

### ITEM 9.03 | DUTIES OF ATTORNEY AND CLIENT REGARDING PRESERVATION OF ESI

Electronically stored information is by its very nature ephemeral and easily transportable, so it can be instantaneously lost, altered, destroyed, or hidden. Understanding the duties regarding preservation of evidence is vital to those who possess or control evidence and those who seek to use it in litigation.<sup>47</sup> The Florida state court common law of preservation is unique<sup>48</sup> and somewhat unsettled, increasing the challenge for lawyers advising their clients on preservation duty. In general, a duty to preserve in Florida can arise from many sources, including court orders, subpoenas, government regulations, statutes, contracts, discovery requests, and common law. Some Florida courts have held that a duty to preserve evidence is triggered by contract, by statute, or by a properly served discovery request once a lawsuit has already been filed.<sup>49</sup> In fact, a number of Florida cases have expressly held that, absent a contractual or statutory duty, there is no duty to preserve evidence before litigation commences.<sup>50</sup> However, a few Florida cases somewhat inconsistently appear to recognize a pre-suit obligation to preserve evidence where the party controlling evidence can reasonably foresee a claim and the relevance of the evidence.<sup>51</sup> For counsel advising clients on preservation duty, notwithstanding these conflicts, or perhaps because of them, it makes sense to advise the client to preserve rather than dispose of relevant evidence, even if suit has not been filed. First, some cases may be filed in either state or federal court, and reliance on a perceived lack of pre-suit duty to preserve under Florida law will not succeed in federal court where the duty to preserve is triggered when litigation is reasonably anticipated. Second, there may be a statutory or contractual obligation to preserve that is not apparent at the time advice is rendered. Third, a finding of spoliation against client or counsel is indeed a serious outcome and may have ramifications beyond the case at issue.

A common e-discovery issue for parties and counsel is the “scope” of evidence that must be preserved. Virtually all cases involve decision-making on the time frame for preservation, the substantive content which determines whether documents are relevant, and the breadth of places in which relevant evidence may be found. In large cases, parties may delineate preservation by persons who are likely to have relevant information, often called “custodians” as they have personal custody of the ESI by virtue of it being their email account, text message account, etc.



The very breadth of reasonably required preservation may raise issues of burden and cost. However, in applying proportionality to limit discovery duties, counsel must be careful to distinguish between scope of preservation versus scope of production. Preservation occurs at a point in time in which potential issues may not be crystallized and the relevance of certain documents may be fuzzy or indeterminable. Counsel and parties should usually err on the side of preservation, at least until the relevance picture sufficiently clarifies to safely distinguish that which must be preserved and produced. While some federal cases have expressed the principle that scope of preservation efforts may be guided by reasonableness and proportionality,<sup>52</sup> other federal courts disagree.<sup>53</sup> In any event, counsel should advise a client to put a litigation hold in place and undertake reasonable efforts to identify and preserve evidence that is relevant by discovery standards.<sup>54</sup>

As for counsel's duties with regard to preservation of evidence, the seminal federal case was written by Manhattan District Court Judge, Shira Scheindlin. It is actually a series of opinions written in the same case, collectively known as *Zubulake*, after the plaintiff, Laura Zubulake. There are four key opinions in this series.<sup>55</sup> These decisions are widely known by both federal and state judges and practitioners around the country.

Judge Scheindlin's last opinion, *Zubulake V*, has had the greatest impact upon federal courts and is also starting to have an impact on state courts, including Florida. In *Zubulake V*, Judge Scheindlin held that outside legal counsel has a duty to make certain that their client's ESI is identified and placed on hold. This new duty on attorneys was created because of the unusual nature and characteristics of ESI and information technology systems in which ESI is stored. Unlike paper documents, ESI can be easily modified or deleted, both intentionally and unintentionally. In many IT systems, especially those employed by medium to large size enterprises, ESI is automatically and routinely deleted and purged from the IT systems. Special actions must be taken by the client with such IT systems to suspend these normal ESI deletion procedures after litigation is reasonably anticipated.

