing them not to delete e-mails. Later, when there was a document request expressly seeking e-mails that may have been preserved on backup tapes, in-house counsel for UBS spoke with the company's technology personnel to locate and retain all such backup tapes and to stop their routine recycling.

Despite all these measures, some relevant e-mails had been deleted and could not be retrieved. The court found that counsel and UBS were responsible for this loss and awarded sanctions to the plaintiff.

So what, according to the court, had the attorneys for UBS failed to do? The court found that they had failed to promptly educate themselves on the company's system for maintenance of backup data and then ensure that effective steps were taken to avoid the routine destruction of relevant e-mails.

The court acknowledged that in its earlier decision in the same case, *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003), it had taken a more forgiving approach and had held that for purposes of weighing the elements of spoliation, the failure to have preserved

backup tapes should be deemed merely negligent, rather than willful, because the issue of whether the duty to preserve evidence extended to backup tapes was, at that time, “a grey area.”

The court, however, gave warning as to the higher standards going forward, stating: “Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information.”

The court stressed that an attorney must “become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.” The court noted that this will require that the lawyer speak with technology personnel in order to obtain an understanding of “the system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm’s recycling policy.” The court also stressed the need for attorneys to follow up with key personnel to ensure an understanding and compliance with the directives.

Similarly, in the massive tobacco case in the U.S. District Court for the District of Columbia, *United States v. Philip Morris, et al.*, 2004 U.S. Dist. LEXIS 13580, Judge Gladys Kessler imposed sanctions against Philip Morris when she learned that numerous e-mails might have been irretrievably lost, in violation of a case management order requiring preservation of all relevant evidence. Attorneys for Philip Morris admitted that the company’s computer system had been routinely deleting e-mails older than 60 days.

No TOLERATION

Judge Kessler sanctioned Philip Morris and its parent, the Altria Group, by precluding them from calling 11 key witnesses at trial and ordered monetary sanctions of more than \$2.75 million. She stated, “It is essential that such conduct be deterred and that the corporate and legal community understand that such conduct will not be tolerated.”

While *Zubulake* and *Philip Morris* provide useful warnings to litigators of what can go wrong, recent proposed amendments to the Federal Rules of Civil Procedure, which remain in the comment stage, would provide detailed instructions to counsel with respect to issues of electronic discovery that could help in preventing this sort of result. (See www.uscourts.gov/rules/newrules4.html.) While these amendments may be the beginning of a solution, lawyers must still be conscious of the potential problem in order to address it. Also, it will take some time for these rules to be adopted.

The approach taken in the proposed amendments recognizes the problems associated with automatic deletion of electronic data. The Civil Advisory Committee said in the introductory comments: “The ordinary operation of computers—including the simple act of turning a computer on or off or accessing a particular file—can alter or destroy electronically stored information, and computer systems automatically alter or destroy or overwrite as part of their routine operation.” The committee further recognized that there are significant burdens to any company that must

halt such routine recycling and retrieve the relevant evidence stored as backup.

One central feature of the “fix” in the proposed amendments is that they would require the parties to address issues of electronic discovery at the initial Rule 26(f) discovery-planning conference, and that the issues should be considered for inclusion in the Rule 16(b) Scheduling Order. With this early attention given regarding electronic discovery, there would then be a “safe harbor” from Rule 37 sanctions relating to a failure to preserve electronically stored information where data is lost through the routine operation of the party’s electronic information system. In order to benefit from the safe harbor, a party must comply with court orders on electronic discovery and act reasonably to preserve information it knows or should know is discoverable.

It remains to be seen whether the high standard set by the courts in *Zubulake* and *Philip Morris* become the standard of care.

What is clear is that lawyers involved in litigation should be alert to these issues and should address them at the earliest possible stage of a case. Since the sanctions can be huge, lawyers are going to need to know more than they ever thought they’d want to know about the logic and functions of electronic evidence.

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