Inaccessible Electronically Stored Information: A Report from the Front Lines

©David K. Isom[1]
Co-Chair, Global eDiscovery & eRetention Practice Group
Greenberg Traurig

Human ability to create, store and use ever-increasing arrays of electronically stored information is the signal miracle of our time. In the United States, the risks and costs of this miracle play out noticeably and sometimes painfully in the discovery and use of the information in litigation. Those costs lie both in liability risk and in the inevitable cost of identifying, accessing, preserving, collecting, processing, reviewing, producing and presenting the information in the litigation process. Maximizing the benefits of this information swell while minimizing its litigation risk is one of the pivotal challenges for all with any connection to our judicial system.

Now, over 99% of information that humans create and store is stored electronically.[2] Both the volume and percentage of electronic information per person continues to swell faster than the aggressive predictions of even a year ago.[3] And the challenges of finding stored digital information become more frenetic.[4] The International Data Corporation estimates that, though individuals create 70% of new digital information, enterprises are responsible for the security, privacy, reliability and compliance of 85%.[5]

The new Federal Rules of Civil Procedure proposed by the Civil Rules Advisory Committee of the United States Judicial Conference ("Committee") and adopted effective December 2006 relating to discovery of electronically stored information (ESI) in federal litigation aim to assist parties, attorneys and courts in managing the tsunami of ESI used in litigation. The goal is to assure that the burden of litigation information management does not overwhelm the ultimate aim of resolving disputes on the merits. Early in nearly every case now, counsel on

---

[1] David K. Isom, Greenberg Traurig, 1200 17th Street, Suite 2400, Denver, Colorado 80202, isomd@gtlaw.com, (303) 685 7404.

[2] Isom, Electronic Discovery Primer for Judges, 2005 Fed. Cts. L. Rev. 1, http://fclr.org/2005fedctslrev1.htm;

[3] John F. Gantz, The Diverse and Exploding Digital Universe, http://www.emc.com/digital_universe ("by 2011, the digital universe will be 10 times the size it was in 2006").

[4] Id. ("Not all information created and transmitted gets stored, but by 2011, almost half of the digital universe will not have a permanent home.")

[5] Id.

both sides of the "v" are faced with the crucial question of how to deal with high volumes of digital information, and whether significant expense can be saved by postponing or avoiding the need to retrieve and produce burdensome and costly ESI. In many cases, the question is not whether all relevant information will be found, produced and used, but whether the important information will be.

The new rule that most directly balances the potential benefit and burden of ESI[6] in litigation is Rule 26(b)(2)(B), "the inaccessibility[7] rule," which provides:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

This paper summarizes what the new rules, courts, commentators and the Committee Notes have said about the four principal elements of the inaccessibility provision – identification, inaccessibility, good cause and specified conditions. Some issues are already quite clear, some are emerging, some are still a mystery.

I. Identification

The fundamental mystery of the inaccessibility provision is whether the identification provision will be read as important, or ignored into oblivion, or something in between. The safest presumption until more law develops is that the identification requirement is important, that proper identification of sources of inaccessible ESI provides significant protection, and that failure to identify such

---

[6] By its terms, Rule 26(b)(2)(B) applies only to ESI, not paper documents.

[7] The rule does not use the term "inaccessible," but "electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost." Though the distinction between "inaccessible" and the rule language can be significant – the elements of identification, sources and reasonableness are critical to an understanding of the provision – the entire phrase, given how many times it would be used in this paper, would gag both reader and writer. The temptation to coin a precise acronym – ESITTPIANRABOUBOC – will, alas, be resisted. The influential Sedona Conference, in its soon-to-be-published white paper on Rule 26(b)(2)(B), makes a fair compromise: "NRA ESI." The Sedona Conference Commentary on Preservation, Management and Identification of Sources of Information that Are Not Reasonably Accessible (2008), http://sedonaconference.org/ (2008 Sedona NRA Commentary").

sources may result in: (1) the loss of protection against producing inaccessible ESI; (2) sanctions for discovery failures; or (3) loss of the possibility of shifting discovery costs to the seeking party.

