

PAPER:

EDISCOVERY IMPLICATIONS, DUTIES AND CONSEQUENCES

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‘The process of discovery is very simple.’¹ Not so, Mr. Thoreau. While legal discovery may have been a simple matter when the only written communications were those of an official or handwritten nature, times have changed. Before the advent of the computer, things said or done were safely whispered or verbally discussed behind oak doors. In the twentieth century, things began to be recorded, stored, and often, inescapably archived on the hard drive memories of machines. This phenomenon has created a new body of evidence on which to predicate and prove or defend legal claims around the world. Bring together the electronic age with lawyers and senior executives hidebound in the tradition of pen and paper, and it transpires that many in the world legal community find themselves out of their depth.

Why understanding ESI is important

Electronic discovery, or colloquially ‘eDiscovery’ has fast become the most expensive, most overlooked and least adapted to issue in modern commercial litigation. This paper is a brief entrée for every business manager and their attorneys into the world of electronically stored information (ESI) and the danger it poses to the unwary in the context of litigation.

This paper is not aimed solely at businesses based or incorporated in the United States. With each passing year, a combination of political and market factors has created a global economy with fewer boundaries and greater access to US markets for foreign companies than at any previous point in US history. These factors include the global proliferation of high-speed data services, the expanding borders of the European Union,

free trade agreements between the United States, and an unprecedented number of foreign countries (NAFTA, CAFTA)² and a weak United States currency that has created an inexpensive milieu for foreign companies. *The Barrister*, a publication for lawyers in England and Wales, recently discussed the issue of eDiscovery (eDisclosure) and the effect of its development in the United States legal system.

The area of E-Disclosure is growing through infiltration from the US and sheer weight of volume of documents being created within the UK and around the world. It is inevitable that the UK judicial system will need to better define practices and procedures in the area. These guidelines will be essential if legal practitioners start to challenge electronic evidence in the same way that their US brethren have since *Zubulake*.³

The number of actions filed against corporations is statistically significant. In 2007, 17 percent of surveyed companies reported litigation, while 58 percent reported 1 to 20 actions and 25 percent reported 21 or more actions. While the total number of actions filed had dropped slightly from the previous year, the cost of new litigation is much higher, with 39 percent of respondents being sued for at least US\$20 million in the past year, compared to 17 percent in the previous year.⁴ For most companies, litigation is a business fact, and an annual expense, and something that appears to be increasingly costlier with each passing year. This increased cost is in no small part due to the increased expenses associated with ESI preservation, production and sanctions for failing to preserve or produce relevant evidence.

It is now necessary for the modern and organized

¹ Henry David Thoreau, *A Week on the Concord and Merrimack Rivers* (1849), referred to by District Judge Scheindlin in *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, at 311 (S.D.N.Y. 2003).

² For other FTAs, see the US Governments FTA

website at <http://www.export.gov/fta/index.asp>.

³ Greg Wildisen, ‘Challenging Evidence in E-Disclosure’ *The Barrister*, 11 January 2008 – 19 March 2008), 20-22.

⁴ Fulbright & Jaworski LLP have conducted annual

surveys through Greenwood & Associates for four years from 2004-2007, from information provided by in-house counsel at 253 companies in the U.S. and 50 in the U.K., based on the preceding 12 months from June 2007.

company to understand its own ESI; have and apply a formal policy for retention of ESI under a 'good faith' records management programme; identify 'not reasonably accessible' systems, and have a litigation team prepared to manage eDiscovery issues in the legal context, including verifiably enforced formal litigation hold and data preservation procedures.

The Sedona Principles

The Sedona Principles were written by a number of private attorneys as a means to deal with eDiscovery.⁵ Three versions have been issued. The first two versions of the Principles were issued in 2004 and 2005, prior to the final changes in the Federal Rules of Civil Procedure. However, the first version was issued almost simultaneously with the Proposed Federal Rules changes issued by the Civil Rules Advisory Committee in August of 2004.⁶ A post Federal Rules changes edition was issued in June of 2007. The most recent commentary on the Federal Rules of Civil Procedure was issued by the Conference in March of 2008.⁷ The initial conference and first version of these Principles were crafted and issued contemporaneously in the context of *Zubulake*. The Principles consist of fourteen proposed 'best practice' recommendations covering the full range of e-discovery issues, together with commentary on their application.⁸

The Principles and commentaries are very useful, and have been cited by Federal Courts in making decisions concerning eDiscovery. However, the full range of these items are beyond the scope of this paper. The final authority and best practice requires consideration of the Federal Rules of Civil Procedure, 2006 as amended. The rulings in various Federal jurisdictions and the way judges across the United States handle the law has differed greatly in the past, although courts have begun to more fully understand the nature and importance of ESI, especially since the rewriting of the Federal Rules of Civil Procedure (FRCP), effective December 1, 2007.