Here are the words of Judge Scheindlin in *Zubulake V* that have frequently been relied upon to sanction attorneys who either unwittingly, or sometimes on purpose, failed to take any affirmative steps to advise and supervise their clients to stop the automatic destruction of ESI:



Counsel must become fully familiar with their client's documents retention policies as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system wide back up procedures in the actual (as opposed to theoretical) implementation of the firm's recycling policy it will also involve communicating with the key players in the litigation, in order to understand how they store information.<sup>56</sup>

Of course, a party to litigation has a duty to preserve evidence in all forms, paper or ESI, and the bad faith failure to do so may constitute actionable spoliation. This is nothing new.<sup>57</sup> But the extension of this duty to the litigants' outside legal counsel in *Zubulake V*, which is sometimes called the "Zubulake Duty," is fairly new and controversial.<sup>58</sup> Although the "Zubulake Duty" has been accepted by many federal judges in Florida and elsewhere, it is unknown whether Florida state court judges will also impose such a duty upon attorneys. However, in view of the popularity in the federal system of placing this burden on the counsel of record, a prudent state court practitioner should also assume that they have such a duty.<sup>59</sup> Outside legal counsel should be proactive in communicating with their client and otherwise taking steps to see to it that the client institutes a litigation hold. Obviously, Judge Scheindlin does not intend to convert attorneys into guarantors of their client's conduct. She also notes in *Zubulake V* that if attorneys are diligent, and they properly investigate and communicate, they should not be held responsible for their client's failures:

A lawyer cannot be obliged to monitor her client like a parent watching a child. At some point, the client must bear responsibility for a failure to preserve.<sup>60</sup>

However, counsel is obligated to have sufficient knowledge of client's IT systems to allow counsel to competently supervise the client's evidence preservation efforts, or lacking such knowledge and competence, should retain experts who do.

The duty to preserve of client and counsel requires a corporate client in most circumstances to provide a written litigation hold notice to its employees who may be involved in the lawsuit, or who may otherwise have custody or control of computers and other ESI storage devices with information relevant to the lawsuit. The notice should instruct them not to alter or destroy such ESI. The potential witnesses to the case should be instructed to construe

their duty to preserve ESI broadly and reminded that the ESI may be located in many different computers and ESI storage systems, including for instance, desktop computers, laptops, server storage, CDs, DVDs, flash drives, home computers, iPods, iPads, iPhones, blackberries, Internet storage webs (cloud computing), social media accounts, Internet e-mail accounts, voice mail, etc. The client's IT department or outside company should also be notified and instructed to modify certain auto-deletion features of the IT system that could otherwise delete potentially relevant evidence. In some cases, it may also be necessary to preserve backup tapes, but this is generally not required, especially if the relevant information on the tapes is likely just duplicative.<sup>61</sup>

There should be reasonable follow-up to the written notice, including conferences with the key players and IT personnel.

Judge Scheindlin wrote another opinion on the subject of litigation holds and ESI spoliation, which she refers to as her sequel to Zubulake.<sup>62</sup> Pension Committee provides further guidance to federal and state courts on preservation issues, and the related issues of sanctions. Judge Scheindlin holds that the following failures to preserve evidence constitute gross negligence and thus should often result in sanctions of some kind:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant Zubulake opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold, to identify the key players and to ensure that their electronic and paper records are preserved, to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control, and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Judge Scheindlin goes on to hold that "parties need to anticipate and undertake document preservation with the most serious and thorough care, if for no other reason than to avoid the detour of sanctions."<sup>63</sup> Counsel should document their efforts to prove reasonableness in the event mistakes are made and relevant ESI deleted, despite best efforts. In any large ESI preservation,



collection and production, some errors are inevitable, and Judge Scheindlin notes this on several occasions in Pension Committee, including the opening paragraph where she observes:

In an era where vast amounts of electronic information is available for review, discovery in certain cases has become increasingly complex and expensive. Courts cannot and do not expect that any party can meet a standard of perfection.

This is an important point to remember. The volume and complexity of ESI makes perfection impossible and mistakes commonplace. All that Judge Scheindlin and other jurors and scholars in this field expect from the parties to litigation and their attorneys are good faith, diligent, and reasonable efforts. In Pension Committee, Judge Scheindlin found that the parties did not make reasonable diligent efforts, and so entered sanctions against them with the words:

While litigants are not required to execute document productions with absolute precision, at a minimum they must act diligently and search thoroughly at the time they reasonably anticipate litigation. All of the plaintiffs in this motion failed to do so and have been sanctioned accordingly.

The opinion of Judge Scheindlin in Zubulake V and the Pension Committee cases provide a road map to practitioners on what needs to be done in order to preserve ESI from destruction, either intentional or accidental, and so avoid sanctions for spoliation. These and hundreds of other cases like it in the federal system are quite likely to be referred to and cited in state court proceedings. Although none of these federal cases are binding upon state court system, many judges find them persuasive, and the federal cases will often at least provide a starting point for further argument.

*Trial Lawyers Section of the Florida Bar  
Conference of Circuit Court Judges  
Conference of County Court Judges*



## Footnotes

<sup>47</sup> Loss of evidence can be devastating to the party whose case would benefit from lost evidence; but a person or party holding relevant evidence make likewise suffer through sanctions if the evidence is lost or destroyed.

