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Gaining Strategic Advantage of E-Discovery Under the New Federal Rules

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The 2006 amendments to the Federal Rules of Civil Procedure[1] have substantially altered the landscape on which litigants battle over discovery of electronically stored information, or ESI.

Rule 26 sets forth a straightforward analytical framework to govern resolving such battles. A party can object to discovery of ESI on the grounds that it is "not reasonably accessible due to undue burden or cost."[2] However, a court can still order production of ESI it agrees is not reasonably accessible if the requesting party demonstrates "good cause," taking into account the traditional protections against unduly burdensome discovery[3] and the requesting party's willingness to bear some or all of the costs.

Rule 26 further advises that a court may set conditions on discovery that include shifting of costs, but hiding behind this deceptively straightforward framework is a world of ambiguity.

When to Determine Accessibility of ESI

First, the amended rules leave a wide berth for when, during the proceedings, the litigants or the court can determine whether ESI is "not reasonably accessible." Second, the amended rules do not clearly define the boundaries of the accessibility, good-cause and traditional protection analyses. Finally, applying the amended rules in complex litigation underscores the fact that parties will be pioneering new ground with little guidance. The good news is that a prepared party can use these ambiguities, on a case-by-case basis, to gain a strategic advantage.

The determination that ESI is not reasonably accessible need not occur at the same time as the determination that there is good cause to permit the discovery of such ESI. Although the good-cause inquiry, by its nature, pivots on a specific pending discovery request, the amended rules permit the accessibility inquiry to occur much earlier in the litigation and under circumstances that include the absence of any pending discovery requests.

A party unprepared to litigate the accessibility question prior to being served discovery will find itself at a disadvantage in the litigation. The amended rules create three specific situations early in litigation where the accessibility of ESI may be established either preliminarily by the litigants or in a finding by the court.

First, Rule 26(f) requires the parties to meet and confer on issues in preparation for their Rule 16 conference, where the court will address scheduling and other preliminary discovery matters. The rule also requires the parties to submit to the court, to the extent practicable, a joint discovery plan addressing their views on various discovery issues. Now expressly among these issues are those "relating to disclosure or discovery" of ESI, including "the form or forms in which it should be produced."

Rule 26(f) does not require parties to agree upon, or even to discuss, the accessibility of ESI. However, a party seeking to gain an advantage in litigation should be prepared to respond to the opposing party's inquiries about producing different forms of ESI with an initial position regarding accessibility.

That party's initial position on accessibility could be an assessment that some ESI is accessible and some is not (*e.g.*, active e-mail accounts are reasonably accessible, e-mail accounts on backup tapes are not) or that any such assessment is premature. Regardless, however, that position should be chosen strategically based on a thorough internal inquiry, and not taken by a party from an uninformed, defensive posture. A party confident that it can justify that its own critical ESI is not reasonably accessible can be proactive at the Rule 26(f) meeting to push the opposing party to justify its own similar position.

Second, at the Rule 16 conference, a court can now consider including in any resulting scheduling or discovery orders "provisions for disclosure or discovery" of ESI, either on the court's own initiative or to address any issues (or to adopt party agreements) concerning discovery of ESI documented as a result of the parties' Rule 26(f) "meet and confer."[4]

The judge or opposing counsel may directly raise the question of accessibility of particular types of ESI, and the responding party needs to be prepared to answer *and justify its position* or proffer a good reason why such information is not available and indicate when it will be forthcoming.

However, a party seeking to delay staking a position on the accessibility of its ESI, without an agreement to do so with the opposing party, risks either the court making a premature adverse ruling that will govern all future discovery requests concerning that ESI, or opposing counsel otherwise taking advantage of the information vacuum.

Third, the parties may agree, or the court may order, that they will stake positions on the accessibility of particular types of ESI in their Rule 26(a) initial disclosures or by a later specified date. For the responding party, there is a strategic advantage to staking a position on accessibility of ESI at this stage of the litigation—after the court has issued its initial scheduling orders and before any particular discovery requests are served.

