Counsel Beware: Preventing Spoliation of Electronic Evidence in Antitrust Litigation

BY GREGORY G. WROBEL, ANDREW M. GARDNER AND MICHAEL J. WATERS

SPOLIATION—THE DESTRUCTION or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation[1]—is a potential concern in virtually all antitrust litigation. Both in-house and outside counsel may have obligations to locate potentially relevant information and ensure its preservation prior to and during the course of a formal antitrust dispute. Even where concerns about potential criminal culpability of counsel do not arise, as in the federal government's criminal case against Arthur Andersen, counsel still face difficult decisions in seeking to prevent spoliation of evidence in a manner consistent with other legitimate business and legal objectives.[2]

Several courts have addressed counsel's responsibility to prevent spoliation of evidence in non-antitrust cases, including *Zubulake V* (employment discrimination) and *Morgan Stanley* (fraud), among others.[3] We focus here on the particular challenges that counsel may confront if the duties discussed in these decisions are applied in pending or reasonably foreseeable antitrust litigation,[4] and provide a checklist for consideration when counsel must put into place a "litigation hold" (i.e., a directive suspending a client's routine purging or other destruction of potentially relevant documents) for such a dispute.[5]

The Case Law and Legal/Ethical Standards

The 2004 decision of Judge Shira Scheindlin of the Southern District of New York in *Zubulake V* was the fifth in a series of opinions in that case concerning electronic discovery matters. These opinions have been closely watched, and *Zubulake V* is significant in part for its discussion of the duty that counsel may have to actively participate in a client's document retention efforts when litigation is pending or reasonably foreseeable.

Prior to *Zubulake V*, it was well established that parties have a duty to preserve documents that may be relevant to ongoing or reasonably foreseeable litigation, and that spoliation or the failure to preserve evidence may result in tort liability or court-imposed sanctions, such as an adverse inference on a point of proof to which the evidence may relate, that can materially affect the outcome of litigation.[6] The separate duties of counsel, however, have not been clearly defined, and many counsel may believe that they have no special duty to preserve potentially relevant evidence and prevent spoliation beyond providing notice to the client of the client's duties as a party or potential party to identify and preserve such evidence.

In *Zubulake V*, the court stated that counsel has an affirmative duty to monitor a client's compliance with its document preservation obligations. This involves both locating relevant information and ensuring the continued preservation of potentially relevant information.[7] Initially, once litigation is reasonably anticipated, counsel must make sure that the client takes reasonable steps to suspend its routine document retention by putting in place a "litigation hold."[8] To do this, the court stated that "counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture."[9] This involves speaking with the client's information technology personnel and "key players" in the litigation.[10] To the extent that counsel cannot speak with every key player, due to the size of the client or scope of the lawsuit, the court encouraged counsel to be "creative," and suggests running a system-wide keyword search and then retaining the documents identified through the search.[11] Although the court appeared to provide some flexibility as to how counsel may work to ensure the preservation of relevant documents, the court emphasized that "it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information."[12]

The court also stated that, once a party and counsel have identified all sources of potentially relevant information, they have a continuing duty to retain the information and produce it to the extent determined to be responsive to proper discovery propounded during the litigation.[13] The court's guidance on the extent of counsel's duties is not fully delineated, given the court's statement that any requirements placed upon counsel must be "reasonable," but the court does list three steps that counsel should take in most document preservation efforts: (1) the issuance of a litigation hold; (2) direct communication with "key players" in the litigation and periodic reminders to these players that the preservation duty is still in place; and (3) instructions to all employees to produce electronic copies of their relevant active files and make sure that all backup media that the party is required to retain is

Gregory G. Wrobel is a shareholder and head of the Antitrust Practice Group of Vedder, Price, Kaufman & Kammholz, P.C., Chicago, IL, and is an associate editor of ANTITRUST. *Andrew M. Gardner is loss prevention counsel and Michael J. Waters is an associate of Vedder Price.*

identified and stored in a safe place. This last step may require counsel to take physical possession of backup tapes.[14]

