

Ripples on the Shores of Zubulake: Practice Considerations from Recent Electronic Discovery Decisions

By Jonathan M. Redgrave and Erica J. Bachmann

Because relatively few reported cases have addressed the issue of cost-shifting in electronic discovery cases at length, the recent decisions from the Southern District of New York in *Zubulake v. UBS Warburg LLC* (addressed in detail in the accompanying article, "Passing the Buck: Cost-Shifting in Electronic Discovery") will have a significant impact. In addition, both the extensive treatment of cost-shifting principles provided in these opinions and careful distinctions drawn between cost-shifting in *Zubulake* and approaches applied in prior cases contribute to the framework to guide the factual and legal analyses needed to address the costs of electronic discovery in other cases.¹ Further, Judge Scheindlin, who issued both the *Zubulake* decisions, is recognized as one of the leading jurists considering electronic discovery issues and currently serves on the Discovery Subcommittee of the Advisory Committee on Civil Rules. Finally, the *Zubulake* opinions have been widely cited in press and trade publications (often to imply that cost-shifting will become far more difficult in the future, although that is not a necessary implication of the decisions).

As noted by Carangelo and Graham, prior to the *Zubulake* decisions, the most widely cited case addressing cost-shifting for electronic discovery was *Rowe Entertainment Inc. v. William Morris Agency Inc.*² *Rowe* established an eight-point test to balance factors to determine which party should bear the costs of electronic discovery.³ Many courts have invoked *Rowe* on the question of cost-shifting.⁴ *Zubulake*, however, relied on a modified version of *Rowe's* eight-point test.⁵ It remains to be seen if the *Zubulake* opinions will be viewed as a divergence from *Rowe* and its progeny, or if a new approach will emerge based on *Zubulake*.

At a minimum, *Zubulake* and *Rowe* highlight the critical need for litigators to consider the following points with respect to electronic discovery disputes.

1) Do not ignore electronic discovery. Courts are increasingly impatient with parties and counsel who do not understand the potential relevance and importance of electronic records in litigation, as well as the means by which responsive data will be identified and produced. As more secondary materials are published⁶ and additional courts issue published opinions, it will be more difficult for parties to ignore electronic discovery issues in litigation of all

types and sizes. Indeed, opinions are already being issued regarding spoliation of electronic evidence that should raise alarm bells for counsel and clients.⁷

2) Understand the world of electronic discovery. While many vendors and software manufacturers assert that electronic discovery is easy and forensic examinations should be conducted on every computer, the real world of potentially thousands of computers and huge volumes of different types of data defies such simplistic assertions. Moreover, the implementation of either the *Rowe* test or the *Zubulake* test presupposes that accurate and reliable information, often about the detailed aspects of data extraction and processing, will be presented to the court. Accordingly, counsel must be cognizant of not only electronic discovery but also the details so that they can communicate effectively with clients, vendors, other counsel, and the courts.

3) Understand Rule 26(b)(2) and Rule 26(c). The decisions in *Rowe* and *Zubulake* are essentially based upon the touchstone concept of proportionality embodied in the Federal Rules of Civil Procedure. Importantly, cost-shifting is but one of the mechanisms that the court has at its disposal to address burden issues. Rule 26(b)(2) grants broad discretion to the trial court to guide discovery, and the court is empowered to limit the frequency and/or extent of discovery sua sponte or on motion by a party under Rule 26(c).⁸ Rule 26(c) specifies a nonexclusive list of provisions that could be adopted in a protective order, including:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the disclosure or discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court; ...
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or revealed only in a designated way; ...⁹

The applicability of these concepts to electronic discovery disputes is obvious, and nothing in *Rowe* or *Zubulake* precludes the availability or importance of these considerations. Understanding the options available to the court (and the standards for obtaining such relief) is critical to success in discovery.

With respect to cost-shifting, counsel should not be distracted by press articles about *Zubulake* (many of which seem to conclude that defendants now must shoulder a greater burden regarding e-discovery) and instead (1) understand the precise holding of *Zubulake* in the specific contours of the case and (2) be prepared to argue that the same or a different result in another case is completely harmonious with the underlying rationale of *Zubulake*.

