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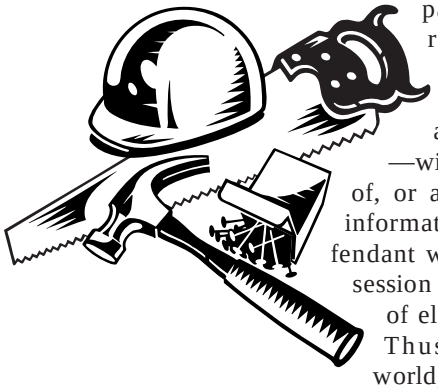
Avoiding the Pitfalls of Electronic Discovery in Employment Litigation

On Dec. 1, 2006, changes to the Federal Rules of Civil Procedure went into effect mandating additional obligations with respect to the discovery of electronically stored information (ESI). Specifically, the Federal Rules now require that, in connection with the Rule 26(f) conference, the parties are to discuss "any issues relating to the disclosure or discovery of electronically stored information."[1] The Federal Rules further provided that, in connection with the Rule 26(a)(1) Initial Disclosures, the parties are to disclose "a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses." However, the Federal Rules also make clear that "a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[2] Failure to comply with these obligations concerning electronically stored information can lead to sanctions.[3]

These changes to the rules present interesting challenges for practitioners of employment law, particularly those who represent employers. Unlike much commercial litigation or other civil litigation involving parties who have roughly equal resources, assets, information, and sophistication, employment litigation generally pits an individual plaintiff-employee —with relatively limited possession of, or access to, electronically stored information—against an employer-defendant who potentially may be in possession of significantly larger amounts of electronically stored information. Thus, in the current business world, where employers rely heavily on electronic means of communication (such as voice mail, e-mail, and a BlackBerry® or other portable digital assistants) and store a wide array of information through computers and other electronic means, the new Federal Rules can impose a heavier burden on employers than on employees during the discovery phase of employment litigation. Accordingly, this column discusses and addresses the impact of the new Federal Rules of Civil Procedure on employers with respect to the litigation hold process, document retention and preservation, and potential sanctions for failure to comply with the provisions related to electronic discovery as detailed in the rules.



As a preliminary matter, in 2004, the U.S. District Court for the Southern District of New York addressed a prime example of what the new rules seek to prevent—the spoliation of relevant evidence.[4] In *Zubulake v. UBS Warburg LLC*, a female employee filed suit against her former employer, UBS, alleging gender discrimination, failure to promote her, and retaliatory discharge. When Zubulake filed her charge with the Equal Employment Opportunity Commission in August 2001, UBS's in-house counsel gave oral instructions to UBS employees not to destroy or delete potentially relevant materials—including e-mails—and to segregate those materials into separate files for counsel's subsequent review. One year later, in August 2002, after litigation was filed, Zubulake issued formal discovery requests for e-mails stored on backup tapes. This request for documents prompted UBS's in-house counsel to instruct UBS's information technology personnel to stop recycling backup tapes, thereby preserving the tapes and the information stored therein. However, over time, without proper structure or guidance, several e-mail messages, backup tapes, and other relevant electronically stored evidence was destroyed. Some of the relevant evidence was recovered through expensive and time-consuming technologies, but some evidence was permanently lost.

After a discussion of the applicable legal standards, the *Zubulake* court held that UBS had violated its duty to preserve, protect, and disclose relevant evidence. Therefore, the court ordered UBS (1) to pay for the redeposition of relevant UBS employees, limited to the subject of the newly discovered e-mails; (2) to restore and produce relevant documents from relevant backup tapes; and (3) to pay Zubulake's reasonable expenses, including attorneys' fees, related to these discovery issues. Finally, the court permitted the jury to draw a negative inference against UBS for lost documents if the jury found UBS

to be at fault for such losses.[5]

Although the new Federal Rules of Civil Procedure do not expressly address one of the major issues in *Zubulake* (a litigation hold), the Committee Notes to the rules make clear that a party's "common law or statutory duties to preserve evidence" survive the new rules.[6] In addition, the new Federal Rules specifically require parties to include electronically stored information in discovery.[7] Therefore, commensurate with a party's common law obligations, a party still "has a duty to preserve evidence where it is *reasonably foreseeable* that [the information] is material to a *potential legal action* and properly discoverable."[8]