Several courts have issued decisions that cite to or support the rulings in *Zubulake V* on electronic discovery issues,[15] but these decisions do not address in the same depth the separate duty—if any—of counsel to locate and preserve relevant electronic information. Nevertheless, these decisions suggest that counsel have at least some duty to actively participate in these endeavors. The court in *Metropolitan Opera*, for example, chastised counsel for failing to implement a systematic procedure for the retention of documents (including electronic documents), for delegating document production to a lay person who did not understand e-discovery obligations, and for failing to ensure that the lay person established a coherent and effective system to faithfully and effectively respond to discovery requests.[16]

Sources of counsel's potential duty to oversee the client's efforts to locate and preserve electronic information are not limited to recent court decisions. The U.S. District Court for the District of New Jersey, for instance, amended its Local Rule 26.1 in October 2003 to require counsel to: (1) understand the client's storage of digital information; (2) review potentially discoverable evidence with the client; and (3) raise the topic of e-discovery, including the preservation and production of digital information, at the Rule 26(f) conference.

Rules of Professional Conduct also may impose duties on litigation counsel to avoid spoliation. Model Rule 3.4(a) of the ABA Model Rules of Professional Conduct provides that a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value."[17] The Model Rule similarly proscribes a lawyer from counseling or assisting another person to do the same. Comment 2 makes clear that this rule applies to "computerized information." Model Rule 3.4(d) addresses counsel's obligations in discovery even more specifically, stating that lawyers must "make [a] reasonably diligent effort to comply with a legally proper discovery request by an opposing party."[18] The Model Rules do not expressly establish specific affirmative duties of counsel to preserve electronic evidence and prevent spoliation, but they do suggest that prudent counsel should address spoliation considerations with the client at an early stage to avoid any claim that counsel participated in client conduct that may result in spoliation.

On April 14, 2006, the U.S. Supreme Court approved, without comment, a number of amendments to the Federal Rules of Civil Procedure (FRCP) that address issues related to electronic discovery. These rules, which take effect on December 1, 2006, will influence how parties and counsel are to conduct e-discovery. The following are a few key amendments:

FRCP 26(b)(2)—Will limit a party's obligation to provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.

FRCP 26(f)—Will mandate that the parties formulate a discovery plan that addresses any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced, and whether the court should issue an order protecting the parties' right to assert claims of privilege after production.

FRCP 34—Will provide additional direction to parties requesting the production of electronically stored information and parties responding to such requests.

FRCP 37(f)—Will institute a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information that is lost because of routine operation of the party's electronic information system, if the party also took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action.[19]

Many of the pending rules approved by the Supreme Court do not directly address or affect the duty of counsel with respect to a litigation hold. However, certain amendments, such as those to FRCP 26(b)(2) and 26(f), could influence the scope of a hold. Thus, counsel should become familiar with these amendments.

Application to Antitrust Litigation

Document preservation obligations present difficult decisions and operational burdens for counsel and parties in all types of disputes, but these concerns are magnified in antitrust cases due to the broad scope of potentially relevant evidence.

Courts that have addressed spoliation disputes in non-antitrust cases have, for the most part, confronted documents and topics that are relatively narrow in scope, with a commensurate burden associated with a litigation hold procedure that would have identified and preserved the documents. The *Zubulake* litigation, for example, was an employment discrimination case in which the primary focus of discovery and the ensuing spoliation dispute was email communications of a number of key UBS employees that were germane to the plaintiff's discrimination claims.[20] Even *Morgan Stanley* concerned only a single transaction or investment.[21]

Consider, in contrast, a typical private antitrust case in which issues of market power and competitive harm may arise under Sections 1 or 2 of the Sherman Act. The parties may seek evidence on a broad range of issues, including: existence of a contract, combination, or conspiracy to restrain trade; market definition, market power, and market performance; anticompetitive intent and conduct; harm to competition; and causation, damages, and injunctive relief, among others.[22] Even if the litigation focuses only on a par-

ticular product line, subsidiary, or other business unit, the scope of electronic and paper records that may contain evidence pertinent to one or more of these topics may be vast.