1. The Timing and Process of Identification

Identifying Inaccessible Sources of ESI in the Rule 34 Response

Assuming that identification is important, as discussed below: When and how must the sources of inaccessible data be identified? The answer appears to be that the sources must be identified as inaccessible in the Rule 34 response to a request for the production or inspection of ESI.[8] "A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible because of undue burden or cost." Rule 26(b)(2)(B). *Cf. also Thielen v. Buongiorno USA, Inc.,* 2007 U.S. Dist. LEXIS 8998 (W.D. Mich. February 8, 2007) (The time to assert inaccessibility is in the Rule 34 response, and failure to do so will normally[9] constitute a waiver of all objections to the sought discovery, including the objection of inaccessibility. Here, however, the court allowed limited protection for inaccessible ESI despite the failure to assert inaccessibility in the Rule 34 response to prevent the seeking party from "wholesale rummaging through" the responding party's entire computer.)[10]

Assessing and Communicating Inaccessibility Before the Rule 34 Response

An entire industry, and new, rapidly-developing early case assessment technology, are arising from the fact that a party to federal civil litigation either must, or is well-served to, understand inaccessible but potentially relevant ESI early in the litigation, even before any discovery is conducted. Though the formal identification requirement does not arise until the formal written response to a Rule 34 request, there are compelling reasons to understand potentially relevant but inaccessible ESI early in the action.

Rule 26(f) was amended in 2006 to require the parties to discuss and create a written discovery plan early in the litigation that addresses the "discovery of

---

[8] There are two inaccessibility provisions – one that applies to Rule 34 requests to parties for ESI, and the other to subpoenas for ESI from nonparties. The last section of this paper analyzes the inaccessibility of non-party ESI sought by subpoena. The other sections discuss how inaccessibility of party-owned ESI sought by a Rule 34 request.

[9] Especially where the only reason tendered for the delay was that the identification "slipped through the cracks."

[10] Some other cases, discussed at footnote 10 below, without squarely addressing the issue, allow a later identification of inaccessible sources with suggestion that the identification needed to be made until responding to a motion to compel.

electronically stored information." Rule 26(f)(3)(C). These discussions and the written plan should include "issues about preserving discoverable information" (Rule 26(f)(3)(A)), "whether discovery should be conducted in phases" (Rule 26(f)(3)(B)), and the "form in which [ESI] should be produced." Rule 26(f)(3)(C). The Committee Notes emphasize that in cases where ESI will be sought, counsel should be familiar with the client's information systems by the time of the early Rule 26(f) conference. Committee Notes, Rule 26(f). In such cases, counsel must be prepared by the time of the early Rule 16(b) and 26(f) conferences to discuss inaccessibility – i.e., "whether the information is reasonably accessible to the party that has it, including the burden or cost or retrieving and reviewing the information. Id.

Later Identification

Waiting to assert inaccessibility until after the ESI has been produced is too late. A party may not go ahead and produce inaccessible ESI, and claim later that the party should be reimbursed for the additional costs and attorney fees expended to overcome the inaccessibility.

The leading case is *Cason-Merenda v. Detroit Medical Center,* 2008 U.S. Dist. LEXIS 51962 (E.D. Mich. July 7, 2008). There, the defendant, instead of identifying requested ESI as inaccessible either in the early Rule 16(b) or Rule 26(f) conferences, or even in the Rule 34 response, or even at any time before actually processing and producing the ESI, produced the requested ESI and only thereafter sought a ruling that the ESI was inaccessible. The defendant sought to shift part the production costs to plaintiff on the argument that the produced ESI was inaccessible. The defendant argued that the new rules do not envision a ruling on cost sharing early in the case, or prohibit seeking a finding of inaccessibility after the ESI has been produced. Magistrate Judge Donald Scheer rejected both arguments and held that inaccessible ESI must be identified and inaccessibility must be asserted before the allegedly inaccessible ESI is produced:

