Zubulake I through IV – Cost Allocation for Electronic Discovery

By

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Four recent federal court decisions, arising from the same case, provide a significant insight into the discoverability and cost allocation for electronic information. In the case a former female employee brought a gender discrimination and retaliation claim against her former employer. At issue was the discoverability of electronic information - specifically electronic mail - in the control and possession of the employer.

Initially, the court issued two decisions on the same day concerning different issues in the case.

Zubulake I

In *Zubulake v. UBS Warburg,* LLC, CIV.02-1243, 2003 WL 21087884 (S.D.N.Y. May 13, 2003) (hereinafter referred to as Zubulake I) the court addressed the specific issues has to whether the employee was entitled to discovery of relevant e-mails that had been deleted and that were stored on backup disk, and, also, whether cost shifting was appropriate for the court to consider.

The plaintiff contended that key e-mail exchanged among the defendants' employees existed only on backup tapes and other archived media. Defendants contended that it would cost approximately $175,000 (down from an earlier estimate of $300,000 dollars), in addition to attorney time in reviewing the e-mail, to disclose the electronic information from the backup and archived media.

The court held that the employee was entitled to discovery of deleted relevant e-mail that resided on backup storage media. Of special significance was the courts analysis regarding the discoverability and cost allocation of discovering the electronic information.

The court phrased the issue as "[t]o what extent is inaccessible electronic data discoverable, and who should pay for its production? Id. at *1. The court also noted that "discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter." Id. at *1.

After the Court analyzed in detail the restoration process of electronic information from backup tape and optical storage, the Court discussed the application of the federal discovery rules to electronic evidence and costs allocation (proportionality test) issues regarding the restoration and production of electronic information. The Court stated:

Under Rule 34 a party may request discovery of any document, "including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations...." The "inclusive description" of the term document "accord[s] with changing technology." "It makes clear that Rule 34 applies to electronics [sic] data compilations." Thus, "[e]lectronic documents are no less subject to disclosure than paper records." This is true not only of electronic documents that are currently in use, but also of documents that may have been deleted and now reside only on backup disks." Id. at *6.

However, the Court ruled that the cost shifting did not have to be considered in every case because “The Supreme Court has instructed that "the presumption is that the responding party must bear the expense of complying with discovery requests. . . .“ (citing from *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978). Id. at *6.

The court also discussed the burdens imposed by electronic discovery and stated,

Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved. This makes no sense. Electronic 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. Id. at *7.

In ruling upon the cost shifting request the court classified data as "accessible" versus "inaccessible.". The court noted that e-mail that was available on active computer files was easily accessible. However, data stored on the optical and tape backup systems was less accessible and more expensive to produce.

The courts then discussed a seven-factor test to determine whether cost shifting should occur. The factors are:

> 1. The extent to which the request is specifically tailored to discover relevant information;
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> 2. The availability of such information from other sources;
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> 3. The total cost of production, compared to the amount in controversy;
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> 4. The total cost of production, compared to the resources available to each party;
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> 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.

Id at *11.

The court noted that these seven factors should not be weighted equally in the court's determination as to whether to shift the cost.

> Weighting the factors in descending order of importance may solve the problem and avoid a mechanistic application of the test. The first two factors-- comprising the marginal utility test--are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources. The substance of the marginal utility test was well described in *McPeek v. Ashcroft:*
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> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own

> expense. The less likely it is, the more unjust it would be to make the [responding party] search at its own expense. The difference is "at the margin."
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> The second group of factors addresses cost issues: "How expensive will this production be?" and, "Who can handle that expense?" These factors include: (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 and (5) the relative ability of each party to control costs and its incentive to do so. The third "group"--(6) the importance of the litigation itself--stands alone, and as noted earlier will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii). Finally, the last factor--(7) the relative benefits of production as between the requesting and producing parties--is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh against shifting costs.

In their decision the Court set forth a three-step analysis in resolving the scope and cost of discovery when electronic information is involved.

> First, it is necessary to thoroughly understand the responding party's computer system, both with respect to active and stored data. For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.
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> Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.
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> Third, and finally, in conducting the cost-shifting analysis, the following factors should be considered, weighted more-or-less in the following order:
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> 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.

> Accordingly, UBS is ordered to produce all responsive e-mails that exist on its optical disks or on its active servers (i.e., in HP OpenMail files) at its own expense. UBS is also ordered to produce, at its expense, responsive e-mails from any five backups tapes selected by *Zubulake*. UBS should then prepare an affidavit detailing the results of its search, as well as the time and money spent. After reviewing the contents of the backup tapes and UBS's certification, the Court will conduct the appropriate cost-shifting analysis.

Id. at *13.

Zubulake II

In *Zubulake v. UBS Warburg LLC*, 55 F.R.S. 3d 622 (S.D.N.Y. May 13, 2003) (hereinafter referred to as *Zubulake* II) the court addressed the issue of whether the plaintiff was under an ethical obligation to report alleged securities violations that were supposedly disclosed in a deposition. The testimony obtained in the deposition was from an individual knowledgeable about the defendants' e-mail retention and retrieval policies. The Court ruled that the plaintiff was not under such an obligation.

Zubulake III

Just over two months later in *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. Jul 24, 2003) (hereinafter referred to as *Zubulake* III) the Court applied the cost shifting principles set forth in *Zubulake* I. The Court ruled that cost shifting was appropriate only when inaccessible data is requested. As requested by the court in *Zubulake* I the defendants had performed a sampling of the backup tapes to determine their relevancy as well as the cost of restoring the e-mail backup tapes.

After performing the sample restoration of backup e-mails, defendant argued that the cost of production of the remaining e-mail backup tapes should be shifted to the plaintiff. The court ruled that the plaintiff was to share in the cost of restoration, although the defendant was to bear the major part of the expense – defendant to pay 75% and the plaintiff to pay 25% of the cost of restoration. Also, the court ruled that the defendant must pay "for any costs incurred in reviewing the restored documents for privilege." Id. at 290.

Zubulake IV

The Court addressed the issue of spoliation. See the court decision.