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## Zubulake: The Catalyst for Change in eDiscovery

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### Abstract

*Common law countries have been struggling with electronic data in regard to their discovery rules from the first digital document. All major common law countries, including Australia, New Zealand, Australia, United Kingdom, Canada, South Africa and the United States have recently changed their rules of discovery in an attempt to make sense of all this data and determine what, when and how data should be disclosed by parties in litigation. Case law in these countries has been defining the responsibilities of potential parties and attorneys to prepare for litigation that might happen. The case that was the catalyst of change was the 2003 United States case Zubulake v. UBS Warburg, LLC. Prior to this case judges and attorneys were trying to determine how to deal with electronic data that was becoming more voluminous. In this case, the court made a series of five pre-trial orders concerning disputes over electronic discovery issues. These orders included defining accessible and inaccessible data, analyzing cost-shifting, and litigants' duties to preserve electronic documents and consequences for failure to have an appropriate retention and deletion policy. This paper reviews the key aspects of the Zubulake case and examines the impact of the case on corporate record retention policies. This case was an important harbinger regarding how the discovery rules needed to be changed or redefined to accommodate the electronic data world.*

### Keywords

Electronic discovery, e-discovery, Zubulake, UBS Warburg, meet-and-confer, Federal Rules of Civil Procedure, litigation hold

### INTRODUCTION

While the rapid advances in computer and communications technology over the past two decades have led to huge gains in productivity for businesses and the reality of an almost totally paperless office for many organizations, one additional result has been an explosion in the amount of information that organizations generate and retain. Before the advent of digital storage of huge amounts of information on relatively small and inexpensive media, many organizations found themselves facing the need to develop record retention policies to avoid using valuable space to store mountains of paper records. Even microfilm and microfiche systems weren't the best solutions to records storage problems since those systems involved costs of converting documents and records from one medium to another. Even though these media required less physical space than paper records, the space required for the records and associated equipment to access them was not insignificant.

One effect of the technological advances in computing and communications networks has been the ease of storing and retrieving large amounts of data and a corresponding drop in the costs of such storage. As one might expect, the pressure to develop retention policies due to cost considerations has eased considerably. It has become so much easier and cheaper to store data and records that the storage space and cost constraints are no longer an issue. Simply stated, it has become easier and cheaper to retain records in digital form either online if the records are needed on an ongoing basis to conduct the organization's business day-to-day or offline on inexpensive media such as magnetic tape for archival purposes. Indeed, our technological advancements have not ceased, so it is very likely that recent trends in this direction will continue absent some external factor re-introducing a compelling reason to establish a policy to prioritize and limit record retention. In short, it appears that reason has arisen in the form of Zubulake v. USB Warburg LLC.

Before discussing why this case will likely have such a huge impact on the need to reevaluate record retention policies, it is instructive to review both the facts and the procedural history of the case.

## **ZUBULAKE V. USB WARBURG LLC**

In August of 2001 Laura Zubulake filed a claim with the EEOC against her employer UBS Warburg LLC alleging gender discrimination. She subsequently brought suit against her employer under Federal, New York State, and New York City law for both gender discrimination and retaliation. When Ms. Zubulake was hired as the director and senior salesperson of UBS's Asian Equities Sales Desk in 1999 she was told that she would be in line for and considered for her supervisor's position whenever it might become vacant. Sixteen months later her supervisor left his position, but Ms. Zubulake was not considered for the position. Instead, UBS hired another male for the position.

Ms. Zubulake complained that from the very beginning that her new supervisor treated her differently than he treated her male colleagues. She alleged that he ridiculed and belittled her in the presence of her co-workers; excluded her from certain activities with co-workers and clients; made sexist remarks in her presence; and isolated her from other senior salespersons by physically locating her away from them. Zubulake further alleged that none of the male employees were treated in a similar manner. She filed her EEOC complaint August 16, 2001 and she was fired October 9, 2001. In January of 2002 Ms. Zubulake filed her suit in United States District Court for the Southern District of New York alleging both gender discrimination and retaliation.

UBS filed its answer claiming that its behavior was not discriminatory because the supervisor in question treated everyone equally badly. As examples of the even-handed approach taken by Ms. Zubulake's supervisor, UBS cited instances where he had been accused of national origin discrimination by a male employee, and he had hired three females for other positions.<sup>3</sup> [Authors' query: Would UBS see its defense as being even stronger had Zubulake's supervisor engaged in racial and religious discrimination as well?]

As interesting as the merits of this case may be, the real story with respect to our premise lies in the procedural history of the case. There have been five pre-trial motions dealing with discovery issues in this case. In the first appearance of the parties, Zubulake claimed that relevant emails had been deleted from UBS's active servers and existed only on backup media, to which she requested access. UBS countered by seeking to shift the cost of restoring the backup tapes to the plaintiff. Initially, UBS was ordered to bear the costs of restoring the backup tapes, and in the third hearing, the court ordered UBS to bear 75% of the costs because Zubulake was able to establish that those tapes were likely to contain relevant information, but the court's analysis of cost shifting factors resulted in the 75%-25% split. In the fifth hearing, the court spelled out specific duties of both parties and their legal counsel regarding the litigation discovery process.

