

# Spoliation of Electronic Evidence: A Judicial Boiling Point?

By Emily Duke and Cynthia Moyer

The quantity and types of electronically stored information (ESI) that can be used in litigation are continuously expanding and have exploded since the turn of the millennium. Indeed, just a few years ago, only technogeeks had BlackBerry devices, Twitter did not exist, and Facebook was almost unheard of. Now, most professionals won't be caught without their smartphone. People "tweet" their every move. Litigators frequently search for information about their clients or adversaries on Facebook. And cloud computing is being touted as the next frontier.

As the pace of technological development has accelerated, the legal profession has struggled to keep up. How does new technology affect litigants' and attorneys' obligations in the discovery process?

Guidance from the courts has been coming since at least 2003, when the first of five landmark *Zubulake*<sup>1</sup> decisions brought technology and its impact on litigation into the common legal discourse. Then in 2006, the Federal Rules of Civil Procedure were amended to address discovery of electronic evidence and provide a modicum of clarity to parties' obligations regarding production of ESI. More recently, in 2009, in a joint effort of the bench and bar, the Seventh Circuit started phase one of an electronic discovery pilot program<sup>2</sup> intended to help litigants and the courts balance the costs of e-discovery with reasonableness and feasibility in each case. Thus, litigators have been aware of and wrestling with the concepts surrounding ESI. What about corporate America?

Today, most companies know about their preservation obligations, but they have trouble managing them. In a recent survey of IT and in-house counsel regarding corporate practices for managing ESI in litigation, Kroll Ontrack, Inc. found that 87 percent of companies in the United States have a document-retention policy.<sup>3</sup> So, companies are aware of the need to look to document-retention policies as a starting point for managing e-discovery. But, nearly half of U.S. companies have not updated their retention policies in the past year to include new devices (e.g., mobile devices) and new communication channels (e.g., instant and text messaging).

The survey also found that just over half of U.S. companies have a procedure to suspend their document-retention/destruction policies in the event of litigation, but 22 percent of IT and in-house counsel for U.S. companies do not know if they have such a procedure in place, and another 21 percent do not have one. According to the study, few companies have actually developed policies, procedures, and tools designed to readily identify and

preserve ESI for litigation or regulatory proceedings. Finally, less than one-third of the companies surveyed feel strongly that their ESI-disclosure policies are repeatable and defensible.

So, more than three years after the Federal Rules were amended, and more than six years after the initial *Zubulake* decision, practitioners and litigants still have questions about their ESI discovery obligations, and how to reconcile those obligations with efforts to resolve disputes quickly and inexpensively.

## The Judicial Boiling Point

Is it any wonder, then, that courts are reaching the boiling point? As is clear from three recent high-profile decisions regarding ESI (*Qualcomm*, *Pension Committee*, and *Rimkus*), courts are increasingly frustrated with the failure by parties and their counsel to take what the courts consider to be well-established, reasonable steps to preserve ESI when litigation is reasonably anticipated. Some of these steps include issuing a *written* litigation-hold letter; having clearly articulated preservation instructions; preserving backup tapes when they are the sole source of potentially relevant information; having outside counsel oversee the collection and preservation of ESI rather than delegating to company employees without instruction; and monitoring preservation efforts throughout the litigation.<sup>4</sup>

Before discussing these three new decisions, let's review where we have been and try to understand why the courts may be frustrated with the lack of progress.

## Where Have We Been?

Since the *Zubulake* decisions were handed down in 2003 and 2004, practitioners have been aware of the basic framework for analyzing clients' ESI obligations. When evidence has been destroyed, a party seeking any severe sanction (e.g., adverse-inference instruction) must establish three things:

- (1) that the opposing party had a duty to preserve the evidence
- (2) that the opposing party had a culpable state of mind
- (3) that the destroyed evidence was relevant

The second factor—culpability—encompasses intentional, grossly negligent, reckless, or negligent behavior. The third factor—relevance—does not simply mean relevance "as that term is ordinarily understood, but also that the destroyed evidence would have been favorable to [the party seeking the instruction]."<sup>5</sup>

## Cost-Shifting For Inaccessible ESI

*Zubulake I*<sup>6</sup> and *III*<sup>7</sup> reinforced the presumption that the cost of producing documents lies with the responding party—even when ESI is involved. Engaging in a cost-shifting analysis is appropriate *only* when *inaccessible* ESI is sought, and after going through the fact-specific seven-part cost-shifting analysis.

