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Shifting Costs

'Zubulake' Helps Clarify Who Pays For What In E-Discovery

Southern District Judge Shira Scheindlin's recent opinion in *Zubulake v. UBS Warburg LLC*,¹ compels a fundamental shift in how attorneys, litigants, and the courts must approach electronic discovery. In considering any request for electronic documents, the first question to be answered now is: Are the requested materials stored in an accessible or inaccessible format?

With information about the physical location and accessibility of electronic data in hand, an attorney can anticipate the results of a cost-shifting request, and can begin mapping out a sensible electronic discovery strategy.

Three-Step Analysis

The *Zubulake* decision instructs that a three-point analysis is required in disputes involving the scope and cost of discovery of electronic data:

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

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

- In conducting the cost-shifting analysis, a seven-factor test should be applied. The new test represents a modification of the widely followed cost-shifting analysis set forth in *Rowe Entertainment, Inc. v. William*

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*Morris Agency, Inc.*²

Zubulake holds that a determination of whether production of documents is unduly burdensome or expensive turns primarily on whether they are 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 compares the notion of electronic "inaccessibility" to that of paper documents. Paper documents kept in a haphazard manner, in a remote location, or stored on microfiche (or otherwise not easily readable) might fit into the category of "inaccessible" in the paper world. Similarly, 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. The categories represent data ranging from most accessible to least accessible for purposes of

electronic discovery:

- **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 is typically housed on removable media, with multiple read/write devices used to store and retrieve records. Storage examples include optical disks or magnetic tape.

- **Offline storage/archives.** This represents data on removable media that have been placed in storage. Offline storage of electronic records is traditionally used for disaster recovery or for records considered "archival" in that their likelihood of retrieval is minimal.

- **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 is also typically compressed, allowing storage of greater volumes of data, but also making restoration more time-consuming and expensive.

- **Erased, fragmented, or damaged data.** This data has been tagged for deletion by a computer user, but may still 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 deemed that the first three categories are typically accessible, and the last two are typically inaccessible.

In assessing an electronic discovery request, an attorney must first examine which of these categories are at issue, while recognizing that one or all may be relevant in a particular case. Responsive documents stored in an accessible format must be produced at the expense of the responding

party.³ The cost of producing documents that are arguably inaccessible may be shifted to a requesting party. *Zubulake* instructs that a cost-shifting determination should be made only after careful analysis of the facts surrounding the document request.

Data ‘Sampling’

If inaccessible data is at issue, the court recommends a “sampling” approach to determine what kinds of documents reside on the inaccessible media.

In *Zubulake*, this resulted in an order to restore and search data from five backup tapes out of 94 available. With a sampling of the data contained on the five representative tapes, the court reasoned it would be in a position to fairly apply a cost-shifting analysis.

Attorneys are now advised to prepare for data sampling in any case involving backup tapes. A comprehensive electronic discovery strategy must include preparation for any contingency that may arise from this scenario.

A producing party may find that relevant data exists on the tapes, requiring the court to move on to the next stage in its analysis. On the other hand, sampling can be used effectively as a shield, as when an unwarranted “fishing expedition” seeks to cripple an opponent with expansive electronic discovery requests.

From a technical standpoint, carrying out the sampling activity is simple. A proportionately reasonable set of the backup media is restored and made available for searching. The searching is then conducted via an online review application, with the responding party’s review team able to access and search many different file types from a common interface accessing one database.

An agreement about search terms and parameters should always be reached before this work is conducted. The results of the search are then reported to the court, to enable the cost-shifting analysis to move to the next stage.

Inaccessible Documents

The *Zubulake* court determined that cost shifting should be considered only when electronic discovery imposes an undue

burden or expense on the responding party, and questioned the rulings of other courts that have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. Rather, the court stated:

Electronic evidence is frequently cheaper and easier to produce than paper evidence

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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.

Noting that the *Rowe* factors generally favored shifting the cost of production to the requesting party, the court reworked the cost-shifting analysis and presented a new seven-factor test:

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 the information.

The court instructed that the seven factors should not be weighted equally (as was typically done with the *Rowe* factors). 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 — comprising a “marginal utility” test — are the most important.⁴ 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 over 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 will generally benefit the requesting party.

Conclusion

Whether representing the requesting or producing party in any electronic discovery scenario, attorneys 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 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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 (1) 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y., May 13, 2003).

(2) 2002 U.S. Dist. LEXIS 8308 (S.D.N.Y. May 9, 2002).

(3) It should be noted that the *Zubulake* court was not asked to decide whether the document request itself was overly broad because the request had already been limited to five custodians for a period of approximately 2-1/2 years. In all cases, the general rules of discovery apply, and requests for data stored in accessible format may still be deemed overly broad and unduly burdensome in their own right.

(4) For a complete discussion of the marginal utility analysis, see *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).

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