Such a party has a better chance of deferring challenges to its ESI accessibility assessments by opposing counsel, or resolution of those challenges by the court, until actual discovery is served and disputes over that discovery have ripened. That party can also use the interim period to gather information and evidence that will support its accessibility assessments.

The Danger of Deferring Disclosure

Of course, the amended rules do not require accessibility assessments to be made by the parties or resolved by the court at these earlier stages of litigation. The rules just as easily permit the scenario where a party first discloses its position that a particular type of ESI is not reasonably accessible when it objects to a specific served discovery request. However, if a party defers such disclosure until this point, it risks taking a request-centric position to avoid an immediate burden that could undermine its overall strategic advantage in reducing its discovery burden.

In addition, a party that waits to stake its accessibility position until a discovery dispute arises must consider the long-term implications of an adverse ruling on the first test of that position, as well any damage to its credibility on this issue in subsequent disputes before the court.

Moreover, the longer a party waits, the more likely it is that events such as new claims, new parties, spoiled evidence, technological advances in ESI access methods, or other discovery rulings in one party's favor or the other might sway the court to find ESI reasonably accessible, or if not, then good cause to produce it anyway.

A party also needs to decide whether to take the position that particular types of ESI (*e.g.*, backup tapes or cell phone text message logs) are not reasonably accessible if it wants the opposing party to produce the same types of ESI. In addition to considering the benefits of pressing discovery burdens upon the other side, a party needs to assess whether the best evidence supporting its substantive case will be found in its opponent's ESI of that same type.

If a party thinks the smoking-gun e-mail will be found in the opposing party's backup tapes, it will need to think twice before arguing to the court that its own backup tapes are not reasonably accessible, even if the technical realities would support such an argument.[5]

A prepared party can use the ambiguities of the amended rules, on a case-by-case basis, to gain a strategic advantage.

Another strategic advantage that can follow from staking early positions that particular types of ESI are not reasonably accessible is the opportunity to delay the resolution of the discovery dispute itself and, by consequence, the production of any such ESI if it were so ordered.

Rule 26 advises that "in many circumstances" the requesting party should be required to obtain and review reasonably accessible ESI before insisting that the responding party provide data that is not reasonably accessible. Indeed, a court may be so persuaded, on the grounds that the resolution of whether discovery of the latter should be permitted is necessarily contingent on whether the requesting party's discovery of the former was fruitful.

A probable condition for this strategy to succeed is a predetermination by the court (by finding or by at least temporarily adopting the responding party's position) that particular ESI is not reasonably accessible. Without such a predetermination, the court will have less justification to defer the good-cause inquiry regarding discovery of that ESI until the results of the requesting party's review of produced materials from reasonably accessible ESI can inform that inquiry.

The Scope of the Accessibility Inquiry

The amended rules have framed ESI accessibility as a threshold question.[6] Unless ESI is found to be not reasonably accessible, the good-cause inquiry is not reached, and a responding party's only refuge is the traditional protections against onerous discovery.[7]

If a responding party has formally established that ESI is not reasonably accessible early in the litigation and before any discovery disputes arise concerning that ESI, the fact that the accessibility question is a distinct determination from the good-cause inquiry is self-evident.

On the other hand, if a party does not disclose its position that ESI is not reasonably accessible until it objects to a discovery request, or the court does not actually rule on whether it agrees with a party's accessibility position staked out earlier in the litigation, the rules do not clearly delineate the boundaries of these inquiries. This can create confusion for the parties and the court—or if a party is prepared, an opportunity to gain an advantage.

Rule 26 can be read to say the question of accessibility of ESI is intended to be limited to an examination of just that—*access*—that effort and cost necessary to convert ESI from a not reasonably accessible format into a reasonably accessible one, and not the additional burdens and costs associated with reviewing and producing such ESI after it has been converted.

