

CLIENT ALERT

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New Electronic Discovery Decision Imposes Sanctions On Employer

Judge Shira A. Scheindlin of the U.S. District Court for the Southern District of New York, a recognized authority on electronic discovery, has issued another significant decision in *Zubulake v. UBS Warburg LLC, et al.* In an earlier decision, Judge Scheindlin addressed the legal standard for allocating costs involved in retrieving e-mails from backup tapes. In the latest decision, on the plaintiff's motion for sanctions for spoliation of evidence, the court highlighted the responsibilities of attorneys and their clients in preserving and producing electronic discovery, and sanctioned the employer for failing to fulfill these responsibilities.

Factual Background

Plaintiff Laura Zubulake, an equities trader, filed a charge of discrimination against her former employer, defendant UBS Warburg LLC ("UBS"), in August 2001 with the Equal Employment Opportunity Commission ("EEOC"). She subsequently filed a lawsuit in February 2002 in which she asserted claims under federal, state, and municipal laws for gender discrimination, failure to promote, and retaliation.

Immediately after Zubulake filed the EEOC charge, UBS's in-house counsel orally instructed employees not to delete or destroy material potentially relevant to her claims and to separate such material for counsel's review. This instruction applied to hard copies and electronic files. UBS's outside counsel then met with employees involved in the litigation and repeated these instructions. In-house counsel again reiterated the instructions in writing in February 2002, immediately after Zubulake initiated her lawsuit, and yet again in September 2002. When Zubulake requested in discovery e-mails stored on

backup tapes, UBS's outside counsel instructed the company's information technology personnel to stop recycling backup tapes.

Zubulake presented evidence that, notwithstanding these instructions, UBS employees deleted e-mails that were relevant to her case. Some of the e-mails were recovered from backup tapes and produced long after she had requested them, and some were never recovered. Zubulake also presented evidence that certain UBS employees possessed e-mails on their computers relevant to the lawsuit but never provided them to counsel and, therefore, they were never produced to Zubulake until her attorney learned of their existence during depositions.

Application For Sanctions

The court stated that a party seeking sanctions for spoliation of evidence must establish: (1) that the party with control over the evidence was obligated to preserve it at the time that it was destroyed; (2) that the evidence was destroyed with a "culpable state of mind"; and (3) that the evidence was relevant such that a reasonable trier of fact could find that it would have supported the moving party's claim or defense. The court explained that "culpable state of mind" means only negligence, and that when evidence is destroyed in bad faith (i.e., willfully or intentionally), the relevance requirement is presumed to be satisfied.

The court found that Zubulake established the first element, and next considered the culpability of UBS's state of mind by evaluating whether UBS had taken all necessary steps to guarantee that relevant evidence was preserved and produced. Judge Scheindlin set forth the necessary steps that an attorney must follow with regard to preserving and producing evidence in the "typical" case.

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First, the attorney must issue a “litigation hold” to the client as soon as litigation can be reasonably anticipated, notifying the client to suspend routine document retention/destruction policies. The attorney must then periodically remind the client’s employees of the hold. As the court explained, “a party cannot reasonably be trusted to receive the ‘litigation hold’ instruction once and to fully comply with it without the active supervision of counsel.”

Second, the attorney must directly communicate the preservation duty to the client’s employees who are “key players” in the litigation, because they are most likely to have relevant information. The attorney should also periodically remind them of the preservation duty. Third, the attorney should instruct all employees to provide him or her with electronic copies of their relevant active files. The attorney should also ensure that backup media are segregated and placed in storage.

Judge Scheindlin explained that counsel must affirmatively monitor

the compliance with discovery obligations in order to identify and search all sources of discoverable information. The court noted that while counsel is not required to supervise every step of the document production process and may to a certain extent rely upon the client, “counsel is responsible for coordinating her client’s discovery efforts.” Nonetheless, the court explained, “[a]t the end of the day, ... the duty to preserve and produce documents rests on the party.”

The court reasoned that in this case, UBS and its counsel had not taken all necessary steps to guarantee that relevant evidence was preserved and produced. Judge Scheindlin noted that although “more diligent action on the part of counsel would have mitigated some of the damage caused by UBS’s deletion of e-mail, UBS deleted the e-mails in defiance of [its counsel’s] explicit instructions not to.”

Sanctions Imposed

Judge Scheindlin concluded that UBS had engaged in willful spoliation of evidence and, therefore, was not required to

demonstrate that the evidence was relevant. As a result, it imposed the following sanctions: (1) the jury would receive an adverse inference charge with respect to e-mails that UBS deleted after August 2001; (2) UBS was required to pay for any additional depositions or re-depositions required by the late production of evidence; and (3) UBS was required to pay the reasonable costs and attorneys’ fees of this motion.

The Court’s Warning

Finally, the court warned that as a result of *Zubulake* and other cases addressing electronic discovery issues for the first time, “parties and their counsel are [now] fully on notice of their responsibility to preserve and produce electronically stored information.”

We send these Alerts to our clients and friends to provide information on recent developments in the law. The Alerts, however, should not be relied on for legal advice in any particular matter.

IMMIGRATION NEWSFLASH

Immigrant Visa Petition Approval Irrevocable When Beneficiary Already In The United States

The Second Circuit recently ruled, in *Firstland Int’l, Inc. v. U.S. Immigration & Naturalization Serv.*, that immigration law does not allow for the revocation of a previously approved immigrant visa petition if the beneficiary is already in the United States. In *Firstland*, a Chinese national – the President of Firstland – entered the United States on an L-1A nonimmigrant visa as an intra-company transferee. Two years later, Firstland filed an immigrant visa petition on his behalf, which was approved. The INS later revoked the petition approval claiming that Firstland had not established that the beneficiary was engaged “primarily” in a “managerial or executive capacity.”

In vacating the lower court’s decision the Second Circuit held that immigration law unambiguously prohibits revocation unless notification “is communicated through the Secretary of State to the beneficiary of the petition before such beneficiary commences his journey to the United States.” Because the beneficiary of the I-140 petition in *Firstland* was already in the United States in L-1A nonimmigrant status, the court ruled that INS had no authority to revoke the petition. It should be noted that although the petition approval was irrevocable, permanent residence status could still be denied the beneficiary on other grounds.

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