

10-24-2005

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Recommended Citation

Mafé Rajul, *"I Didn't Know My Client Wasn't Complying!" The Heightened Obligation Lawyers Have to Ensure Clients Follow Court Orders in Litigation Matters*, 2 SHIDLER J. L. COM. & TECH. 9 (2005).

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Litigation

Cite as: Mafé Rajul, "I Didn't Know My Client Wasn't Complying!" *The Heightened Obligation Lawyers Have to Ensure Clients Follow Court Orders in Litigation Matters*, 2 *Shidler J. L. Com. & Tech.* 9 (Oct. 24, 2005), at <<http://www.lctjournal.washington.edu/Vol2/a009Rajul.html>>

"I DIDN'T KNOW MY CLIENT WASN'T COMPLYING!" THE HEIGHTENED OBLIGATION LAWYERS HAVE TO ENSURE CLIENTS FOLLOW COURT ORDERS IN LITIGATION MATTERS

By Mafé Rajul¹

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Abstract

Ensuring a client's compliance with court orders and federal law is becoming a bigger responsibility for attorneys. This is because courts and Congress are starting to hold attorneys to higher standards with respect to their clients' compliance with litigation duties and with federal law. This Article will address the duties Congress imposed on lawyers through the Sarbanes-Oxley Act with respect to up-the-ladder reporting and will parallel such standards with those set by the Southern District of New York court in *Zubulake* with respect to preserving electronic discovery in anticipation of litigation. Although the duties imposed by the Sarbanes-Oxley Act and those imposed by the *Zubulake* court differ from one another, both show the direction in which lawmakers are moving with respect to lawyers' ethics and obligations: lawyers are being held responsible for their clients' wrongdoing!

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INTRODUCTION

<1> A lawyer can now be held responsible when a client decides not to comply with a court order or with a federal statute. Through the Sarbanes-Oxley Act, Congress sought to impose new duties of accountability on counsel: up-the-ladder reporting when attorneys become aware of wrongdoing by the organization's officers, directors, employees, or agents.² Similarly, when UBS, the defendant in *Zubulake v. UBS Warburg LLC*, failed to preserve e-mails that were relevant to the case, the court not only sanctioned UBS, but also reproached defendant's counsel.³ In doing so, the court established a new standard for lawyers: a lawyer needs to take affirmative reasonable steps, such as speaking with every key player involved in the litigation, to ensure the entire organization is complying with the preservation of electronic discovery.⁴ The *Zubulake V* decision raises an interesting question: how much of that same duty does the Sarbanes-Oxley Act impose on counsel when it comes to document preservation? The answer is simple: although the Sarbanes-Oxley Act does not impose affirmative duties on lawyers when it comes to document retention for litigation purposes, the *Zubulake V* decision and the Sarbanes-Oxley Act read together indicate a shift where lawmakers are increasingly holding lawyers responsible for their clients' actions.

SARBANES-OXLEY ACT

<2> Through the Sarbanes-Oxley Act of 2002, Congress federalized several aspects of attorney conduct and duties, as well as penalized the intentional spoliation of evidence. Before exploring the duties imposed by Sarbanes-Oxley, it is important to be clear on what the courts consider spoliation of evidence to be. Spoliation of evidence is the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.⁵ The obligation to preserve evidence 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.⁶ Even if the destruction is not intentional, a party cannot escape civil liability for spoliation. That is because regardless of intent, disposal of evidence is spoliation when a party knows or should know that the evidence should be preserved for pending or future litigation.⁷ What this means is that spoliation of evidence *can* result from the destruction of electronic documents in compliance with internal document retention policies.

<3> The Sarbanes-Oxley Act penalizes a party for spoliation of evidence. However, it is important to keep in mind that the Sarbanes-Oxley provision that provides for *criminal* penalties

focuses on the *intent* to alter or destroy the evidence.

Whoever knowingly alters, destroys, mutilates, conceals,...[a] document, or tangible object with the intent to impede, obstruct or influence the investigation... shall be fined under this title, imprisoned not more than 20 years, or both.⁸

Even if criminal penalties are only imposed when the party intentionally destroys evidence, parties should still be concerned from a *civil* perspective and that is because a finding of spoliation of evidence does not require intent.⁹ In short, organizations and counsel should be careful when destroying evidence through document retention policies in order to avoid civil penalties, even if the destruction is not intentional.

