



Litigation e-Newsletter



Cost of E-Discovery

New Test for Allocating Costs of E-Discovery Applied for First Time

The first application of the so-called *Zubulake* test for allocating e-discovery costs has resulted in some modest cost-shifting. The court orders the producing party in a high-stakes gender discrimination suit to bear the bulk of the expense of restoring potentially relevant e-mails and all the expense of reviewing the restored documents for privilege. But because the plaintiff has not been able to demonstrate that the material she seeks will contain indispensable evidence, i.e., direct evidence of discrimination, 25% per cent of the restoration costs will be shifted to her. *Zubulake v. UBS Warburg LLC*, 2003 WL 21714957



(S.D.N.Y., decided July 23, 2003). U.S. District Judge Shira A. Scheindlin authored the opinion, as well as the earlier one in the same case, which set out the revised test (*Zubulake v. UBS Warburg LLC*, 2003 WL 21087136, decided May 13, 2003 (*Zubulake I*)).

Link to: [The full story](#)

Rowe & Zubulake Compared

In *Zubulake I* Judge Scheindlin acknowledged that Rowe has emerged as the "gold standard" for resolving e-discovery disputes, but identified a serious deficiency that has become evident in the year in which it has been applied: it generally favors cost-shifting. (All the reported cases that have applied Rowe to date assigned the costs of discovery to the requesting party.) She cites three reasons why the Rowe factors undercut the presumption that discovery costs are the responsibility of the responding party: the factors are incomplete; courts have given equal weight to all of the factors, when certain ones should predominate; and the courts applying the Rowe test have not always developed a full factual record.

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