With respect to the impact of this case on an organization's need to review and revise its document retention policy, the result of Zubulake I and Zubulake V have the greatest impact. In Zubulake I, the court revised discovery requirements and standards previously well established. We'll turn first to the long established rules of discovery before Zubulake and then the results of Zubulake I and Zubulake V.

## **ELECTRONIC DISCOVERY BEFORE ZUBULAKE I**

Discovery of all kinds – electronic or otherwise – is covered by Federal Rules of Civil Procedure 26 through 37. As long ago as 1947, the United States Supreme Court spelled out the purpose of these rules as follows:

The pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure. Under the prior federal practice, the pre-trial functions of notice-giving issue-formation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. (Zubulake v. UBS Warburg, 2003)

In general, the cost of producing the requested information in the discovery process rests on the party producing the responses. Exceptions to this rule are covered in Rule 26(c), which provides protection from undue burdens or expense and conditions production on the requesting party's payment of costs of discovery. RFCP 26(b)(2). Thus, very often the courts faced decisions balancing the right of liberal discovery with the cost burdens in cases

where production of documents could be very costly. Typically, the issue became one of determining whether it would be appropriate to shift the costs of production. In electronic discovery, generally some types of electronic information are relatively inexpensive to produce while other types, primarily inactive files stored on backup media such as magnetic tapes, can be relatively expensive to restore to useable form.

In 2002 the issue of cost-shifting in electronic discovery was dealt with explicitly in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002), aff'd 2002 WL 975713 (S.D.N.Y. May 9, 2002). The Federal District Court Judge devised a scheme involving eight factors to consider when determining whether and to what extent costs of discovery production of documents should be shifted to the requesting party. Those factors can be summarized as follows:

1. The specificity of the discovery requests;
2. The likelihood of discovering critical information;
3. The availability of such information from other sources;
4. The purposes for which the responding party maintains the requested data;
5. the relative benefits to the parties of obtaining the information;
6. The total accosts associated with production;
7. The relative ability of each party to control costs and its incentive to do so;
8. The resources available to each party.

Even though the *Rowe* test is relatively new, the judge in *Zubulake I* encountered circumstances in the case that required significant alterations of the *Rowe* test. The new test will likely have a lasting impact on all litigation discovery in both Federal and State courts.

## ELECTRONIC DISCOVERY AFTER ZUBULAKE I

In analyzing the circumstances in *Zubulake I*, the judge determined that the traditional approach set forth in *Rowe* did not apply. Typically, the *Rowe* factors had been considered one by one by judges weighting all factors roughly equally. Here, the judge determines that the *Rowe* test is incomplete and modifies the test to include additional factors while dropping others. In the end, the court settles on a new seven-factor test that irrevocably changes the *Rowe* test. The factors enumerated are shown below in descending order of importance. The new *Zubulake* test to be applied when determining whether and when to introduce cost-shifting in electronic discovery is as follows:

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.

### Zubulake v. UBS Warburg LLC

In developing the new *Zubulake* test, the judge analyzed several factors that are likely to be present in virtually every case involving electronic discovery. For that reason, the *Zubulake* test sets a new standard for electronic discovery and provides a straightforward analytical means for judges to use in all such cases. The judge, citing a white paper by Cohasset Associates, Inc. on management of electronic records, identifies five different types of electronic storage some of which are readily accessible and some of which are relatively inaccessible. These five types of electronic storage include the following:

1. Active, online data: “On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life – when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, i.e., milliseconds.” Examples of online data include hard drives.

2. Near-line data: “This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially search media, such as magnetic tape.” Examples include optical disks.
3. Offline storage/archives: “This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered ‘archival’ in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility.” The principal difference between nearline data and offline data is that offline data lacks the “the coordinated control of an intelligent disk subsystem,” and is, in the lingo, JBOD (“Just a Bunch of Disks”).
4. Backup Tapes: “A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably. . . . The disadvantage of tape drives is that they are sequential access devices, which means that to read any particular block of data, you need to all the preceding blocks.” As a result, “the data on a backup tape are 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.” Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.
5. Erased, fragmented or damaged data: “When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters. . . . As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk.” Such broken-up files are said to be “fragmented,” and along with damaged and erased data can only be accessed after significant processing.”<sup>8</sup>

The judge goes on to describe the first three categories as accessible and the remaining two categories as inaccessible. This distinction is critical in her analysis of the duties that apply to accessible data versus inaccessible data.

## DUTIES OF PARTIES AND COUNSEL IN ELECTRONIC DISCOVERY

The most recent hearing, *Zubulake V*, concerned a motion for sanctions against UBS for not complying with previous discovery orders. In analyzing the situation and considering whether to order sanctions, including an adverse inference instruction should the case go to trial, the judge enumerated the duties of parties and their counsel during the discovery portion of litigation. Specifically, in imposing sanctions Judge Scheindlin stated the following in her concluding remarks with respect to the duties of the parties and counsel:

In sum, counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve.