4) Understand the role and importance of Rule 26(a) disclosures and Rule 26(f) conferences. From the standpoint of both requesting and producing parties, negotiated productions and protocols can often better serve the client than protracted (and expensive) discovery motions and battles can. *Zubulake III* ends with a notice to the parties that they should explore ways in which the review costs can be reduced.¹⁰ Similarly, in *Livent*, the court ordered that the parties review the decision in *Rowe* and confer to reach an agreement on issues such as cost-shifting. The parties were to approach the court via a joint letter in the event they could not agree.¹¹ Given that *Rowe*, *Zubulake*, and other cases have used similar formulations of a multifactor test and considering that costs are rarely wholly shifted to the requesting party but are often apportioned between both parties, it may be more efficient for parties to approach the issue realistically and reach an agreement without court involvement.¹²

5) Tailor discovery requests and responses properly to make sure they are specific. The more specific the request, the more likely it will be sustained as relevant and not unduly burdensome. On the other hand, numerous courts have placed greater financial burden on the requesting party in the face of a refusal to narrow discovery requests. In *Medtronic*, the requesting party sought e-mails from all backup tapes beginning in 1993, despite knowing that e-mail was not used extensively by the producing party until 1997 and it being clear that the most relevant information would be from 1998 or later.¹³ On this basis, the court determined that the “specificity of requests” factor weighed in favor of imposing costs on the requesting party.¹⁴ In contrast, in *Zubulake III*, the time frame sought by the requesting party was limited to less than 18 months and to only five individuals. The court specifically noted that this was “a relatively limited and targeted request.”¹⁵ When it is possible to limit the discovery requests to particular time periods or individuals, parties that do so will, in turn, help tip the balance of factors in their favor.

6) Understand and be able to explain the theory of your case. The key to prevailing in prosecuting or opposing a motion to compel (or a motion for a protective order) is understanding the relevance of the particu-

lar requests and data at issue. The closer data appear to come to the heart of the matter, the more likely that data will be discoverable and the less likely that cost-shifting will be ordered. Thus, being able to define precisely the distance of data from the core issues in the case will be a significant factor in the ultimate resolution of a discovery motion.

It is helpful for the requesting party to have deposition testimony to support an argument that useful e-mails exist or for the producing party to have testimony to the contrary. In *Byers*, the requesting party (plaintiff) claimed that a discriminatory e-mail had previously surfaced and could be found again among archived e-mails.¹⁶ The plaintiff identified three individuals who were aware of the e-mail, but the depositions of these individuals rebutted the averment. Because the plaintiff could not establish that the e-mail existed, the court found that it was not likely that a search of archived e-mail would result in the discovery of relevant information. This calculation of likelihood to produce relevant information is emphasized by courts, particularly those that focus on the marginal utility of the discovery.¹⁷

7) Understand as much as you can about the data at issue. Know where it is located, know what is likely to be deemed “accessible” and “inaccessible” under the *Zubulake* formulation, know why the data was generated and retained, and know as much as you can regarding the potential relevance of the data. For example, the plaintiff in *Zubulake* was able to demonstrate from her own collection of printed e-mails that the defendant’s opening argument that production was “complete” was hollow. The “sample tape” production confirmed this fact for the court. In addition, do not make assumptions about the positive or negative aspects of data without a substantive foundation for that judgment (*i.e.*, do not assume that all client data, including e-mails, are harmful to the theories of the case).

Zubulake I deemed three categories of data to be “typically identified as accessible”: active, online data (often provided on magnetic disk, one example is a hard drive); near-line data (such as a robotic storage device or library, one example is an optical disk); and off-line storage/archives (removable optical disk or magnetic tape media, one example would be a box of disks).¹⁸ On the other hand, typically inaccessible data would include backup tapes and erased, fragmented, or damaged data. Many of the cost-shifting cases center on these two types of inaccessible data, seeking either restoration of the backup tapes or mirror images of hard drives to allow the requesting party to search for erased or damaged data. Cost-shifting is less likely to be granted for accessible data.

Some courts will focus more heavily than others on the purposes for which the data at issue are retained. The court in *Rowe* held that if the data were retained for emergency disaster recovery only, this did not constitute a current business purpose and weighed in favor of having the requesting party bearing the costs.¹⁹ The court in *Medtronic* used a marginal utility analysis to determine

the likelihood of finding relevant information on each of the backup tapes.²⁰ Because the requesting party could not show that the entire spectrum of requested backup tapes would contain relevant information, this factor weighed in favor of having the requesting party bear the costs. On the other hand, in *Zubulake I*, the court stated that it was not important why the data was retained.²¹ In any event, understanding the reason why the data was retained is important to many of the factors being considered by courts regardless of the nomenclature.

8) Prepare and present your best record. The importance of an evidentiary record on discovery motions cannot be overstated, particularly with respect to electronic discovery. Many of the terms, technical concepts, and issues are foreign to courts, and a voluminous record may be necessary to communicate the necessary facts. In addition, courts are suspicious (as they should be) of blanket statements of need, availability, and burden. Declarations or affidavits from information technology staff and document custodians, as well as from vendors, may be needed to address case-specific issues as well as general background information. In particular, because estimates of costs often vary wildly between the parties, a party's briefing may need to include written estimates from numerous vendors, as well as an itemized estimate of costs from the vendor of choice.²² It is also helpful to provide an explanation of the assumptions for the estimate based on realistic expectations of the discovery sought.

