

BACKUP TAPES IN CIVIL LITIGATION: PRESERVATION, DISCLOSURE AND PRODUCTION

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specter of backup data in the course of discovery. For those in regulated industries, mandatory protocols are increasingly dictating what to keep, the retention period, and the manner of preservation. For everyone else, the following analysis of the evolving case law is designed to help address the challenges presented by discovery requests aimed at the perceived mother lode of information: backup tapes.

THE NATURE OF BACKUP TAPES AND THEIR LIMITATIONS IN DISCOVERY

The most vexing subset of backup tapes are those commonly used in systems designed for disaster-recovery purposes. While such tapes provide a valuable tool to organizations in guarding against data loss from sudden, catastrophic systems failure, there are several features that make them a relatively poor medium for the preservation of potentially-relevant information. The federal courts have recognized some of these limitations:

Back-up tapes, for example, ‘are not archives from which documents may easily be retrieved. The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system. Therefore, the organization of the data mirrors the computer’s structure, not the human records management structure, if there is one.’²

This means that retrieval of “a specific file or data set [from a backup tape is] a time-consuming and inefficient process.”³

Moreover, there are few uniform methods by which backup-software programs compress files to save storage space and to reduce bandwidth. Tackling those various approaches to storing information further complicates the efforts to restore data from backup tapes.⁴ In addition, because backup tapes contain vast amounts of duplicative data (every full-backup cycle creates another copy of the same documents), they tend to be an over-inclusive source of information. At the same time, considering that backup tapes only capture information in existence at the precise moment the backup program is running, such tapes often miss potentially relevant material. Such limitations on the utility of backup

tapes, however, do not deter litigants from seeking them. The question that follows is whether parties have a duty to preserve their backup tapes.

THE DUTY TO PRESERVE BACKUP TAPES

Numerous courts have made clear that a party has an “obligation to preserve evidence [that] 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.”⁵ While the common-law preservation obligation applies to electronic information as well as to paper documents, the parameters of its application to backup tapes have not yet been fully defined.

The now famous decision in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 215, 218 (S.D.N.Y. 2003) (“*Zubulake IV*”) contains the most comprehensive analysis of the duty to preserve backup tapes. The *Zubulake IV* court addressed a situation where a litigant produced some, but not all, backup tapes containing data for certain key employees. The plaintiff sought sanctions for defendant’s failure to preserve the missing backup tapes.⁶ Specifically addressing the scope of the general duty to preserve information contained on backup tapes, the court explained:

Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every email or electronic document, and every backup tape? The answer is clearly, “no”. Such a rule would cripple large corporations ... that are almost always involved in litigation. As a general rule, then, *a party need not preserve all backup tapes even when it reasonably anticipates litigation.*⁷

Zubulake IV does not, however, establish a bright-line rule that exempts all backup tapes from the duty to preserve. Instead, the inquiry focuses on how the backup systems operate in order to determine whether a specific tape must be preserved in certain circumstances:

As a general rule, [a] 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, it does make sense to create 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 contained on those tapes is not otherwise available. This exception applies to *all* backup tapes.⁸

Significantly, the onus is on counsel (both in-house and outside) to develop a working knowledge of a company’s backup systems sufficient to (1) recognize the types of backup systems operating at the company; (2) identify how to retrieve and secure data from each backup program; and (3) implement reasonable procedures to preserve relevant material.

To do this, counsel must become **fully familiar** with her client's document 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 backup procedures and 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.

One can no longer avoid discovery sanctions by pleading ignorance or by relying on a company's general assurances that all electronic data sources have been identified and preserved.¹⁰

Therefore, the *Zubulake* opinions carry several important lessons for dealing with backup tapes. First, to the extent a company actively uses its backup tapes to retrieve information, it may have an obligation to retain those tapes in connection with litigation, along with all other readily accessible sources of information.¹¹ The *Zubulake* court did not indicate—and it appears to remain an open question—whether the occasional use of backup tapes to recover information accidentally deleted by employees renders them “accessible,” and therefore subject to a litigation hold.

