Electronic Discovery

Zubulake, *its Progency and its Ramifications for the Practitioner*

The storage of information electronically is, like air-conditioning, here to stay. Inevitably, discovery disputes relating to electronically-stored information ("ESI") have arisen in great number in the federal courts and to a lesser degree in the state courts. Many litigators who were not conscious of the subject first learned of the types of issues which can arise relative to ESI discovery when they read a series of decisions which have been given the improbable appellation, *Zubulake*, named for the plaintiff who prosecuted a discrimination action resulting from the termination of her employment. One of those decisions stimulated an outcry from members of the federal bar that lawyers were being unfairly saddled with responsibilities that should rightly fall on the shoulders of their clients. This article will examine the *Zubulake* decisions in particular, review certain of the approximately 300 decisions which have alluded to Zubulake in some fashion, and attempt to recommend a series of practical steps for the practitioner involved in a dispute in which ESI is likely to be involved.

By Howard C. Emmerman

The *Zubulake* Decisions

There is much to be learned from a review of the four decisions that led up to Judge Scheindlin's controversial decision in *Zubulake v. UBS Warburg*, LLC, 229 F.R.D. 422 (S.D.N.Y. 2001).[1] Too often lost in the bar's reaction to the *Zubulake* decisions is the excellent analysis by Judge Schendlin in *Zubulake I* of the nature of ESI itself, and the issues uniquely presented by discovery of ESI. The seminal issue in *Zubulake I*, an employment discrimination and retaliatory discharge case, was the plaintiff's request for internal e-mails directly relevant to the reasons for the termination of her employment, and Defendant UBS Warburg's rather weak (and later all but abandoned) contention that those e-mails were neither discoverable nor readily recoverable.[2] After determining that the Plaintiff was entitled to the requested e-mails under Federal Rules 26 and 34,[3] the court undertook to determine whether the cost of reproducing those e-mails should be shifted to the Plaintiff.[4] The court first described the two primary methods used by Warburg in backing up its e-mails: (1) backup tapes, the restoration process for which is lengthy and expensive, and (2) optical disks, which are quickly and easily searchable and retrievable.[5] The court then reviewed the factors taken into account in determining whether the presumption that the responding party must bear the costs of production should be considered outweighed by the "undue burden" of recovering the e-mails in question.[6] Rejecting the notion that all ESI discovery automatically involves an undue burden on the producing party, Judge Scheindlin favored the proportionality test prescribed by Rule 26(b)(iii) and analyzed the proportionality factors set forth in *Rowe Entertainment v. William Morris Agency, Inc.* ("*Rowe*"), 205 F.R.D. 421, 429 (S.D.N.Y. 2002) for determining whether the producing party would be afflicted by such "undue burden" as would occasion the shifting of the cost of recovery to the requesting party.[7] Melding those factors with those set forth in the Federal Rules and eliminating duplication in the *Rowe* factors, she formulated a seven-point test for determining whether the cost of recovery of the requested ESI should be shifted to the plaintiff:

- The extent to which the request is specifically tailored to discover relevant information
- The availability of such information from other sources
- The total cost of production compared to the amount in controversy
- The total cost of production compared to the resources available to each party
- The relative ability of each party to control costs and its incentive to do so
- The importance of the issues at stake in the litigation
- The relative benefits to the parties of ob-

[1] The cases are cited at 217 F.R.D. 309 , decided July 13, 2003("*Zubulake I*"); 230 F.R.D. 290, decided the same day, July 13, 2003 ("*Zubulake II*"); 216 F.R.D. 280, decided July 24, 2003 ("*Zubulake III*"); 220 F.R.D. 212, decided October 22, 2003 ("*Zubulake IV*"); and 229 F.R.D. 422, decided July 20, 2004 ("*Zubulake V*"). The author finds no explanation for the chronologically non-sequential Federal Rules Decisions volumes, but assures they are accurately cited.

[2] *Zubulake I*, 217 F.R.D. at 217.

[3] *Id.*

[4] The court distinguished the ESI kept on a backup system from ESI kept on an active on-line or near-line system, the latter of which was held to fall within the presumption that production is at the cost of the responding party. *Id.*, 217 F.R.D. at 323.

