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Focus

Scope of Electronic Discovery Turns on Accessibility of Data

By Julie Locke

In the past several months, courts around the country have issued landmark rulings related to electronic discovery. In California, cases like *Dodge, Warren & Peters Insurance Services Inc. v. Riley*, 2003 Cal.App.LEXIS 171 (Cal. App. 4th Dist. Feb. 5, 2003), the first reported issuance of a preliminary injunction requiring a party to preserve electronic evidence for use in future discovery, underscore the importance of a coordinated plan for review and production of electronic documents.

A recent decision from the Southern District of New York signals a fundamental shift in how attorneys, litigants and the courts will approach electronic discovery. See *Zubulake v. UBS Warburg LLC*, 2003 U.S.Dist.LEXIS 7939 (S.D.N.Y. May 13, 2003). Judges in the Southern District of New York have been at the forefront of this developing body of case law, and other courts are following their lead. California attorneys should be prepared to contend with the repercussions of *Zubulake*.

Zubulake requires a three-step analysis in any dispute involving the scope and cost of discovery of electronic data:

■ First, the court must understand thoroughly the responding party's computer system, with respect to both active and stored data. For data kept in an accessible format, the usual rules of discovery apply; the responding party must pay for production. The court should consider shifting costs only when inaccessible data is at issue.

■ Second, because the cost-shifting analysis is so fact-intensive, the court must determine which data may be found on the inaccessible media. A "sampling" approach is sensible in most cases.

■ Third, in conducting the cost-shifting analysis, the court should apply a seven-factor test. The new test represents a modification of the widely followed cost-shifting analysis in *Rowe Entertainment Inc. v. William Morris Agency Inc.*, 2002 U.S.Dist.LEXIS 8308 (S.D.N.Y. May 9, 2002).

'Zubulake' questioned other rulings that have assumed that an undue burden may arise simply because electronic evidence is involved.

With the framework of the court's analysis in mind, attorneys must adapt their own practices for making and responding to electronic discovery requests. The following three-step approach will position any attorney to effectively consider a request for electronic data.

■ **Consider the accessibility of requested electronic documents.** In analyzing any request for electronic documents in discovery, the first question is, Are the requested materials stored in an accessible or inaccessible format? With information about the physical location and accessibility of the electronic data in hand, an attorney can anticipate the results of a cost-shifting request and begin to map out a sensible electronic discovery strategy.

Zubulake holds that a determination of whether the production of documents is unduly burdensome or expensive turns primarily on whether the data is kept in an accessible or inaccessible format. Reasoning that the expense of production corresponds closely to the location and storage format of electronic data, the court stated that electronic documents that are not readily available in a usable or reasonably indexed format may be considered "inaccessible."

Noting that search engines typically make any data retained in a machine-readable format "accessible," the court recognized five general categories of stored data:

■ Active, online data. This data is in an "active" stage in its life and is available for access as it is created and processed. Storage examples include hard drives or active network servers.

■ Near-line data. This data typically is housed on removable media. Storage examples include optical disks or magnetic tape.

■ Off-line storage/archives. This represents data on removable media that have been placed in storage. Off-line storage of electronic records traditionally is used for disaster recovery.

■ Backup tapes. Data stored on backup tapes is not organized for retrieval of individual documents or files, because the organization of the data mirrors the

computer's structure, not the human records-management structure. Data stored on backup tapes typically is compressed, allowing storage of greater volumes of data but making restoration more time-consuming and expensive.

■ Erased, fragmented or damaged data. A computer user has tagged this data for deletion, but it may exist somewhere on the free space of the computer until it is overwritten by new data. Significant efforts are required to access this data.

The court grouped the first three categories as typically accessible and the last two as typically inaccessible.

In making or responding to an electronic discovery request, an attorney must examine which of these categories are at issue, while recognizing that one or all may be relevant in a particular case. The responding party must produce documents stored in an accessible format at its own expense.

The cost of producing documents that are arguably inaccessible may be shifted to a requesting party. A cost-shifting determination should be made only after careful analysis of the facts surrounding the document request.

■ **Search a sample of the data.** If inaccessible data is at issue, the court recommends a "sampling" approach to determine the kinds of documents on the inaccessible media. In *Zubulake*, this resulted in an order to restore and search data from five backup tapes out of 94 available.

Attorneys are well-advised to prepare for data sampling in any case involving backup tapes. A requesting party should craft the document requests carefully to include information from a sensible number of custodians for a reasonable time.

A producing party may find relevant data on the tapes, requiring the court to move on to the next stage in its analysis. On the other hand, a responding party sometimes can use sampling as a shield effectively — as when a party's unwarranted "fishing expedition" tries to cripple an opponent with expansive electronic discovery requests.

From a technical standpoint, carrying out the sampling activity is simple. The responding party restores and makes available for searching a proportionately reasonable set of the backup media. The responding party's attorneys search through an online review application, with the ability to access and search many different file types from a common interface accessing one database.

Web-based applications designed exclusively for discovery review are quite common today and are available from electronic discovery service providers. They enable attorneys to search, mark, redact and prepare necessary electronic documents for production.

The parties to the lawsuit should reach an agreement about search terms and parameters before this work is conducted. The results of the search are reported to the court, to enable the cost-shifting analysis to move to the next stage.

■ **Prepare for the cost-shifting argument.** The *Zubulake* court determined that cost-shifting should be considered only when electronic discovery imposes an undue burden or expense on the responding party. The court questioned the rulings of other courts that have assumed an undue burden or expense may arise simply because electronic evidence is involved.

Rather, the court stated, "[e]lectronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying."

Zubulake presented a seven-factor test for determining whether cost-shifting is appropriate:

■ The extent to which the request is tailored to discover relevant information.

■ The availability of such information from other sources.

■ The total cost of production, compared to the amount in controversy.

■ The total cost of production, compared to the resources available to each party.

■ The relative ability of each party to control costs and its incentive to do so.

■ The importance of the issues at stake in the litigation.

■ The relative benefits to the parties of obtaining the information.

The *Zubulake* court instructed that the seven factors should not be weighted equally. Instead, the central question must be whether the request imposes an undue burden or expense on the requesting party — or, stated differently, "How important is the sought-after evidence in comparison to the cost of production?"

The court stated that the first two factors — composing a "marginal utility" test — are the most important. The second part of the analysis should consider factors three, four and five in making a determination of expense and relative ability to bear the burden of the expense.

The court further stated that factor six, considering the importance of the litigation itself, must stand on its own and has the potential to predominate among the other factors when it comes into play. Finally, factor seven was listed as the least important because of the general presumption that the response to a discovery request generally will benefit the requesting party.

In many of today's cases, information from parties' computer systems takes center stage in discovery disputes. Attorneys on both sides of the electronic discovery fence must understand the implications of *Zubulake*.

A responding party's attorney must be familiar with the basic framework of the client's computer systems, with respect to both active and archived data, and must be prepared to search a sample of inaccessible data.

Counsel for the requesting party must craft a sufficiently narrow document request and conduct enough due diligence to recognize the possible financial consequences of requesting potentially large volumes of electronic data.

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