> In the instant case, Defendant DMC did not identify any form of ESI "as not reasonably accessible because of undue burden or cost," nor did it file a motion for an order protecting it from the obligation of production. Rather, it produced the information requested of it and seeks, after the fact, an order imposing 50% of its costs upon the Plaintiffs.
>
> I am persuaded that the instant motion is untimely…. [T]he provisions of Fed. R. Civ. P. 26(b)(2)(B) and 26(c) plainly contemplate that a motion for protective relief (including cost shifting) is to be brought before the court *in advance* of the undue burden, cost or expense from which protection is sought…. DMC could have self-designated the request information as "not

> reasonably accessible because of undue burden or cost," and refused to complete production pending the court's ruling on a Motion to Compel Discovery or DMC's motion for a Protective Order….
>
> On a Motion to Compel Discovery or for a Protective Order, the non-producing party must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may only order the discovery from such sources "if the requesting party shows good cause . . .," in which case the court may specify conditions for discovery (including cost sharing). Implicit in the grant of authority to impose such conditions is the proposition that the requesting party may elect either to: (a) meet the conditions, or (b) not obtain the disputed discovery (thus avoiding undue burden or cost to the producing party). It offends common sense, in my view, to read the rule in a way that requires (or permits) the producing party to suffer "undue burden or cost" *before* raising the issue with the court. Under such a reading, a court would be powerless to avoid unnecessary expense or to specify any meaningful "conditions" for the discovery other than cost sharing. Furthermore, the requesting party would be stripped of its implicit right to elect either to meet the conditions or forego the requested information.

Id. *Accord Committee Concerning Community Improvement v. City of Modesto*, 2007 U.S. Dist. LEXIS 94328 (E.D. Cal December 11, 2007) (party seeking to recover the cost of sorting through one million emails should have asserted Rule 26(b)(2)(B) before incurring the cost); *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006) (court would consider shifting costs based upon the inaccessibility as to data yet to be produced after the Rule 26(b)(2)(B) motion, but not for data already produced before the party asserted inaccessibility).

2. Content of Identification: What Must Be Identified

Rule 26(b)(2)(B) does not require the identification of inaccessible information, but only the identification of *"sources"* of inaccessible ESI. There is no requirement, for example, of an "inaccessibility log" akin to a privilege log. In many cases the cost of producing a log of each document claimed to be inaccessible would not only cost more than producing the data, but would undercut the claim that the data is inaccessible.

Although the rules do not define what constitutes sufficient specificity for identification, the specificity required for a proper identification can be inferred from the functions to be served by the identification requirement, which are: (1) to ease the burden of dealing with inaccessible ESI (which suggests that the burden of identifying should be less than the burden of retrieving and producing it); (2) to give the seeking party notice that additional relevant information may be available, at least at some cost. The responding party normally has no duty to

search the sources of inaccessible ESI even to quantify the volume of ESI on the asserted inaccessible sources: "The responding party must … identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." Committee Note, Rule 26(b)(2). *See also Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.,* 2008 U.S. Dist. LEXIS 35166 (W.D. Wash. April 21, 2008).

A proper identification must at least put the opponent on notice that additional responsive information may exist, and provide the seeking party with enough information to make a reasoned decision whether to pursue the additional information. Any motion to compel or for a protective order to test the identification must be preceded by a negotiated attempts to resolve any dispute about the identification. Discovery may be allowed in order to test whether the ESI identified is in fact inaccessible.

3. The Importance of Identification

Several courts have analyzed the second and third parts of Rule 26(b)(2)(B), the inaccessibility and good cause requirements, without expressly requiring compliance with the first step of the rule, the identification requirement.[11] This raises the question whether Rule 26(b)(2)(B) protects ESI from inaccessible sources, or only information from sources *properly and timely identified* as not reasonably accessible. The answer to this question will determine how important identification is, and what incentive a party will have to identify inaccessible data.[12]

The answer to these questions may turn on how "information" is interpreted in the second sentence of Rule 26(b)(2)(B): "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the *information* is not reasonably accessible because of undue burden or cost." (Emphasis added.) It is clear that "information" here means "electronically stored information," since, as the title of this section shows, Rule 26(b)(2)(B) creates only "Specific Limitations on Electronically Stored Information," not paper. The

