The Burden of Discovering Inaccessible Electronically Stored Information:

Rules 26(b)(2)(B) & 45(d)(1)(D)

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Abstract

The central tension in civil litigation is how to balance the burden and cost of discovering ever-increasing types and volumes of relevant electronically stored information (ESI) against the need, benefit, and importance of the information for the litigation to achieve a just, speedy, and cost-effective result. The Federal Rules of Civil Procedure have addressed this tension most directly in new Rules 26(b)(2)(B) and 45(d)(1)(D) — the inaccessibility rules — which allow parties and nonparties to refrain from producing relevant, requested, responsive ESI from sources that the parties or nonparties identify as not reasonably accessible because of undue burden or cost. If either the seeker moves to compel production, or the holder resists production by a motion to quash or a motion for protective order, the holder must prove inaccessibility by showing that production of the ESI would be unduly burdensome. If this showing of inaccessibility is made, the court will not order the ESI to be produced unless the seeking party shows good cause for production of the inaccessible ESI. If the showing of good cause is made and the ESI is ordered to be produced, the court may impose conditions upon the production, including cost-shifting and other conditions relating to the method, volume, and format of the production.

This article summarizes how the courts, two years after the enactment of these rules, have applied the new rules to balance these crucial competing interests. It shows that some important questions have been answered clearly, some answers are emerging, and some critical issues are still unanswered.

Article

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

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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 are becoming 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 were proposed by the Civil Rules Advisory Committee of the United States Judicial Conference (Committee) and adopted effective December 2006. These new rules relate to discovery of ESI in federal[6] litigation and aim to assist parties, attorneys, experts, 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 both sides of the "v" are faced with the crucial question of how to deal with high volumes of electronic 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 ESI will be found, produced, and used, but whether the important ESI will be.

Yesterday, companies embraced email and the Internet with one eye on cost and risk and the other on the astonishing and irrepressible gains in the speed and reach of the new media. Today, still wary of cost and risk, some companies are nevertheless embracing an integration of personal and company media, and rushing headlong into the brave world of social networking.

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

[3] John F. Gantz et al., The Diverse and Exploding Digital Universe, 2 (2008) 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.*

[6] The federal inaccessibility rule is also likely to have a significant impact in state courts. *See Ex parte* Cooper Tire & Rubber Co., 987 So. 2d 1090, 1105 (Ala. 2007) (in granting a writ of mandamus on discovery issues, the Alabama Supreme Court ordered the trial court to consider federal Rule 26(b)(2)(B) in evaluating accessibility).

The fulcrum on which the potential benefit of the discovery of ESI[7] by parties[8] in federal civil litigation and the cost and risk of ESI discovery are balanced is Rule 26(b)(2)(B), "the inaccessibility rule,"[9] 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 nonetheless 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.[10]

This paper (we still say paper, though most readers will not read this on paper) summarizes what courts, commentators, the Committee Notes, and the new rules 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, and some are still a mystery.

I. Identification

The fundamental mystery of Rule 26(b)(2)(B) is whether the first sentence, the identification provision, will be read as important, ignored into oblivion, or something in between. Until more law develops, the safest presumption is that the identification requirement is important, that proper identification of sources of inaccessible ESI provides significant protection, and that failure to identify such sources may result in: (1)

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[7] *See* Fed. R. Civ. P. 26(b)(2)(B)(By its terms, Rule 26(b)(2)(B) applies only to ESI, not paper documents.)

[8] As discussed below, the rule virtually identical to Federal Rule of Civil Procedure 26(b)(2)(B) that governs discovery of inaccessible ESI from nonparties pursuant to subpoena is Federal Rule of Civil Procedure 45(d)(1)(D). Much of the discussion here under Rule 26(b)(2)(B) will apply similarly to subpoenas of ESI under Rule 45(d)(1)(D). The primary exception is Section V below which shows that the new rules will result in shifting discovery costs to the seeking party much more often for subpoenas for ESI from nonparties than for requests for ESI from parties.