9) Be prepared for a sampling procedure. As demonstrated in the *Zubulake* and *McPeck*²³ decisions, the sampling process enables the court to target a particular segment of requested material for review. Based on the results of the sampling, further production may be denied or additional materials may be ordered to be produced. The cost-shifting analysis can then be argued and determined on the basis of actual experience. Typically, courts will either select a sample of the tapes (either randomly or for expressed reasons) or allow the requesting party to choose which tapes will be restored as part of the sample. After a sampling procedure has been completed, parties may be in a better position to reach an agreement about cost-sharing or limitation of the requests.

10) Be aware that neither *Rowe* nor *Zubulake* is binding on other courts. Finally, even though these cases are likely to be widely cited and relied upon outside the Southern District of New York, an examination of whether a hybrid or modified formulation would better apply in a particular case should be conducted. For example, there is room under *Zubulake* to argue that it may be unduly burdensome to retrieve and produce "accessible" data. There is also a significant open question as to whether the "total cost of production" factor should include the estimated costs of reviewing retrieved documents for privilege, confidentiality, and privacy purposes. The *Zubulake III* decision excludes the cost of production (e.g., review for privilege) from consideration,²⁴ but Rule 26 does not so narrowly define the burdens

that can be considered by a court in the proportionality analysis. The inclusion/exclusion of such figures can greatly affect the outcome of the balancing test.

Furthermore, the "claw-back" option detailed by the *Zubulake III* court (in which the producing party forgoes privilege review prior to production in favor of an agreement to return inadvertently produced privileged documents) is not an option in many situations and must be carefully examined. For example, for clients facing serial litigation in multiple jurisdictions, a "claw-back" order in one jurisdiction may not preclude a litigant (and a court) in another jurisdiction from arguing (or holding) that the manner of production (knowingly allowing others the opportunity to review privileged documents under any conditions) constitutes a waiver of the privileges to those documents — regardless of the terms of any protective order entered in the original case. It is also conceivable that an advocate might argue that the waiver would extend to the subject matter of the documents. In sum, little guidance is currently available regarding how "claw-back" productions would be viewed in such circumstances, and clients should be informed of the risks if the idea is raised by the parties and/or imposed by a court.

In short, courts have adopted varied approaches to cost-shifting in the developing realm of electronic discovery, with *Rowe* and *Zubulake* now providing a substantial framework for future cases. Within this framework, however, there is extensive latitude for the arguments of counsel as they may pertain to a particular case in light of the developed record in those cases. Understanding the relevant considerations may well prove crucial to providing clients and courts with tenable arguments and workable solutions to navigate electronic discovery disputes of today and tomorrow. **TFL**

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Endnotes

¹See *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS), 2003 WL 21087884 (S.D.N.Y. May 13, 2003) (*Zubulake I*), and 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*). The second, unrelated *Zubulake* opinion was also issued on May 13, 2003. *Zubulake v. UBS Warburg LLC*, No. 02 Civ. 1243 (SAS), 2003 WL 21087136 (S.D.N.Y. May 13, 2003). The authors note that the word play in the title requires a slight mispronunciation of the plaintiff's name, which they understand should be pronounced as "zoo-byew-lake" with the emphasis on the first syllable.

²205 F.R.D. 421 (S.D.N.Y. 2002).

³*Rowe*, 205 F.R.D. at 429. The *Rowe* decision was addressed at length in the authors' article last year, see

Jonathan M. Redgrave and Erica J. Bachmann, *Electronic Discovery: Recent Views on Cost Shifting*, THE FEDERAL LAWYER, Aug. 2002, at 36–37.