---

[11] *E.g., U & I Corp. v. Advanced Medical Design, Inc*., 2008 U.S. Dist. LEXIS 27931 (M.D. Fla. March 26, 2008); *Petcou v. C.H. Robinson Worldwide, Inc.*, 2008 U.S. Dist. LEXIS 13723 (N.D. Ga. February 25, 2008)

[12] See generally Thomas Y. Allman, The Two-Tiered Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?, 14 Rich. J. L. & Tech. 7 (Spring 2008); Thomas Y. Allman, The Impact of the Proposed Federal E-Discovery Rules, 12 Rich. J. L. & Tech., 1, 9 (2006) (arguing that the identification requirement is the only real change to Rule 26(b)(2).

question, though, is: Does "information" in this context mean (1) "ESI from sources that the responding party has timely identified as not reasonably accessible" existing" (the identification-is-important rule) or (2) "ESI, even where the responding party did not identify sources of inaccessible ESI" (the identification-can be-ignored rule)?

If the identification-is-important reading prevails, Rule 26(b)(2)(B) will become the pivotal rule only for disputes following timely identification. The traditional grounds for a motion for protective order (Rule 26(c)) and a motion to compel (Rule 37(a)) will continue to be the methods for judicial resolution of burdensomeness disputes relating to ESI whose sources have not been timely identified as inaccessible. Assuming that Rule 26(b)(2)(B) offers more protection against the duty and the expense of producing ESI than would Rules 26(c) and 37(a), as now appears to be the case, a party failing to identify sources of inaccessible ESI timely will have lost real protection.

If the latter reading prevails, the identification-can-be-ignored interpretation, Rule 26(b)(2)(B) will become the catch-all provision for resolution of all disputes about the discoverability of ESI whose discovery the responding party claims to be unduly burdensome.

The following weighs the arguments on each side of this debate.

Rule 26(b)(2)(B) defines four steps for responding to requests for ESI: (1) the responding party identifies sources that may contain relevant and responsive but allegedly inaccessible ESI that the respondent plans neither to search not produce; (2) after conferring with the requesting party, and either upon a motion by the respondent for protective order, or a motion to compel by the seek, the respondent must prove inaccessibility; (3) if the responding party proves inaccessibility, the seeking party must show good cause for production of the inaccessible ESI; and (4) if any ESI from the inaccessible sources is ordered produced, conditions and limits may be imposed, including shifting some or all of the production costs to the seeking party.

The Committee explained that the new requirement for a responding party to identify sources of potentially responsive ESI that the party was not searching or producing "is an improvement over the present practice, in which the responding parties simply do not produce electronically stored information that is difficult to access."[13] The apparent bargain offered by the rule is that a party that at least identifies sources of potentially responsive but inaccessible ESI will receive benefits for revealing that the sources exist. The benefits include: (1) at least a

[13] Comm. On Rules of Practice & Procedure, Judicial Conference of the U.S., Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 31 (2005) available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf ("2005 Report").

temporary reprieve from the requirement produce the inaccessible data; (2) the assurance that the failure to produce such expensive information will not result in sanctions at least until after the responding party has had a chance to test whether the inaccessible ESI must be produced, and a chance to comply with whatever the court determines as to accessibility; (3) the shifting to the seeking party of the burden of showing good cause for requiring the production of the burdensome data; and (4) an increased probability that the seeking party may have to pay the cost of the production of inaccessible ESI.

As discussed above, some of the courts that have interpreted Rule 26(b)(2)(B) seem[14] to suggest that these potential benefits of the inaccessibility provision may be available even for a party that fails to identify sources of inaccessible data. In general, these cases say that ESI that is identified as not reasonably accessible even after a motion to compel is filed is discoverable only if the requesting party can establish good cause, instead of holding that good cause is required, not just for ESI from inaccessible sources, but for ESI from sources *timely identified* as not reasonably accessible. *E.g., Ameriwood Industries, Inc. v. Liberman,* 2007 U.S. Dist. LEXIS 10791 (E.D. Mo. February 12, 2007) (finds plaintiff's responsive ESI to be inaccessible apparently based solely upon volume – 52,125 emails and 4,413 other files from 12 employees – and refuses to order production for defendant's failure to show good cause – all without discussing whether the data came from sources that plaintiff identified as not reasonably accessible); *Baker v Gerould*, 2008 U.S. Dist. LEXIS 28628 (W.D.N.Y. 2008).