For example, the Committee Notes to Rule 26 state that a court should base this determination on whether ESI "can be *accessed* only with substantial burden or cost." They also focus on an issue divorced from review and production in litigation, advising that ESI may be reasonably accessible even if a party does not access it frequently in the ordinary course of business.

In addition, the notes contemplate that the requesting party may be granted discovery on the accessibility question alone, to test the responding party's assertion that a particular type of ESI is not reasonably accessible. Such discovery could take the form of sampling and/or inspection of such ESI, or even depositions of witnesses (such as IT personnel) familiar with the responding party's storage and use of such ESI.

Moreover, if the parties disclose, or the court rules on, ESI accessibility assessments at earlier stages of the litigation, those assessments would necessarily need to have occurred without consideration of the burden to review or produce ESI responsive to any particular discovery request.

Indeed, the requesting party's mantra might be that were it not merely for the format in which the ESI currently resides, its accessibility would not be at issue and the court would not even need to consider ESI-specific discovery considerations.

Therefore, the argument would continue, once the ESI has been converted to an accessible format, discovery should proceed as before with no considerations of the additional burden or cost of reviewing and producing such ESI—and certainly not any consideration of shifting the review or production costs to the requesting party—as part of the calculus.

Rule 26 also states, in the context of resolving discovery disputes concerning ESI, that it is the responding party's burden to show that the requested ESI "is not reasonably accessible in light of the burdens and costs required to *search for*, retrieve *and produce* whatever *responsive information* may be found."[8]

This language implies that the question of accessibility will be contingent on what and how much is requested. Therefore, Rule 26 can also be read to say that a court in ruling on accessibility should also consider the responding party's burden to review and produce, as well as access, the ESI at issue.[9]

This might be the responding party's mantra, but it also presents a sticky issue. In cases involving substantial volumes of discovery, legal costs are more dramatically affected by the review and production of retrieved ESI, as opposed to the mere access or retrieval of that ESI.

A large amount of ESI stored in a medium that entails minor obstacles to access may add up to an arguably larger burden, whereas a small amount of ESI that is extremely difficult to access may add up to an arguably lesser burden. Even at only moderately distant points along this continuum, this reading of Rule 26 permits a court's accessibility determinations to mask, and not consistently account for, the true technological obstacles to access.

To a court willing to engage the details of discovery economics, a party that does not tread carefully in its application of a more inclusive accessibility determination risks appearing at least inconsistent and possibly self-serving.

The Scope of the Good-Cause Inquiry

Another ambiguity is whether the good-cause inquiry completely subsumes the consideration of traditional discovery protections under Rule 26(b)(2)(C) or whether the responding party, even after a court finds good cause for production of not reasonably accessible ESI, can still ask the court to consider some or all of the traditional protections (which still remain in a distinct subsection of the rule) in an additional inquiry.

In particular cases, a court may use the flexibility inherent in the scope of the good-cause inquiry to narrow or change the factors it considers, as the factors suggested by Rule 26 to consider are permissive and not exclusive.[10] For example, a requesting party may move to compel answers to an interrogatory that require the responding party to review both ESI and non-ESI sources of factual evidence.

A party unprepared to litigate the accessibility question prior to being served discovery will find itself at a disadvantage in the litigation.

Under such circumstances, a responding party could argue that the court's consideration of the traditional protections in the good-cause inquiry was bounded by the ESI-specific issues and/or focused on such a unique set of factors that a full consideration of the traditional protections is still warranted.

However, Rule 26 states that the court will evaluate whether the requesting party has "show[n] good cause, considering the limitations of Rule 26(b)(2)(C)." This language strongly suggests that any benefit the traditional protections provide to the responding party will be considered by the court in its good-cause determination, and that party will not be able to raise them again in regard to a particular discovery request.

Indeed, many of the factors that Rule 26 suggests should inform the good-cause inquiry, such as the parties' resources and the importance of the issues at stake, are the same factors that inform the traditional protections. Although it is too early to identify a clear trend, courts have begun to issue opinions that suggest there is no further inquiry beyond good cause.[11]

Rule 26 further advises that a court may be able to address the accessibility and good-cause inquiries, including the traditional discovery protections under Rule 26(b)(2)(C), "through a single proceeding or presentation."

