

## **The “Zubulake Duty” Challenge and the e-Discovery Team Solution**

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October 9, 2008

United States District Court Judge Shira A. Scheindlin, one of the leading jurists in the field of electronic discovery, contends that all attorneys who litigate have an affirmative duty to understand their clients' computer systems sufficiently to know where potential electronic evidence is stored, or affiliate with an attorney who does. Judge Scheindlin even specifies how she expects outside counsel to fulfill that duty. She requires them to speak directly with the key players in a lawsuit about their computer files and other electronic documents and to speak directly with their clients' IT personnel about their data retention architecture. This duty presents a challenge of epic proportions to most attorneys litigating cases today.

Judge Scheindlin stated this principle in the most famous e-discovery case of all, *Zubulake v. UBS*, 229 F.R.D. 422 (S.D.N.Y. 2004) (*Zubulake V*). Here are Judge Scheindlin's actual words on the subject in *Zubulake V*:

Counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures in the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information.

### ***Zubulake Duty Started in New Jersey***

I refer to this obligation as the "*Zubulake duty*" because it first became widely known in this decision. See: *E-Discovery: Current Trends and Cases* (ABA 2008) at pgs. 55-65. Also see: [E-Discovery Team Blog – Duties Page](#). But the truth is, it could probably also be called the "New Jersey duty" because it was required by local rule in New Jersey district courts even before Judge Scheindlin's *Zubulake* opinions. L.Civ.R. 26.1(d) of the Local Rules of the U.S. District Court, District of New Jersey. The N. J. local rules states:

Prior to a Fed.R.Civ.P. 26(f) conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved ... including currently maintained computer files as well as historical, archival, backup and legacy computer

files.

The New Jersey rule also requires counsel to locate an “IT witness”:

Counsel shall also identify a person or persons with knowledge about the client’s information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.

The federal courts in the rest of the country have uniformly followed the lead of New Jersey and Judge Scheindlin on these requirements. In most district courts today, and a growing number of state courts, attorneys are not permitted to just rely on the assurances of senior management and in-house counsel concerning e-discovery compliance. They are supposed to personally verify that all discoverable electronic information has been identified, preserved, gathered and produced.

The district court judges and magistrates today demand that the attorneys who appear before them have enough technical competence, somewhere on their litigation team, to know where the electronic evidence is located and how to preserve, collect and present it in court in a forensically sound manner. Attorneys, especially outside counsel of record, are required to understand their client’s computer architecture, policies, and actual practices, both company-wide and user-by-user. Ignorance of the technology is no defense. *Martin v. Northwestern Mutual Life Insurance Company*, 2006 WL 148991 (M.D Fla. Jan. 19, 2006). (Magistrate rejected the attorney’s excuse of “computer illiteracy” as “frankly ludicrous.”) This is a huge challenge for most attorneys; especially experienced litigation attorneys who have been trained in the “paper chase,” and typically have little, if any, specialized computer skills.

### **Trial Lawyers Unprepared to Fulfill the *Zubulake* Duty**

Most trial lawyers lack the necessary skills and knowledge to fulfill the *Zubulake* duty. They do not have a clue what data retention architecture even means, much less how to speak the “heavy geek” needed to talk to their client’s IT about it. That is not likely to change anytime soon despite the alleged competence of younger lawyers in all things having to do with computers. As a result, in today’s world one of three things generally happens:

1. Trial lawyers ignore the *Zubulake* duty, putting themselves or their clients at risk when e-discovery problems develop, and it is revealed that they have not done their job. See *Eg.: Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05-CIV-4837, 2006 WL 1409413; 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 22, 2006) (Defendant and its lawyers each sanctioned and ordered to pay \$22,581 a piece for breaching the

*Zubulake* duty and failing to find “hidden server partitions” containing crucial evidence, a failure which the judge described as “gross negligence,” but which I contend, most trial lawyers do not even begin to understand); *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 2006 U.S. Dist. LEXIS 87096 (S.D.N.Y. Nov. 30, 2006) (attorneys depend on client IT personnel to do it, and they are untrained in e-discovery, mess it up, and the result is sanctions).

2. They go through the motions of trying to fulfill that duty, and do a poor job, usually by assigning the tasks to the youngest associates in the blind hope that kids who grew up with computers might innately know how to do this. When e-discovery problems develop, and they often do, the results are only slightly better than when the duty is ignored altogether. *Danis v. USN Communications, Inc.*, 2000 WL 1694325 (N.D. Ill. 2000) (\$10,000 fine imposed against CEO personally when the young general counsel he hired and asked to supervise ESI preservation totally botched the project).