Despite the breadth of potentially relevant evidence in antitrust litigation, it may be impractical and unwarranted for the client to implement a complete (and perhaps lengthy) cessation of all normal procedures for purging electronic and paper records.[23] Alternatively, counsel may assist the client to adopt reasonable and effective procedures to identify and archive potentially relevant documents that are part of the client's records, and exclude such documents from normal or targeted purging procedures. If the dispute involves ongoing conduct or if current market facts are potentially relevant, the client may have to apply the procedures to new documents that the client creates or receives during the course of the dispute.

Tactical Considerations in Addressing a Litigation Hold

A litigation hold serves some of the same purposes as an antitrust compliance program: the goal is prevention, and this goal will be achieved in many or most cases. The hope, however, is that any spoliation that might occur will be excused if a reasonable and timely litigation hold was implemented. Nevertheless, much like a corporate defendant that seeks a reduced criminal fine based on an antitrust compliance program that did not prevent unlawful conduct by members of its staff, a party that has failed to preserve relevant evidence may be in a difficult position to demonstrate that its litigation hold was reasonable and effective, or that it acted reasonably in deciding not to institute a litigation hold at an earlier date because litigation was not reasonably foreseeable.

Given this reality, counsel should presume that spoliation of evidence directly relevant to potential antitrust litigation prevents a risk, which may be substantial, of adverse consequences if litigation ensues, at least for the party if not for counsel. The presumption, then, should be to preserve records if there is uncertainty or doubt about whether a litigation hold is warranted. Even if counsel advises the party to do so and the client agrees, however, important tactical questions still must be considered.

When to Act. A potential plaintiff (or counterclaimant) should address the preservation of evidence no later than the point that it begins to take actions as a potential litigant, such as the retention of litigation counsel, development of a litigation strategy, or identification of potential defendants.

A potential defendant must surmise the intentions of others and may not be able to determine that litigation is reasonably foreseeable until a potential plaintiff engages in some overt conduct evidencing an intention to institute litigation. Nevertheless, a potential defendant should address the preservation of evidence upon receipt of draft pleadings or a demand letter overtly threatening litigation, and even sooner if experience shows that a breakdown in the type of business relationships or negotiations in question frequently results in litigation. In some contexts, such as a major change in distribution channels or practices, a party may anticipate litigation even before the change is announced or implemented, and it may be prudent to address the preservation of evidence while the new program is still under internal consideration.[24]

Counsel should assist the client to evaluate the prospects that litigation will ensue, advise the client about potential adverse consequences if a litigation hold is not implemented, and document the grounds for the client's determination and any specific recommendation that counsel provides on whether and when to implement a litigation hold.

Procedural Options. In a context where the potential parties to a dispute are established companies and would bear a comparable burden of preserving evidence, there may be mutual benefit in negotiating the terms for a litigation hold applicable to all parties. If a hold is implemented in accordance with such an agreement, parties to the agreement may, as a practical matter, be barred from asserting that adverse parties acted unreasonably by failing to preserve documents that are not covered by the agreed-upon hold. If the parties cannot agree, either party may still act unilaterally to implement its own litigation hold and issue a demand letter that the other party do so as well.

Such an agreement may be impractical in some contexts, may send the wrong signal if the parties still are working in good faith to resolve a dispute without litigation, and may not prevent other future litigants who are not a party to the agreement from seeking relief for spoliation of evidence not covered by the agreement. Nevertheless, an agreed litigation hold may help to avert spoliation claims in many complex antitrust disputes.

If litigation has commenced, counsel should consult with the client about seeking a court order or a court-approved stipulation memorializing the terms of a litigation hold. The Federal Rules of Civil Procedure do not require the parties or the federal district court to enter an order on preservation of evidence as part of the pretrial discovery process,[25] but many counsel raise this issue with the court at an early date after litigation has commenced. A court order may serve to establish that the conduct of the party and counsel in accordance therewith was reasonable, and thus, as a practical matter, may protect the parties and their counsel from spoliation claims.

