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## Litigation

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# E-DISCOVERY – CAN THE PRODUCING PARTY EXPECT COST-SHIFTING?: THE NEW TREND AND WHAT CAN BE DONE TO REDUCE PRODUCTION COSTS

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## Abstract

Now that computers and the Internet have radically changed the way businesses create and transmit information, questions about discovery rules in litigation continue to arise, such as which party should pay for producing electronic discovery. The courts are now considering cost shifting when the cost of production is unduly burdensome on the producing party by applying a seven-factor test. However, cost shifting is not always considered or granted, which is why it is important to have electronic documents relevant to anticipated litigation accessible in order to minimize the cost of producing electronic discovery.

This Article will examine how courts are determining who should pay for electronic document production and suggest how lawyers should advise their clients in order to reduce the cost and burden of producing e-discovery.

## Table of Contents

[Introduction](#)

[Accessibility of Stored Records](#)

[Document Retention Policies and Litigation](#)

[Court's Approach to Cost-Shifting \(\*Zubulake I\*\)](#)

[Advisory Committee on Civil Rules Proposed Amendment to Federal Rules on Electronic Discovery](#)

[Conclusion](#)

[Practice Pointers](#)

## INTRODUCTION

<1> The consequence of not having relevant electronic discovery

accessible when litigation arises can mean \$16.5 million dollars, which was Medtronic's estimated cost of production in its trade secrets litigation.<sup>2</sup> Because rules are changing as a result of the increasing amount of electronic discovery (e-discovery), a current question facing the courts today is which party should bear the cost of production.

<2> When the cost of production of e-discovery is unduly burdensome, parties producing discovery are asking the court to shift the costs to the requesting party. In deciding whether cost-shifting is appropriate, the Southern District of New York in the case of *Zubulake v. UBS* developed a test (which other courts are using as guidance) where the court decides how important the sought-after evidence is in comparison to the cost of production. The court takes into consideration factors such as the needs of the case, the resources of the parties, the amount of controversy, the issues at stake, and the importance of the proposed discovery in resolving the issue.<sup>3</sup> This new test is gradually, and generally, replacing a prior test under which the courts were more likely to shift the cost to the producing party upon request.

<3> The Advisory Committee on Civil Rules proposed an amendment to Rule 26 of Civil Procedure where a party does not need to provide electronically stored information that is not reasonably accessible. Whether or not the amendment is implemented businesses need to anticipate high costs of production and take proactive steps to minimize such expense.

## ACCESSIBILITY OF STORED RECORDS

<4> Courts and businesses agree that discovery requests become costly when data is stored in inaccessible formats requiring an enormous amount of time to locate volumes of electronic information. One of the most challenging issues involved in electronic discovery is finding the "physical" location of the information.<sup>4</sup> Network servers can connect and store data from many employees' computers in different offices, cities, and even different countries throughout a multinational organization. Relevant information may be stored in employees' desktops, laptop computers, and removable data storage devices.<sup>5</sup> Furthermore, people fail to recognize that most documents are created on computers and more significantly, that many of these documents are never printed to paper.<sup>6</sup> As a result, many documents are not as accessible now as they used to be when records were kept in printed form.

<5> The importance of quick accessibility to these computer-

generated documents varies for each business. In general, from a business perspective, the priority of having records easily accessible from the computer starts relatively high and then decreases with the age of the record.<sup>7</sup> From a regulatory perspective, however, depending of the type of records, business, and jurisdiction the expectation of when documents should be readily available varies. For instance in some cases the expectation is for the first two to three years of the required retention period, which is the period when the potential investigation or litigation is likely to occur.<sup>8</sup> In situations when the issue is citizen complaints the retention period and accessibility period may be up to seven years.<sup>9</sup> The reality is that there is no specific period of time across the board. As a result each business needs to be familiar with the applicable regulations and manage the retention of documents accordingly. Additionally, the Federal Records Act (FRA) and federal regulations allow agencies to develop internal guidelines for document retention and destruction.<sup>10</sup> Even though the required retention period is such a gray area, when the question is raised with respect to civil litigation one rule is clear: once a party reasonably anticipates litigation will occur it must suspend the destruction of documents.<sup>11</sup> It then follows that once a business anticipates litigation the business should take reasonable steps to make sure relevant documents are easily accessible.