Once counsel has taken these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel's instructions or to a court's order, it acts at its own peril. (*Zubulake v. UBS Warburg LLC*, 2004)

## IMPLICATIONS OF ZUBULAKE FOR BUSINESS EXECUTIVES

Perhaps the single most important statement in *Zubulake V* for businesses involved in electronic discovery is the following:

At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril. (*Zubulake v. UBS Warburg LLC*, 2004)

Thus, while legal counsel has significant duties as noted in the previous section above, in the final analysis the party litigant is the one who will bear the burden of complying with the duty to preserve and produce the documents requested. So, what are the practical implications of the *Zubulake* test on this duty and how does it affect a retention policy? Before addressing that question directly, we should consider basic business reasons for a sensible document retention policy and then address how the *Zubulake* test affects that policy.

First and foremost, the reason for any business policy is to satisfy the record management and information needs of the business. The primary motivation has to be the creation and maintenance of good business practices in furtherance of the organization's mission. In some instances a legal obligation to retain certain records may be imposed by Federal, State or Local Government. Examples include regulations of the Securities Exchange Commission or Internal Revenue Service. With this philosophy in mind, the following are factors should be considered in any document retention policy formation before or since *Zubulake*:

1. Balance business and legal needs along with costs and technological limitations. Each of these issues is important and a valid consideration in developing a retention policy. The tendency to retain the information because there is no compelling reason to destroy it must be resisted. Records should be retained as long as necessary, but no longer than absolutely necessary. Otherwise, the retention of records could become a liability in future litigation.
2. Consider industry norms for various categories of documents in order to establish a reasonable good faith basis for the specifics of the policy. If you're following industry standards, this should be construed as prima facie evidence of good faith in the retention period chosen.
3. Do not use litigation defense as the primary reason for determining when to destroy documents. If a policy is considered to have been made in bad faith, the consequences in litigation could be serious and costly.

Additions to this framework of policy development should also include the following as a direct result of *Zubulake*:

1. Every document retention policy should require employees to notify the legal department as soon as any potential litigation threat occurs. This doesn't mean that each employee needs to become a lawyer, but it does mean that the legal department needs to educate employees about situations that may arise that require legal department assistance. This includes any circumstances where there may be litigation. A "litigation hold" on document destruction must be imposed long before the organization is served with summons and complaint. *Zubulake* requires a litigation hold whenever the possibility of litigation arises. The legal department or outside counsel must be consulted and monitor the situation while litigation might be pending. This possibility must be dealt with in the policy. For example, if an employee threatens legal action, or even if he or she does not, if there exists an air of hostility around any event it is best to impose a litigation hold until the matter is fully resolved. It is far less expensive to impose a litigation hold when it is not needed than it is to not impose a litigation hold when the court later determines that it should have been imposed.

2. Once a litigation hold has been imposed either by the court or by legal counsel, the key individuals involved in the legal action must be alerted to the needs to retain all relevant documents on an ongoing basis. The key individuals certainly include individuals who may have been directly involved in an incident, but it also extends to any individuals who may have relevant information, such as emails. This implies that an extensive investigation must be completed to ascertain who those individuals are. Monitoring by legal counsel is required by Zubulake and a section in the retention policy should specifically include address the question of retention during a litigation hold.
3. Review the document retention policy to determine whether documents may be moved into a so-called “inaccessible” category as discussed in Zubulake. That is, if certain data must be retained, include provisions in the retention policy that will facilitate moving the documents in question into a so-called “inaccessible” category at the earliest opportunity. This will make court-ordered document production more likely to allow cost shifting to the plaintiff rather than imposing the costs of production upon the organization.

## **CONCLUSION**

Document and record retention policies have always been important to any organization and will continue to be important. Above all, any document retention policy must first satisfy the business and legal needs of the organization and incorporate technological limitations of retention. Retention of documents should consider types or categories of documents, and absent compelling legal or business reasons for other retention periods, consideration of industry retention norms is prudent in establishing a good faith policy. While litigation defense should not be the primary consideration in determining the period of document retention, documents should be retained as long as necessary but no longer.

Zubulake required that a litigation hold on some documents be imposed in certain circumstances when a threat or possibility of litigation arises. In such circumstances a retention policy must include the identification and monitoring of documents held by key individuals who may have some involvement, even if only peripherally, regarding the possibility of litigation. Finally, this case also suggests that a prudent approach to document retention will include a systematic moving of documents from “accessible” categories to “inaccessible” categories at the earliest opportunity in order to facilitate cost shifting during discovery.

After this case it became evident that the rules needed to address these issues. The case has been cited in many of the common law countries and was the catalyst to rule change beginning 2006 when the United States changed its e-discovery rules.

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