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### Parties' Preservation Obligations and Backup Tapes

In *Zubulake IV*, the court explained that the duty to preserve arises “when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”<sup>8</sup> Once a company recognizes the threat of litigation, it need not preserve “every shred of paper, every e-mail or electronic document, and every backup tape” because such a requirement “would cripple large corporations . . . that are almost always involved in litigation.”<sup>9</sup> But, it does need to put a hold on the destruction of relevant documents, including *some* backup tapes:

Once a party reasonably anticipates litigation, it must *suspend its routine document retention/destruction policy* and put in place a “litigation hold” to ensure preservation of *relevant documents*. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company’s policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes *would* likely be subject to the litigation hold.

However, . . . [there is] one exception to this general rule. *If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of “key players” to the existing or threatened litigation should be preserved if the information . . . is not otherwise available.* This exception applies to *all* backup tapes.<sup>10</sup>

### Duty to Monitor Compliance and Appropriate Sanctions

In *Zubulake V*, Judge Scheindlin discussed the culpability and relevance prongs of the spoliation analysis. When the level of culpability is intentional or willful, “that fact alone is sufficient to demonstrate relevance” and justifies a *presumption* of relevance.<sup>11</sup> However, when a party is only *negligent* in destroying evidence, the party seeking sanctions must *prove* relevance. The relevance prong serves a “corroboration” role because one cannot infer, from negligent conduct, that the evidence would have been harmful to the spoliator.<sup>12</sup>

Counsel (and the client) must ensure that “all sources of potentially relevant information are identified and placed ‘on hold,’” and “counsel must oversee [the client’s] compliance with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.”<sup>13</sup> While perfection at the outset of the case is not required, counsel and the client must take reasonable steps to identify and preserve sources of potentially relevant information, and they must do so periodically throughout the litigation process.

### Proportionality Standard

The Federal Rules were amended in 2006 to clarify that only “reasonably accessible” ESI need be produced in discovery.

Under the 2006 amendments to the Federal Rules, parties are *required* to exchange information about ESI in their Rule 26(f) conference. But, judges recognize that it may be necessary to test a party’s assertion that information is not reasonably accessible. An incremental or tiered approach to discovery, whereby easily

accessed sources of ESI are sorted first, and then the parties (with or without the court’s assistance) determine whether it is necessary to search less accessible sources for discovery, helps parties and courts determine whether “inaccessible” ESI satisfies the proportionality requirement of Rule 26(b)(2)(C).<sup>14</sup>

Rule 26 does not address the preservation obligations of parties. In fact, the advisory notes to the Rule leave the scope of preservation up to the judgment and risk tolerance of the decision-makers and parties holding ESI.<sup>15</sup> Generally speaking, however, there is no *per se* rule, and preservation obligations also have a proportionality component that is dependant on the case.<sup>16</sup>

### Judges Are Frustrated

In the face of continued failures by litigants to preserve, locate, and/or produce relevant ESI, three courts (*Qualcomm*,<sup>17</sup> *Pension Committee*,<sup>18</sup> and *Rimkus*<sup>19</sup>) have recently discussed, in painful detail, how lawyers—both in-house and outside attorneys—failed to ensure that their clients met discovery and preservation obligations. When these obligations are not met, “the integrity of the judicial process is harmed and the courts are required to fashion a remedy.”<sup>20</sup>

### Qualcomm and Qualcomm II

In January 2008, the *Qualcomm* court assessed sanctions for a series of discovery abuses, which culminated in misrepresentations to the court during a patent-infringement trial. The court clearly felt that Qualcomm’s and its attorneys’ conduct in the litigation undermined the legitimacy of the litigation process, particularly the discovery process:

The [Federal Rules Advisory] Committee’s concerns are heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client’s custody and control. For the current “good faith” discovery system to function in the electronic age, *attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.* Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or the attorney’s discovery obligations.<sup>21</sup>

In addition to suppressing critical documents, *Qualcomm* failed to search the computers or emails of designated 30(b)(6) corporate representatives for documents potentially relevant to the designated topics. Counsel who prepared the witnesses did not provide them with documents relevant to their topics in preparation for their depositions and made no effort to ensure that each person was, in fact, knowledgeable about the designated topics. The court found that Qualcomm’s conduct warranted sanctions and awarded Broadcom all its litigation costs, fees, and expenses—\$8 million.

The court also noted that Qualcomm “could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys.” Specifically, the court

noted that the Federal Rules “impose an affirmative duty upon lawyers to . . . conduct a ‘reasonable inquiry’ to determine whether discovery responses are sufficient and proper.” Because the client had conducted its own due diligence as to the location of and search for relevant electronic records, the attorneys should have “insisted on reviewing Qualcomm’s records regarding the locations searched and terms utilized.” Delegating the document search to the client, without direct oversight by outside counsel, did not satisfy the attorneys’ discovery obligations.<sup>22</sup>

The court referred certain of the attorneys to the California State Bar for “intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm’s document search was inadequate, and blindly accepting Qualcomm’s unsupported assurances that its document search was adequate”<sup>23</sup> It later sanctioned them.

