

E-Discovery: Who Bears The Costs? (Part I)

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With the growth in the use of electronic media for communication and data storage, there has been a concomitant growth in the need for electronic discovery (“e-discovery”), i.e. requesting that a party produce electronically stored information (“ESI”). As e-discovery becomes more prevalent, the complexity of discovery and the potential cost of document production may increase¹. In order to address these concerns, courts have developed a metric for deciding who should bear the expense of e-discovery. While this test appears to be both logical and effective, questions arise as to whether the test is directly applicable to new mechanisms of data storage (namely clouds).

Discovery is the fact finding process that occurs prior to trial, and usually involves written questions (interrogatories), oral questions (depositions) and requests for production of documents. Issues surrounding e-discovery are most prevalent in relation to requests for production of documents. In many instances, responses to requests for production require parties, attorneys and paralegals to sift through large volumes of material to find the documents responsive to each request. While one would expect that the use of electronic storage, because of the presumed abil-

¹ In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) Judge Scheindlin noted that:

the reliance on broad discovery has hit a roadblock. As individuals and corporations increasingly do business electronically—using computers to create and store documents, make deals, and exchange e-mails—the universe of discoverable material has expanded exponentially. The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, “discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.”

The reason electronic data is so voluminous is explained by the costs of storage of documents kept in hard copy the amount of available storage is limited by the cost of the space necessary to store the documents. In contrast, the electronic storage of data is, essentially, free. Therefore, when information is stored electronically there is no incentive to be selective in regard to what is kept and what is not. As the amount of stored data increases the cost of discovery increases. In addition, as discussed below, data can be stored electronically in such a way that accessing the data is both difficult and expensive.

ity to search great volumes of data almost instantaneously, would render discovery simpler and more efficient, this is not always true. In some instances e-discovery can increase the costs involved in litigation. This increase in cost can arise in two ways, first because parties have a tendency to retain almost all electronically stored information, increasing the volume of material to be searched. Second, sometimes the method by which electronic information is stored can increase costs.

Indeed, because the costs of e-discovery can be so significant courts have developed a mechanism to determine whether the cost of e-discovery should be shifted from the party responding to the discovery request (who/which would normally bear the cost) to the party requesting the documents. In order for cost-shifting to occur it must be shown that the discovery request poses an undue burden such that the cost of discovery outweighs its likely benefit. The fact that e-discovery is sought is not sufficient to establish the existence of an undue burden.

In deciding whether cost-shifting is appropriate where e-discovery is at issue, the Court must answer a number of questions. This article addresses the first question relating to the manner in which the data is stored². More particularly it must be determined whether the data is stored in a medium that is accessible such that the cost of e-discovery is no higher than usual, or whether the data is deemed to be stored in a manner that renders the data inaccessible, thus increasing discovery costs. Courts will only consider cost-shifting where the data is found to have been stored in such a way that it is deemed to be inaccessible.

² The second question relates to the competing interests of the parties and the likely utility of the discovery sought compared to its cost. This is addressed in in the next edition of the RCFP Newsletter "E-discovery: Who bears the costs? (PART II)."

In *Brokaw v. Davol*, decided in February, 2011, Judge Gibney acknowledged that “ESI [Electronically stored information] is still a novel means of discovery in Rhode Island state courts. Accordingly, this Court will turn to the Federal Rules of Civil Procedure and federal jurisprudence for guidance on the subject.” Judge Gibney acknowledged that “*Zubulake I* is recognized as the primary case on ESI discovery in courts throughout the United States.”

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*), Judge Scheindlin of the Southern District of New York identified five categories of electronically stored data:

1. Active, online data. The best example of active online data is the data stored on a computer hard drive.
2. Near-line data. Judge Scheindlin defined near line data as a “robotic storage device,” in essence the equivalent of a jukebox.
3. Offline storage/archives. Offline storage/archives, otherwise known as “just a bunch of discs,” is in essence a number of CDs/DVDs/Thumb-drives or other similar storage devices that have to be removed from their storage area and manually placed in, or connected to, a computer to be read.
4. Backup tapes. A backup tape is created when data is recorded onto a magnetic tape. The data is usually recorded in a compressed format. In addition, although this is changing, tape drives are not usually organized in a way that promotes data recovery. The recovery of informa-

tion from back-up tapes will therefore require specialized equipment and significant work.

5. Erased, fragmented or damaged data³. When data is erased from a computer and overwritten (either partially or fully), becomes fragmented or damaged, significant work is required to restore that data to its original, useful, format.

Active on-line data, near-line data and offline storage archives, i.e. items 1, 2 and 3 in the above list, are all treated as accessible data. For all three types of data storage the information is readily available and stored in a useable format. Backup tapes and erased, fragmented or damaged data, i.e. items 4 and 5 in the above list, are treated as inaccessible data. The restoration of backup tapes and erased, fragmented or damaged data often requires the assistance of a third-party with the equipment and expertise necessary to restore the data and make it useable; an expensive process. Under current rules only data stored either on a back-up tape or erased, fragmented or damaged data will be deemed to be inaccessible and subject to cost-shifting.

Since the mechanisms for data storage are constantly evolving Judge Scheindlin's decision in *Zubulake I* can only be a guide where newer storage techniques are at issue. Perhaps the best example of this is the increasing use of "cloud" services. The use of cloud services raises many questions regarding e-discovery. To the extent data stored on a cloud is immediately accessible it ought to be treated as the equivalent of active

³ An additional complication in relation to e-discovery is the fact that "deleted" is a relative term. When a file is deleted the data is not actually erased from a computer's storage devices. Rather than removing the data, deleting a file simply marks the data entry as "not used" in the disk directory, thus permitting the computer to overwrite the deleted data. Until the data is overwritten, however, the file may be recovered. In addition, if the computer is backed up during the period of time before the data has been overwritten, the deleted file may also be backed up and available for restoration.

on-line data. Indeed, even if data stored on a cloud is not “immediately” accessible and can only be made available after a few hours or even a few days, it is the functional equivalent of Offline storage/archives. In either case, such data is likely to be deemed to be accessible.

There are circumstances, however, where it is conceivable that data stored on a cloud may not be deemed to be accessible. Since clouds are not simply used for data storage, but take multiple different forms including platform as a service (where the cloud provider provides the networks, servers, storage and other services while the user provides the software) and software as a service (where the cloud provider provides software), the documents and data sought through discovery may not be directly accessible by the producing party. In such circumstances the producing party may have to have their cloud service provider access the data and make it available to the producing party in a useable format. Many contracts with cloud service providers will allow the service provider to charge additional fees for these services. Therefore, in addition to being unable to access the necessary data directly, the producing party will likely have to pay additional fees to make the discoverable data available. As such, some data on clouds may actually be deemed to be inaccessible. As a result, it should not be assumed that data is “accessible” simply because it is stored on a cloud.

Although many people still use computer hard-drives, external hard-drives, optical disks, thumb drives and back-up tapes to store electronic data, as the use of cloud computing grows Courts will either have to analogize information stored on a cloud to one of the types of data storage discussed by Judge Scheindlin in *Zubulake I*, or create a whole new category. Whatever courts ultimately decide, there is likely to be a significant period of adjustment where cloud computing is concerned. While Rhode Island Courts appear to have accepted *Zubulake I*, at least in principle, it remains

to be seen how Rhode Island courts will react to the advent of new discovery problems created by the growing use of cloud computing.

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