Taking into account the complete text and advisory notes on the Rule 26 changes, a party should not be surprised if a court's resolution of a discovery dispute considers, at one time, the superset of:

- Good-cause factors;
- Traditional protection factors;
- The requesting party's willingness to share the cost of at least accessing, and also possibly reviewing and producing, the requested ESI; and
- Any other factors the court determines to be germane.[12]

Moreover, because the accessibility analysis and traditional protections both consider the burden or expense of the requested discovery, if a court has not already ruled on the accessibility of ESI, that inquiry may also be enveloped into a single, overarching analysis.[13]

A party that thinks the smoking-gun e-mail will be found in the opposing party's backup tapes should think twice before arguing to the court that its own backup tapes are not reasonably accessible.

Gaining Strategic Advantage in Complex Litigation

One aspect of litigating ESI discovery issues not covered at all by the new rules is how to address these questions in large cases involving multiple parties on the same side and/or parties whose actions are being coordinated for discovery under a multidistrict litigation. Many of these parties may be large, multinational corporations with complex computer systems. Even party corporations of moderate size can have substantial IT systems with a variety of ESI subject to potential discovery.

Although most of these parties may have similar types of ESI (*e.g.*, some type of active e-mail system, backup/restoration system or transactional database), many of the details that could influence the court's views on accessibility or good cause may differ. These include the specific capabilities of their IT personnel, the extent each has decommissioned computer systems or the volume of ESI on any particular storage medium.

In these multiparty cases it is common for the court to fashion scheduling and discovery orders to which all parties on one side, or all parties period, are equally subject. However, a court may find itself facing quite a quandary if it is forced to decide whether to consistently determine that all parties' backup tapes are, or are not, reasonably accessible, or whether to examine each particular defendant's accessibility and good-cause issues independently and fashion tailored orders.

One can easily see that a court in a complex, multiparty case would strive to have the parties—both those opposed to one another and those individual participants on the same side—come to an agreement on which ESI will be considered reasonably accessible and, therefore, subject to discovery in the first instance.

For all parties involved, this will be breaking new ground. Even the parties on one side that share a common-interest privilege will need to share details about their IT systems and available ESI that they have not likely previously been sharing.

There will inevitably be conflict between parties with less burdensome ESI to access and those with more burdensome ESI to access, if all such parties are to come to agreement on a position of what is, or is not, reasonably accessibly ESI. Each party will need to be vigilant in such discussions in balancing its own potential discovery burdens against any overall position taken by the parties against the other side that might have desirable strategic advantages.

These party discussions and negotiations will take time, and parties in these complex litigations are going to want to plan out long-term strategies for discovery and need some predictability to do so. Consequently, it may become prudent for such parties, as part of their Rule 26(f) meet-and-confer, to agree on a scheduling order addressing these issues and submit it to the court to approve during the Rule 16 conference.

Such an order would specify schedule milestones for parties to disclose what types of ESI they have, identify their positions on its accessibility and negotiate on those determinations, with an eye toward eventually presenting the court with a stipulated order that formalizes those assessments.

Parties can then later draft their discovery requests with full knowledge of what ESI the other side, subject to other objections that may be raised, will be searching for in response to the initial order.[14]

Subsequent discovery disputes might then, at least with respect to these issues, be limited to the questions of whether good cause exists for production of not reasonably accessible ESI and possibly whether the good-cause inquiry should be deferred until some sampling or other discovery concerning the benefits or burdens of producing such ESI can be determined. At the very least, the benefits to the requesting party of prior discovery from reasonably accessible sources of ESI may be more easily measured at this point, and can inform the court's analysis as the amended rules suggest should occur.

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Notes

1 The amendments became effective Dec. 1, 2006.

2 *See* Fed. R. Civ. P. 26 & Committee Notes to 2006 Amendments.