Litigation Hold Checklist

The checklist below is offered to aid counsel in advising a party to an antitrust dispute on whether and how to adopt a litigation hold. The court noted in *Zubulake V* that the exact nature of counsel's duty in any particular dispute is a "tricky question" and one that may vary given the specifics of the situation.[26] Thus, both the procedures that are deemed reasonable and the subject matter and scope of electronic records that are potentially relevant in a given dispute will vary, but counsel should be prepared with documentation to demon-

strate that both counsel and the client acted reasonably under the circumstances to identify and preserve potentially relevant electronic records.

1. Communicate in Writing About Litigation Hold. Communicate with the client in writing about document preservation matters, and retain the communications in counsel's file. Limit the communications to that topic alone in order to preserve other client confidences about the dispute or the client's business if a spoliation dispute arises. Counsel and the client should anticipate that the content of these communications, even if privileged, may be subject to voluntary or involuntary disclosure if a spoliation dispute arises.[27] It may be preferable to communicate orally with the client and then memorialize in writing the steps the client will take to meet its preservation obligations and other matters of importance related thereto. Counsel may wish to note in such communications that the existence and terms of the litigation hold is not an acknowledgment or admission that any records preserved under the procedure are discoverable, relevant, or admissible with respect to any fact or issue that may relate to the dispute.

2. Determine Need for Litigation Hold. Determine whether a litigation hold should be implemented if litigation has not commenced but facts and circumstances suggest that litigation is reasonably foreseeable. Make a record of the client's conclusion and the grounds on which it is based. If outside litigation counsel have been retained specifically for the dispute, this fact alone may be sufficient to warrant a litigation hold. Closer questions may arise for inside counsel who are addressing a potential dispute prior to or without any intention to proceed with litigation, or for outside counsel who are retained for non-litigation purposes. In those circumstances, the client's general experience with pertinent business relationships and transactions may be relevant in assessing whether litigation is reasonably foreseeable in a particular context.

3. Advise Client on Litigation Hold Obligations. Advise the client and confirm in writing with respect to the client's obligation to identify and preserve documents pending initiation of and during litigation. Obtain from the client and/or work with the client to develop a written description of (1) the client's electronic and paper records and records systems used by pertinent business units, (2) the client's established policies and procedures on document retention and purging, including automatic or routine procedures for purging email and other electronic documents, (3) the identity of client staff with primary responsibility for managing such systems and procedures in pertinent business units, and (4) the steps the client will take to alter its retention practices and preserve potentially relevant documents. Request and confirm that the client has temporarily suspended all regular document purging procedures until the litigation hold procedures have been developed and implemented.[28]

Counsel should discuss the client's electronic records and computer systems, and procedures for creating and preserving such records directly with the client's technology staff to ensure that counsel has an accurate understanding of those records and systems. Depending on counsel's level of technical competence and the complexity of the client's systems, counsel should consider involving an outside consultant from counsel's own staff or an outside vendor retained by counsel as a nontestifying expert. Counsel also should communicate directly with key personnel to ensure that the terms of the hold are properly understood and implemented. Given the breadth of potentially relevant evidence in antitrust disputes, litigation counsel also should work closely with in-house counsel and/or senior management to assure that key personnel are identified who have responsibility for the various business functions potentially relevant to the dispute.

4. Identify Potentially Relevant Records and Staff. Identify managers responsible for basic functions in pertinent business unit(s), including marketing, sales, strategic planning, manufacturing, research and development, accounting, and internal audit, among others. Obtain organization charts and staff lists for business functions that relate directly to the conduct at issue in the dispute, and directories of the paper and electronic files that the staff maintain or use for each business function. This task may entail particularized inquiry as to the record-keeping practices of individual staff in archiving email and other electronic documents that they create or receive on the client's computer and communications systems. Identify pertinent former staff whose electronic files already have been purged, and obtain written confirmation that this occurred in accordance with normal document purging procedures (or an explanation for the purging if this is not the case), and the date(s) thereof.

5. Prepare List of Electronic Search Terms. Prepare a list of search terms, including key names (customers, suppliers, competitors, other entities and organizations, and pertinent individuals on their staffs) and business terms (products, programs, technology, business practices, etc.) that pertain to the dispute. This task may be difficult and cumbersome, but the goal is to devise a reasonable—not perfect—list of search terms that fairly describe the subject matter of the dispute. Update the list as more details are learned through investigation or filed pleadings.