The FRCP changes that specifically relate to ESI include: Rule 26(a) duty to disclose ESI and specific right to discovery ESI; Rule 26(f), requirement to meet-and-confer with opposing counsel to resolve eDiscovery issues; Rule 26(b)(5), inadvertent production of

privileged information through eDiscovery ('claims of privilege' and 'clawback agreements'); Rule 26(b)(2), unduly burdensome ESI with respect to discovery, and Rule 37(f), protection for inadvertent records destruction in the course of 'good faith' records management operations.

Even before the recent changes to the Federal Rules of Civil Procedure, courts began to impose strict record protection duties on corporations and their outside counsel. This means that both in-house and outside counsel must be keenly and specifically aware of not only the duties imposed by the new Federal Rules, but also of the potential sanctions and costs to companies that are not prepared. These rules changes with respect to ESI were finalized after the *Zubulake* decision and owe much of their genesis to that line of decisions.

The importance of *Zubulake*

In the short space of less than two years (2003-2004), Judge Scheindlin of the Southern District of New York Federal District Court issued detailed, definitive and still relevant opinions that changed the way lawyers, businesses and judges looked at eDiscovery. The *Zubulake* series of decisions in the matter of *Zubulake v. UBS Warburg*, commonly referred to as *Zubulake I* to *VII*, serve as a foundational interpretation of the duties imposed by the Federal Rules with respect to electronic discovery both from the perspective of who owes a duty to preserve ESI, to what extent ESI needs to be preserved and importantly, who bears the costs in respect of these duties.

The issues in the first three *Zubulake* decisions⁹ centered around plaintiff's request for '[a]ll documents concerning any communication by or between UBS employees concerning the plaintiff,' a fairly innocuous and common discovery request in employment discrimination cases. UBS produced approximately 350 pages of documents, of which approximately 100 pages comprised of company e-mails. *Zubulake* herself, in possession of at least 450 pages of e-mail, demanded additional production from the company's archival media sources. The defendants cited the *Rowe* decision in the Southern District of New York,¹⁰ which described eight equally weighted cost-shifting factors considered

⁵ The Conference's stated mission is '...to allow leading jurists, lawyers, experts, academics and others, at the cutting edge of issues in the area of antitrust law, complex litigation, and intellectual property rights, to come together - in conferences and mini-think tanks (Working Groups) - and engage in true dialogue, not debate, all in an effort to move the law forward in a reasoned and just way' <http://www.thesedonaconference.org>

⁶ [/content/tsc_mission/show_page_html](http://content/tsc_mission/show_page_html).
⁶ Federal Courts Law Review, *The Sedona Production Principles And The Proposed Federal Rules Addressing E-Discovery*, Thomas Y. Allman, 2005 Fed. Cts. L. Rev. 3

⁷ The Sedona Conference® Commentary on ESI Evidence & Admissibility, is available at http://www.thesedonaconference.org/content/misc/Files/ESI_Commentary_0308.pdf.

⁸ The Principles are available at <http://www.thesedonaconference.org>.

⁹ *Zubulake v. UBS Warburg LLC et al.* 217 F.R.D. 309 (S.D.N.Y. 2003), *Zubulake v. UBS Warburg LLC*, 55 F.R.S. 3d 622 (S.D.N.Y. 2003) and *Zubulake v. UBS Warburg LLC et al.* 216 F.R.D. 280 (S.D.N.Y. 2003).

¹⁰ *U.S. v. Rowe Entertainment*, 205 F.R.D 421, 429-432 (S.D.N.Y. 2002).

in the context of the production of electronic records where unduly burdensome requests were made.¹¹ The significance of *Zubulake I* was the modification the court made to this decision, and the fact that most courts, after *Zubulake I*, applied the *Zubulake I* version of the cost shifting analysis.¹²

Zubulake I reduced the number of factors to seven, and departed from *Rowe* by holding that the factors were not to be weighed equally. The factors are: (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 (the court noted that this factor should outweigh all others when the case has broad public effect); and (7) the relative benefits to the parties of obtaining the information. The first two factors were to be afforded the greatest weight, and the last factor to be given the least.

The court in *Zubulake I* did not apply the cost shifting factors, but rather ordered UBS, at its expense, to produce all responsive e-mails on its optical disks or on its active servers and from any five backups tapes selected by *Zubulake*. The court then required UBS to prepare an affidavit with search results and a summary of the costs of the search. The court then indicated that it would review the contents of the search, and conduct the cost-shifting analysis described in this important opinion. The importance of *Zubulake* is the in detailed explanation of the cost shifting analysis, which the judge later applied in *Zubulake III*.

