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FROM THE FEBRUARY *ABA JOURNAL*  
 IDEAS FROM THE FRONT

### THE ZUBULAKE ROAD SHOW

Lawyers Are Traveling to Conferences, Companies to Explain E-Discovery Opinions

BY WENDY DAVIS

A decision last year by a federal district judge in New York regarding discovery of electronic documents has lawyers across the country hitting the road to lecture corporations, speak on panels and reassure skittish clients.

In the case—a sex discrimination lawsuit against global financial firm UBS Warburg—Judge Shira Scheindlin said she intended to instruct the jury that it could make a negative inference about certain e-mails deleted by the company. In her July 2004 ruling, Scheindlin also made clear that she believes counsel must do more than simply tell clients that material is subject to a “litigation hold.”

“Counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained and produced,” she wrote.

The decision was the latest in a series of five rulings concerning electronic discovery in the case, *Zubulake v. UBS Warburg*, No. 02 Civ. 1243 (S.D.N.Y.). Commonly called *Zubulake V*, it has led general counsel, corporations and even judges to seek extra guidance about electronic discovery in New York and elsewhere.

Scott A. Kallander, senior consulting attorney with Bellevue, Wash.-based Applied Discovery, says the increased interest is translating into a marked uptick in inquiries to the data management and electronic discovery firm.

“Lawyers are taking a more active stance with respect to client data,” Kallander says. “They’re making sure they’re doing more than just sending out an e-mail or a letter saying, ‘Please preserve this information.’ ”

*Zubulake* has meant more work for Austin lawyer Charlene Brownlee, too. The Fulbright & Jaworski attorney estimates she visited clients at least six to seven times a month last fall to speak about records retention policies, compared to about four times a month before *Zubulake V*. She also says that since the opinion, the firm’s records practice group doubled in size in Austin alone.

Other lawyers at the firm are similarly busy. Robert Owen of the New York office has booked several speaking engagements to discuss the decision, including one at a seminar for New York state commercial judges. He adds that the firm has gained at least one new major client because of the decision.

And Steven Schortgen, a partner in the Dallas office of Baker Botts, says he's spoken about electronic document retention to clients on at least a dozen occasions in the first five months after the decision.

## HEIGHTENED CONCERN

The increased concern, says Schortgen, is partly due to worries about accountability—thanks, largely, to corporate scandals and the Sarbanes-Oxley Act of 2002. “You take these opinions that come out one after another,” he says. “It's like a perfect storm has hit clients' shores.”

While the opinions provide guidance for companies questioning how much electronic information to keep, the answers are still murky, Schortgen says.

So why don't companies routinely keep everything, even when litigation is unlikely? For one thing, it's expensive, Schortgen says. Companies have to buy and warehouse backup tapes. Then, if there is a lawsuit and tapes have to be produced, it is costly to glean information from them. It's not as easy as popping a backup tape into a hard drive and searching it. Instead, the backup must be used to recreate the entire system as it existed when the tape was made—possibly years before, when using different computers or operating systems.

Despite all the buzz about *Zubulake V*, some lawyers say the ruling merely articulates existing law. “There's a duty to act reasonably and avoid the intentional bad-faith destruction of data,” says Gregory Joseph, who co-chaired the ABA Litigation Section's Task Force on Electronic Discovery. “This is not something that you need a computer science degree to figure out.”

Common sense or not, it seems *Zubulake* is sending a signal that clients are calling their lawyers to hear.

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