

Automotive

COMMENTARY

REPRINTED FROM VOLUME 26, ISSUE 10 / NOVEMBER 14, 2006

Federal Rule of Civil Procedure 26(b)(2)(B) And The 2006 Amendments:

How the Federal Courts Will Implement Two-Tier Discovery of Electronic Information

By Martin D. Beirne, Esq., David A. Pluchinsky, Esq., and George B. Murr, Esq.*

Introduction

Beginning Dec. 1, under the amended Federal Rule of Civil Procedure 26(b)(2)(B), a party responding to discovery requests need not provide discovery of electronically stored information from sources that it deems to be “not reasonably accessible.” This effectively reverses the initial presumption that all relevant evidence is discoverable (unless it is privileged or the subject of a protective order) — a presumption that has been assumed in civil procedure and federal practice for decades, dating back virtually to the adoption of the Federal Rules in 1937.

Rule 26(b)(2)(B) effectively creates a new presumption that electronic information that is unilaterally designated as “not reasonably accessible” is not discoverable absent further motion filing and showing. This creates a “two-tier” approach to electronic information discovery: It not only determines the initial scope of discovery, but it profoundly impacts the cost of overall electronic information discovery, likely to be the most burdensome aspect of what is traditionally the most expensive part of the litigated case.

The plaintiffs’ bar’s insistence that recent victories in litigation were the result of breakthroughs in discovery of electronic information and metadata may make this the focal point of complex commercial litigation under the amended rules. Further, as the federal courts implement this new procedure for electronic discovery nationwide, so the state courts and legislatures in state jurisdictions may likely follow, implementing the new two-tiered discovery in state court procedures as well.

Overview

This article examines the legal landscape facing both the federal bench and the federal bar as these amended rules come on line, analyzing what criteria may be used to delineate which electronic information is “not reasonably accessible” under the new two-tiered discovery plan.

The Rules Committee proposed amending Rule 26(b)(2)(B) so that “[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.” Federal Rule of Civil Procedure 26(b)(2)(B) (proposed July 25, 2005).

Before the amendment to Rule 26(b)(2)(B), all potentially relevant material was discoverable. See, e.g., *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 309 F.Supp.2d 459, (S.D.N.Y. 2003), (“Thus, as a general matter, all potentially relevant material is discoverable. The court may, however, limit or condition discovery where a request imposes an ‘undue burden or expense’ on the responding party.”). Under the new rules effective Dec. 1 the most critical question facing litigants and the federal courts is how to define “not reasonably accessible” electronic information and what constitutes “undue burden and cost.” See *id.* Advisory Committee Note (noting that “some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.”).

What defines and what divides the two tiers of discovery under the proposed, amended Rule 26(b)(2)(B)? The answer to this question determines which party bears the burden of showing that the electronic information is discoverable, and possibly which party is responsible for bearing the considerable costs of production. This article examines the amended Rule 26(b)(2)(B) and analyzes its basis in case law, which will inevitably provide the point of departure for construing the language of the rule and conducting two-tiered discovery for electronic information.

How the Court Determines What Is “Not Reasonably Accessible”

The Proposed Amendments to the Federal Rules

The proposed Advisory Committee Notes do not define what is or is not “reasonably accessible.” The committee says: “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.” Advisory Committee Note, Rule 26(b)(2) (proposed July 25, 2005). In the Report of the Judicial Conference Committee on Rules of Practice and Procedure, examples are provided:

While the features that may make it burdensome or costly to access electronically stored information vary from system to system and with the progress of electronic storage systems over time, examples under current technology include deleted information, information kept on some backup-tape systems for disaster recovery purposes, and legacy data remaining from systems no longer in use. (Report of the Judicial Conference Committee on Rules of Practice and Procedure at 30-1 (September 2005)).

The proposed Advisory Committee Notes also say:

Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph B [of Rule 26(b)(2)] is added to regulate discovery from such sources.