## DOCUMENT RETENTION POLICIES AND LITIGATION

<6> An effective document retention policy will vary depending on the business and its needs. In order to have a workable retention policy the business needs to know what the retention period is for each specific type of document.<sup>12</sup> Although this article does not focus in any one particular practice area or business, as a general rule the first step should always be to ensure that the document retention is consistent with federal, state, and local legislation and regulation.<sup>13</sup> Given that the duty to preserve electronic documents exists, it is important to take proactive steps in order to minimize costs.

<7> The high costs of document production arise when data is stored in a disorganized manner requiring people to review the information in order to locate the relevant information. These costs can be substantial and may defeat the purpose of a fair, just, and speedy resolution of a dispute. Document retention policies should be designed to prevent unnecessary time and effort in locating relevant information, as well as provide a framework and storage location for dealing with confidential

company information.<sup>14</sup>

<8> While courts may be understanding in situations where documents are not readily available or accessible, electronic data is discoverable and the producing party can be required to design a computer program to extract the requested data from its computerized business records in order to make it available to the requesting party.<sup>15</sup> This can prove costly!

<9> The court in *Zubulake v. UBS Warburg LLC (Zubulake I)* was interested in the producing party's computer system when faced with cost-shifting because whether production of documents is unduly burdensome depends mainly on whether the information is kept in an accessible or inaccessible format.<sup>16</sup> The court started with an analysis of the five ways in which electronic data can be stored and determined that UBS, the producing party, maintained the data in an accessible and usable format.<sup>17</sup> The court at a later date ordered the producing party to pay for most of the production costs stating that cost-shifting is not appropriate when documents are stored in accessible format.<sup>18</sup> Similarly, the court in *McPeck v. Ashcroft* wrote a detailed analysis of the producing party's (defendant/employer) computer and archived backup system.<sup>19</sup> The *McPeck* case involved retaliation claims where the court was persuaded by the plaintiff that relevant e-mails related and material to the claims had been deleted but stored on backup tapes.<sup>20</sup> As a result the court ordered the producing party to perform backup restoration of e-mails connected to the plaintiff's computer for one year.<sup>21</sup>

<10> The results will differ depending on the litigation itself, the relevance of the documents, how accessible the documents are, whether the inaccessibility of documents is intentional, and the resources available to each party. Although the courts will look at these and many other factors, the above cases are indicative of the courts' inclination toward having the producing party pay for most of the cost or have the requested information restored at the producing party's expense. A way to resolve this problem is to extract all the electronic documents relevant to the litigation from the document retention policy and preserve them in an accessible manner from the moment there is a reasonable expectation of litigation. The importance of taking this step is to avoid extra costs since it is unlikely the court will shift the cost if the producing party ought to have anticipated producing the documents.

## COURT'S APPROACH TO COST-SHIFTING (ZUBULAKE I)

<11> Judge Scheindlin of the South District Court in New York was faced with various interesting issues pertaining to electronic discovery and in fact wrote six different opinions.<sup>22</sup> Of particular interest is the new test Judge Scheindlin implemented with respect to cost shifting, which is the sole focus of this article. Other issues addressed by the court in the various opinions will not be addressed here but some are addressed in other articles.<sup>23</sup>

<12> It is common in litigation for the producing party to ask the requesting party to pay for the cost of the archived information if producing such information is costly and burdensome. The most recent case dealing with this issue is *Zubulake I*. The decision in *Zubulake I* is instructive because it shows that while courts are now considering shifting the cost of production to the requesting party, cost shifting *does not have* to be considered in every case involving the discovery of electronic data (emphasis added).<sup>24</sup> Equally important, only the costs of restoration and searching, not all costs, may be shifted.<sup>25</sup>

<13> The Southern District of New York in *U.S. v. Rowe Entertainment* was the first court to consider the issue of cost-shifting in the context of electronic records, in which the court set forth eight equally-weighted factors in order to determine if cost-shifting was appropriate.<sup>26</sup> All the subsequent cases that applied the *Rowe* test shifted the cost to the requesting party.<sup>27</sup> This trend stopped with *Zubulake I*. In fact, in *Thompson v. U.S. Dept. of Housing and Urban Development*, which followed *Zubulake I*, the District Court of Maryland discredited the *Rowe* test writing that “[*Rowe*] has been perceived as permitting too easily the shifting of the expense of production from the producing party to the requesting party.”<sup>28</sup>