To date, only one reported decision appears squarely to have analyzed the identification requirement[15] and what consequences may flow from a failure to identify sources of inaccessible ESI. In *Cason-Merenda,* discussed above, Magistrate Judge Donald Scheer held that because the defendant did not identify the sources of the requested ESI as not reasonably accessible before producing the allegedly-inaccessible ESI, the defendant was not entitled to an order shifting any of the cost of the production to plaintiff.

To the extent that courts hold that the failure to identify sources of relevant and responsive but inaccessible ESI has consequences, the incentives to identify sources of ESI early as inaccessible will be increased.

II. Inaccessibility

[14] None of these cases addresses or expressly rejects the identification requirement. Rather, they apply the burden-shifting analysis of Rule 26(b)(2)(B) without requiring identification.

[15] Several cases cite the identification requirement without any discussion as to how or whether there was compliance with the identification requirement in the case. *E.g., Peskoff v. Faber,* 2007 U.S. Dist. LEXIS 11623 (D.D.C. February 21, 2007).

This section discusses how the responding party may assert inaccessibility, what burdens the party must meet to demonstrate inaccessibility, and the relationship between the inaccessibility provision and a party's duty to preserve relevant ESI for the litigation.

1. The Burden of Proving Inaccessibility

Inaccessibility must be proven by evidence. Inaccessibility will not be presumed, but the burden of proving inaccessibility is not complex or heavy.

Whether the inaccessibility issue is brought to the court by the seeking party as a motion to compel, or by the responding party as a motion for protective order, the responding party has the burden "to show that the information is not reasonably accessible because of undue burden or cost." Rule 26(b)(2)(B). *Canon U.S.A., Inc. v. S.A.M., Inc*., 2008 U.S. Dist. LEXIS 47712 (E.D. La. June 20, 2008); *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006).

The burden of proving inaccessibility can only be carried with real evidence, not just argument. *E.g., Auto Club Family Insurance Co. v. Ahner,* 2007 U.S. Dist. LEXIS 63809 (E.D. La. August 29, 2007); *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 2008 U.S. Dist. LEXIS 42025 *31 (D. Md. May 29, 2008). The new rules quite clearly place upon the responding party only the burden of proving inaccessibility. "The responding party has the burden as to one aspect of the inquiry – whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve and produce whatever responsive information may be found." Committee Note Rule 26(b)(2)(B).

If the responding party fails to meet the burden of proving inaccessibility, the seeking party has no burden to demonstrate good cause. *Auto Club, supra.*

Whether data is inaccessible depends, as the rule suggests, upon the burden or cost that must be incurred to identify, acquire, review and produce the data.

The burden and cost of providing discovery of ESI are essentially a function of volume and searchability. *Best Buy Stores, L.P. v. Developers Diversified Realty Corp*., 247 F.R.D. 567 (D. Minn. 2007); .*Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) ("*Zubulake I*") ("In fact, whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production)."). While the format of the data, of course, affects searchability, format alone is not likely to answer the question of accessibility. The Committee in its September 2005 report to the Judicial Conference identified three formats of ESI that were not reasonably accessible under then-current technology. "Examples from current technology include back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from

obsolete systems and is unintelligible on the successor systems; date that was 'deleted' but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information."[16]

The 2006 Committee Notes make it clear, however, that the type of medium will not by itself determine whether the medium is accessible:[17] "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information." Committee Note, Rule 26(b)(2). The more reliable test is functional, not categorical: whether the burden or cost of searching and producing the data is undue. One case, for example, holds that a backup tape that can be restored to a searchable format for approximately $3,000 is reasonably accessible. *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006) The Sedona Conference suggests 12 factors to consider in determining accessibility.[18]

The assertion of inaccessibility can be raised with the court, after conferring in an attempt to resolve the issue, either by the responding or seeking party: "If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order." Committee Note, Rule 26(b)(2)(B).