In light of the fact that electronically stored information, in all forms, is subject to discovery,[9] where litigation is reasonably foreseeable, counsel should advise employer-clients of the requirement to preserve *all* relevant information and documents, whether they are stored electronically or as hard copy. The Committee Notes to Rule 26(f) opine that, "[w]hen the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution."[10] Specifically, according to the notes, counsel should work with the employer to do the following:

- identify by location, category, and content all potentially relevant documents and electronically stored information;
- identify automatic deletion processes, planned system upgrades, or equipment replacements and act accordingly to preserve relevant information;
- halt the destruction of documents under the employer's document retention policies;
- identify employees who have relevant electronic or paper data and address preservation issues with them, including the requirement to cease any planned document destruction and to preserve relevant information;
- identify systems where data may be located and work with the employer's information technology department to cease any planned document destruction, prevent unintentional document deletion or destruction, and preserve relevant information; and
- memorialize in writing all efforts related to the litigation hold process.

When counsel for the employer has taken the above steps in advance of litigation, the discovery process becomes much simpler and there is less likelihood that the employer will run afoul of discovery obligations under the rules. Once litigation has commenced, the rules now impose an obligation on the parties to discuss electronically stored information during the Rule 26(f) Conference and to make certain mandatory disclosures regarding electronically stored information. Pursuant to Rule 26(f)(3), the parties are required to confer about "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."

Some helpful steps counsel can take when dealing with the production and preservation of electronically stored information, both before and after the Rule 26(f) Conference, include the following:

- never to forget the obligation to conduct a reasonable inquiry before producing documents in response to a discovery request;
- to request information from the client about data preservation sources and accessibility (for example, servers, individual computers, home computers, work computers, PDAs, etc.);
- to become connected with the employer's manager of information technology, because that person is the key to unlocking and discovering much of this information;
- to interview the individuals who are in control of electronically stored information (to learn about their individual practices, which sometimes may diverge from company practice); and
- to memorialize meetings and all information that has been gathered.

Before the Rule 26(f) conference, these procedures—and the knowledge gained by following them—can facilitate quick resolutions to disputes that may arise during the conference. After the conference, these steps can help further direct the parties in requesting and gathering evidence during discovery. Finally, these steps can assist the employer in avoiding unnecessary and burdensome discovery of information that is not relevant to the litigation.

Although the new Federal Rules impose significant obligations related to discovery on the employer, there are limits to those obligations. For example, Rule 26(b)(2)(B) provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." The more voluminous and costly the request, the less likely an employer will be compelled to produce the information that has been requested. Therefore, as with standard written discovery, when the request is unduly burdensome or expensive, it is foreseeable that a court might require the plaintiff to bear some or all of the costs associated with producing the information.[11]

Finally, an issue that is of great concern to many employers is the risk of sanctions for failing to produce electronically stored information that may have been inadvertently lost as a result of the employer's data retention and/or automatic destruction policies. However, Rule 37(f) makes clear that, "[a]bsent ex-

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ceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."

According to the comments, Rule 37(f) focuses on "information lost due to the 'routine operation of an electronic information system.'"[12] Many employers have processes in place that purge electronic systems of information as part of their routine business practice. Rule 37 will not support sanctions in cases when an employer continues this routine business practice in good faith. However, employers must never forget about the continuing obligation to preserve relevant evidence, regardless of such routine business practices. An employer's blind continuation of a routine document destruction policy might provide grounds for sanctions when the employer acted in bad faith or knew about potential litigation—or had reason to know about it.[13] As the Committee Notes to Rule 37(f) state, "a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."[14]

Before the amendments to the Federal Rules of Civil Procedure that were made on Dec. 1, 2006, the employer in *Zubulake* discovered the difficulties and dangers involved in electronic discovery. Today, a simple news search on Google containing the terms "electronic discovery and "civil procedure" yields the following headlines on the first page alone:[15]

- Oracle Case E-Discovery Fight Heats Up;[16]
- Is Your Company Destined to Make Headlines for Its Handling of Sensitive Records and Information;[17]
- Rising Costs of E-Discovery Requirements Impacting Litigants;[18]
- Pay Now Or Pay Later: How Changes In Electronic Discovery Will Impact Your Business;[19] and
- New Electronic Discovery Rules May Challenge Litigators Not Familiar with Digital Evidence Says K&F Consulting.[20]

Thus, failure to comply with the new Federal Rules of Civil Procedure and to recognize one's obligations could lead to sanctions and lost time and money for the client-employer. No attorney wants a client to make headlines because of destruction of electronic documents, whether the act was unintentional or not. Accordingly, counsel should review the new rules and advise clients to properly conform their practices to them.