⁴See *Medtronic Sofamor Danek Inc. v. Michelson*, No. 01-2373-M1V, 2003 WL 21468573, at *3–8 (W.D. Tenn. May 13, 2003) (applying the *Rowe* test to all factors except one to shift the majority of costs to the requesting party; using the marginal utility approach for the “purpose of retaining the data” factor); *Computer Assocs. Int’l Inc. v. Quest Software Inc.*, No. 02 C 4721, 2003 WL 21277129, at *2 (N.D. Ill. June 3, 2003) (applying the *Rowe* test and refusing to shift any portion of costs to the requesting party; reasoning that the case was unlike *Rowe* and others because the producing party was seeking recovery of consulting costs to remove privileged information rather than the costs of production); *In re Livent Inc. Noteholders Sec. Litig.*, No. 98 Civ. 7161 VMDFE, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003) (instructing parties to review *Rowe* and confer about the eight factors; if parties do not reach an agreement, they must send a single joint letter to the judge); *Antioch Co. v. Scrapbook Borders Inc.*, 210 F.R.D. 645, 652 n.6 (D. Minn. 2002) (citing *Rowe* in dicta; cost-shifting was not at issue because the requesting party had agreed to pay); *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 443 (D.N.J. 2002) (citing *Rowe* with approval but not applying the eight-factor test; instead finding that there was no financial hardship to the producing party and that the producing party would not have to undertake additional steps to accommodate the requesting party; requesting party ordered to pay the nominal costs of copying the CDs containing the digital information); *Byers v. Illinois State Police*, No. 99C 8105, 2002 WL 1264004, at *10–12 (N.D. Ill. June 3, 2002) (citing *Rowe* but primarily applying a marginal utility analysis to shift costs to the requesting party); *Murphy Oil USA Inc. v. Fluor Daniel Inc.*, No. 99-3564, 2002 WL 246439, at *3–8 (E.D. La. Feb. 19, 2002) (applying the *Rowe* test, reaching the same result as *Rowe* on all factors except the specificity of the requests, diverging from *Rowe* in holding that the producing party’s desire to conduct a privilege review did not affect the cost burden). The *Rowe* approach “with the slight modification set forth in *Murphy Oil*” was adopted in *Gambale v. Deutsche Bank AG*, No. 02 Civ. 4791 HB DFE, 2002 WL 31655326, at *1 (S.D.N.Y. Nov. 21, 2002). However, the continuing validity of *Gambale* is questionable in light of the more recent *Zubulake* decisions in the Southern District of New York.

⁵*Zubulake I*, 2003 WL 21087884, at *11.

⁶A good summary of the key issues and suggested guidelines for action can be found in *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (March 2003) available at www.thesedonaconference.org/publications.html. The principles in this document are currently being revised and the document will be re-published in early 2004. See www.thesedonaconference.org/wgs for more information on The Sedona Conference and its working groups.

⁷See, e.g., *Keir v. UnumProvident*, No. 02 Civ. 8781(DLC), 2003 WL 21997747, at *13 (S.D.N.Y. Aug. 22, 2003) (stating that the court could not determine how much data was lost or the extent of prejudice to the requesting party from producing party’s unintentional failure to preserve e-mails as instructed in the preservation order; suggested the appointment of an independent expert to determine if data can be retrieved); *Commissioner of Labor v. Ward*, No. COA02-838, 2003 WL 21267941, at *4 (N.C. App. June 3, 2003) (affirming order requiring producing parties to produce backup tape data at their own expense due to their failure to comply with motions to compel).

⁸See Fed. R. Civ. P. 26(b)(2).

⁹Fed. R. Civ. P. 26(c).

¹⁰*Zubulake III*, 216 F.R.D. at 290.

¹¹*Livent*, 2003 WL 23254, at *3.

¹²Courts generally are sorely tested by time-consuming, rancorous discovery disputes, and the Federal Rules of Civil Procedure discovery rules and a myriad of local rules reflect a demand that parties and counsel resolve as many matters as possible without judicial intervention. Counsel accordingly should view *Rowe* and *Zubulake* to be guidelines for negotiation and dispute resolution.

¹³*Medtronic*, 2003 WL 21468573, at *3, *6.

¹⁴*Id.* at *3–4; see also *id.* at *11 (imposing 40 percent of costs on the requesting party).

¹⁵*Zubulake III*, 216 F.R.D. at 285; see also *id.* at 289 (imposing 25 percent of costs on the requesting party).

¹⁶*Byers*, 2002 WL 21468573, at *3, *6.

¹⁷The marginal utility approach, as described in detail in *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001), reasons that the more likely it is that the archived e-mails contain relevant information, the fairer it is to impose the costs of production on the producing party, and vice versa. Thus, any evidence indicating the existence of relevant data that have not been produced because they are not reasonably accessible would be useful for a court’s consideration of the issue. As referenced above, numerous courts have focused on the marginal utility of electronic data requests. See *Medtronic*, 2003 WL 21468573, at *5–6; *Byers*, 2002 WL 1264004, at *11–12; *McPeck*, 202 F.R.D. at 34.

¹⁸*Zubulake I*, 2003 WL 21087884, at *7–8.

¹⁹*Rowe*, 205 F.R.D. at 430–31; see also *Murphy Oil*, 2002 WL 246439, at *6.

²⁰*Medtronic*, 2003 WL 21468573, at *5–6.

²¹*Zubulake I*, 2003 WL 21087884, at *10.

²²See *Medtronic*, 2003 WL 21468573, at *7 (“[n]either party provides an itemized estimate for designing a search to identify potentially relevant documents, de-duplicating files, or conducting the search”).

²³See *McPeck v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003).

²⁴*Zubulake III*, 216 F.R.D. at 290 (“the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form”).