3. They delegate the duty to others who claim expertise in this area and hope for the best. Typically this means they either bring in specialized co-counsel to handle the e-discovery aspects of a case (although very few such attorneys exist today, and so this “gold-standard” option is now limited), or they hire consultants or e-discovery vendors to help them with the technical facts, and sometimes also the strategies, and try to handle the legal issues themselves (since by law consultants and vendors are not permitted to provide legal advice).

### **Recipe for Crushing e-Discovery Expenses**

Today, the situation of marginal competence and over-delegation leads two things. First, an unnecessarily adversarial approach to e-discovery; and second, excessive vendor input and control over the amount of Electronically Stored Information (“ESI”) that needs to be reviewed in any one case. These two factors, in turn, significantly increase the costs of e-discovery to the point that the costs are turning parties away from the courts. Defendants are forced into extortion type settlements and plaintiffs are forced into ADR systems where all discovery is prohibited or severely limited.

### **Marginal Competence Works Against New Cooperation Paradigm**

When a trial lawyer who does not fulfill the duty, or just delegates it without real understanding of the processes involved in the overall e-discovery work, in other words, all nine steps of the standard EDRM model, he or she will not understand that the “business as usual” adversarial model is counter-productive in e-discovery. They will not appreciate or understand how cooperation and transparency can significantly reduce e-discovery costs and are thus in their

clients' best interest. This is something that the Sedona Conference is now focusing on. I recommend that readers look further into their important new work in this area: *The Sedona Conference® Cooperation Proclamation* located at the Sedona webpage.

[http://www.sedonaconference.org/content/tsc\\_cooperation\\_proclamation](http://www.sedonaconference.org/content/tsc_cooperation_proclamation)

### **Over-delegation to Vendors Drives Up the Costs**

Another factor impacting e-discovery costs is the natural tendency of e-discovery vendors to increase the amount of ESI collected and processed for review in a case. When inexperienced trial attorneys hire vendors to help them, they typically buy these services as uninformed consumers. They do not know the right questions to ask, much less strategies, to minimize data review. They are easy to doubletalk and dazzle with technical lingo. Often they fall for hype and over-promises. Typically this leads to dissatisfaction at the end of a project, and so the trial lawyers choose a different vendor for the next project. They typically do not work together with the same vendor on multiple projects as part of a team.

Almost all trial lawyers today do not understand the technical processes involved in e-discovery, nor even the specialized law of e-discovery. As a result, they are easily convinced to err on the side of over-collection and review of too many computer files. After all, this review usually results in very profitable work for teams of law firm associates. No one complains, except for the clients who pay the bills. The trial lawyers then blame the judges and the new rules, saying they, not them, are to blame for the excessive costs. This is a common practice that is totally inappropriate. I have written about this before in *Trial Lawyers Turn a Blind Eye to the True Cause of the e-Discovery Morass*.

<http://ralphlosey.wordpress.com/2008/09/14/trial-lawyers-turn-a-blind-eye-to-the-true-cause-of-the-e-discovery-morass/> The truth is, the bills are too high because the lawyers are untrained and working without the proper support of IT.

This uninformed-consumer, over-collection, excessive review model prevalent today suits the typical vendor's pricing model. They typically charge on a per gigabyte basis. For that reason, some vendors encourage this kind of overuse of their services, or at least, they do not direct uninformed consumers to a more reasonable model. After all, they sometimes convincingly argue, it is safer to review too much, than to risk sanctions for missing key evidence. Also, the vendors would have to stray too far into the area of legal advice and legal strategies to forcibly redirect the trial lawyers. They are not permitted to do that. This provides them with a perfect cover to stand back and get paid for the over-conservative, over-collection of ESI.

Some vendors even exploit the fears, inexperience, and lack of knowledge of their customers to fulfill their duties to their shareholders to maximize profits. To date, e-discovery vendors have no code of ethics, and, unlike lawyers, they are not subject to professional regulation or oversight. It should be pointed out,

however, that the EDRM group is working on developing a voluntary code of ethics, and, of course, most vendors are honorable people.

[http://www.edrm.net/wiki2/index.php/EDRM\\_Code\\_of\\_Conduct](http://www.edrm.net/wiki2/index.php/EDRM_Code_of_Conduct)

### **Call For a Change to Avoid Crushing Expenses**

The situation described has to change. We can no longer afford to continue with the same paradigm. We must begin to envision and implement a different model.