Advisory Committee Note, Rule 26(b)(2) (proposed July 25, 2005).¹ The penultimate sentence in this passage is particularly troublesome: It implies that information that is “accessible” may be obtained by “incurring substantial burdens or costs.” *Id.* This contradicts the language of Rule 26(b)(2)(B), which identifies for special discovery treatment “sources

that the party identifies as *not* reasonably accessible because of undue burden or cost.” Rule 26(b)(2)(B) (proposed July 25, 2005) (emphasis added).²

Zubulake and Five Categories of Electronic Information

Prior case law will inevitably provide the point of departure for defining what constitutes electronic information that is “not reasonably accessible.” Judge Shira A. Scheindlin, a member of the Judicial Conference Committee, held in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), that:

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). In the world of paper documents, for example, a document is accessible if it is readily available in a usable format and reasonably indexed. Examples of inaccessible paper documents could include (a) documents in storage in a difficult-to-reach place; (b) documents converted to microfiche and not easily readable; or (c) documents kept haphazardly, with no indexing system, in quantities that make page-by-page searches impracticable (emphasis original).

Judge Scheindlin specifically tied the question of whether electronic information is “accessible” or “inaccessible” to the cost of its production. See *id.* This connection made it to the amended Rule 26(b)(2)(B).

“Whether electronic data is accessible or inaccessible turns largely on the media on which it is stored,” Judge Scheindlin said. She then detailed a spectrum of electronic data formats. “Of these, the first three categories are typically identified as accessible, and the latter two as inaccessible.” *Id.* at 319-20.

- *Active, online data:* “Online storage is generally provided by magnetic disk. It is used in the very active stages of an electronic record’s life — when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, i.e., milliseconds.” Examples of online data include hard drives.
- *Near-line data:* “This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to

store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10 to 30 seconds for optical disk technology, and between 20 and 120 seconds for sequentially searched media, such as magnetic tape." Examples include optical disks.

- *Offline storage/archives:* "This is removable optical disk or magnetic-tape media, which can be labeled and stored in a shelf or rack. Offline storage of electronic records is traditionally used for making disaster copies of records and also for records considered 'archival' in that their likelihood of retrieval is minimal. Accessibility to offline media involves manual intervention and is much slower than online or nearline storage. Access speed may be minutes, hours or even days, depending on the access-effectiveness of the storage facility." The principled difference between nearline data and offline data is that offline data lacks "the coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch Of Disks").
- *Backup tapes:* "A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred kilobytes to several gigabytes. Their transfer speeds also vary considerably. ... The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks." As a result, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] ... the organization of the data mirrors the computer's structure, not the human-records-management structure." Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of a uniform standard governing data compression.
- *Erased, fragmented or damaged data:* "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters. ... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the

disk." Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), (internal footnotes omitted).

Judge Scheindlin concludes: "Information deemed 'accessible' is stored in a readily usable format. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. 'Inaccessible' data, on the other hand, is not readily usable. Backup tapes must be restored using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable." *Id.* at 320.

The Manual for Complex Litigation

The Manual for Complex Litigation will also inform the federal courts deciding what is or is not "reasonably accessible" electronic information. Even before the Committee began its inquiry into electronic information discovery, the Manual for Complex Litigation had provided a framework for analyzing the levels of access to electronic information. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004) ("Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, handheld devices, automobiles or household appliances; or it can be accessible via the Internet, from private networks or from third parties.").

The Manual for Complex Litigation also sets forth classifications for electronic discovery that will inform the court's decision:

For the most part, such data will reflect information generated and maintained in the ordinary course of business. As such, discovery of relevant and nonprivileged data is routine and within the commonly understood scope of Rules 26 and 34. Other data are generated and stored as a byproduct of the various information technologies commonly employed by parties in the ordinary course of business, but not routinely retrieved and used for business purposes. Such data include the following:

- *Metadata, or "information about information."* This includes the information embedded in a routine computer file reflecting file creation date, when it was last accessed or edited and by whom, and sometimes previous versions or edito-

rial changes. This information is not apparent on a screen or in a normal printout of the file, and it is not often generated and maintained without the knowledge of the file user.