The sanctioned attorneys objected. In a decision released in April 2010, after over a year of discovery relating to communications between the client and outside counsel, in *Qualcomm II*,<sup>24</sup> the court found that four factors led to the massive discovery failure: (1) an “incredible breakdown in communication”; (2) a lack of agreement regarding who would be responsible for document collection and production; (3) an “incredible lack of candor on the part of the principal Qualcomm employees”; and (4) inadequate follow-up by the outside attorneys in response to contradictory, or potentially contradictory, evidence.

*Qualcomm II* strongly criticized the outside attorneys for the manner in which they managed the discovery process:

The Court was not presented with any evidence . . . that either in-house lawyers or outside counsel met in person with the appropriate [key employees] . . . at the beginning of the case to explain the legal issues and discuss appropriate document collection. Moreover, outside counsel did not obtain sufficient information from any source to understand how Qualcomm’s computer system is organized: where emails are stored, how often and to what location laptops and personal computers are backed up, whether, when and under what circumstances data from laptops are copied into repositories, what type of information is contained within the various databases and repositories, what records are maintained regarding the search for, and collection of, documents for litigation, etc. Finally, no attorney took supervisory responsibility for verifying that the necessary discovery had been conducted . . . and that the resulting discovery supported the important legal arguments, claims, and defenses being presented to the court.<sup>25</sup>

Nevertheless, based on the new evidence, the court found that the attorneys did not act in bad faith and reversed the attorney sanctions.

### *Pension Committee*

*Pension Committee*, a securities case involving the liquidation of a hedge fund, also stresses the theme that outside attorneys must oversee and monitor a client’s preservation, collection of, and search for documents relevant to litigation as soon as litigation is reasonably anticipated.

The facts in *Pension Committee* pointed to a pervasive lackadaisical attitude toward preservation and search efforts

regarding relevant records. In the opinion, which she subtitled “*Zubulake Revisited: Six Years Later*,” Judge Scheindlin clearly expressed her frustration with this attitude, particularly in light of the extant jurisprudence on the topic of ESI and preservation. In *Pension Committee*, the plaintiffs’ attorneys issued a litigation hold that did not direct employees to preserve or collect relevant records. Instead, it “place[d] total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel.”<sup>26</sup> Moreover, despite sending the client monthly status reports and requests for additional documents, counsel “never specifically instructed [the client] not to destroy records so that Counsel could monitor the collection and production of documents.”<sup>27</sup> Indeed, managers delegated the document preservation and collection efforts to inexperienced subordinates with little or no instruction on how to adequately take on these efforts. No comprehensive search for documents was conducted. And, there were no knowledgeable witnesses who could testify about “which files were searched, how the search was conducted, who was asked to search, what they were told, and the extent of any supervision.”<sup>28</sup> The court found this conduct grossly negligent, presumed the relevance of the destroyed records, and issued adverse-inference instructions.

### *Rimkus*

On the heels of the *Pension Committee* decision, U.S. District Judge Rosenthal of the Southern District of Texas issued her decision in the *Rimkus* case, which centered around breach of a non-competition agreement and misappropriation of trade-secrets claims. *Rimkus* involved allegations of intentional destruction of evidence, unlike *Pension Committee*, which involved allegations of negligent or grossly negligent destruction of evidence. Nevertheless, in *Rimkus*, Judge Rosenthal was notably more circumspect in her willingness to impose severe sanctions. She noted that the culpability and relevance prongs of the spoliation analysis are important checks and balances on spoliation and sanctions motions seeking severe sanctions because, in many cases, “there are sources from which at least some of the allegedly spoliated evidence can be obtained,” and “the party seeking discovery can also obtain extrinsic evidence of the content of at least some of the deleted information from other documents, deposition testimony, or circumstantial evidence.”<sup>29</sup> When other sources exist, the remedy for the spoliation is more appropriately monetary, because sanctions “should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.”<sup>30</sup>

Pointing to a split amongst the circuits, the court noted that in the Fifth and Eleventh Circuits, severe sanctions can only be imposed where there is evidence of bad faith. Other circuits that appear to require bad faith to support an adverse-inference instruction include the Eighth, Tenth, and D.C. Circuits.

In *Rimkus*, the court ultimately concluded that some defendants intentionally deleted emails after a duty to preserve had clearly arisen. The court ordered that the jury would be allowed to hear about the destruction of evidence and the concealment/delay tactics, and that the jury would “be instructed that if it decides the defendants intentionally deleted emails to prevent their use in litigation, [it] . . . may infer that the . . . emails would have been adverse to defendants.”<sup>31</sup> Furthermore,

the defendants had to reimburse the plaintiff for the excess discovery costs caused by their deletion, concealment, and delay.