Analysis of the problem suggests the answer. The only viable solution is the team approach where technology savvy lawyers, e-discovery technicians, trial lawyers, clients, records managers, and vendors all work together to fulfill the *Zubulake* duty. This is an interdisciplinary model where the technical fields of law, information technology, and information management each contribute. At a minimum, a person from each of these three fields must be included on a good e-discovery team. Then, they must all be taught a base level of competence in the other two fields. Finally, all three have to be taught the specific issues of law and technology that are unique to e-discovery.

I will elaborate on the *team solution* at the conclusion of this article. But first I will address two “beg the question” type “avoidance-solutions” to the problem.

#### **The Duty Will Not Just Go Away and Should Not Be Shifted to the Parties**

The first avoidance type solution to this fundamental problem is to simply get rid of the duty altogether. Under this argument, New Jersey, Judge Scheindlin and the dozens, if not hundreds, of judges who have adopted this doctrine are simply wrong and appeals courts should reject the tenet. They argue that it is unfair to impose such duties on attorneys. The parties who own the data should be solely responsible.

That argument is not likely to be accepted by the courts because discovery has traditionally been the joint responsibility of the parties and their lawyers. In fact, some e-discovery issues have always been the sole responsibility of attorneys as officers of the court, for example legal objections to discovery. That is the reason many types of discovery responses must be signed by the attorney. That is also why it is well established that both litigants **and their attorneys** can be sanctioned for the failure to supervise discovery. *Metro. Opera Ass’n Inc. v. Local 100, Hotel Employees and Restaurant Employees Int’l Union*, 212 F.R.D. 178, 218-219 (S.D.N.Y. 2003). This is based upon the practical reality that “*discovery is run largely by attorneys, and the court and the judicial process depend upon honesty and fair dealing among attorneys.*” *In re September 11th Liability Insurance Coverage Cases*, 2007 WL 1739666 (S.D.N.Y. June 18, 2007).

To date, no judge (to my knowledge) has rejected the imposition of the *Zubulake*

duty upon the counsel of record, nor listened favorably to an argument by an attorney that he or she just assumed that their client did the right thing without asking, much less counseling them about it. The logic behind the duty is too compelling. It makes sense for lawyers to be responsible to search out and find the evidence. That is, after all, the job of trial lawyers, not the parties, unless they are unrepresented. It makes sense to have a party's lawyer take reasonable steps to try and prevent their client's destruction of evidence.

On the other hand, I will concede that there are situations where a lawyer has made reasonable efforts, and has thereby fulfilled the *Zubulake* duty, but the client was untruthful or grossly negligent. In these circumstances, when ESI is lost or withheld, the client alone should be sanctioned. Lawyers are not insurers of their clients' actions, nor should they be. Parties to litigation must be responsible to meet the *Zubulake* duties too. It is their data and their lawsuit.

Another slightly different argument is to accept the duty of lawyers to make reasonable efforts to satisfy *Zubulake* duties, but try to shift the duties from outside counsel to in-house counsel. This is an attempt to shift the duty from the officers of the court, the trial lawyers who appear of record to represent parties in litigation, to in-house lawyers. Of course, this argument only applies when the parties are big enough to have their own law departments. But when they do, some argue that the duty should not still be imposed on outside counsel.

One such commentator is Thomas Y. Allman, who was himself an in-house attorney for many years. He thinks that outside counsel should be able to rely upon the representations of their clients that e-discovery has been handled properly. He contends it should be sufficient for in-house counsel to speak to the IT personnel, and relay pertinent points to outside counsel. Many in-house counsel agree with Tom on this point, and certainly it has merit and can reduce costs. But in my view, this proposed modification to the *Zubulake* duty is unlikely to be accepted by the courts.

Judges want the attorney with these important evidence preservation and collection responsibilities to appear before them; in other words, to be a counsel of record in a case. By doing so, they subject themselves to the ethical obligations and duties of an officer of the court, not to mention personal jurisdiction of the court to sanction them for misconduct, including violation of the *Zubulake* duty. In-house counsel do not appear of record in cases and so they do not assume the same ethical duties and responsibilities. Also, the court lacks personal jurisdiction over in-house counsel. They only have jurisdiction over the company. This means the judge can only sanction the corporation, not the in-house counsel personally.