- *System data, or information generated and maintained by the computer itself.* The computer records a variety of routine transactions and functions, including password access requests, the creation or deletion of files and directories, maintenance functions, and access to and from other computers, printers, or communication devices.
- *Backup data, generally stored offline on tapes or disks.* Backup data are created and maintained for short-term disaster recovery, not for retrieving particular files, databases, or programs. These tapes or disks must be restored to the system from which they were recorded, or to a similar hardware and software environment, before any data can be accessed.
- *Files purposely deleted by a computer user.* Deleted files are seldom actually deleted from the computer hard drive. The operating system renames and marks them for eventual overwriting, should that particular space on the computer hard drive be needed. The files are recoverable only with expert intervention.
- *Residual data that exist in bits and pieces throughout a computer hard drive.* Analogous to the data on crumpled newspapers used to pack shipping boxes, these data are also recoverable with expert intervention. *Id.*

According to the Manual for Complex Litigation: "Each of these categories of computer data may contain information within the scope of discovery. The above categories are listed by order of potential relevance and in ascending order of cost and burden to recover and produce." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004). Similar to the *Zubulake* ruling, the Manual for Complex Litigation should be consulted by litigants and the courts in applying the new language of Rule 26(b)(2)(B). See *id.*

Undue Burden and Cost

The meaning of "reasonably accessible" is inexorably linked to the "undue burden" and "cost" of producing the electronic information at issue. See Rule 26(b)(2)(B) ("[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."); *Zubulake*, 318 F.R.D. 309 ("Thus, cost-shifting

should be considered only when electronic discovery imposes an 'undue burden or expense' on the responding party. The burden or expense of discovery is, in turn, 'undue' when it 'outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.'"). Accordingly, the burden and cost analysis of the production inevitably forms part of the analysis and determination of whether the electronic information is "accessible" or "inaccessible."

Undue Burden and Cost in Terms of Cost-Shifting

"[C]ourts have devised creative solutions for balancing the broad scope of discovery prescribed in Rule 26(b)(1) with the cost-consciousness of Rule 26(b)(2). By and large, the solution has been to consider cost-shifting: forcing the requesting party, rather than the answering party, to bear the cost of discovery." *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).³ Accordingly, whether or not the court will consider the electronic information "reasonably accessible" is, in large part, a function of the burden and cost of producing the electronic information at issue. See *id.* That burden has been analyzed in the case law, which set forth a multifactor test that has been modified and placed by the Judicial Conference Committee in the new Advisory Committee Notes to Rule 26(b)(2)(B).

Zubulake cites to and relies heavily upon *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002).⁴ *Rowe* set forth an eight-factor balancing approach to deciding whether electronic information should be produced, and the costs of doing so shifted to the requesting party:

[C]ourts have adopted a balancing approach, taking into consideration such factors as: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. *Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002).

These same factors are considered and amended by Judge Scheindlin in *Zubulake*.

Judge Scheindlin amended the *Rowe* factors after noting that every case that had applied them ordered costs

shifted to the requesting party. "In order to maintain the presumption that the responding party pays, the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption." *Id.* at 320. She found that the "seven-factor test used to determine cost-shifting for electronic data discovery" is:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

Id. at 322; see also *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, 309 F.Supp.2d 459 (S.D.N.Y. 2003), (applying the *Zubulake* factors and finding that the costs of production for the electronic information at issue should not be shifted to the requesting party); *Mosaid Technologies Inc. v. Samsung Electronics Co. Ltd.*, 348 F.Supp.2d 332 (D.N.J. 2004), (citing *Zubulake* and finding that deleted or "inaccessible" emails should not have been destroyed by the responding party and issuing a spoliation instruction to the jury).

These factors were again amended in the proposed Advisory Committee Note to Rule 26(b)(2)(B):

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.

Appropriate considerations may include: (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 (7) the parties' resources. Rule 26(b)(2)(B), Advisory Committee Note (proposed July 25, 2005).

The Rules Committee changed Factors 3, 4 and 5 from the *Zubulake* opinion and placed these factors in the amended Advisory Committee Notes to Rule 26. See *id.*

Trial Run or Sampling of Electronic Information

Courts may order the responding party to produce a small sample of the electronic information sought by the requesting party in discovery. See, e.g., *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001).⁵ Judge Scheindlin explains:

Requiring the responding party to restore and produce responsive documents from a small sample of backup tapes will inform the cost-shifting analysis laid out above. When based on an actual sample, the marginal utility test will not be an exercise in speculation — there will be tangible evidence of what the backup tapes may have to offer. There will also be tangible evidence of the time and cost required to restore the backup tapes, which in turn will inform the second group of cost-shifting factors. Thus, by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

In effect, the court may order a "trial run" of production of electronic information to better assess for itself what constitutes "accessible" electronic information. See *id.* Afterwards, the court may assess the marginal utility and:

(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 (7) the parties' resources.