## Conclusion

These recent cases point to a growing judicial frustration that outside counsel and in-house counsel continue to misapprehend their obligations regarding e-discovery. Outside and in-house counsel must affirmatively and proactively manage the document-preservation process. During that process, counsel must educate themselves as to their clients' computer and electronic-device architecture, as well as who the key players in litigation are and where they store their ESI. Counsel need to instruct their clients to preserve all reasonably accessible sources of relevant records and inaccessible backup tapes containing relevant records if no readily accessible source is available (the litigation hold). Counsel should monitor clients' preservation and collection efforts and provide specific instructions on what needs to be preserved. A best practice is to have counsel either conduct searches for relevant and responsive records themselves, or minimally confirm what the client has given them by conducting their own random searches or audits of the client-identified records. Another best practice is to document the efforts taken to identify, locate, preserve, and search records containing relevant ESI, and to prepare a client representative who is knowledgeable about those efforts and company systems in the event that discovery on the issue becomes necessary. Recognizing that some courts may have reached a boiling point and taking these kinds of steps will help your clients avoid the outcome faced by the parties in *Qualcomm*, *Pension Committee*, and *Rimkus*.

## Endnotes

1. *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*); *Id.*, 230 F.R.D. 290 (S.D.N.Y. 2003) (*Zubulake II*); *Id.*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Id.*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); *Id.*, 220 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).
2. [www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf](http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf).
3. See Kroll Ontrack Third Annual ESI Trends Report 2009; available at [www.krollontrack.com/library/esitrends3\\_krollontrack2009.pdf](http://www.krollontrack.com/library/esitrends3_krollontrack2009.pdf).
4. See Judge Shira A. Scheindlin, *FAQ's of E-Discovery*, FEDERAL JUDGES ASSOC. NEWSLETTER, November 29, 2006, available at [www.fjc.gov/public/home.nsf/autoframe?openform&url\\_l=/public/home.nsf/](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/)

- inavgeneral?openpage&url\_r=/public/home.nsf/pages/196.
5. *Zubulake IV*, 220 F.R.D. at 221.
6. *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. May 13, 2003).
7. *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003).
8. *Zubulake IV*, 220 F.R.D. at 216.
9. *Id.* at 217.
10. *Id.* at 218 (emphasis added).
11. *Zubulake V*, 229 F.R.D. 422, 431 (S.D.N.Y. July 20, 2004).
12. *Pension Committee's* only significant departure from the *Zubulake I–V* opinions is that now, at least in the Southern District of New York, gross negligence in the preservation of evidence, including ESI, will support a presumption that the destroyed documents were relevant and detrimental to the destroying party's case, such that an adverse-inference instruction may be given to the jury. Previously, only a willful destruction supported such a presumption.
13. *Zubulake V*, 229 F.R.D. at 432.
14. Barbara J. Rothstein, Ronald J. Hedges, and Elizabeth C. Wiggins, *Managing Discovery of Electronic Information: A Pocket Guide for Judges*, Federal Judicial Center (2007), available at [www.fjc.gov/public/home.nsf/autoframe?openform&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/196](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/196).
15. See Rule 26(b)(2)(B), Advisory Committee note.
16. See *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp.2d 598 (S.D.Tex., February 19, 2010) (Judge Lee H. Rosenthal).
17. *Qualcomm, Inc. v. Broad Com Corp.*, 2008 WL 66932 (S.D. Cal. January 7, 2008) (hereinafter "*Qualcomm*").
18. *The Pension Committee of the University of Montreal Pension Plan vs. Band of America Securities LLC*, 2010 U.S. Dist. LEXIS 1839 (S.D.N.Y. Jan. 11, 2010), as amended by 2010 WL 184312 (S.D.N.Y. January 15, 2010) (docket no. 320) and subsequently amended May 28, 2010 (sanctioning plaintiff with an adverse-inference instruction for failing to preserve relevant ESI; applying a gross-negligence and negligence standard to various conduct; presuming culpability and relevance for grossly negligent destruction of documents).
19. *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp.2d 598 (S.D.Tex., February 19, 2010).
20. *Pension Committee* 2010 WL 184312 at \*2.
21. *Qualcomm* at 17–18 (emphasis added).
22. *Id.* at 17, 27.
23. *Id.* at 37.
24. *Qualcomm, Inc. v. Broadcom Corp.*, 2010 WL 1336937 (S.D.Cal. April 2, 2010)(*Qualcomm II*).
25. *Qualcomm II* at 4.
26. *Pension Committee* at 28.
27. *Id.* at 29.
28. *Id.* at 36.
29. *Rimkus* at 616.
30. *Id.* at 618.
31. *Id.* at 653.