Second, where backup tapes serve the traditional purpose of disaster recovery, they should be deemed “inaccessible”. But the obligation to retain such tapes may arise *if* a company can identify data pertaining to key players that is only available on disaster-recovery tapes. It is important to note, however, that the producing party in *Zubulake IV*, UBS Warburg LLC, was subject to the detailed recordkeeping obligations governing broker-dealers.¹² Consequently, the backup system in that case was designed to isolate quickly the field of potentially relevant tapes. It remains to be seen whether courts will apply the preservation obligations articulated in *Zubulake IV* differently when the backup systems are not designed to readily retrieve information for regulators.

DISCLOSURE AND THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

In response to mounting confusion surrounding the preservation and production of electronically-stored information, significant changes are coming to the Federal Rules.¹³ The amendments are designed to clarify and to standardize e-discovery practices.¹⁴ In particular, the amendments promote early disclosure of electronically-stored information, including “inaccessible” sources of data such as backup tapes. While the proposed rules are not yet in effect, some federal district courts have already looked to the reasoning underlying the proposed amendments for guidance in resolving current electronic-discovery disputes.¹⁵

Highlighting some of the major changes, the proposed amendment to Rule 26(b)(2) provides that a party need not produce electronically-stored information that is not reasonably accessible because of undue burden or cost, but requires a responding party to identify those sources of potentially-responsive information that it will not search.¹⁶ This amendment is intended to improve upon the present practice, under which, according to the Judicial Conference, “responding parties simply do not produce electronically stored information that is difficult to access.”¹⁷

Merely because a litigant is obligated to *disclose* existing sources of inaccessible data, however, does not mean that a litigant will be required to endure the expensive and time-consuming process of restoring and producing data from backup tapes. As one court recently noted (relying on *Zubulake* and the rationale of the proposed amendments), although a litigant is obligated to identify all potential sources of electronic data—including inaccessible sources—a litigant’s affirmative duty is “not to retrieve information from a difficult to access source” but rather to “ascertain whether any information is stored there.”¹⁸

Providing additional protection against the onerous prospect of routinely suspending disaster-recovery backup systems (which can lead to the intolerable situation of being unable to dispose of any documents), proposed Federal Rule of Civil Procedure 37(f) provides that, “[a]bsent exceptional circumstances, a court may not impose sanctions under [the Federal Rules of Civil Procedure] on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.” Therefore, litigants should find that unless and until a Court orders preservation of information stored on disaster-recovery backup tapes, those bothersome data sources fall outside the scope of discovery.

THE OBLIGATION AND COSTS OF PRODUCING DATA CONTAINED ON BACKUP TAPES: SAMPLING AND COST-SHIFTING

Should the need arise to extract information from backup tapes, there are steps that can help minimize the accompanying costs. While the federal courts follow the general rule that the responding party bears the expense of complying with discovery requests, they also acknowledge the need for meaningful exceptions when it concerns the restoration and searching of data randomly scattered across innumerable backup tapes. A recent trend gaining wide acceptance favors sampling techniques to assess the relevance of the data contained on the backup tapes and the total costs of restoration.¹⁹ This sampling approach is a qualitative process; it does not aspire to reach confidence intervals associated with quantitative concepts, such as statistical significance. Instead, sampling involves an analysis of a small subset of tapes using a limited number of search terms, and extrapolates the results to determine the value of processing additional tapes.²⁰ Judges can then compare the results with the costs of restoration to determine whether it is reasonable and cost effective to require further exploration of the backup-tape trove.