Tom has written a short article on this subject, arguing that outside counsel should be excused of these duties and instead be allowed to rely on their clients' in-house counsel do it for them. The article was recently published in Law

Technology News. *Pandora's Box: Compliance Quagmires Can Alienate Legal Teams*, 15 Law Technology News No. 8 at pg. 26 (August 8, 2008). Here is an excerpt from Tom's interesting article:

The implication -- when applied literally to clients with significant in-house e-discovery capability -- is that retained counsel may not rely upon the reasonable assurances by a client about discovery compliance. However, entities that can afford to do so are increasingly responding to electronic data discovery demands by designating in-house teams to be responsible for accomplishing the task of EDD management in a cost-effective and compliant manner. ...

The quest for a single best practices rule, focusing on a duty to supervise by retained counsel, is understandable, but misplaced.

Aside from the anticipated opposition to this proposal from the judiciary, I think the timing of this proposed shift is all-wrong. It goes against the grain of recent experience in e-discovery where parties to litigation have often shown a need for independent outside counsel to act as a guardian of proper conduct. Many people, even large corporations, can get caught up in the turbulence of litigation. One of the important roles of outside counsel is to serve as a kind of ethical gatekeeper and restrain the impulses of some clients to win a case at all costs, even if it means bending the law, or even lying to opposing counsel or the court.

The new *Qualcomm v. Broadcom* case, which is still in progress in San Diego federal court, shows the importance of ethical outside counsel. It shows how bad it can get when outside counsel do not fulfill the *Zubulake* duties and instead rely on in-house counsel to do it. *Qualcomm, Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) (one of several relevant decisions in this case). *Qualcomm* is an unfortunate situation where outside counsel's over-reliance on in-house counsel led to unethical behavior and outright fraud-on-the-court.

Although Tom Allman's position may someday prevail, to date there is no court decision criticizing Judge Scheindlin's ruling, nor shifting the duty to in-house counsel. In view of the chilling lessons of *Qualcomm*, none are likely soon. For the time being, the placement of the *Zubulake* duty remains squarely on the shoulders of outside counsel, and then secondarily upon the litigants themselves.

### **The Team Solution to the *Zubulake* Duty**

The days of a lone trial lawyer preparing for trial by him or herself, with perhaps a

few trusty associates to assist, are over for all but the smallest of cases. This was the Nineteenth Century model followed by Abraham Lincoln and popularized in fiction by Sherlock Holmes and his trusty associate, Dr. Watson. It worked well enough through most of the Twentieth Century too, although the numbers of lawyers involved in bigger cases began to increase steadily in the second half of the last century, as did the addition of private investigators to the lawyer team a *la* the Perry Mason model. But this limited team started to become inadequate in the 1990s when clients started to switch to computers for creating and storing documents and other evidence.

By now, in late 2008, the old solo trial lawyer or small team model is obsolete in most cases of any significant size. In all but a few rare cases, the only viable model to meet the *Zubulake* duty is through larger scale teams that incorporate computer and other technical specialists as key members of the team. I call this new paradigm the “CSI” type team, after the popular television program, where technical specialists encompassing a wide variety of disciplines are used for forensic investigation to solve crimes.

The trial lawyer today needs to be a part of a larger team, a key part to be sure, but not a one-man team as in Lincoln’s day. Trial lawyers need to retain and rely upon lawyers specializing in e-discovery, their own computer science specialists (i.e. – law firm techs), their own favored e-discovery vendors and consultants, and ideally their client’s own litigation readiness team. This ESI-type team model frees trial counsel to do what they do best -- try cases, and not mess around with computers.

Although there is some territorial type of resistance by the trial bar to this proposal, once they try it (or it is forced upon them by the client), they see how well it can work and are pleased. It alleviates them of the burden to try to learn IT systems, and pretend like they know what they are doing in this new area of the law. The truth is, the IT systems of most large companies are so complicated, that only an attorney who specializes in this area of law can do it properly, and even then he needs the support and contributions of other non-lawyer team members who are specialists in various technologies. This is a highly arcane area, and lawyer dabblers, as well as IT dabblers, often get themselves (and their clients) into deep trouble before they even realize what happened.

The e-discovery teams in law firms, and in companies often subject to litigation, can act together to efficiently meet the *Zubulake* duties and thus significantly reduce the costs and risks of e-discovery. The efficiency is maximized for larger companies when they have their own internal e-discovery team that works with the team of their outside counsel. When there is an internal corporate team in place, outside counsel can then more efficiently discharge their duties, and focus on their specialty skills of communication to the court and opposing counsel.