In *Zubulake II*,¹³ the court reviewed the plaintiff's ethical obligation to report alleged securities violations that may have been disclosed in a deposition from an individual with information about the defendant's e-mail retrieval and retention policies. In another win for Ms. *Zubulake*, the court determined that she did not have an obligation to report the alleged violations. This decision is not particularly relevant to this line of cases, except insofar as it touches on eDiscovery.

A couple of months later, the court applied the

weighted cost shifting analysis it had described in *Zubulake I*.¹⁴ As required by the court in *Zubulake I*, UBS had completed a sampling of back-up tapes and optical drives to determine relevancy and the cost UBS would incur to restore e-mail from the tapes, arguing that the cost of production should be shifted to Ms. *Zubulake*. After reviewing the data, the court found that cost shifting was appropriate only when inaccessible data is requested. The court determined that the parties had to share the burden of the production cost, but that UBS would pay seventy-five percent of such costs, as well as for 'any costs incurred in reviewing the restored documents for privilege.'¹⁵

After the order of the court in *Zubulake III*, which required UBS to produce archived e-mails, the plaintiff discovered that some back-up tapes and particular e-mails had been seemingly intentionally deleted, and thus sought sanctions against UBS for its failure to preserve the same. Which brings us to *Zubulake IV*.¹⁶ While Ms. *Zubulake* did not file suit until April 2001, Judge Scheindlin noted at 217, that '... everyone associated with *Zubulake* recognized the possibility that she might sue[.]'¹⁷ Based on this knowledge, the court found the defendant had an affirmative duty to preserve potential litigation evidence and should have known the information would be relevant to future litigation. This decision places a heavy burden on potential litigants. The court found that although UBS had a duty to preserve the destroyed tapes and was therefore culpable, *Zubulake* could not demonstrate the tapes would have supported her claims. Nevertheless, the court ordered UBS to bear the plaintiff's costs for new depositions of certain witnesses to inquire into the purpose of the destruction of the back-up tapes and any newly discovered emails.

Zubulake V inevitably followed.¹⁸ The production ordered by the court in *Zubulake IV* took longer than it should have. As a result, the plaintiff discovered that the defendant had actually willfully deleted e-mails in an effort to cover-up adverse evidence. Judge Scheindlin granted the plaintiff's motion for sanctions and ordered UBS to pay her costs. That is not the chilling or innovative decision of *Zubulake V* (depending on who you are, of course). The court also found that defense

¹¹ The factors enumerated by the *Rowe* court were: (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.

¹² *Thompson v. U.S. Dept. of Housing and Urban Development* 219 F.R.D. 93, 98 (D.Md. 2003) following *Zubulake I* and noting '[Rowe] has been perceived as permitting too easily the shifting of the expense of production from the producing party to the requesting party.'

¹³ *Zubulake v. UBS Warburg LLC*, 55 F.R.S. 3d 622

(S.D.N.Y. 2003).

¹⁴ *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003).

¹⁵ *Zubulake v. UBS Warburg LLC, et al.* 220 F.R.D. 212 (S.D.N.Y. 2003).

¹⁶ *Zubulake v. UBS Warburg, LLC, et al.* 229 F.R.D. 422; (S.D.N.Y. 2004).

counsel was jointly liable for the document destruction, because counsel had failed in its duty to locate relevant information, to preserve that information, and to produce that information in a timely manner. Judge Scheindlin stated, at 432, '[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched[,]'¹⁹ and thus attorneys are obliged to ensure such documents are discovered, retained, and produced. The court further imposed a duty on counsel to guarantee that relevant documents are preserved through a 'litigation hold' on the documents, requiring attorneys to communicate the need to preserve, and arrange for the safe storage of relevant archival media.²⁰

Judge Scheindlin cited a line from the film *Cool Hand Luke*, 'What we've got here is a failure to communicate.' She then went on to describe, in varying levels of detail, what amount to six guiding principles that counsel should abide by to avoid sanctions:

1. Actively monitor compliance so that all sources of discoverable information are identified and searched, noting that it is not sufficient to advise the client of a litigation hold and then expect the client to retain, identify and produce the relevant evidence;
2. Become familiar with the client's document retention policies and computing infrastructure, communicating with the client's relevant IT personnel to do so;
3. Communicate with all the significant people involved in the litigation, inquiring as to how and where they store their information, and advising them of their obligations to preserve evidence;
4. Ensure that a 'litigation hold' is implemented whenever litigation is reasonably anticipated, and periodically reissue the notice;
5. Communicate directly with the most important individuals; and
6. Instruct all employees to produce responsive electronic files and ensure that relevant backup tapes or other archival media are safely stored.