6. Prepare Summary of Dispute. Prepare a summary description of the dispute based on the complaint and other pleadings (i.e., preliminary injunction motion, jurisdictional motion, class certification motion, etc.), interviews of the client's management staff, and key contracts or other documents, noting potentially relevant time periods, geographic and product lines, business programs and conduct, and names and positions of key individuals or job titles.

7. Issue Notice of Litigation Hold. Prepare a communication to client staff forwarding the summary description of the dispute, the litigation hold procedures, and the list of search terms that will be used to identify potentially relevant documents. Request and confirm that in-house counsel or senior management distribute the communication to all staff

in pertinent business units, with copies to counsel of the initial communication and any responses from the staff. The communication should direct each recipient to: (1) suspend all document purging activity for paper and electronic documents that satisfy any of the parameters described therein, or that the staff person otherwise regards as relating directly to the dispute described in the communication; (2) identify and, to the extent feasible consistent with continued business needs, deliver to a designated central repository established by the client, all central office files, individual staff desk files, and electronic records (particularly email folders) that the staff person maintains that satisfy the search terms and other parameters; (3) identify any additional key names and terms that may pertain to the dispute; and (4) acknowledge in writing in reply to the litigation hold directive that the staff person received the communication and complied with its terms. Counsel also may recommend that the client direct the staff to move and store pertinent email in specially designated electronic folders to facilitate access and review during the dispute.

8. Conduct Electronic Search of Information Systems. Request and confirm that the client's technology staff conducts an electronic search of pertinent electronic records using the search terms and parameters identified through the above procedures. Obtain written verification that the search has been conducted and, if a reasonable volume of electronic documents is involved, obtain a copy of pertinent records in electronic form. Verify that the copy is machine-readable. Work with the client to delete or modify search parameters to eliminate extraneous documents or overbroad search terms, and, in particular, to add or modify search parameters to cover all transactions, events, and business practices that may be relevant to the dispute.

9. Provide Instructions on Delivery and Storage of Active Files and Backup Media. Request and confirm that the client instructs all pertinent employees to deliver electronic copies of their relevant active files to the designated central depository, and obtain verification that all pertinent backup media that the client maintains is identified and stored safely such that it will not be deleted or overwritten as part of the client's normal business practices. Depending on the situation and available options, this may or may not involve counsel actually taking physical possession of the backup media.

10. Provide Instructions on Changes in Ongoing Archiving and Purging Procedures and Issue Periodic Reminders. Request and confirm that the client modifies procedures for archiving and purging electronic records as warranted to preserve email and other electronic documents that satisfy the search terms, but which are deleted by individual users of the client's computer and communications systems.

Also, obtain information about staff turnover and establish an appropriate schedule for periodic re-issuance of the litigation hold communication to new and existing staff, with copies to counsel of each such communication and the responses thereto confirming that staff are in compliance. Counsel also may wish to issue periodic direct reminders to key personnel, particularly for clients who do not employ in-house counsel.

Compliance Concerns

What should the client do to assure compliance with a litigation hold? What should counsel do to verify compliance? What can or should counsel do if there is reason to believe that the client is not in compliance with a litigation hold?

A client seeking to assure compliance by its staff with a litigation hold may have several practical options. The client can issue periodic reminders and obtain periodic verifications of compliance from staff. The client can direct its information systems staff to conduct spot checks of deleted electronic records to determine whether any fall within the parameters of the litigation hold. If so, the client may need to re-educate staff about the existence and terms of the hold. The client may establish a systematic and ongoing procedure to review deleted electronic records before they are permanently purged from the active email system or computer network. In any event, the client should promptly react to any evidence of noncompliance and take appropriate steps to prevent a recurrence of any purging of documents covered by a litigation hold.