The efficiencies are further maximized when corporate counsel uses national or

regional discovery counsel to coordinate the activities of local counsel, and appear where necessary to discharge the *Zubulake* duties. Specialty discovery counsel become familiar over multiple case with their clients' ESI storage architecture, employee practices, and the data itself. The learning curve for any one case becomes far less. The same holds true with the corporate utilization of national or regional e-discovery vendors. Just like specialty legal counsel, the vendors can act more efficiently in any particular case when they already know the client's systems and practices from multiple past cases.

Where possible, the outside specialty legal counsel and select vendors can also serve directly on the corporate readiness and response teams. This dual role improves knowledge and communication, and thus maximizes cost reduction and risk management. Although this is ideal, in truth, very few vendors and even fewer attorneys are qualified to serve on both teams in an effective and impartial manner. That takes not only extensive knowledge and experience in both law and technology, but also maturity and leadership skills to operate effectively in the two types of teams, both law firm and corporate.

### **Conclusion**

The multi-specialty team approach to e-discovery, an approach which includes vendors and their products where needed will, in time, overcome the situation prevalent today of marginal competence and over-delegation to vendors and consultants. As the teams, both legal and corporate, train and become skilled players, and understand how and what it means to win this game, they will adopt the Sedona approach of cooperative and transparent e-discovery. Experience shows that this move from an unnecessarily adversarial approach to e-discovery will, in itself, lead to significant cost reductions.

The second factor driving excessive e-discovery costs, which is seldom spoken about but well known to industry insiders, is the unsophisticated e-discovery buyer. This naive lawyer or corporate purchaser of e-discovery vendor services often not only pays too much, but also usually over delegates to vendors. Without an expert team, it is typical for parties to litigation and their attorneys to rely too much on vendor input and control as to the amount of ESI that needs to be reviewed in any one case. The new teams will not only know how to control that, but when vendors are a part of the team, and better assured of longer lasting relationships, they will be less likely to fall for this temptation.

Over time, different types of e-discovery vendors are likely to participate on e-discovery teams. At first, especially when larger projects and cases are involved, the full service type A-Z vendors will predominate. As the teams mature and begin to take more of the functions of e-discovery in-house, they will rely less and less on service vendors to do the work for them. They will not only handle the preparation and enforcement of litigation holds, which is the first and most basic function of any e-discovery team, but also move on to collection and processing

the ESI themselves. Some internal corporate teams have even matured to the point where they conduct their own ESI review, and transmit the culled data set to the outside counsel members of their team for final analysis and preparation of privilege logs and productions. Of course, since outside counsel is still responsible for supervision of discovery, including signing discovery responses, this must be done with their close supervision and fully integrated teams.

As the teams mature, they will, I predict, redirect their vendor purchases from e-discovery service companies, who typically charge on a project by project per gigabyte basis, to e-discovery software companies. The software companies license a product that can be used by the team, typically without limits or regard to the number of gigabytes or terabytes of data involved.

All educated teams already know that the highest costs in e-discovery are from review. They also know that the best ways to control these costs are by: (1) reducing the amount of ESI to be reviewed, which is done by aggressive culling and advanced search techniques; and (2) faster and better review tools. This means that products that process ESI so as to reduce volume, coupled with products that speed up the actual review process itself, will be in high demand by tomorrow's review teams. A few such products that fit into this category include:

Catalyst's *CatalystCR* <http://www.catalystsecure.com/>

CT Summations' *Enterprise and Discovery Cracker*  
<http://www.ctsummation.com/Solutions/>

Inference Data's *Inference* <http://www.inferencedata.com/index.htm>

Kcura's *Relativity* <http://www.kcura.com/>

LexisNexis' *Law PreDiscovery* <http://law.lexisnexis.com/law-prediscovery>

Wave Software's *Trident* <http://www.discoverthewave.com/>

There are many others that provide team oriented solutions directed to processing and review. I do not have personal experience with these programs, except for Wave's *Trident*, which I have used to good effect to cull down and analyze email.

It seems to me that the winners in the vendor circle of tomorrow will be the companies that provide software and other tools to empower e-discovery teams to play the game better. Aside from the processing types of software mentioned above, other types of software that will be in high demand for teams are the litigation hold and collection type software. These are the tools that e-discovery teams need and want. There will still be a place for A-Z service providers, especially for the big cases where a team does not feel up to it in view of the

complexity and risks. Also, the non-team players, lone trial lawyers, novices, and neophytes will still need their care and assistance in every case. But the trend is clear. The direction for both law firms and corporations is towards self-sufficient, well-trained interdisciplinary teams.