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E-Discovery—business as usual

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On Dec. 1, 2006, with a change in the Federal Rules of Civil Procedure, electronic discovery "officially" moved to the top of the agenda in federal court litigation and in the minds of many in the legal and business communities.

For some, e-discovery was already old news and an integral part of their legal risk management strategy — where an understanding of the technology and proper planning could go a long way in minimizing the costs of discovery and avoiding e-discovery risks. For others, though, it was a day of stark awakening — lawyers and clients now need to be even more aware of all those electronic digits flying about the business community, or resting in the digital archives on backup media.

At a seminar I attended in April 2008, the topic turned to e-discovery and the question was asked of more than 100 lawyers in attendance: How many of you have heard of the Zubulake or the Qualcomm cases? Much to my surprise, only a few hands went up in addition to mine.

Whether you are a lawyer in private practice doing litigation or transactional work, or an in-house counsel, you and your clients need to be mindful of e-discovery before litigation demands your attention.

While this article will not make you an expert in e-discovery, it will make you aware of some key issues involving cost-shifting and sanctions.

E-discovery is really not new. Ever since business information was being created and stored electronically, e-discovery has been an issue. .Many pre-December 2006 cases addressed e-discovery issues.

One landmark e-discovery case pre-dates the effective date of the change in the FRCP by more than three years. In *Zubulake v. UBS* Warburg (2003-2004), the U.S. District Court, Southern District of New York, presented five opinions related to e-discovery, and explored the issue of cost-shifting in discovery.

Underlying *Zubulake* is a gender discrimination case brought by the plaintiff against her former employer, UBS Warburg. The plaintiff requested the defendant to produce an extensive amount of documents, including many e-mails relevant to the case. Initially, the defendant said it would be too burdensome to produce all the requested e-mails. After the defendant was ordered to produce them, it appeared to the court that not everything was actually produced, which ultimately resulted in sanctions against UBS.

In her May 2003 decision Judge Shira A. Scheindlin framed the issue: "To what extent is inaccessible electronic data discoverable, and who should pay for its production?" When the defendant tried to shift the burden and expense of this e-discovery to the plaintiff, the court struggled with this issue and presented a new seven-factor cost-shifting test:

The extent to which the request is specifically tailored to discover relevant information;

The availability of such information from other sources;

The total cost of production, compared to the amount in controversy;

The total cost of production, compared to the resources available to each party;

The relative ability of each party to control costs and its incentive to do so;

The importance of the issues at stake in the litigation; and

The relative benefits to the parties of obtaining the information.

"The seven factors should not be weighted equally," the court said. When evaluating cost-shifting, the central question must be, does the request impose an 'undue burden or expense' on the responding party?"

The defendant was found to have failed in its duty to preserve some missing backup tapes and was ordered to pay some of the plaintiff's discovery costs; in addition, the court allowed an adverse inference jury instruction against the defendant.

In a later opinion — *Zubulake V* (2004) — the court believed that counsel was partly to blame because it failed to locate, preserve, and produce relevant information. Underscoring counsel's obligation, the court stated, "Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."

Qualcomm Incorporated v. Broadcom Corporation (USDC, CA, 2008), involved another case where electronic information was not produced. This failure to produce resulted in an $8,568,633 sanction against defendant Qualcomm (in addition to other sanctions), plus sanctions against Qualcomm's outside counsel.

Magistrate Judge Major wrote: "For the current 'good faith' discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search."

The *Zubulake* and *Qualcomm* cases underscore the need for proactively considering e-discovery risk management. Any business using electronic documents needs to proactively consider the legal implications.