Next, often in combination with sampling, federal courts are increasingly employing a cost-shifting analysis to allocate the expenses associated with retrieving information from backup tapes. Again, the most widely-followed approach in this areas comes from the *Zubulake* family of decisions. Returning to the distinction between “accessible” and “inaccessible” electronic media, the court found that relevant electronic information stored in an “accessible” format must be produced at the producing party’s expense.²¹ But where a party seeks the production of material from “inaccessible” media, like backup tapes, the court determined that a cost-shifting analysis would be appropriate.²² Judge Shira Scheindlin then set forth a seven-factor test, derived from Rule 26 of the Federal Rules of Civil Procedure, to guide the decision of whether to require the requesting party to incur the costs of obtaining electronically-stored information:

- (1) The extent to which the request is specifically tailored to discover relevant information;
- (2) The availability of such information from other sources;
- (3) The total cost of production, compared to the amount in controversy;
- (4) The total cost of production, compared to the resources available to each party;
- (5) The relative ability of each party to control costs and its incentive to do so;
- (6) The importance of the issues at stake in the litigation; and
- (7) The relative benefits to the parties of obtaining this information.²³

In advocating its analysis, the court noted that the test should not be applied “mechanically,” but should be evaluated on a case-by-case basis taking into consideration all of the pertinent facts. Further, the court suggested that weighing the seven factors in descending order of importance should avoid any mechanistic application of the test.²⁴ Subsequent rulings are cementing the *Zubulake* court’s cost-shifting analysis as the standard approach.²⁵

In short, though the case law is developing, sampling is an accepted method for evaluating the quality of information contained on backup tapes and the costs associated with retrieving it. The ultimate determination as to which party should bear the costs of producing material contained on backup tapes depends upon the court’s analysis of all of the cost-shifting factors. But the less likely a search of backup tapes will yield large amounts of responsive data not available from other sources, the more likely the requesting party will have to share in the costs of attempting to extract information from backup tapes.

CONCLUSION

Generally speaking, documents and email on backup tapes used for disaster-recovery purposes need not be preserved, unless those tapes provide the only source of information for persons critical to the underlying dispute, and the producing party can identify where those key-personnel documents are stored on the backup tapes. In-house and outside counsel, however, need to be sufficiently knowledgeable about a company’s information-systems, including backup tapes, to meet their expanded disclosure obligations when (as is expected) the pending amendments to the Federal Rules become law. Lastly, where backup tapes become part of discovery, producing parties should: (1) encourage further use of sampling techniques to establish reasonable, cost-effective parameters for addressing that source of information, and (2) urge consideration of the cost-shifting factors to allocate fairly the resulting expense. ■

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² *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002); see also *Wiginton v. Ellis*, No. 02 C 6832, 2003 WL 22439865, at *3 (N.D. Ill. Oct. 27, 2003) (“A backup system is not an archiving system that would preserve all information going into [a company’s] computers. Rather, it is a disaster recovery system that takes only snapshots of computer files so that if a catastrophic event occurs, the information from the immediately preceding period can be reloaded.”).

³ The Sedona Conference® Glossary For E-Discovery And Digital Information Management (May 2005) (“Sedona Glossary”) at 4. The Sedona

Glossary is available at <http://www.thesedonaconference.org/content/miscFiles/tsglossarymay05>.

⁴ *Id.*

⁵ *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001).

⁶ *See Zubulake IV*, 220 F.R.D. at 218.

⁷ *Id.* at 217 (footnotes omitted) (emphasis added).

⁸ *Id.* at 218.

⁹ *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS), 2004 WL 1620866, at *8 (S.D.N.Y. July 20, 2004) (emphasis in original).

¹⁰ *See, e.g., Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 1409413, at *6 (S.D.N.Y. May 23, 2006) (finding that counsel's reliance on company's general assurances that all electronic data sources had been identified without a more methodical survey constituted "gross negligence"); *Housing Rights Ctr. v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739, at *3, *6-*7 (C.D. Cal. Mar. 2, 2005) (holding that "alleged miscommunication or misimpression" between counsel and client regarding whether e-mail backup system existed, which led to responsive e-mail being produced at the last date for discovery, was "patently insufficient" and "at least grossly negligent.").