[5] *Id.*, 217 F.R.D. at 314-316.

[6] Fed. R. Civ. P. 26(b)(2); *e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S. Ct. 2380 (1978).

[7] *Id.*, 217 F.R.D. at 318.

[8] *Id.*, 217 F.R.D. at 322.

taining the information[8]

Applying these factors, the court required UBS Warburg to produce the e-mails stored on optical disks at its own expense, and any five backup tapes containing e-mails to be selected by the plaintiff, and reserved ruling on allocating the cost of retrieval of those five tapes.[9] While it could be argued that the court overreached its function by attempting to legislate standards into the legal analysis of cost-shifting ESI discovery,[10] it appears that in fact the court applied a well-informed technical analysis of the nature of ESI, and attempted to arrive at a fair, balanced and educated compromise of the competing interests of the litigants.

The court's decision in *Zubulake III* was the logical consequence of *Zubulake I*.[11] In *Zubulake III*, Judge Scheindlin applied the seven principles articulated above to the facts of the case and determined that the cost of *restoring* the backup tapes should be allocated 25% to the plaintiff and 75% to UBS Warburg. She also held that the cost of *producing* the tapes, which included the costs of paralegals in searching the tapes for responsive e-mails, and the cost of attorneys' reviews of those e-mails should be borne by the producing party, UBS Warburg.[12]

Zubulake IV deals with the fact that certain of the relevant backup tapes which were the subject of the court's previous order were missing; that certain isolated e-mails created after UBS supposedly began retaining all relevant e-mails had been deleted from its current files, though saved on backup tapes; and that certain potentially relevant e-mails had not been saved at all.[13] In considering Zubulake's motion for sanctions, Judge Scheindlin, citing the common law of spoliation of evidence, addressed the nature of evidence that must be preserved and the time at which the obligation to preserve evidence arises. The court , citing prevailing case law authority, held that a party must preserve evidence which the party knows or reasonably should know (i) is relevant, (ii) is reasonably calculated to lead to the discovery of admissible evidence, (iii) is reasonably likely to be requested during discovery, and/or (iv) is the subject of a pending discovery request.[14] The court further held that the obligation to preserve evidence – "putting in place a litigation hold" – arises when the relevant employees of the party in possession of the evidence reasonably anticipate that litigation will ensue.[15] Nothing in the court's analysis thus far is unique or controversial.

Confronted with the fact that UBS's employees failed to comply with the "litigation hold" directive from its attorney, and that UBS waffled in its representations to the court regarding the existence or non-existence of an internal retention policy in one of its offices,[16] the court nonetheless rejected Zubulake's request that the court impose the sanction of relieving her of her share of the cost of restoring the tapes, and further rejected Zubulake's request for an adverse-inference instruction.[17] In part, the court's denial of the request for the adverse-inference instruction was based on its observation that it was not "terribly surprising" that a company would not think itself obligated to preserve all its backup tapes even when litigation was reasonably anticipated.[18] The only sanction imposed by the court was that UBS was required to pay the cost of re-deposing certain witnesses for the limited purpose of inquiring into the issues raised by destruction of evidence and newly discovered e-mails.[19]

It was not until *Zubulake V* that Judge Scheindlin issued the decision that has elicited the firestorm of reaction from the bar. In *Zubulake V*, the court, having crafted what it believed, and what appears objectively to be a balanced and well-informed determination of the scope and type of information to be disclosed and of the allocation of the cost of recovery and production of such information, displayed its frustration with UBS Warburg's continued failure to timely produce the requested e-mails. Attributing this "failure to communicate"[20] to both the failure of UBS employees to follow the litigation-hold directive given by its counsel, and to counsel's failure to effectively communicate the litigation-hold instruction to key employees in charge of the information,[21] Judge Scheindlin lowered the boom on UBS Warburg, imposing a multitude of sanctions on the Defendant.[22] However, it was not the sanctions, but rather the court's determination of the duties imposed on counsel that has reverberated throughout the profession. Simply enumerated, the duties imposed on counsel are as follows:

- **Counsel's duty to oversee compliance with a "litigation-hold instruction.** Counsel is required not only to give a "litigation-hold" instruction, but also to "oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents...."[23]

[9] The Court does not indicate what information UBS Warburg was required to provide Zubulake to enable her to determine which 5 tapes to select. Presumably, the backup tapes were dated, which would allow her to make some educated guess as to what dates might contain "smoking gun" e-mails.