Notwithstanding the discussion in *Zubulake V*, courts have not widely addressed or established a duty or standard of conduct for counsel to assure compliance with a litigation hold. Nevertheless, the checklist above suggests that counsel receive copies of client communications about the litigation hold and that counsel assure that such communications and verifications of compliance are received and are complete. If the client has adopted an internal auditing procedure to verify compliance, counsel should receive any reports issued thereunder and follow up immediately with the client to address any evidence of noncompliance.

Counsel also may receive and retain copies of client records that are preserved in accordance with the litigation hold, but should carefully consider whether counsel has adequate systems to store and assure the continued integrity of electronic records, particularly if the volume is large. If counsel physically takes possession of electronic records (whether storage media such as CDs, DVDs, tapes, or complete hard drives or servers), care must be taken that the electronic files are not altered by counsel's own computer systems. A chain-of-custody record should be created, with input from knowledgeable IT professionals, if necessary, to protect against charges that transferring documents to counsel caused changes in what would otherwise be original client files.

If counsel has concerns about whether the client is complying with a litigation hold—particularly one required under a court order or court-approved stipulation—counsel should promptly communicate those concerns to the client. The decision in *Zubulake V* would suggest that a client's fail-

ure to implement or comply with a litigation hold may subject counsel to sanctions for failure to ensure compliance. If a client is failing to comply (perhaps due to cost concerns or to avoid disruption of business operations), counsel should explain to the client the potential consequences of non-compliance to both counsel and the client.

Persistent disagreement between client and counsel regarding compliance with (or even implementation of) a litigation hold may create a conflict of interest for counsel, where counsel's own interest in avoiding potential sanctions for spoliation may materially limit counsel's ability to represent the client.[29] Counsel in this situation should communicate in writing to the client the potential consequences of non-compliance to both the client and counsel. If a client continues to wilfully refuse to comply with a litigation hold, counsel should consider whether they are required to withdraw or whether, even if withdrawal is not necessary, it is prudent to withdraw.[30]

Conclusion

The decision in *Zubulake V* may presage broader judicial consideration of whether counsel has a duty to identify and preserve potentially relevant evidence through a litigation hold, and the steps that counsel must take to discharge such a duty. Given the potentially dire consequences for the client and perhaps even for counsel of an adverse inference ruling in a spoliation dispute, counsel are well-served to address document preservation with clients early in potential antitrust litigation, and in a systematic and documented manner. ■

---

[1] *See, e.g.*, Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) (defining spoliation).

[2] The 2002 criminal conviction of Arthur Andersen LLP was overturned by the Supreme Court. Arthur Andersen LLP v. United States, 125 S. Ct. 2129 (2005). In delivering the opinion of the Court, Justice Rehnquist emphasized that the criminal statute under which Arthur Andersen was charged requires knowledge or a requisite intent to obstruct justice. These issues are unlikely to arise in connection with typical civil antitrust litigation, and the authors here focus on steps that counsel can take to avoid the imposition of civil sanctions.

[3] Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*); Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., 2005 WL 674885 (Fla. Cir. Ct. Mar. 23, 2005).

[4] We do not address here whether federal courts have authority under the Federal Rules of Civil Procedure, federal statutes, or the court's inherent powers to impose sanctions against counsel for spoliation of evidence by a client. *See Zubulake V*, 229 F.R.D. at 430 n.60 (noting that the authority to sanction litigants for spoliation arises jointly under the Federal Rules of Civil Procedure and the court's inherent powers, but not addressing the source of the court's authority to impose sanctions against counsel); *See also* ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 7.9 (2004) (discussing spoliation sanctions and court authority for imposing same); MICHAEL ARKFELD, ELECTRONIC DISCOVERY AND EVIDENCE § 3.03 (2003) (same).

[5] We focus on electronic discovery, as it is the subject of several recent and newsworthy decisions and presents unique spoliation challenges due to automatic purging protocols that exist in many e-mail and network computer systems, but the issues and practices we discuss apply equally to traditional hard-copy records.