<sup>48</sup> Florida law on triggering of the duty to preserve is unlike federal court law and virtually every other state court jurisdiction. In federal court, and in many other jurisdictions, a party in control of relevant evidence is obligated to preserve it if there is reasonable anticipation of litigation.

<sup>49</sup> See, e.g., *Royal & Sunalliance v. Lauderdale Marine Center*, 877 So. 2d 843, 845 (4th DCA 2004).

<sup>50</sup> Id. (holding that "we find Royal's argument that there was a common law duty to preserve the evidence in anticipation of litigation to be without merit"); *Gayer v. Fine Line Constr. & Electric, Inc.*, supra n. 45 at 426 (Fla. 4th DCA 2007)(holding that "[b]ecause a duty to preserve evidence does not exist at common law, the duty must originate either in a contract, a statute, or a discovery request"); *In re: Electric Machinery Enterprises, Inc.*, 416 B.R. 801, 873 (M.D. Fla. 2009)("The majority of Florida courts have held that there is no common law duty to preserve evidence before litigation has commenced").

<sup>51</sup> See *Osmulski*, supra n. 29 at 393, citing *American Hospitality Management Co. of Minnesota v. Hettiger*, 904 So. 2d 547, 549 (Fla. 4th DCA 2005)(where a defendant has evidence within its control, it can "be charged with a duty to preserve evidence where it could reasonably have foreseen the [plaintiff's] claim."). This is also the federal rule on when a duty to preserve is triggered.

<sup>52</sup> See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. Sep. 9, 2010); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)("Whether preservation or discovery conduct is acceptable in a case depends on what is reasonable, and that in turn depends on whether what was done--or not done--was proportional to that case and consistent with clearly established applicable standards").

<sup>53</sup> *Orbit One Communications, Inc. v. Ronsen*, 271 F.R.D. 429; 2010 U.S. Dist. LEXIS 123633 (S.D. N.Y. 2010)("Although some cases have suggested that the definition of what must be preserved should be guided by principles of "reasonableness and proportionality," [citations to Victor Stanley and Rimkus omitted], this standard may prove too amorphous to provide much comfort to a party deciding what files it may delete or backup tapes it may recycle.").

<sup>54</sup> Information on preservation advice and litigation holds in Florida state court litigation is found in Ch. 5, *Initial Procedures in EDiscovery and Preservation of Evidence in Florida State Court*, Artigliere & Hamilton, LexisNexis Practice Guide Florida EDiscovery and Evidence, LexisNexis/Matthew Bender (2012) available from LexisNexis and from The Florida Bar.

<sup>55</sup> *Zubulake v UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*); *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y. 2003) (*Zubulake IV*); and *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*).

<sup>56</sup> *Zubulake V*, supra n. 54 at 432.

<sup>57</sup> See *Martino v. Wal-Mart Stores, Inc.*, 908 So. 2d 342 (Fla. 2005); *Golden Yachts, Inc. v. Hall*, 920 So. 2d 777, 781 (Fla. 4th DCA 2006).

<sup>58</sup> See *Metro. Opera Ass'n Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 218-219 (S.D.N.Y. 2003); but see Thomas Allman, *Deterring E-Discovery Misconduct By*



*Counsel Sanctions: The Unintended Consequences of Qualcomm v. Broadcom*, 118 Yale L.J. Pocket Part 161 (2009).

<sup>59</sup> Like their federal counterparts, Florida judges have statutory, rule-based, and inherent authority to sanction parties and their counsel for discovery violations and for spoliation. Judges are taught to seek out the source of the problem and administer a measured sanction that remedies the wrong committed. If the party is not the culprit, it makes little sense to administer the sanction against an innocent participant. See *Ham v. Dunmire*, 891 So. 2d 492, (Fla. 2004)(dismissal based solely on an attorney's neglect in a manner that unduly punishes a litigant espouses a policy that the Supreme Court of Florida does not wish to promote). Florida courts are not averse to applying appropriate sanctions to counsel. *Id.* at 498 (a trial court "unquestionably has power to discipline counsel" for discovery violations).

<sup>60</sup> *Zubulake V*, supra n. 54 at 433.

<sup>61</sup> *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (*Zubulake IV*); also see Rule 37(e) Federal Rules of Civil Procedure.

<sup>62</sup> *The Pension Committee of the University of Montreal Pension Plan, et al. v. Banc of America Securities, et al.*, 2010 WL 184312, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010).

<sup>63</sup> *Id.*