[10] This criticism would equally apply to the court's decision in *Rowe*.

[11] *Zubulake II*, issued the same day as *Zubulake I*, involved the plaintiff's unsuccessful effort to obtain the release of a confidential deposition transcript and did not involve discovery of ESI.

[12] *Zubulake III*, 216 F.R.D. at 291.

[13] *Zubulake IV*, 220 F.R.D. at 215.

[14] *Zubulake IV*, 220 F.R.D. at 217, citing *Turner v. Hudson Transit Lines*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991)

[15] *Id.*, 220 F.R.D. at 217-218.

[16] *Id.*, 220 F.R.D. at 219.

[17] Such an instruction tells the jurors that they can infer from the fact that a party destroyed evidence, that the party did so out of the realization that the evidence was unfavorable to the party responsible for the destruction. Black's Law Dictionary 1401 (6th ed.1990);

[18] *Id.*, 220 F.R.D. 220.

[19] *Id.*, 220 F.R.D. 222.

[20] Yes, the allusion to the oft-quoted phrase from the movie, *Cool Hand Luke*, was noted by the court.

[21] *Zubulake V*, 229 F.R.D. at 424.

[22] *Id.*, 229 F.R.D. at 437.

[23] *Id.*, 229 F.R.D. at 432.

- **Counsel's duty to locate relevant information.** Counsel must "make certain that all sources of potentially relevant information are identified and placed on hold.... To do this, *counsel must become fully familiar with [the] client's document retention policies [and] data retention architecture.* This will invariably involve *speaking with information technology personnel [and] communicating with the 'key players' in the litigation in order to understand how they store information."*[24] But that's not all: "To the extent it may not be feasible for counsel to speak with every key player given the size of the company or the scope of the lawsuit, *counsel must be more creative.* It may be possible to run a system-wide keyword search [preserving] a copy of each 'hit.'[25]

- **Counsel's duty to continuously ensure preservation of ESI.** Counsel must bear the responsibility of supplementing responses to discovery, which Judge Scheindlin interprets as "strongly suggesting that parties also have a duty to make sure that discoverable information is not lost." The court delineates the duty on counsel of (a) *issuing a litigation-hold* whenever litigation is reasonably anticipated, and periodically re-issuing that instruction so that "it is fresh in the minds of all employees;"[26] (b) *communicating with "key players;"* and (c) *instructing "all employees to produce electronic copies of their relevant active files* [making] sure that all backup media...is identified and stored in a safe place."

Criticisms of *Zubulake V* abound. In addition to the apparent *non-sequitur* evident in the sudden transfer of virtually all responsibilities for preserving ESI from the client to its counsel, it can readily be and has been argued that the decision creates an automatic conflict of interest between attorney and client in that it sets the attorney against his own client whenever an allegation is made of spoliation of ESI; that it all but destroys the privilege that attaches to attorney-client communications with regard to alleged spoliation of ESI; that it ignores the first sentence of Federal Rule 26(e), which requires supplementation of discovery only when a party learns that in some material respect, the information disclosed is incomplete or incorrect and that the additional or corrective information had not been made known to adverse parties; that it unjustifiably exalts the duty to produce and preserve ESI over other potentially equally important types of evidence; and that it provides litigants with the opportunity to deter the court from the substantive issues in the dispute by forcing focus on discovery issues as a means to gain an advantage in the litigation.[27]