[6] *See Morgan Stanley*, 2005 WL 674885 at *9–10 (court granted default judgment in part, as well as an adverse inference, and allowed the jury to consider the spoliation when determining whether an award of punitive damages is appropriate). In the antitrust context, FTC complaint counsel have sought to use evidence of spoliation to overturn an adverse decision by the administrative law judge on the FTC's administrative complaint against Rambus, Inc., a California-based firm that develops and licenses technology to companies that manufacture computer memory. In 2000, Rambus filed a complaint in the Eastern District of Virginia against memory manufacturer Infineon Technologies, alleging that Infineon infringed four of its patents. In its defense, Infineon brought fraud counterclaims against Rambus related to the company's involvement in and conduct associated with the Joint Electron Device Engineering Counsel (JEDEC). Thereafter, in 2002, the FTC brought an administrative complaint against Rambus that alleged violations of antitrust law related to the same conduct at issue in the Infineon dispute. Although the Infineon dispute has since been settled, a massive Rambus document destruction campaign has been a prominent issue in both cases. In the Infineon matter, the district court ordered the parties to conduct discovery to address the subject of appropriate sanctions. Rambus Inc. v. Infineon Technologies, 222 F.R.D. 280, 298–99 (E.D. Va. 2004). In the FTC proceeding, complaint counsel filed a motion for sanctions based on alleged spoliation by Rambus, seeking a default judgment and/or an adverse inference that Rambus's conduct in connection with the JEDEC standard-setting process led to its market power. *Rambus Inc.*, FTC Docket No. 9302 (Sept. 20, 2005) (complaint counsel's motion for sanctions due to Rambus's spoliation of documents), http://www.ftc.gov/os/adjpro/d9302/050810ccmosanctions.pdf. *See also* Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 127 (S.D. Fl. 1987) (entering default judgment against defendant in antitrust case due to in-house counsel's direction to staff to destroy documents after service of complaint and document request); Marks v. San Francisco Real Estate Board, 1973 WL 793 (N.D. Cal. Mar. 26, 1973) (plaintiff held in contempt for destroying documents and ordered to pay $1,500 to the court); Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71 (2004), *available at* http://www.mttlr.org/voleleven/scheindlin.pdf (reviews all cases from January 1, 2000 through the date of the article in which a court issued sanctions against a party for the spoliation or late production of electronic documents, and discusses the types of sanctions imposed by courts and the stated motivation for imposing such sanctions).

[7] *Zubulake V*, 229 F.R.D. at 431.

[8] *Id.* at 431–32.

[9] *Id.* at 432.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 432–33.

[14] *Id.* at 433.

[15] *See, e.g.*, Hopson v. The Mayor and City Counsel of Baltimore, 2005 WL 3157949 (D. Md. Nov. 22, 2005) ("counsel have a duty to take the initiative in meeting and conferring to plan for appropriate discovery of electronically stored information at the commencement of any case in which electronic records will be sought"); Tantivy Communications, Inc. v. Lucent Technologies Inc., 2005 WL 2860976 (E.D. Tex. Nov. 1, 2005) ("The party and its counsel should ensure that (1) all sources of relevant information are discovered, (2) relevant information is retained on a continuing basis, and (3) relevant non-privileged material is produced to the opposing party."); Coleman (Parent) Holdings, Inc. v. Morgan Stanley, 2005 WL 674885 at *9–10 (Fla. Cir. Ct. Mar. 23, 2005) (court revokes attorney's pro hac vice admission due to client's failure to preserve and produce electronic documents); Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union, 212 F.R.D. 178 (S.D.N.Y. 2003) (finding that counsel failed to adequately explain and assist client with preservation obligations).

[16] *Metropolitan Opera*, 212 F.R.D. at 222.

[17] MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2002) (Model Rules). Although the Model Rules form the basis for the rules of professional conduct in many

jurisdictions, they are often amended or modified before adoption by state and federal courts. Counsel are advised to always check the rules of professional conduct adopted in the applicable jurisdictions or consult with ethics counsel to ensure compliance.

[18] MODEL RULES R. 3.4(d).

[19] For additional information on these and other proposed amendments, see U.S. Courts, Federal Rulemaking: Proposed Rules Amendments, http://www.uscourts.gov/rules/newrules6.html.

[20] Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 287 (S.D.N.Y. 2003) (*Zubulake III*); Zubulake v. UBS Warburg LLC, 229 F.R.D. at 426 (*Zubulake V*).

