

**Mortgage Bankers Association  
Legal Issues and Regulatory Compliance Conference**

Workshop 2: Newcomer to Inside Counsel  
Claims, Litigation and Other Inside Concerns

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**E-Discovery and Issues Concerning Preservation of Evidence**

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- A. General Rule Regarding Preservation of Evidence
- When the Duty Arises: Federal litigants owe an “uncompromising duty to preserve” what they know or reasonably know will be relevant evidence in a pending lawsuit, or in a potential lawsuit. (*Kronisch v. United States* (2d Cir. 1998) 150 F.3d 112, 130.)
  - What Information Must be Preserved: a party must “preserve evidence that is properly discoverable under Rule 26,” or of which “it has notice is reasonably likely to be the subject of discovery request” from the allegations in the complaint. (*Wigington v. Ellis* (N.D. Ill. 2003) 2003 WL 22439865, \*4.)
  - What Forms of Information Must be Maintained: Litigants must maintain information and records “kept within the normal course of its business.” (*Getty Properties Corp. v. Raceway Petroleum, Inc.* (D.N.J. 2005) 2005 WL 1412134, at \*4.)
- B. E-Discovery Rules
- Amendments to the Federal Rules of Civil Procedure relating to discovery of “electronically stored information” are scheduled to go into effect on December 1, 2006. Some key provisions include:
  - The Planning Conference and Scheduling Order: Amended Rule 26(f) will require the parties to issues relating to the discovery of “electronically stored information,” and the “form or forms” in which it should be produced.

- Discovery and Initial Disclosures: Amended Rule 26(a)(1) adds the term “electronically stored information” and now expands the scope of the initial disclosure requirements.
- The amendment recognizes that the retrieval of information from some electronic sources, such as obsolete systems, may be difficult and costly. Thus, the amended rule contemplates that a party responding to discovery may handle such information differently, by identifying by category and type any electronic sources containing potentially responsive information that the party is neither searching nor producing.
- The sanctions rule has been amended to preclude the imposition of sanctions “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.” The safe harbor will *not* excuse parties who carry on with regularly scheduled document disposal in the face of litigation, because a party is under an obligation to preserve information related to pending or reasonably anticipated litigation.
- The amended rules contemplate that with the production of enormous volumes of electronically stored information may result in the advertent disclosure of privileged materials. This danger is addressed by the amended rules in several respects. See Rule 26(b)(5) (“quick peek” of requested materials) and Rule 26(b)(5)(B) (post-production assertion of objections to privileged documents).
- The new rules place a heavy burden on attorneys to learn what data their clients have, how (and how long) it is stored, and how it can be retrieved, and to discuss this information candidly with opposing counsel and the court. The bottom line is that all attorneys will have to thoroughly understand their clients’ technologies in order to comply with the requirements of the new rules.

#### C. State Rule

- There is generally no explicit provision in state law requiring parties to preserve relevant evidence prior to a lawsuit, discovery demand, or court order for its production. (*E.g.*, *Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1419.)

- Best practices, however, would be to comply with the Federal standards.

D. A Counsel's Duty

- The *Zubulake* Rule. The Court found a substantial duty on the part of counsel to shepherd the document retention processes of the client. This Court's finding was based on the continuing duty to supplement disclosures expressed in the Federal Rules of Civil Procedure, Rule 26(e), and state and federal rules of professional conduct. (*Zubulake v. UBS Warburg, LLC* (S.D.N.Y. 2004) 229 F.R.D. 422) According to the *Zubulake* Court, counsel has the following obligations in fulfilling that duty:
  - a. to issue a litigation hold at the outset of litigation or whenever litigation is reasonably anticipated and periodically re-issue that hold;
  - b. to become familiar with the client's document retention policies, which may include speaking with IT personnel regarding such policies and to contact other key players that might have information regarding the retention of relevant information;
  - c. to communicate directly with the key players in the litigation, those being "employees likely to have relevant information"; and
  - d. to instruct all employees to produce electronic copies of their relevant active files and to make sure that all backup media the party is required to retain is identified and stored in a safe place.