Reaction Of The Courts

Reaction of the courts to *Zubulake V* in the approximately 300 opinions citing the decision has been inconclusive. Courts confronting arguments for sanctions based on *Zubulake V* have for the most part sidestepped its effect by distinguishing the facts in their respective cases from those in Zubulake V. However, many of these decisions have expressly rejected one or more facets of the opinion, few have embraced the duties of counsel purportedly created by Judge Scheindlin, and many have treated ESI no differently than any other evidence of which spoliation was alleged. In *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390 at *12 (S.D. Fla. 2009), the court paid homage to the "pioneering writings" of *Zubulake V* and the Sedona Principles[28] which formed the basis in part of Judge Scheindlin's decision, but decided:

> [T]he Court need not travel down the Zubulake road because the question before the Court is an elementary one that must be answered in all discovery matters, regardless of whether the medium of the discovery sought happens to be electronic in nature: whether we can reasonably anticipate that the information to be gleaned from the discovery sought will be relevant and non-duplicative. After all, electronic discovery is, at bottom, just discovery, and, as Rule 26(b)(2)(B) makes clear, the usual limitations to which all discovery is subject apply with equal force to electronic discovery.

In *Gaffield v. Wal-Mart Stores East, LP*, 616 F.Supp.2d 329, 337 (N.D.N.Y. 2009), the district court refused to apply the presumption articulated in *Zubulake V* that once a party is subject to a duty to preserve evidence, any failure to do so is negligent, holding that *Zubulake V* "is unpersuasive because it is contrary to the weight of precedent and was decided prior to the Second Circuit's decision in [*Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 458 (2d Cir. 2007.)]"[29] However, most decisions cite *Zubulake V* with approval[30] but decline to impose the severest of sanctions. In *Getty Properties Corp. v. Raceway Petroleum, Inc.*, 2005 WL 1412134 (D.N.J. 2005), the district court distinguished *Zubulake V*, characterizing it as applicable only to situations wherein relevant ESI has been destroyed, but holding in the case at bar that the Defendant never kept any records and had no duty to do so. No comment was made as to the array of counsel's responsibilities created by *Zubulake V*.

In *Ball v. Versar, Inc.*, 2005 WL 4881102 (S.D. Ind. 2005), the court agreed with *Zubulake V* that the duty to preserve e-mails commenced at the time the defendant issued a default notice to the plaintiff, resulting in the plaintiff's threat of suit, and that the defendant had delayed for ap-

[24] *Id.*, 229 F.R.D. at 432.

[25] *Id.* (emphasis added)

[26] One might legitimately ask, "anticipated by whom?" for if the circumstances are such that counsel who is (as we often are) uninformed by a client of facts which would give us as lawyers reason to anticipate litigation, how then are we to know when to issue a litigation-hold instruction?

[27] See, e.g., Levitt, *Counsel's Obligations for E-Discovery; Is Zubulake Right?*, 3 *Bloomberg Corp. Law J.* 141 (2008)

[28] *The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production (2004 Annotated Version*, Jonathan M. Redgrave, ed. 2004)

[29] This case did not involve ESI.

[30] See, e.g., *Semsroth v. City of Wichita*, 239 F.R.D. 630, 636 (D.Kan.2006) (*Zubulake* is the leading case on "cost-shifting of electronic discovery."); *Kemper Mortgage, Inc. v. Russell*, 2006 WL 2319858 at *1 (S.D.Ohio 2006) ("While Judge Scheindlin's decision in *Zubulake IV* is not technically binding on this Court, it has received wide recognition at the federal bar as authoritative.")

[31] *Ball v. Versar ("Ball")*, 2005 WL 4881102 at *5.

proximately 3 years in giving a "litigation-hold" instruction to its employees regarding its e-mails. Nonetheless, the court refused to give an "adverse inference" instruction, explicitly rejecting *Zubulake V* as "too severe."[31] A similar result was reached by the Texas Court of Appeals in *MRT, Inc. v. Vouncx*, 299 S.W.3d 500 (2009), wherein the court denied an unsuccessful plaintiff's post-trial motion, which was grounded in part on the failure of the defendant to locate and produce potentially relevant e-mails stored on backup tapes notwithstanding an order that certain of the tapes be produced.[32] The trial court had rejected plaintiff's pretrial request for a spoliation instruction, and plaintiff's twelfth-hour motion for a continuance. Affirming a judgment on a jury verdict in favor of the defendant, the reviewing court noted that the plaintiff had never included a specific reference to "backup tapes" in its initial discovery requests and that the defendant had made a sufficient showing that the backup tape search requested by the plaintiff "was not reasonably possible."[33] The court expressly distinguished *Zubulake V* on the grounds that there was evidence in *Zubulake V* of deliberate deletion of e-mails and backup tapes in contravention of company policy, noting significantly that "the purpose of IMEC's backup tapes was to provide information retrieval in the case of database corruption or disaster recovery and not for the purposes of archival preservation."[34] Some decisions have ordered the shifting or sharing of costs as a result of the complexity of restoring backup ESI,[35] and some have ordered issue preclusion or witness preclusion as a sanction.[36]