[21] Coleman (Parent) Holdings, Inc. v. Morgan Stanley, 2005 WL 674885 at *1 (plaintiff sought documents, including e-mail, connected with a specific acquisition transaction in which Coleman (Parent) Holdings, Inc. sold its 82% interest in Coleman Company, Inc. to Sunbeam).

[22] In addition to counsel's own professional experience, counsel may wish to rely on published sources that identify the type of information that may be requested during discovery in an antitrust suit. *See, e.g.*, ABA SECTION OF ANTITRUST LAW, ANTITRUST DISCOVERY HANDBOOK 135–253 (2d ed. 2003) (sample discovery requests with topical breakdown). Use of such resources may bolster a defense against spoliation claims and show that the client and counsel acted reasonably in seeking to identify and preserve potentially relevant evidence on the range of issues that may arise in an antitrust dispute.

[23] *See, e.g.*, Concord Boat Corp. v. Brunswick Corp., 1997 WL 33352759 at *4 (E.D. Ark. Aug. 29, 1997) (party involved in an antitrust dispute is not obligated to preserve all e-mail, as this would be too burdensome and costly).

[24] At the latest, litigation is reasonably foreseeable when a complaint is filed and served. Mosaid Tech. Inc. v. Samsung Elecs. Co., 348 F. Supp. 2d 332, 336 (D.N.J. 2004). Often, however, litigation may be anticipated earlier. *See, e.g.*, Silvestri v. General Motors Corp., 271 F.3d at 591 (holding in product liability action arising from a vehicle collision that plaintiff had a duty to preserve the automobile once he recognized he would be suing defendant); *see also* John L. Carroll, *Developments in the Law of Electronic Discovery*, 27 AM. J. TRIAL ADVOC. 357, 369–72 (2003) (presenting discussion as to when the duty to preserve attaches in the context of electronic discovery).

[25] Currently, the court must enter a scheduling order pursuant to FCRP 16(b). The court may also enter a protective order, pursuant to FCRP 26(c), upon motion by a party or by the person from whom discovery is sought. This would not change under the proposed rules; rather, the courts' ability to address issues of electronic discovery in said orders would be enhanced. The Committee Note associated with FCRP 26(f) states: "The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances."

[26] Zubulake v. UBS Warburg LLC, 229 F.R.D. at 433 (*Zubulake V*). For instance, Judge Scheindlin suggested key word searches as a creative alternative to retaining all electronic documents. *Id.* at 432. In some instances, however, the client may determine that it is more expedient to retain all electronic documents, or all electronic documents for key individuals or business operations, rather than conduct key word searches of the type described in item numbers 5 and 8 of the checklist.

[27] Courts have pierced the attorney-client privilege in connection with spoliation claims based on a prima facie showing that: (1) the party was engaged in or planning a scheme of spoliation and sought or used the advice of counsel or the input of work product to further the scheme; and (2) the documents containing the privileged communications or work product bear a close relationship to the scheme. *See, e.g.*, Rambus Inc. v. Infineon Technologies, 222 F.R.D. at 296.

[28] Although the *Zubulake* litigation dealt with a client that maintained a routine document retention/destruction policy, the practices discussed herein with respect to the preservation of potentially relevant information would apply regardless of whether the client presently has such a policy in place.

[29] Model Rule of Professional Conduct 1.7(a)(2) provides that a "concurrent conflict of interest exists if . . . there is a significant risk that the representations of one or more clients will be materially limited by . . . a personal interest of the lawyer."

[30] If a client's failure to comply will result in a violation of rules of professional conduct (such as Model Rule 3.4(a) or (d)), counsel may be required to withdraw under Model Rule 1.16(a)(1) (requiring withdrawal if the representation will result in a violation of the rules of professional conduct or other law). Even if not required, withdrawal under such circumstances likely would be permitted under Model Rule 1.16(b), subject to court approval if necessary. Care must be taken in any withdrawal to avoid disclosing client confidences.

Reprinted with Permission of Antitrust, Vol. 20, No. 3, Summer 2006