3 *See* Fed. R. Civ. P. 26(b)(2)(C), previously at Fed. R. Civ. P. 26(b)(2)(i)-(iii).

4 *See In re Seroquel Prods. Liab. Litig.*, 2007 WL 219989, at *1-6 (M.D. Fla. Jan. 26, 2007) (issuing omnibus discovery scheduling order providing for interviews of party IT personnel, format of electronic productions, production of metadata, preservation of documents and potential motions to share costs of producing "not readily accessible" ESI).

5 For example, one party may have decommissioned its backup tape creation system, while the other party's is still active, making the latter's backup tapes more reasonably accessible.

6 *See In re Veeco Instr. Sec. Litig.*, MDL 1685, 2007 WL 983987, at 1 (S.D.N.Y. Apr. 2, 2007) (slip op.) (finding initially that backup tapes were not reasonably accessible and then performing good-cause inquiry to order production). The Committee Notes to amended Rule 26 often reference the accessibility and good-cause inquiries distinctly. They further suggest the potential to defer the good-cause inquiry until ESI that is not reasonably accessible can be sampled and its potential value assessed, which presupposes that the court will distinctly resolve the accessibility question first.

7 *See Apsley v. Boeing Co.*, 2007 WL 163201, at *4-5 (D. Kan. Jan. 18, 2007) (ordering hearing on burden and benefits of requested e-mail production under traditional discovery protection analysis); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 640-41 (D. Kan. Nov 15, 2006) (applying soon-to-be-effective amended rules, finding single backup tape at issue reasonably accessible and therefore making good-cause/cost-shifting inquiry moot, but applying traditional protections to somewhat narrow permitted discovery).

8 Rule 26 (emphasis added).

9 *See Guy Chem. Co. v. Romaco AG*, 2007 WL 1521468, at *1 (N.D. Ind. May 22, 2007) (finding third party's ESI not reasonably accessible without any consideration of cost to access, rather only cost to produce); *W.E. Aubuchon Co. v. Benefirst LLC*, 2007 WL 1765610, at * 4 (D. Mass. Feb. 6, 2007) (finding electronic images of medical claims stored on defendant's server "accessible" under *Zubulake v. UBS Warburg*, 217 F.R.D. 309 [S.D.N.Y. 2003]), but nonetheless "not reasonably accessible" under amended rules because method of indexing for retrieval was arcane and burdensome); *Semsroth*, 239 F.R.D. at 632-33, 638 (evaluating accessibility of backup tape based on burden of tape restoration and "search," which entailed automated or manual review of e-mails for hits on specified search terms and gathering responsive e-mails into a single folder).

10 Rule 26 advises that a court in determining good cause *may* consider factors including the specificity of the discovery request; the quantity of information available from more easily accessible sources; whether the requested information used to exist on more easily accessible ESI, but was deleted, and now only exists as ESI that is not reasonably accessible; the likelihood of finding relevant, responsive information that cannot be obtained

from more easily accessible sources; predictions as to the usefulness of the information; the importance of the issues at stake; and the parties' resources.

[11] *See Benefirst*, 2007 WL 1765610, at * 4-5 (subsuming traditional protection inquiry in good-cause inquiry); *Veeco Instr.*, 2007 WL 983987, at 1 (same); *Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 2007 WL 1585452, at *6-9 (D.D.C. June 1, 2007) (same).

[12] *See Benefirst*, 2007 WL 1765610, at * 5 (considering in good-cause inquiry fact that under contract between parties, plaintiff owned the documents it requested).

[13] *See Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093, at 30-31 (C.D. Cal. May 29, 2007) (slip op.) (ordering production of server log data in RAM after walking through accessibility, good-cause and traditional protection factors in conclusory fashion and without delineating one finding from another).

[14] *See Veeco Instr.*, 2007 WL 983987, at 1 (admonishing plaintiffs for assuming backup tapes would be searched by defendants when parties did not establish electronic discovery protocol under the amended rules).