However, a small number of decisions have in fact sanctioned counsel for failure to comply with the *Zubulake V* duties. In *Swofford v. Eslinger*, 671 F.Supp.2d 1274 (M.D. Fla. 2009), the court, citing *Zubulake V*, imposed sanctions on defendant's counsel for failing to issue a litigation hold on relevant ESI and tangible evidence after receiving a request from opposing counsel, resulting in the loss or destruction of that evidence. The court also found that the sanctioned attorney had failed to supervise compliance with any litigation hold, and that the attorney had confessed to never having read the Federal Rules of Civil Procedure.[37]

Illinois Decisions

The District Courts in Illinois also have cited the *Zubulake* decisions with approval, but have applied cost-shifting and the imposition of sanctions unevenly. The court demonstrated a disinclination to impose cost-shifting in *Autotech Technologies v. AutomationDirect.Com*, 2007 WL 2746646 (N.D. Ill. 2007), holding that cost-shifting is only appropriate where ESI is inaccessible other than through means that involve undue expense.[38] But in *Wiginton v. CB Richard Ellis*, 229 F.R.D. 568 (N.D. Ill. 2004) the court acknowledged the distinction drawn by Judge Scheindlin between ESI and other forms of evidence, modified the *Zubulake* rules by adding an eighth factor to the cost-shifting analysis – a consideration of the degree of importance of the requested discovery in resolving the issues in the litigation32 – then not surprisingly weighted that factor most heavily in deciding to allocate 25% of the costs of searching backup tapes to the requesting party.[40] No greater degree of consistency can be found with respect to sanctions. In *Trade Finance Partners, LLC v. AAR Corp.*, 2008 WL 904885 (N.D. Ill. 2008), Judge Pallmeyer found that the defendants had destroyed ESI but lacked the "culpable state of mind" required for sanctions to be imposed, citing *Zubulake V*.[41] In In *re Kmart Corporation*, 271 B.R. 823 (N.D. Ill. 2007) the Bankruptcy Court held that the debtor failed to put a litigation hold in place at a time when it should have been aware of facts relevant to its objection to creditors' claims and failed to implement a litigation hold belatedly put in place resulting in the potential loss of e-mails, but refused to consider those failures evidence of bad faith or "willful blindness"[42] and refused to order sanctions beyond the assessment of "some of the attorneys' fees and costs" incurred in the drafting and presentment of the creditor's motion for sanctions.[43] But in *Krumweide v. Brighton Associates*, 2006 WL 1308629 (N.D. Ill. 2006), the court imposed perhaps the strongest sanction to date employed for spoliation of ESI. Determining that the plaintiff in an employment dispute had failed to put in place a litigation hold, had failed to surrender his company-owned laptop computer to a service center, and acted willfully and in bad faith when he continued to alter and destroy evidence, the court entered a default judgment against the plaintiff on his complaint and a default judgment against the plaintiff on the employer's counterclaim. The court also ordered the immediate surrender of the laptop computer and awarded defendant its costs and attor-

[32] *MRT, Inc. v. Vouncx ("MRT")*, 299 S.W.3d at 507-508 (2009).

[33] *MRT*, 299 S.W.3d at 508-509.