<14> The *Zubulake I* court determined that the *Rowe* test was inappropriate because it was incomplete and gave equal weight to all of the factors when some should be given more weight.<sup>29</sup> The court, in following the requirements of Rule 26 of Civil Procedure (consideration of the amount in controversy, the parties’ resources, the importance of the issues at stake, and the importance of the proposed discovery) modified these factors. The *Zubulake I* court enumerated a seven-factor test and cautioned that all seven factors should not be weighed equally. The new factors include: (1) the extent to which the request is specifically tailored to relevant information; (2) the availability of such information; (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; and (7) the relative benefits to the parties of obtaining the information.<sup>30</sup>

<15> In its more enhanced approach to the seven factors, the *Zubulake I* court suggests that its first two factors (the extent to which the request is specifically tailored to relevant information and the availability of such information) are the most important, while the seventh factor (the relative benefits of production) is the least important. It is significant to note that although the importance of the litigation will rarely come into play, factor six (importance of the issues at stake) will weigh heavier than any other factor when the case has broad public impact.<sup>31</sup> In other words, these seven factors are only a guide for answering the core question: how important is the sought-after evidence in comparison to the cost of production?

<16> Although the *Zubulake I* test is not binding authority outside of New York, courts throughout the country are adopting the same seven-factor analysis and rationale resulting in a denial of overall cost-shifting.<sup>32</sup>

#### ADVISORY COMMITTEE ON CIVIL RULES PROPOSED AMENDMENT TO FEDERAL RULES ON ELECTRONIC DISCOVERY

<17> The Advisory Committee on Civil Rules has proposed the following amendment to Rule 26(b)(2)(C) of Civil Procedure pertaining to electronic discovery:

a party does not need to provide electronically stored information that is not reasonably accessible. If the requesting party moves to compel discovery, the responding party must demonstrate that the information is not reasonably accessible. If that showing is made, the court may still order the party to provide the information if the requesting party shows good cause. After showing of good cause, the court may impose conditions and terms on the discovery of electronically stored information that is not reasonably accessible.<sup>33</sup>

<18> The Judicial Conference Committee on Rules of Practice and Procedure has not yet approved this proposal. If approved, the change could become effective on December 1, 2006.<sup>34</sup>

#### CONCLUSION

<19> The cost of electronic document production in litigation can be substantial if documents are not stored in formats that can be easily accessible. Although courts can consider shifting the cost of production, the *Zubulake I* analysis, which is being followed throughout the country, will more likely impose the majority of the cost burden on the producing party. Hence, it is important to anticipate and minimize the costs of producing e-discovery. A way to do this is to design an effective document retention policy that allows for documents to be retrieved and placed in accessible mediums once litigation is anticipated. This way the business can meet its goals in maintaining and destroying documents at the appropriate time, while avoiding headaches and high costs when discovery requests are made.

## PRACTICE POINTERS

- Attorneys should be involved in helping their clients develop a document retention program that identifies the type of documents the clients have and the legal retention period.
- As soon as the attorney finds out of the potential litigation, the attorney and client should identify where relevant information is and how to save it.
- Attorneys should be proactive and find out from opposing counsel exactly what documents are being sought in order to limit the documents that are being saved.
- Attorneys should make sure all employees are aware of the documents that are to be saved and retained for litigation in order to avoid unintentional destruction of relevant information.

[<< Top](#)

## Footnotes

1. Mafé Rajul, University of Washington School of Law, Class of 2006. Thank you very much to Mark Walters of Blank & Associates and to Edmund Robb of Foster, Pepper & Shefelman for their feedback and to Professor Jane Winn for her support. Mafé can be reached at [mafecita@u.washington.edu](mailto:mafecita@u.washington.edu).
2. *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 WL 21468573, at \*7 (W.D.Tenn. May 13, 2003).



3. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003) [hereinafter *Zubulake I*].
4. Michael R. Arkfeld, *Electronic Discovery and Evidence* § 2.06[A]2-39 (Law Partner Pub. 2003).
5. *Id.*
6. Mark D. Walters, *Electronic Evidence Discovery & Electronic Document Retention Strategies*, (Blank & Associates P.S., Seattle, WA), 2004, at 2 (on file with author [http://www.digital-legal.com/firm\\_mwalters.html](http://www.digital-legal.com/firm_mwalters.html)). "...between 20% and 80% of electronic documents created are never printed to paper."
7. Cohasset Associates, Inc., *White paper: Trustworthy Storage and Management of Electronic Records: The Role of Optical Storage Technology* at 11 (April 2003).
8. *Id.*
9. *Fletcher v. Superior Court*, 100 Cal.App.4th 386, at 393 (Cal.App. 1 Dist., 2002). The new statutes thus incorporated a new policy for document retention and included a compromise provision requiring citizen complaints to be preserved "for a period of at least five years." (Pen.Code, § 832.5, subd. (b)).
10. *McNamara v. U.S. Dept. of Justice*, 949 F.Supp. 478, at 485-486 (W.D.Tex.,1996).
11. *Rambus, Inc. v. Infineon Technologies, AG* 222 F.R.D. 280 (E.D.Va., 2004).
12. Arkfeld, at § 6.02[D] 6-28.
13. *Id.* at 6-29.
14. *Id.* at 6-28.
15. *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ.2120(LMM)(AJP), 1996 WL 22976, at \*1 (S.D.N.Y. Jan. 23, 1996), *cert. denied*, 525 U.S. 813 (1998).
16. *Id.* at 318.
17. 217 F.R.D. at 318-320. (1) Active, online data: provided by magnetic disk, such as hard drives. (2) Near-line data: robotic storage device that houses removable media and uses multiple read/write devices to store and retrieve records, such as optical

disks. (3) Offline storage/archives: removable optical disk which can be labeled and stored in a shelf. Its accessibility required manual intervention and it is much slower than online or near-line storage. (4) Backup tapes: Like a tape recorder that reads data from and writes it onto a tape. In order to read one particular block of data it is necessary to read all the preceding blocks. Restoration is time-consuming and expensive. (5) Erased, fragmented or damaged data: can only be accessed after significant processing because the files are erased and their clusters are made available again as free space.

18. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003). [hereinafter *Zubulake III*].
19. 202 F.R.D. 31, 33 (D.D.C. 2001).
20. *Id* at 32.
21. *Id* at 34.
22. *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake II*, No. 02 Civ. 1243, 2003 WL 21087136 (S.D.N.Y. May 13, 2003); *Zubulake III*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake IV*, 220 F.R.D. 212 (S.D.N.Y. 2003); *Zubulake V*, No. 02 Civ. 1243 (SAS), 2004 WL 1620866 (S.D.N.Y. July 20, 2004); *Zubulake VI*, No. 02 Civ. 1243SAS, 2005 WL 627638 (S.D.N.Y. Mar. 16, 2005).
23. Issues pertaining to the attorney's duties to monitor compliance (*Zubulake V*) are addressed in: Mafé Rajul, "I Didn't Know My Client Wasn't Complying" - *Lawyers can no Longer Turn a Blind Eye When Clients Ignore Court Orders in Litigation Matters* (upcoming publication in the *Shidler Journal of Law, Commerce & Technology*).
24. *Zubulake I*, 217 F.R.D. at 317.
25. *Zubulake III*, 216 F.R.D. at 289-90.
26. 205 F.R.D. 421, 429-432 (S.D.N.Y. 2002). The factors enumerated by the court are: (1) the specificity of discovery; (2) likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purpose for which the responding party maintains the requested data; (5) the relative benefit to the parties for obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to

control costs and its incentives to do so; and (8) the resources available to each party.

27. *Murphy Oil USA, Inc., v. Fluor Daniel, Inc.*, No. CIV.A. 99-3564, 2002 WL 246439, at \*6 (E.D. La. Feb. 19, 2002); *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 444-45 (D.N.J. 2002); *Byers v. Illinois State Police*, No. 99 C 8105, 2002 WL 1264004, at \*12 (N.D. Ill. June 3, 2002). .
28. 219 F.R.D. 93, 98 (D.Md. 2003).
29. *Zubulake I*, 217 F.R.D. at 320-322.
30. *Id.* at 322.
31. *Id.* at 322-323.
32. *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 602 -603 (E.D.Wis. 2004); *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2004 WL 1895122, at \*8 (N.D.Ill. Aug. 10, 2004); *Open TV v. Liberate Technologies*, 219 F.R.D. 474, 476-477 (N.D.Cal. 2003) *Thompson*, 219 F.R.D. at 98.
33. Administrative Office of the U.S. Courts, *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure*, \*2 (Aug. 2004) available at <http://www.uscourts.gov/rules/comment2005/CompleteBrochure.pdf>, and Administrative Office of the U.S. Courts, *Report of the Civil Rules Advisory Committee*, at 10-12 (2004) available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.
34. *Id.* at 1