"The requesting party may need discovery to test this assertion [of inaccessibility]. Such discovery might take the form of requiring the responding party to conduct a sampling of information on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems." Committee Note, Rule 26(b)(2)(B).

2. The Relationship Between Inaccessibility and the Preservation Duty

---

[16] Comm. On Rules of Practice & Procedure, Judicial Conference of the U.S., Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 40 (2005) available at http://www.uscourts.gov/rules/Reports/ST09-2005.pdf ("2005 Report").

[17] A recent case cites Judge Shira Scheindlin's opinion in Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I") for the proposition that "backup tapes and erased, fragmented, or damaged data is not accessible." *Canon U.S.A., Inc. v. S.A.M., Inc.*, 2008 U.S. Dist. LEXIS 47712 (E.D. La. June 20, 2008). *Zubulake I,* however, does not support this categorical conclusion. Judge Scheindlin's opinion in *Zubulake I* stated that backup tapes were *typically* classified as inaccessible, but emphasized that inaccessibility turned ultimately upon searchability, not media type.

[18] 2008 Sedona NRA Commentary.

The question here is: What is the relationship between Rule 26(b)(2)(B) and the duty to preserve documents? The short answer is that the inaccessibility rule does not abrogate the duty to preserve ESI: "A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law[19] or statutory[20] duties to preserve evidence." The longer answer is that there is a complex relationship between inaccessibility and the preservation duty.

The Electronic Discovery Reference Model (EDRM)[21] has emerged as the leading model of the steps in the typical electronic discovery process, from identification[22] of ESI as the first step in the electronic discovery process – through preservation, collection, processing, review and analysis – to the production and presentation of ESI. Compliance with the identification requirement of Rule 26(b)(2)(B) allows the complying party, subject at least to later motions to compel and potential orders to compel, not to have to "provide discovery," which appears to mean that the party does not need to collect ESI from inaccessible sources or to take any other of the later steps toward production.

While it is clear that the inaccessibility provision of Rule 26(b)(2)(B) does not "relieve" the preservation duty, neither should the rule expand the preservation duty. Inaccessibility may well be the basis for seeking an order[23] declaring that

---

[19] The "common-law … dut[y] … to preserve evidence" refers to the duty grounded in federal or state tort law or in a court's inherent power to punish as spoliation the destruction of ESI that occurs when a party is on notice of reasonably foreseeable disputes as to which the ESI may be relevant.

[20] "[S]tatutory duties to preserve evidence" appear to include document retention duties created by statutes or regulations, and can exist before and outside the context of any litigation or other dispute, audit or government investigation. While this is the only express reference in the new rules to a company's document retention practices, the requirement of the new rules to understand a company's information systems early in any civil litigation has created real incentives to make information systems more accessible for litigation. If the size of the industry that has grown up in the last two years to assist companies in making information more accessible for litigation is any indication, the rule-makers' worry that the new inaccessibility provision might create an incentive to make information less accessible has turned out to be not well-founded.

[21] http://www.edrm.net/

[22] "Identification" in the EDRM is not synonymous with the identification process of Rule 26(b)(2)(B).

[23] Though an order is not necessary if a party is certain that there is no duty under the circumstances to preserve relevant ESI on inaccessible sources, a party would be well advised to seek an order clarifying the right to destroy the relevant, inaccessible ESI until the law on these issues is more developed.

ESI on inaccessible sources need not be preserved. A Committee Note invites this possibility: "Whether a party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case."

III. Good Cause

A significant feature of the inaccessibility provision is that it places upon the party seeking inaccessible ESI the burden[24] of showing good cause for production of the inaccessible ESI, irrespective of whether the issue is presented by the seeking party on a motion to compel or by the responding party: "On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." At least one commentator, Henry Noyes, analyzing this rule after the rule had become effective but before many courts had yet applied the rule, suggested that the rule would not shift the burden of showing good cause to the seeking party.[25] The Committee Notes, however, expressly state that the good cause language of Rule 26(b)(2)(B) shifts the burden of proving good cause to the seeking party: "The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information."