<4> The availability of civil penalties for spoliation of evidence raises the question of whether the organization and counsel should ensure that every single document is saved. The answer to this question depends on each individual case and is not the focus of this Article since Sarbanes-Oxley does not impose any affirmative duties on lawyers with respect to document retention for litigation purposes. However, even if Sarbanes-Oxley does not impose affirmative duties on lawyers with respect to their clients' document retention, it does impose other duties on counsel that is sending a clear message: counsel has the obligation to report and prevent the client's wrongdoing. Specifically, Sarbanes-Oxley imposes on counsel the duty of up-the-ladder reporting of "evidence of a material violation of securities laws, a breach of fiduciary duty, or similar violations by the company or any agent of the company" to the chief legal officer or chief executive officer of the company.¹⁰ The up-the-ladder reporting duty continues in the event that the reportee does not respond appropriately. In that situation, the attorney has the duty to report the evidence to the audit committee, or a committee of the board consisting of non-management directors, or to the board of directors.¹¹

<5> Presumably one of the things Congress is attempting to accomplish with the up-the-ladder reporting requirements of the Act is to create a new obligation on attorneys: keeping an eye on the organization's employees and holding the entire organization accountable. Whether Congress will succeed in holding attorneys to an even higher standard by requiring counsel to report outside of the organization is still to be decided.

<6> The central question in *Zubulake V* is whether defendant UBS and its counsel took all necessary steps to guarantee the preservation of electronic discovery after the court had ordered defendant to preserve all relevant data pertaining to an ongoing employment discrimination lawsuit.¹² The court determined that the defendant failed to comply with the court order, specifically the preservation of e-mails. More importantly, the court articulated special duties that counsel has in order to ensure compliance.¹³

Counsel's Duty to Monitor Compliance

<7> It is established as a general rule in litigation that once a party reasonably anticipates litigation, it must suspend the destruction of documents.¹⁴ This means that any document retention policy that is in place must stop and a "litigation hold" must be put in place.¹⁵ In the world of electronic discovery this duty only extends to accessible backup tapes.¹⁶ A "litigation hold" is the beginning of a party's discovery obligations and counsel must ensure compliance with the litigation hold.¹⁷ Before *Zubulake V* the courts generally reprimanded the parties for their failure to preserve discovery. *Zubulake V* reminds us of those duties, but more importantly articulates the duties counsel has with respect to the preservation of electronic discovery. The following are those new duties imposed by the court:

1. Duty goes beyond issuing a "litigation hold"

The beginning of discovery compliance is the implementation of a litigation hold. In order to make sure that the litigation hold is effective, counsel and the client need to make sure that all relevant information is identified and placed "on hold."¹⁸ The court makes it clear that in order to have an effective "litigation hold," counsel has an obligation to learn about the client's document retention policies and data retention architecture.¹⁹ This obligation means that counsel needs to speak with technology personnel, in order to understand the electronic backup procedures, and each employee that might have any connection to the litigation.²⁰ The court's rationale is that unless this is done, it is impossible to determine whether "all potential sources of information have been inspected."²¹ The court understands that this could be burdensome for an attorney representing a very large corporation

with thousands of employees, so it allows for counsel to be creative and take *reasonable steps* to make sure all relevant information is located.²² This could be interpreted to mean that the smaller the corporation, the higher the expectation of the court that counsel has spoken with every possible employee involved in the litigation. However, counsel for large organizations does not escape admonishment if counsel does not demonstrate that reasonable and affirmative steps were taken beyond simply notifying all employees of a “litigation hold” and expecting the employees to comply with the hold.

2. Duty to communicate with “key players” in the litigation

Counsel is required to communicate directly with “key players.”²³ This means that counsel’s communication goes beyond the legal department or the regular contact person. Counsel must communicate on a regular basis with the people identified in the client’s disclosures.²⁴ Any person in the organization who might have any kind of involvement in the matter being litigated needs to be in regular contact with counsel, because no matter how minor that person’s involvement might be, it could be highly relevant and might not otherwise be discovered.

3. Duty to obtain and retain relevant active files.

Counsel has the duty to instruct all employees to produce relevant electronic copies and make sure that backup media is identified and stored in a safe place.²⁵ The court goes further and suggests that counsel should take possession of backup tapes if the number of tapes is small or, if there are a large number of tapes, to segregate them in storage.²⁶ In essence, the court is suggesting that counsel should take responsibility to ensure that backup tapes are not destroyed or lost. If counsel is in possession and safeguards the tapes, it is more likely that the tapes would be safely preserved.