Zubulake V is the first time a court has explicitly set out the detailed requirements for lawyers in managing preservation and production of ESI.

There were two more *Zubulake* opinions, neither of which are particularly significant outside of the

Zubulake case. In the final discovery ruling, the court agreed with UBS that the court's previous ruling on imposing sanctions on UBS for its failure to produce certain e-mails were not relevant to the allegations of discrimination and would unfairly prejudice UBS. Ms Zubulake was only able to raise the discovery matter in examination in chief if UBS introduced evidence as to whether its failure to produce e-mails was reasonable.

At trial, the issue of punitive damages in the matter required the members of the jury to decide whether UBS acted with malice or reckless indifference to Ms. Zubulake's rights, and further required the jury to consider UBS's defense that it acted in good faith in an effort to comply with the laws prohibiting discrimination and retaliation. The crux and central supporting theme of Mr. Hubbard's (counsel for Ms. Zubulake) closing argument for punitive damages centered around the eDiscovery abuse perpetrated by the defendant UBS, which resulted in a punitive damages award of US\$20,169,081. The text of the closing speech by Mr Hubbard, (1808 – 1811) is set out below:-

Ladies and gentlemen, the purpose of this proceeding is to decide whether or not you conclude that UBS acted with malice or reckless disregard to Laura Zubulake's rights in this case, and that is by discriminating against her on the basis of her gender and by retaliating against her.

Now, there is a different standard here. You've determined before intentional discrimination and intentional retaliation. The standard here now is different and that is whether or not the men whose testimony you heard here acted with malice or with intentional disregard of those rights.

How do you make that decision? Because they are big words. The judge is going to tell you how you make that decision. The defendants act with malice if you find that the employees knew that the treatment of her and that her termination on the basis of her gender and on the basis of retaliation was in violation of the laws that protect us from those things. And that's why I asked or Mr. Batson asked every man who is on that stand, did you know when you did this that this was against the law, both federal, state, and city? And everybody said yes. You need to go no further. They acted with knowledge that they were

¹⁹ *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

²⁰ *Ironically, defendant's counsel had issued a litigation hold after a complaint had been filed, but failed to mention backup tapes.*

acting in violation of these laws, and, therefore, with malice, as the law defines it in this case.

But there is a lot more than that beyond the witnesses agreeing to it. Their conduct demonstrates that they acted with awareness that they were violating the law. They destroyed the evidence that they knew would reveal their misconduct. They didn't just inadvertently or negligently delete those e-mails or fail to serve them. They repeatedly failed to preserve those e-mails when their own lawyers told them to save them, their own lawyers. And they did that and the only fair inference from that is they did it to cover up what they were doing and, therefore, with awareness of that they were doing.

Most significantly, they covered up the two that showed the tracks to Mr. Orgill. The first one where he says exit her ASAP doesn't put him in touch with the rest of the termination process. Okay. It's a pity. Remember those things were not recovered until the backup tapes were recovered. So the two e-mails that linked Mr. Orgill to the entire episode were not saved, in part by Mr. Varsano. He was on both of those e-mails.

What else did they do? They take all these complaints against Ms. Zubulake that Mr. Chapin is storing, and they put attorney-client privilege on them to hide them from discovery.

What else do they do, worst of all? They come in this courtroom and they don't tell you the truth. And that, again, is part of an effort to conceal or protect themselves from their responsibility for what they did.

For all of those reasons, we say the evidence shows in this case that UBS egregiously, egregiously acted

with knowledge of the wrongdoing and with malice and with reckless disregard here, and that they should be liable, therefore, for punitive damages.²¹

Laura Zubulake was also awarded US\$2,241,009 in back pay and US\$6,863,100 in lost future pay by a jury verdict on April 6, 2005 for her complaint alleging gender discrimination and retaliatory dismissal. *Zubulake* and a number of subsequent decisions in the US Federal Courts should change the way attorneys think about e-mail, how it is used by their clients, and how it is retained.

Conclusion

It is crucial that lawyers beware and become aware of what ESI is, and when and how it must be protected. It is also necessary to know and understand document retention policies, litigation hold protocols and the ability and willingness of company employees and IT departments to comply with the protocols. Mistakes in this realm are costly and can have significant consequences. IT personnel are highly important, and must be included in every plan, and it is necessary to plan ahead.

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²¹ *Zubulake v. UBS Warburg, LLC et al transcript of hearing April 6, 2005, 2:30 p.m., New York, NY, available from <http://www.liddlerobinson.com/546MZUBF.txt>.*