As a final recommendation: Practitioners of employment law should read the Federal Judicial Center's publication, *E-Discovery Amendments and Committee Notes*, which can be found at www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. **TFL**

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Endnotes

[1]Fed. R. Civ. P. 26(f)(3).

[2]Fed. R. Civ. P. 26(b)(2)(B).

[3]Fed. R. Civ. P. 37(f).

[4]*Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

[5]*Id.* at 439-40. ("You [the jury] have heard that UBS failed to produce some of the e-mails 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.")

[6]E-Discovery Amendments and Committee Notes, 14, Federal Judicial Center, www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last viewed April 17, 2007).

[7]*See* Fed. R. Civ. P. 26(a)(1)(B).

[8]*Easton Sports Inc. v. Warrior Lacrosse Inc.*, No. 05-72031, 2006 U.S. Dist. LEXIS 70214, at *9 (E.D. Mich. Sept. 28, 2006) (emphasis added). *See also Zubulake*, 229 F.R.D. at 430. ("Spoliation is 'the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or *reasonably foreseeable litigation*.'")

[9]Fed. R. Civ. P. 26(a)(1)(B). ("[A] party must, without awaiting a discovery request, provide to other parties a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the

disclosing party may use to support its claims or defenses, unless solely for impeachment.")

[10]E-Discovery Amendments and Committee Notes, 20, Federal Judicial Center, www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last viewed April 17, 2007).

[11]Fed. R. Civ. P. 26(c). *See also Rowe Entertainment Inc. v. William Morris Agency Inc.*, 205 F.R.D. 421, 428 (S.D.N.Y. 2002). ("[A] court may protect the responding party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party.")

[12]E-Discovery Amendments and Committee Notes, 42, Federal Judicial Center, www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last viewed April 17, 2007).

[13]*See Zubulake*, 229 F.R.D. at 430.

[14]E-Discovery Amendments and Committee Notes, 42, Federal Judicial Center, www.uscourts.gov/rules/EDiscovery_w_Notes.pdf (last viewed April 17, 2007). ("A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case.")

[15]Google Search, April 18, 2007, news.google.com/news?hl=en&q='electronic%20discovery'%20and%20'civil%20procedure'&btnG=Google+Search&ie=UTF-8&oe=UTF-8&um=1&sa=N&tab=wnhttp://news.google.com/news?hl=en&q='electronic%20discovery'%20and%20'civil%20procedure'&btnG=Google+Search&ie=UTF-8&oe=UTF-8&um=1&sa=N&tab=wn (last viewed April 18, 2007).

[16]Pamela A. MacLean, THE NATIONAL LAW JOURNAL, *Oracle Case E-Discovery Fight Heats Up*, April 18, 2007, www.law.com/jsp/article.jsp?id=1176800655902 (last viewed April 18, 2007).

[17]PRWeb Press Release Newswire, I*s Your Company Destined to Make Headlines for Its Handling of Sensitive Records and Information*, April 18, 2007, www.prweb.com/releases/information_management/information_technology/prweb518694.htm (last viewed April 18, 2007).

[18]Ann G. Fort, FULTON COUNTY DAILY REPORT, *Rising Costs of E-Discovery Requirements Impacting Litigants*, March 20, 2007, www.law.com/jsp/article.jsp?id=1174307784199&pos=ataglance (last viewed April 18, 2007).

[19]Data Storage Connection, *Pay Now Or Pay Later: How Changes In Electronic Discovery Will Impact Your Business*, March 19, 2007, www.datastorageconnection.com/content/news/article.asp?DocID=%7B29EB1D0E-310E-4ADC-A1E7-7D8ECD0BEF34%7D&Bucket=Current+Headlines (last viewed April 18, 2007).

[20]K&F Consulting Inc., *New Electronic Discovery Rules May Challenge Litigators Not Familiar with Digital Evidence says K&F Consulting*, March 19, 2007, www.earthtimes.org/articles/show/news_press_release,76877.shtml.