1. Burden of Showing Good Cause

Most courts[26] that have addressed the Rule 26(b)(2)(B) allocation of burdens have held that, once the responding party proves inaccessibility, the seeking

---

[24] Given that the good cause process is a balancing of several factors that add up to whether the likely benefit of the inaccessible ESI outweighs the burden of producing the ESI in the particular case, the placement of the burden is not as critical as if the carrier of the burden had to satisfy each of prescribed number of essential elements: "The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case." Committee Note, Rule 26(b)(2)(B).

[25] Henry S. Noyes, Good Cause Is Bad Medicine for the New E-Discovery Rules, 21 Harv. J. L. & Tech. 49, 80-83 (2007).

[26] *Commerce Benefits Group, Inc. v. McKesson Corp.*, 2008 U.S. Dist. LEXIS 15181 (N.D. Ohio February 13, 2008) is unclear as to allocation of burden: "Defendant McKesson appears to have been largely uncooperative throughout the discovery process. Further, the Defendant's assertion that the back-up tapes recently discovered by Per-Se are presumptively not searchable is without merit. Defendant McKesson misstates 'the general rule that such electronic media are not to be searched because the data on them is not reasonably accessible without undue burden or cost.' [Doc. 58 at 4-5.] Rather, upon a motion to compel

party has the burden of proving good cause for production of the inaccessible ESI. *See, e.g., Cason-Merenda v. Detroit Medical Center,* 2008 U.S. Dist. LEXIS 51962 (E.D. Mich. July 7, 2008)*; Peskoff v. Faber,* 2008 U.S. Dist. LEXIS 51946 (D.D.C. July 7, 2008).

2. Carrying the Burden: Seven Factors and More

A court deciding whether the seeking party has shown good cause to order the responding party to produce inaccessible ESI has broad discretion to consider virtually any factor that weights the balance between the predicted benefit of the inaccessible ESI and the burden and cost of producing it. Among the factors that Rule 26(b)(2)(B) requires the court to consider are "the limitations of Rule 26(b)(2)(C)".[27] In addition,[28] the Committee Notes suggest that a court may consider the following seven factors in weighing whether good cause exists for ordering the production of inaccessible data:

> (1) the specificity of the discovery request;
>
> (2) the quantity of information available from other and more easily accessed sources;
>
> (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
>
> (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
>
> (5) predictions as to the importance and usefulness of the further information;
>
> (6) the importance of the issues at stake in the litigation; and

---

discovery, the presumption is that electronically stored information is indeed discoverable unless the party from whom discovery is sought makes a sufficient showing of undue burden or cost. *Fed. R. Civ. P. 26(b)(2)(B)*. Even if that party shows that the electronic discovery would be unduly expensive and burdensome, the Court may still order discovery of such information upon a showing of good cause. *Id.*

[27] No clear line has been drawn between the timing or sequence or weight of these 26(b)(2)(C) factors and other 26(b)(2)(B) factors, including the seven factors specified in the Committee Notes about Rule 26(b)(2)(B).

[28] See *PSEG Power New York, Inc. v. Alberici Constructors, Inc.,* 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. September 7, 2007) (noting that the 26(b)(2)(C) factors overlap somewhat with the 26(b)(2)(B) factors.

(7) the parties' resources.

Committee Notes, Rule 26(b)(2)(B). Cases that have applied these factors to date include: *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority,* 2007 U.S. Dist. LEXIS 39605 (D.D.C June 1, 2007) ("Application of these factors make for an overwhelming case for production of the backup tapes."); *PSEG Power New York, Inc. v. Allmerica Constructors, Inc.,* 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. September 7, 2007) (finding good cause for the production of inaccessible ESI); *W.E. Aubochon Co. v. Benefirst,* LLC, 245 F.R.D. 38 (D. Mass. 2007) (finding good cause for production).

