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The Duty to Preserve Electronic Business Records by Steve Reich -- September 2004

For companies in highly regulated industries, lawsuits and government investigations are a cost of doing business. This cost goes well beyond the fees for lawyers, experts and consultants. In the early stages of a lawsuit or investigation, much of it comes from the diversion of personnel from their business responsibilities to complying with requests for information made by an adverse party or the government. Instead of running the business, employees spend their time meeting with lawyers and reviewing historical records.

While there has always been a duty to preserve and produce documents and information relevant to a lawsuit or government investigation, the increased reliance of businesses on electronic communications and documents has altered traditional preservation and production practices. The standards that courts expect businesses to follow were closely examined in two recent decisions by U.S. District Judge Shira A. Scheindlin, whose earlier opinions in the same case addressed novel issues of how the costs of electronic discovery should be allocated. As with those prior decisions, the two recent opinions could contribute to a national standard on a business's obligations with respect to electronic recordkeeping and production during litigation. Although Judge Scheindlin's rulings were made during civil litigation, the same preservation and production standards could well apply in a government investigation.

Background of the Lawsuit

The decisions were rendered in the lawsuit captioned Zubulake v. UBS Warburg LLC, No. 02 Civ. 1243 (SAS) (S.D.N.Y.). Plaintiff Laura Zubulake was an equities trader who sued her former employer, UBS, claiming gender discrimination, failure to promote and retaliation. See 220 F.R.D. 212, 215 (S.D.N.Y. 2003) ("Zubulake IV"). Over the course of the litigation, the parties repeatedly have clashed over a variety of discovery issues, including who should bear the cost of producing email contained on computerized backup tapes, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I"), and who should absorb the cost of restoring backup tapes, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III").

Zubulake IV

Zubulake IV and Judge Scheindlin's latest decision, Zubulake V, 2004 U.S. Dist. Lexis 13574 (S.D.N.Y. July 20, 2004), go beyond the earlier opinions' analysis of cost allocation and set forth standards of behavior required of businesses and their counsel in litigation. In Zubulake IV, the plaintiff asked the court to impose sanctions for UBS's failure to preserve missing computer backup tapes and because certain emails that were supposed to have been saved by UBS employees were deleted. Zubulake IV, 220 F.R.D. at 215. In ruling on the sanctions motion, the court held that two questions had to be answered: When does a business's duty to preserve documents, including electronic records, arise? What records must be preserved? The court began by holding that 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" (internal quotations omitted). Put another way, the "duty to preserve attache[s] at the time that litigation [is] reasonably anticipated." 220 F.R.D at 217. Moreover, the duty to preserve includes a duty to impose a "'litigation hold' to ensure the preservation of relevant documents."

Having answered the first of its two queries, the court next considered "[w]hat is the scope of the duty to preserve? Must a corporation upon recognizing the threat of litigation, preserve ... every e-mail or electronic document, and every backup tape?" Judge Scheindlin answered no, explaining that "a litigant could choose to retain all then-existing backup tapes for the relevant personnel ... and to catalogue any later-created documents in a separate electronic file." Id. at 218 (emphasis added). Such actions, "along with a mirror-image of the computer system taken at the time the duty to preserve attaches ... creates a complete set of relevant documents." Thus, when litigation reasonably is anticipated, the court's opinion requires businesses to: 1) preserve backup tapes for the relevant personnel; 2) save relevant documents created after the initial group of documents is preserved; and 3) make a mirror image of the computer system itself.

Significantly, the court went on to except from this rule computer backup tapes that the business creates solely for disaster recovery purposes (ie, tapes not actively used by the business for data retrieval), presumably because the information on such tapes is not readily retrievable. However, Judge Scheindlin also created an exception to this exception: If a business can identify where particular employee documents are stored on backup tapes, the tapes must be preserved even if they were created solely for disaster recovery purposes. In the case before her, Judge Scheindlin denied the plaintiff's request for an adverse inference instruction to the jury based on the defendant's failure to preserve electronic records, but allowed the plaintiff to re-depose certain UBS witnesses to ask about UBS's failure to maintain documents.

Zubulake V

In Zubulake V, the court considered whether the supplemental depositions provided evidence that UBS failed to "preserve and timely produce relevant information" and, if so, "Did it act negligently, recklessly, or willfully?" 2004 U.S. Dist. Lexis 13574 at *4. The court quickly determined that UBS had failed to preserve and timely produce some responsive emails, and therefore proceeded to consider issues of negligence, recklessness or willfulness. In answering the question of UBS's intent, the court again addressed the nature of a business's electronic records-retention obligations.

The court explained that the implementation of a "litigation hold" on electronic records is "only the beginning" of a business's obligations in litigation. Where a company is so large that it is not possible for counsel to speak with every key employee to assure the preservation of their records, Judge Scheindlin said there is a duty for the business and its counsel to "be more creative ... It may be possible to run a system-wide keyword search; counsel [for the business] could then preserve a copy of each 'hit.' Although this sounds burdensome, it need not be. Counsel does not have to review these documents, only see that they are retained. For example, counsel could create a broad list of search terms, run a search for a limited time frame, and then segregate responsive documents." Moreover, Judge Scheindlin wrote that "[i]t might be advisable to solicit a list of search terms from the opposing party for this purpose, so that it could not later complain about which terms were used." Whatever path the business takes, the opinion makes clear that "it is not sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information."

On the issue of the litigation hold, Zubulake V imposes a duty to update and re-issue the instruction to preserve documents periodically "so that new employees are aware of it, and so that it is fresh in the minds of all employees." Moreover, the business must assure that the company's key players communicate directly with counsel and store all electronic backup tapes required to be preserved in a safe place. Physical segregation of the backup tapes is required to eliminate the possibility that "tapes will be inadvertently recycled."

Applying these principles, Judge Scheindlin concluded that UBS failed to communicate the litigation hold to all key players and that the document management practices of some key players had not been sufficiently ascertained. Moreover, despite efforts of UBS's counsel to assure the preservation of electronic records, the court found that some key UBS employees failed to comply. As a remedy, the court ordered that the jury would be given an adverse inference instruction with respect to emails deleted

by UBS employees after a specified date and awarded plaintiff expenses for additional depositions and plaintiff's sanctions motion.

The court closed its opinion with a warning to businesses and their counsel about the rapidly evolving law of electronically stored information. "There have been a flood of recent opinions -- including a number from appellate courts -- and there are now several treatises on the subject." Now that "national standards are developing, parties and their counsel are fully on notice of their responsibilities to preserve and produce electronically stored information."

Conclusion

The recent Zubulake opinions should serve as a wake-up call. Companies must understand the standards imposed by courts and establish protocols for meeting those requirements. Moreover, businesses that are the subject of government investigations would be well-advised to adhere to these same standards, since there is no obvious reason why they would not apply in a criminal case.

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