

## Lessons Learned from the World-Renowned Zubulake Case

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As electronic data has become mainstream discovery for U.S. courts, American judges are increasingly unwilling to tolerate destruction of relevant electronic information. In fact, in a recent study of U.S. cases involving e-spoilation\* sanctions, the most frequently sanctioned behaviour involved the non-production of documents, i.e. destruction of electronic documents (84%), rather than a delay in production (16%). See Shira A. Scheindlin and Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. Tech. L. Rev. 71 (2004).

In the world-renowned *Zubulake v. UBS Warburg* case, a lawsuit involving employment discrimination allegations, Judge Shira A. Scheindlin issued a series of e-discovery decisions, ultimately concluding UBS wilfully deleted relevant emails despite contrary court orders. The court granted an adverse inference instruction, directing the jurors to assume emails – discarded by UBS after *Zubulake* filed a complaint with the United States federal agency tasked with overseeing equal employment opportunities – would have negatively impacted UBS' case. In April 2005, after three-years of litigation, the trial culminated with the jury finding the company discriminated against *Zubulake* and awarding more than \$29 million in damages.

The court noted defence counsel was partly to blame for the document destruction because it had failed in its duty to locate relevant electronic information, to preserve that information, and to timely produce that information. In addressing the role of counsel in litigation generally, the *Zubulake* court stated "[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched." See *Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004). This includes assuming responsibility for uncovering relevant documents (with the assistance of an e-evidence expert if necessary) and evaluating discovery requests for electronic information. Additionally, the court declared U.S. litigators must ensure that relevant documents are preserved by establishing a "litigation hold" process and effectively communicating the need to preserve relevant electronic documents.

The multitude of challenges presented by electronic evidence can overwhelm practitioners and the clients they represent. Those familiar with the relevant legal and technical issues understand that electronic disclosure requires careful planning at each step. Organisations cannot begin planning too early in the process. In fact, a corporation's most beneficial preparation comes long before litigation commences or is even anticipated. By developing and following a solid document retention program for use in the normal course of business and a litigation response plan to preserve e-documents should a dispute ensue, litigants can take steps to reduce the risks associated with electronic data.

The lesson we have learned in the U.S. is simple. In today's complex digital age, counsel, organizations and individuals must take affirmative steps to prevent e-evidence spoliation – whether it is negligent or intentional. As the *Zubulake* decisions illustrate, U.S. courts will not hesitate to impose sanctions for spoliation of electronic documents – even if the spoliation occurs as a result of document mismanagement. Lawyers are expected to know their responsibilities for preserving their client's data and to be diligent in monitoring ongoing preservation obligations. If an organisation can show it proactively developed a reasonable document retention and preservation plan long before litigation ever commenced and then followed that plan when litigation ensued, chances of spoliation sanctions will be significantly reduced.

To access the opinions given in the *Zubulake v. UBS Warburg* case by Judge Shira Scheindlin, visit the Legal Resources section of the Kroll Ontrack website at:[www.krollontrack.co.uk/legalresources/zubulake.asp](http://www.krollontrack.co.uk/legalresources/zubulake.asp)

*\* Spoliation is the destruction, damaging, altering or destroying of evidence.*

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