[34] *MRT*, 299 S.W.3d at 511. A similar distinction from *Zubulake V* was found to have existed in, e.g., *Bensel v. Allied Pilots Ass'n*, 263 F.R.D. 150, 153 (D.N.J. 2009); *Passlogix, Inc. v. 2FA Technology, LLC*, 2010 WL 1702216 (S.D.N.Y., 2010); In *re A & M Florida Properties II, LLC*, 2010 WL 1418861 (S.D.N.Y., 2010); *Crown Castle USA Inc. v. Fred A. Nudd Corp.*, 2010 WL 1286366 (W.D.N.Y. 2010); *Ferron v. Echostar Satellite, LLC*, 658 F.Supp.2d 859 (S.D. Ohio 2009)

[35] See, e.g., *Universal Del., Inc. v. Comdata Corp.*, 2010 WL 1381225 (E.D.Pa. 2010)

[36] See, e.g., *Wilson v. Thorn Energy, LLC*, 2010 WL 1712236 (S.D.N.Y. 2010); but cf. *Tierno v. Rite Aid Corp.*, 2008 WL 3287035 at *5 (N.D.Cal. 2008) (The cost-shifting principles of *Zubulake* do not apply to discovery of non-ESI.); In re *Napster, Inc. Copyright Litigation*, 462 F.Supp.2d 1060, 1078 (N.D. Cal. 2006) (ordering issue preclusion, an adverse-inference instruction and attorneys as sanctions for spoliation of ESI.)

[37] *Swofford v. Eslinger*, 671 F.Supp.2d 1274, 1278, 1287-88 (M.D. Fla. 2009)

[38] *Autotech Technologies L.P. v. AUTOMATIONDIRECT.COM*, 2007 WL 2746646 at *3 (N.D. Ill. 2007); see also, *United States v. Amerigroup Illinois, Inc.*, 2005 WL 3111972 at *3,*4 (N.D. Ill. 2005) wherein the court quashed a subpoena for backup tapes directed to a non-party to the lawsuit.("[I]n the hierarchy of accessibility...electronic data stored on backup tapes is near the bottom...")

[39] *Wiginton v. CB Richard Ellis*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004); see also, *Portis v. City of Chicago*, 2004 WL 2812084 (N.D. Ill. 2004)(the court shifted half of the expenses to compile a data base of arrest reports, to the plaintiff, the party, requesting the records.)

[40] *Id.*

[41] *Trade Fin. Corp. v. AAR Corp.*, 2008 WL 904885 at *13 (N.D. Ill. 2008)

[42] In re *Kmart Corporation*, 271 B.R. 823, 847 (N.D. Ill. 2007).

[43] *Id.*, 371 B.R. at 855.

neys' fees.[44] Perhaps the most that can be said of these decisions and of the decisions in the several state and federal courts cited above, is that notwithstanding noble attempts by the courts to fix specific standards of responsibility and accountability when it comes to the preservation and discovery of ESI, the decisions are made on an *ad hoc* basis.

In stark contrast to the plethora of litigation created by Zubulake in the federal bar, there appear to be no decisions, legislative guidelines or other official proclamations or policies regarding discovery of ESI in Illinois state courts. Indeed, as one commentator has put it,

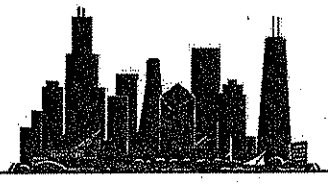
> For now, civil practitioners involved in formal ESI discovery in Illinois circuit courts will gather information under written procedural laws that are relatively silent on ESI. Information is available from 'documents or tangible things,' [under Ill. Sup. Ct. Rule 201(b)(1)] as well as from "specified documents, objects or tangible things," [Ill. Sup. Ct. R. 214] that include in both settings 'retrievable information in computer storage.'[45]

There are those who probably believe that this omission is not necessarily fatal, and that the attempts of *Zubulake* and its progeny have attempted to over-regulate an area which, due to the fact-intensiveness of the disputes arising in that area, cannot be so regulated.

