

Zubulake Re-Visited

Zubulake's e-Discovery: The Untold Story of my Quest for Justice by Laura A. Zubulake

Review by: Patrick W. Michael

Laura Zubulake was a high-ranking sales executive with UBS Warburg working on a male-dominated securities desk. In April of 2001, this department moved to its New York City location. Zubulake was assigned a work-station with other female assistants instead of being seated with other male senior sales executives. Zubulake filed a "Charge of Discrimination" with the Equal Employment Opportunity Commission on August 16, 2001. She was terminated by UBS on October 9, 2001. The EEOC issued a right to sue notice, and thereafter, Zubulake asserted claims for sexual discrimination and retaliation against UBS in the United States District Court for the Southern District of New York in Manhattan.

Zubulake v. UBS Warburg is one of the most important cases defining the obligations relating to the preservation and production of electronically stored information. According to the *Zubulake* court, the process begins with the issuance of a litigation hold. Thereafter, counsel has a duty to monitor compliance to assure that the litigation hold is implemented and efforts are made to retain and produce relevant documents. To comply with that duty counsel must:

1. "become familiar with her client's document retention policies, as well as the client's data retention architecture";
2. communicate with the "key players in the litigation, in order to understand how they store information"; and
3. monitor the client's preservation activities to assure compliance.

Plaintiff Laura Zubulake chronicles the events surrounding this landmark series of decisions in her book *Zubulake's e-Discovery: The Untold Story of my Quest for Justice*. She describes her active participation and strategy in the e-Discovery process as "that of a woman standing on principle, persevering against a formidable opponent, and achieving vindication, accountability and justice."

Zubulake provides the insight of an individual plaintiff into the litigation process, illustrating a keen sense of the frustration a neophyte litigant experiences during the progression of a lawsuit: the interminable waiting for discovery, hearings and rulings on motions, combined with the significant advantage of a large corporate litigant that has the ability to delay the process. Another theme is the emphasis on understanding the business activity of her former employer, including its formal and informal communication and decision-making structure. This is the back story in litigation that only a party truly understands. It is this institutional knowledge that guided Zubulake in her decisions to request e-mails from specific individuals, and to seek production through motions to compel of e-mails that were not produced from certain "key players." As she described it: "Only I lived the events. Only I knew the players and the periods of time significant to my allegations. I understood my industry, its rules and regulations, its daily routines and practices."

Zubulake was actively involved in the discovery process: obtaining copies of every document produced by UBS, reviewing these documents, and creating Excel databases for tracking virtually every element of each e-mail. She quickly realized these e-mails could be used to create a "visual chronology," establishing a foundation to support witness testimony. Her approach was to support the credibility of oral testimony with documentary evidence, which also resulted in improving jury comprehension.

The electronic evidence served my purposes: establishing a visual timeline of events, questioning the credibility of allegations, and supporting my claims. The evidence I discovered enlightened me as to the events about which I had limited knowledge at the time they played out. It captured the precise date, time, and language of a dialogue. It made me aware of key players, some of whom I was unaware had played significant roles. It justified lines of questioning we would have been unlikely to pursue otherwise. It undermined evidence offered against my case. It supplied a visual substantiation to verbal evidence supporting my claims.

The court ruled that UBS should have reasonably anticipated litigation in April, 2001, the date its preservation obligation arose. Months later, UBS' counsel issued a litigation hold, flawed from the outset since the hold was not issued to all of the "key players" who had a role in the Zubulake termination decision. Furthermore, UBS' counsel did not actively monitor the hold to assure that the UBS employees were complying with their preservation obligation.

This case took on a heightened sense of importance due to the stature of the parties involved. Zubulake was a highly compensated executive with UBS earning more than \$650,000 annually. As a result, it was a perfect factual setting for applying document production cost shifting analysis. The court ruled that Zubulake would be responsible for 25 percent (\$40,000) of the \$160,000 cost of recovering data from back-up tapes—a significant burden for an unemployed, individual plaintiff.

The court granted Zubulake's motion for an adverse inference instruction based upon the fact that UBS was not able to produce certain e-mails during critical time periods in its termination decision-making process. The instruction read, in part, as follows:

I have already instructed you that the Court has found several UBS employees failed to preserve some of their e-mails after they had been repeatedly instructed by UBS counsel beginning in August 2001, and thereafter, to preserve their e-mails. Some of those e-mails were eventually recovered from back-up tapes and produced to plaintiff. Others could not be recovered because back-up tapes no longer existed for certain months or portions of certain months. No one can ever know what would have been on those back-up tapes and whether relevant e-mails would have been recovered and produced. The fact that some UBS employees failed to preserve their e-mails after being instructed to do so, and that such e-mails cannot now be produced, is sufficient circumstantial evidence from which you are permitted, but not required, to conclude that the missing evidence was unfavorable to UBS ... Now in deciding whether to draw this inference you should consider whether the evidence that was not produced would merely have been cumulative of other evidence already before you.

Following the verdict in Zubulake's favor on both the sexual discrimination and retaliation claims, the jury was made available for public questions. At one point, the jurors were asked what role the adverse inference instruction played in the verdict. Many reporters suggested that the verdict was based upon this instruction. Contrary to these accounts, the adverse inference instruction was not the basis for the verdict. One juror responded that this instruction played no role in the decision. "She claimed they only considered the e-mails that were entered into evidence because that was all they needed to arrive at a verdict."

It is important to an understanding of the evolution of e-Discovery that *Zubulake* arose during a time when "[l]egal precedent was sparse and all documents were produced in paper, not electronic format." Furthermore, electronic evidence was primarily in the form of e-mails. For the practicing trial bar, this case is most significant for its transformational impact on the litigation process. "No longer does discovery begin with document requests, conferences, or the filing of a complaint. It begins with an organization's information management policies and procedures."

Zubulake's e-Discovery provides a fascinating behind-the-scenes look at a game-changing case. It should be on every law school reading list, and should be read by every trial lawyer.

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