

SPOILIATION OF ELECTRONIC EVIDENCE: THIS WAY BE DRAGONS

By Sharon D. Nelson, Esq. and John W. Simek
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Ancient mariners navigated by maps that sometimes depicted dragons in uncharted waters, occasionally even bearing the legend: “This way be dragons.” Within the legal profession, spoliation of electronic evidence has constituted murky, dangerous and uncharted waters, and it is no exaggeration at all to say, “This way be dragons.”

Then came *Zubulake V*, and the waters became clearer – but more fearsome. The fifth decision in *Zubulake v. UBS Warburg LLC et al* (2004 WL 1620866 S.D.N.Y.) came down on July 20, 2004 and its effects have rippled throughout the legal profession. In an otherwise routine employment discrimination case, plaintiff Laura Zubulake moved to sanction UBS Warburg for its failure to produce relevant information and for its tardy production of evidence.

Warburg’s counsel had issued a litigation hold after Zubulake filed EEOC charges and had orally transmitted preservation of evidence instructions, but failed to mention backup tapes. A visibly disgruntled Judge Scheindlin noted that some employees deleted e-mails in spite of the instructions and others did not produce relevant information to counsel. The judge acknowledged that this was not the fault of the defense attorneys. However, she chided the attorneys for failure to request retained information from one key employee and failure to give litigation hold instructions to another. She admonished the attorneys for failure to talk with another employee about how she maintained her computer files. Judge Scheindlin was clearly irked by counsel’s failure to safeguard backup tapes that might have contained some of the deleted e-mail, thereby mitigating the damage done by the client’s e-mail deletions. Her decision provides a detailed list of the client and attorney shortcomings. Worse yet, evidence eventually recovered from the back-up tapes (and some had inexplicably “gone missing”) clearly showed that relevant evidence favorable to the plaintiff had been destroyed.

As the judge noted wryly, the famous line from *Cool Hand Luke* was right on target: “What we’ve got here is a failure to communicate.” The result? UBS Warburg was ordered to pay the costs of plaintiff’s motion including attorneys’ fees, as well as to pay the costs of any other depositions required by the late production of the e-mails. Most distressing was the imposition of the dreaded “adverse inference instruction,” which Judge Scheindlin announced she would give to the jury. The judge considered but declined to award sanctions against the attorneys, citing the specific set of facts and the dearth of judicial direction in this area. However, she laid out a list of counsel responsibilities intended to give future guidance and made it clear that lawyers might be subject to sanction if they did not abide by them. The guidelines say that counsel must:

- 1) actively monitor compliance so that all sources of discoverable information are identified and searched, noting that it is NOT sufficient to advise the client of a

- litigation hold and then expect the client to retain, identify and produce the relevant evidence;
- 2) become familiar with the client's document retention policies and computing infrastructure, speaking with the client's key IT personnel to do so;
 - 3) communicate with all key players involved in litigation, inquiring as to how and where they store their information, and advising them of their preservation of evidence obligations;
 - 4) ensure that a "litigation hold" is implemented whenever litigation is reasonably anticipated and periodically reissue the notice;
 - 5) communicate directly with key players; and
 - 6) instruct all employees to produce responsive electronic files and ensure that relevant backup tapes or other archival media are safely stored.

If some of this seems onerous, the Judge was careful to point out that the actions of counsel must be reasonable, noting that counsel cannot be obligated to monitor their client like a parent watching a child. Still, the judge observed that counsel is more aware of the legal duties surrounding evidence preservation and production, and therefore held to a high standard of involvement and monitoring.

As a sidebar note, since *Zubulake V* came down, the American Bar Association's standards have been revised to offer an updated and more pragmatic approach to preservation of evidence and production obligations. The amendments may be found at www.abanet.org/litigation/documents/home.html

Will *Zubulake's* clear reasoning and explicit standards be heeded? Commentators, the authors included, believe it will. Judges are showing increasing intolerance for spoliation, whether it is the open mockery of the system displayed by Arthur Andersen and Enron or the more subtle spoliation that comes from lassitude and a failure to energetically get (and keep) a handle on the preservation of electronic evidence. Hefty fines have become the norm (fines exceeding \$1,000,000 are no longer rare), and the issuance of adverse inference instructions is also on the rise.

Zubulake continues to spawn precedent-setting opinions with which all attorneys should be familiar. *Zubulake V* represents the first time that a court has set forth such explicit guidelines for attorneys managing the preservation and production of electronic evidence. The betting money is that courts will largely fall in like dominoes behind the principles of *Zubulake* with only minor modifications. If this is true, the waters will no longer be uncharted and navigation by legal counsel must be considerably more zealous and comprehensive than it has been in the past. If you ignore *Zubulake V*, you risk being scorched by a dragon's breath as you flounder in perilous waters!

The authors are the President and Vice President of Sensei Enterprises, Inc., a computer forensics and legal technology firm based in Fairfax, VA. 703-359-0700 (phone) 703-359-8434 (fax) sensei@senseient.com (e-mail), <http://www.senseient.com> (web site)