The Seventh Circuit Electronic Discovery Pilot Program ("Program") – Phase One

As is indicated in the Program's preamble, the procedures set forth are intended to "assist courts in the administration of [Fed. R. Civ. P. 1], to secure the just, speedy and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of [ESI] without court intervention...."[46] The most important feature of the Program is the required designation of an individual(s) as "e-discovery liaison" for purposes of meeting, conferring and attending court hearings concerning the discovery of ESI. The liaison must be prepared to resolve e-discovery disputes, must be knowledgeable about the party's e-discovery efforts, and must herself be familiar or have reasonable access to someone familiar with the party's electronic systems and the technical aspects of electronic document storage, search and retrieval methodologies.[47] The Program also requires a party seeking preservation of ESI to issue a "preservation letter," specifically identifying the types of information which should be preserved and provides for an optional response by the opposing party.[48] Additionally, in what appears to be a slight

[44] *Krumweide v. Brighton Associates*, 2006 WL 1308629 at *11 (N.D. Ill. 2006) No sanctions were levied against Krumweide's counsel.
[45] Parness, "E-Discovery in Illinois Civil Actions", 95 *Ill. Bar J.* 150 (March, 2007)
[46] *Principles Relating to the Discovery of Electronically Stored Information* § 1.01 (Seventh Circuit Electronic Discovery Pilot Program – Phase One)
[47] *Id.*, § 2.02.
[48] *Id.*, § 2.03.



amelioration of the duties of counsel prescribed in *Zubulake V*, the Program requires every party and its counsel to take "reasonable and proportionate" steps to preserve relevant and discoverable ESI, with or without receipt of a preservation letter.[49] Significantly, the Program highlights those categories of ESI which are generally not discoverable, including unallocated data on hard drives, RAM, temporary internet files, and data in metadata fields (Like backup tapes) that are frequently updated automatically.[50] Nothing is provided in the Program regarding principles of cost-shifting, the only allusion to the issue being a vague statement that "generally, the requesting party is responsible for the *incremental cost* of creating its copy of requested information.[51]

Where Does This Leave The Practitioner?

With rare exception, businesses today keep extensive ESI consisting of e-mails, documents, database files (such as files reflecting customer or supplier histories, employee performance data), spreadsheets (such as those reflecting cost and pricing information), and the like. It is almost impossible to expect that, in any lawsuit in which a business is a party, you will not encounter this information in some form. Additionally, most business servers backup their information on random-access systems which are periodically overwritten and used primarily for disaster recovery. It is more than likely that you will encounter the necessary recovery or production of ESI in any lawsuit in which your client or adversary is a business entity. In light of this inevitability, it cannot be said that the principles of *Zubulake V* are nothing more than a draconian attempt to force counsel of record to assume responsibility for preserving discoverable evidence. Rather, the principles are practical in their application wherever a suit is litigated. Moreover, our clients are not well-served if we suffer the deterrence of the court's attention from the merits of a strong case, to a dispute over ESI. Every practitioner should, therefore, at the minimum, take the following measures beginning as soon as she becomes involved in a dispute whether or not litigation has been commenced, and whether or not the litigation is to take place in federal or state court:

- Learn about your client's systems for storing and retrieving e-mails and other electronic data (what data is stored in current or active files, what data is stored in backup files, how often files are purged or deleted, and how such categories of data may be researched and retrieved) and make notes of what you learn;
- Learn about your client's policies, if any, for destruction of data, again making notes;
- Identify the people with technical knowledge of your client's systems to act as a designated or *de facto* e-discovery liaison;

[49] *Id.*, § 2.04(a).
[50] *Id.*, § 2.04(d).
[51] *Id.*, § 2.06(d) (emphasis added).

- Issue a litigation-hold letter to your client with copies to each of your client's employees who are reasonably expected to have knowledge relating to all data that could be relevant to the dispute;
- Issue a request for preservation of data to the opposing party, specifically identifying the data you want preserved;
- In your initial discovery request, include interrogatories seeking information regarding the opposing party's systems for storing and retrieving e-mails and other electronic data (what data is stored in current or active files, what data is stored in backup files, how often files are purged or deleted, and how such categories of data may be researched and retrieved) and ask that the opposing party to identify all persons with knowledge of this information.

If you include these concerns in your case management strategy from the very beginning of the case, you will have done your best to head off any allegations of spoliation by your client, and to anticipate any possible spoliation by your adversary.

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