See Rule 26(b)(2)(B), Advisory Committee Note (proposed July 25, 2005); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 ("The court should consider how to minimize and allocate the costs of production. Narrowing the overall scope of electronic discovery is the most effective method of reducing costs.") (2004).

Conclusion

Under the new Rule 26(b)(2)(B), the most critical issue facing litigants and the federal courts will be the meaning of the new language “not reasonably accessible” and how it is applied with regard to the discovery of electronic information. The answer to this question appears in the opinions of the members of the Judicial Conference Committee and the precedent that forms the basis for the new rules governing the discovery of electronic information. Due to the ever-changing nature of electronic information and technology, the courts will likely examine what is “not reasonably accessible” as a function of “undue burden and cost.” In the event the court has questions, it may order the requested electronic discovery to be performed on a small sample, and then ascertain whether the requested information is “not reasonably accessible” as well as whether to apportion costs among the parties.

¹ The Texas Trial Lawyers Association asked for clarification from the Judicial Conference Committee to confirm that electronic information that is “not usually accessed” should not be considered “not reasonably accessible.” (See Statement by the Texas Trial Lawyers Association [Correspondence from James E. Wren to Peter G. McCabe, dated Jan. 27, 2005] at 1.) Intel Corp. asked that the electronic information stored in disaster recovery systems be deemed “not reasonably accessible” by definition. (See Statement by Intel Corp. at 2-3.)

² In a similar vein, the Association of the Bar for the City of New York, in its written submitted comments to the committee, notes that the standard for being required to respond to discovery of electronic information should not be what is “reasonably accessible.” (See comments submitted by the Association of the Bar for the City of New York, Feb. 15, 2005, at 3.):

In our view, the “reasonably accessible” standard focuses on the wrong issue and will not establish a clear or workable standard for courts and litigants. The proper standard for all discovery — electronic or otherwise — should not relate to “access,” but to the relative costs and burdens associated with the collection and production of information in the context of its importance to the issues in a particular case. To the extent that relative costs and burdens are the focus of the proposed “reasonably accessible” standard, then that standard adds nothing to the rules as currently drafted. Rule 26(b)(2) already sets out the factors a court should consider in determining whether otherwise permissible discovery should be limited by the court. Those factors provide adequate guidance and discretion to the courts in resolving

issues related to the relative costs and burdens associated with all forms of discovery. *Id.*

³ Intel Corp. asked that the committee amend Rule 26 to “provide for a [rebuttable] presumption of cost-sharing — not cost-shifting, but cost-sharing — when a party requests information that is not reasonably accessible.” (Intel Statement at 6.)

⁴ Rowe began with the assumption that “[e]lectronic documents are no less subject to disclosure than paper records,” an assumption that the committee and the proposed Rule 26(b)(2)(B) implicitly refute. *Compare Rowe Entertainment v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002), with Rule 26(b)(2)(B) (proposed July 25, 2005).

⁵ In *Zubulake*, Judge Scheindlin explained the reason for this by quoting *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001):

Given the complicated questions presented [and] the clash of policies ... I have decided to take small steps and perform, as it were, a test run. Accordingly, I will order [the Department of Justice] to perform a backup restoration of the e-mails attributable to Diegelman’s computer during the period of July 1, 1998, to July 1, 1999. ... The DOJ will have to carefully document the time and money spent in doing the search. It will then have to search in the restored e-mails for any document responsive to any of the plaintiff’s requests for production of documents. Upon the completion of this search, the DOJ will then file a comprehensive, sworn certification of the time and money spent and the results of the search. Once it does, I will permit the parties an opportunity to argue why the results and the expense do or do not justify any further search. *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001), (quoted in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323-4).

* *Martin Beirne is managing partner of Beirne, Maynard & Parsons, a litigation-only law firm with offices in Houston and Dallas. He has extensive trial experience in complex business, intellectual property, oil and gas, products liability, automotive and antitrust litigation. David Pluchinsky, a partner with the firm, represents clients in commercial, products liability and personal-injury disputes in Texas, nationally and internationally, concentrating largely on the energy and chemical industries. George Murr, counsel with the firm, represents clients in all aspects of complex commercial, energy, real estate and pharmaceutical litigation.*