¹¹ The *Zubulake* court identified five categories of data: active or online data; near-line data; archival data **kept on removable media**; data stored on backup tapes; and fragmented, erased or damaged data. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318-20 (S.D.N.Y. 2003) ("*Zubulake I*"). Under the *Zubulake I* taxonomy, documents in the first three categories are considered "accessible" data, while materials contained on the last two categories are considered "inaccessible." *Id.*

¹² *See id.* at 313-14. The Securities and Exchange Commission promulgated Rule 17a-3, which describes the records that must be created and maintained by broker-dealers, and Rule 17a-4, which addresses the record retention periods and the accessibility requirements. In particular, Rule 17a-4 provides, in pertinent part, "[e]very [] broker and dealer shall preserve for a period of not less than 3 years, the first two years in an accessible place . . . [o]riginals of all communications received and copies of all communications sent by such member, broker or dealer (including inter-office memoranda and communications) relating to his business as such." *Id.* at 314 n.21 (quoting 17 C.F.R. § 240.17a-4(b) and (4)).

¹³ On September 20, 2005, the Judicial Conference of the United States approved and forwarded to the United States Supreme Court amendments to the Federal Rules of Civil Procedure specifically addressing electronic discovery. On April 12, 2006, the United States Supreme Court approved those amendments and transmitted them to Congress. If Congress does not enact legislation to reject, modify or defer the amended rules during that time period, the amendments will take effect as a matter of law on December 1, 2006.

¹⁴ *See* Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States (September 2005) at 3-6 hereinafter, "Report of the Judicial Conference", available at, http://www.uscourts.gov/rules/suptct1105/Excerpt_STReport_CV.pdf.

¹⁵ *See, e.g., In re Priceline.Com Inc. Sec. Litig.*, No. 3:00CV01884 (DJS), 2005 WL 3465942, at *5 (D. Conn. Dec. 8, 2005); *Hobson v. The Mayor and City Council of Baltimore*, 216 F.R.D. 280, 233-35 (D. Md. Nov. 22, 2005); *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640, 649 (D. Kan. 2005); *Phoenix Four, Inc.*, 2006 WL 1409413, at *6.

¹⁶ *See* Report of the Judicial Conference at 11-12.

¹⁷ *Id.* at 12.

¹⁸ *Phoenix Four, Inc.*, 2006 WL 1409413, at *6.

¹⁹ *See Zubulake I*, 217 F.R.D. at 324 ("Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases."); *Wiginton*, 229 F.R.D. at 570.

²⁰ *See e.g., Zubulake I*, 217 F.R.D. at 311-12 (ordering defendant UBS to restore and produce, at its own expense, responsive email from any five backup tapes selected by the plaintiff); *Hagemeyer N. Am., Inc. v. Gateway Data Sci. Corp.*, 222 F.R.D. 594, 601-03 (E.D. Wis. 2004) (fashioning a protocol based on the *Zubulake I* and *McPeck* sampling methods that required the defendant to search any five backup tapes that the plaintiff selected); *Quinby v. WestLB AG*, No. 04 Civ. 7406 (WHP) (HBP), 2005 WL 3453908, at *3 (S.D.N.Y. Dec. 15, 2005) (discussing court's requirement that defendant restore "as a sample" backup tape(s) from the relevant period).

²¹ *Zubulake I*, at 324.

²² *Id.* at 318.

²³ *Id.* at 322.

²⁴ *Id.* at 323.

²⁵ *See, e.g., Wiginton v. C.B. Richard Ellis, Inc.*, 229 F.R.D. 568, 572-77 (N.D. Ill. 2004) (adopting *Zubulake I*'s seven factor test, plus adding a factor for consideration of the importance of the requested discovery in resolving the issues in the litigation, and ultimately deciding to shift 75% of the costs to the requesting party); *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 599-603 (canvassing all of the different tests developed by the courts for evaluating the production of backup tapes and determining that the *Zubulake I* seven-factor test best integrated the principles of Rule 26(b)(2)).