<8> The court in *Zubulake V* sets a new standard on the reasonable steps attorneys need to take in order to ensure the

preservation of electronic discovery. The courts are not just penalizing the parties destroying relevant electronic discovery, but are also shifting part of the blame to the lawyers. Although *Zubulake V* can be seen as the case setting forth the affirmative duties with respect to document retention, other cases are also indicative that the courts are imposing affirmative duties on lawyers to prevent a client's wrongdoing when it comes to discovery. For instance, in *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern*, the district court for the Southern District of New York stated that counsel had an affirmative duty under Rule 26(g) to make a reasonable inquiry into the basis of their discovery responses and to "stop and think about the legitimacy of those responses."²⁷ The court in *Metropolitan* not only sanctioned the party for failing to provide the requested discovery, but also sanctioned counsel for failure to ensure compliance.²⁸

SARBANES-OXLEY ACT AND ZUBULAKE V

<9> If the Sarbanes-Oxley Act is read in conjunction with *Zubulake V* it can be inferred that lawyers increasingly have a greater duty to take affirmative steps to assure that clients are abiding by the law. In the Sarbanes-Oxley context, it's up the ladder reporting. Under *Zubulake*, it's an increased duty to monitor compliance. The two are different, but they share a common theme: lawyers have an obligation to take affirmative steps to ensure their clients' compliance with the laws. Failing to do so creates the risk for a potential obstruction charge and civil liability. However, it is also clear that the key word for obstruction of justice charges and civil liability claims is *intent* of wrongdoing.

CONCLUSION

<10> It is crucial for counsel to learn about the client's document retention policies in order to ensure that relevant information will not be destroyed and avoid ethical, civil, and criminal consequences for the destruction of evidence. From the Sarbanes-Oxley Act perspective, the moment counsel learns of a potential violation, it becomes counsel's duty to report. Similarly, from the *Zubulake V* perspective, the moment counsel learns of a potential claim, counsel's duty becomes to advise the client to suspend any document destruction and take reasonable affirmative steps to monitor compliance. In other words, a lawyer can no longer tell the court "I didn't know my client was doing that" and get away with it.

PRACTICE POINTERS

- When the client is an organization, one of the first steps an attorney should take is to contact the people in charge of document retention and destruction, as well as the people involved in backing up computer data, in order to learn the organization's procedures and system. This will enable the attorney to give prompt advice when litigation commences on what the litigation hold will entail.
- Although the Sarbanes-Oxley Act does not impose any duties on attorneys with respect to document retention, it is recommended that attorneys learn their clients' document retention policy and take necessary steps to prevent the destruction of any documents that may trigger spoliation of evidence charge.

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Footnotes

1. Mafé Rajul, University of Washington School of Law, Class of 2006. Thank you to Felix Luna and Matthew Carvalho of Heller Ehrman LLP, and Edmund Robb of Foster, Pepper & Shefelman for their feedback. Mafé can be reached at mafecita@u.washington.edu.
2. The Sarbanes-Oxley Act 17 C.F.R. §205.3(b)(1).
3. *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243(SAS), 2004 WL 1620866 (S.D.N.Y. July 20, 2004) [hereinafter *Zubulake V*].
4. *Id.* at *8.
5. *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 574 S.E.2d 923 (Ga.App. 2002).
6. *Fujitsu Ltd. v. Federal Exp. Corp.* 247 F.3d 423, 436 (2nd Cir. 2001).
7. *Auto-Owners Ins. Co. v. Heggie's Full House Pizza, Inc.* No. A03-316, 2003 WL 22293643, *4, (Oct. 7, 2003) (citing *Patton v. Newmar* 538 N.W.2d 116 (Minn.App.,2003)).
8. 18 U.S.C.A. § 1519 (2002).
9. *Washington State Physicians Ins. Exchange & Ass'n*

- v. Fisons Corp.*, 122 Wn.2d 299, 345 (1993).
10. SEC-SOAP § 4:3 (Sept. 2004).
 11. *Id.*
 12. *Zubulake*, 2004 WL 1620866, at *7.
 13. *Id.* at *14-15.
 14. *Rambus, Inc. v. Infineon Technologies, AG*, 222 F.R.D. 280 (E.D.Va. 2004).
 15. *Zubulake*. 2004 WL 1620866, at *7.
 16. *Id.*
 17. *Id.*
 18. *Id.* at 8.
 19. *Id.*
 20. *Id.*
 21. *Id.* [emphasis added].
 22. *Id.*
 23. *Id.*
 24. *Id.*
 25. *Id.* at *10
 26. *Id.*
 27. *Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Intern*, 212 F.R.D. 178, 221 (S.D.N.Y. 2003).
 28. *Id.* at 231.