

Zubulake and FRCP begin to set standards.

By Jamie Ann Tyo

E-discovery Rules Solidify

Bringing to a close the landmark *Zubulake v. UBS AG* trial, the judge and jury made a strong statement in April to attorneys and their clients regarding electronic discovery — a statement to the tune of more than \$29 million.

“The jury award really is sending a very powerful message to corporate America and the legal industry that we need to take electronic document discovery and its production seriously,” said Michele Lange, staff attorney with Kroll On-track, an electronic discovery solutions provider. “Judges are expecting e-savvy practitioners in courtrooms. It’s no longer OK to say, ‘I don’t know anything about e-evidence, my client doesn’t know anything about electronic evidence and I am not going to deal with it.’”

The *Zubulake* case set precedent in federal cases after Southern District of New York Judge Shira Scheindlin issued a series of five opinions regarding production of electronic information and appropriate sanctions if spoliation should occur. The opinions stemmed from the sex bias suit filed in

August 2001 by Laura Zubulake against her former employer, Switzerland’s UBS AG. After the plaintiff requested the production of electronic documents that allegedly were relevant to the case, Scheindlin outlined in her opinions the

VI. POSTSCRIPT

The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions — including a number from appellate courts — and there are now several treatises on the subject.¹²¹ In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information.¹²² Many courts have adopted, or are considering adopting, local rules addressing the subject.¹²³ Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.¹²⁴

Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court’s limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.

SO ORDERED:

Shira A. Scheindlin
United States District Judge

The postscript to Scheindlin’s fifth opinion implores attorneys to heed to the electronic discovery standards set by *Zubulake*.

obligations of parties to preserve electronic information, the duties of production and who is responsible for its cost.

After UBS failed to produce all of the requested documents, Scheindlin issued her fifth opinion, finding the defendant willfully violated its duty to preserve and protect documents "in defiance of explicit instructions [by counsel] not to." The court ordered the jury to assume the documents would have been detrimental to the defendant's case.

"As most know, with the publication of *Zubulake V*, Judge Scheindlin levied what was effectively a terminating sanction against UBS by deciding that a spoliation inference instruction would be given to the jury," Dean Gonsowski, corporate counsel and director of discovery management services for electronic discovery firm Fios Inc. said in a statement. "Apparently, UBS didn't read the writing on the wall and their spoliation of critical e-mails has come home to roost."

After the ruling, UBS issued a statement saying it plans to appeal.

In addition to sorting out electronic discovery through case precedent, the Civil Rules Advisory Committee of the Judicial Conference of the United States has been attempting to update the Federal Rules of Civil Procedure to meet the needs of the 21st century (see "The Era of Electronic Discovery," March

2005 *eLOC*, www.lawofficecomputing.com/EDC/eloc/march05/news03.php.)

The proposed revisions to the rules have been a hot topic of debate among legal professionals throughout the country. All the amendments but one are ready to be passed on to the Committee on Rules of Practice and Procedure, with a recommendation they be approved and transmitted to the Judicial Conference for consideration.

The only rule left under debate is Rule 37, the "Safe Harbor" provision, which would protect against sanctions for parties failing to produce electronically stored information under narrow circumstances. This provision will be discussed and modified by the Committee in June, then perhaps added back into the package to be submitted to the Judicial Conference.

"We need to have some kind of cohesive guide for electronic evidence and how to handle it," said Sharon Nelson, president of Sensei Enterprises, a computer forensics and legal technology consulting firm. "If we get rules for the federal courts, I think it will filter down to state courts. We are heading in a well-reasoned direction. Technology is always changing, and the law is always trying to catch up. We have to start somewhere." **ALOC**

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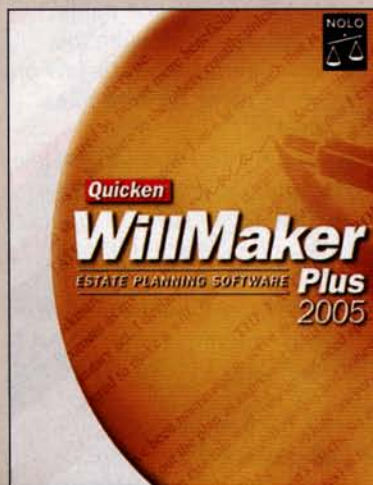
Living Will Software Options

As the nation watched the Terri Schiavo case unfold earlier this year, an increased interest in living wills sparked software developers to create do-it-yourself will programs. As the software gains momentum, some attorneys are not so gung-ho about the idea of planning one's dying wishes via PC.

"The danger of using the [living will] software is you are not getting the counseling and advice of an experienced attorney," said Gary B. Garland, an attorney specializing in estate planning, elder law, Medicaid planning and estate administration in Freehold, N.J. "If your wishes are simple, then a cookie-cutter software program is better than nothing. However, if questions about intent show up or if something missing from the document comes up later, a court could throw the living will out on its head."

Software programs such as Quicken WillMaker from Nolo or WillWriter Deluxe from Broderbund, allow users to legally specify their personal wishes, much like many of today's popular tax filing programs do. Used carefully

and with clear-cut directives, these programs could prove sufficient. "While I would always advocate legal advice geared



Do-it-yourself will programs, such as Quicken WillMaker, are gaining momentum.

toward an individual's specific needs, a decent software package or [a paper] form can identify the grantor's intent, and if it conforms to the state's requirements, it should at least get the desired end result without ending up in the media," Garland said.

However, Garland warned a need for accuracy and experience still is prevalent. For instance, there could be variables not addressed by the software, such as an individual's tolerance for medications or what to do in the event of pregnancy, he said.

"It's almost the same as if you filed your taxes through \$40 software," Garland said. "It will work out fine if your needs are simple, but if you are a home owner or have your own business and still want to save \$100 or so dollars by filing through a software program as opposed to an accountant, it could end up costing you \$20,000 in audits as a result. You don't want to end up like the Schiavo case."

— Tina Dhamija