IV. Cost Shifting and Other Conditions

From 1970 to 2006, the federal rules of civil procedure did not in the text of the rules specify who must pay the costs of producing things or documents requested under Rule 34 or 45. The Committee Notes to the 1970 revisions of the rules did, however, provide that the court may shift the cost of discovery so as to protect responding parties against undue burden or expense. *Peskoff v. Faber*, 2008 U.S. Dist. LEXIS 51946 (D.D.C. July 7, 2008) ("2008 *Peskoff*").

The new inaccessibility provisions (Rules 26(b)(2)(B) and 45(d)(1)(D)) now expressly authorize cost shifting as a condition of requiring a party or subpoenaed nonparty to produce ESI from inaccessible sources: in ordering the production of ESI from inaccessible sources for good cause, the court "may specify the conditions for the discovery." Rule 26(b)(2)(B). The Committee Notes expressly include cost-shifting as one of the conditions that a court may impose upon ordering the production of inaccessible data upon a showing of good cause: "The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party or part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible."

The new rules do not change the basic presumption that a party producing ESI in response to a Rule 34 request and a nonparty producing ESI in response to a subpoena must pay for the production.[29] The new rules do, however, provide a basis for shifting from one party to an action to the seeking party the cost of producing inaccessible ESI.[30]

---

[29] See *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340 (1978); 2008 *Peskoff; Guy Chemical Co. v. Romaco*, 243 F.R.D. 310 (N.D. Ind. May 22, 2007.)

[30] Indeed, several recent cases hold that inaccessibility is the *only* situation that may justify cost-shifting.

The next section shows that, unlike where the responding party seeks to shift production costs to the other party seeking ESI pursuant to a Rule 34 request, the new rules provide heavy weights for shifting costs to the party seeking ESI from a nonparty by subpoena.

V. Subpoenas of Inaccessible ESI

Rule 45 was amended in 2006 to clarify the procedure for obtaining ESI by subpoena. Rule 45(a)(1)(C) was amended to recognize that ESI could be sought from nonparties by subpoena in much the same way as it could sought under Rule 34 from parties. Rule 45(d)(1)(D) added an inaccessibility provision that is virtually identical to the Rule 26(b)(2)(B) inaccessibility discussed above. The inaccessibility provision will have a significant impact in shifting to the seeking party the cost of producing ESI from a subpoenaed nonparty.

The new Committee Notes make it clear that nonparties subpoenaed to produce ESI must be protected from the need to finance other people's litigation and electronic discovery. For example, the Committee Notes emphasize that Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." The Committee Notes also state: "Because testing or sampling may present particular issues of burden or intrusion for the person served with a subpoena … the protective provisions of Rule 45(c) should be enforced with vigilance" when a subpoena seeks the testing or sampling of nonparty ESI. Finally, the Committee Notes clarify that the right to inspect, test and sample ESI pursuant to subpoena "is not meant to create a routine right of direct access to a person's electronic information system…." "Courts should guard against undue intrusiveness resulting from inspecting or testing such systems."

The amendments expressly apply to ESI the right of the subpoenaed nonparty to halt the production by filing a unilateral objection to the requested production for reasons including that compliance with the subpoena would require "significant expense." Rule 45(b)(2)(B).

The result of all of this is that the inaccessibility provision will have a different impact upon nonparty ESI discovery than upon discovery of ESI from a party. The impact upon the inaccessibility and good cause elements of the inaccessibility provision is not yet clear, but the impact upon the "conditions" provision – upon cost-shifting – is already clear: the inaccessibility provision will result in many cases in the shifting of ESI production costs to the seeking party. *See, e.g., Guy Chemical Co. v. Romaco AG,* 243 F.R.D. 310 (N.D. Ind. 2007) (The $7,000 cost to the subpoenaed nonparty of producing the subpoenaed ESI makes the ESI inaccessible. The fact that the responding company was not a party to the action was the main factor in concluding that the court should impose

the condition of cost-shifting to the requesting party. The costs shifted included the whole cost of searching for, locating and producing ESI).