[9] The rule does not use the term "inaccessible," but "electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B). 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. But the longer phrase would gag both reader and writer, given how many times it would be used here. The temptation to coin a precise acronym – ESITTPIANRABOUBOC – will, alas, be resisted. The influential Sedona Conference, in its just-published white paper on Rule 26(b)(2)(B), coins a term that may be a fair compromise: "NRA ESI." *See Preservation, Management and Identification of Sources of Information that are Not Reasonably Accessible*, 9-10 (2008), http://sedonaconference.org/ (Thomas Y. Allman et al, eds., The Sedona Conference Working Group on Electronic Document Retaliation & Production ((WG1), 2008).

[10] Fed. R. Civ. P. 26(b)(2)(B).

loss of protection against producing inaccessible ESI; (2) sanctions for discovery failures; and/or (3) loss of the possibility of shifting discovery costs to the seeking party.

1. The Timing and Process of Identification

a. Identifying Inaccessible Sources of ESI in the Rule 34 Response

Assuming that identification is important, as discussed below, the initial question is: When and how must the sources of inaccessible ESI be identified? The answer is that the sources must be identified as inaccessible at the latest in the Rule 34 response to a request for the production or inspection of ESI.[11]

b. Assessing and Negotiating Inaccessibility Before the Rule 34 Response in the Rule 26(f) and 16(b) Conferences

There is good reason, however, for a party and its counsel to understand even earlier what potentially relevant but inaccessible ESI may be under the control of a party.

The need and market for new, rapidly-developing early case assessment technology is increasing because 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.

For example, the 2006 amendments to Rule 26(f) require the parties to discuss and create a written discovery plan early in the litigation that addresses the "discovery of electronically stored information."[12] These discussions and the written plan should include "issues about preserving discoverable information[,]"[13] "whether discovery should be conducted in phases[,]"[14] and the "form[] in which [ESI] should be produced[.]"[15] 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.[16] In such cases, counsel must be prepared by the time of the early

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[11] *Cf.* Thielen v. Buongiorno USA, Inc., No. 1:06-CV-16, 2007 U.S. Dist. LEXIS 8998, *7-*8 (W.D. Mich. Feb. 8, 2007) (allowing 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. However, the court reminded the parties that the time to assert objections to a Rule 34 request is in the Rule 34 response, and failure to do so will normally constitute a waiver of all objections to the discovery sought, including the objection of inaccessibility.)

[12] Fed. R. Civ. P. 26(f)(3)(C).

[13] Fed. R. Civ. P. 26(f)(2).

[14] Fed. R. Civ. P. 26(f)(3)(B).

[15] Fed. R. Civ. P. 26(f)(3)(C).

[16] Fed. R. Civ. P. 26(f) advisory committee's note to 2006 amendment.

Rule 16(b) and Rule 26(f) conferences to discuss inaccessibility – i.e., to negotiate "whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information."[17] It is now common to include in early discovery and case management orders and plans detailed requirements about how to assess and comply with the requirements of Rule 26(b)(2)(B).[18]

c. Identifying Inaccessible Sources After the Rule 34 Response and Before Providing the Requested Inaccessible ESI

The cases discussed in Section I(3) below address the possible consequences of identifying sources of relevant ESI as inaccessible after serving the Rule 34 response but before providing the allegedly inaccessible ESI. At present, those consequences are uncertain. Clearly, until further development of the law, the best practice is to assert inaccessibility at least by the time the response to the Rule 34 request is served.

d. Asserting Inaccessibility after Providing Discovery

Waiting to assert inaccessibility until after the ESI has been produced is too late to gain protection from Rule 26(b)(2)(B). 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*.[19] 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 at any other time before actually processing and producing the ESI, produced the requested ESI. Only thereafter did the defendant assert that the ESI was inaccessible. The defendant sought to shift part of the production costs to the 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 A. 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.

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[17] *Id.*

[18] *See, e.g.*, O'Bar v. Lowe's Home Ctrs., Inc., No. 5:04-CV-00019-W, 2007 U.S. Dist. LEXIS 32497, *12-*21 (W.D.N.C. May 2, 2007).

[19] Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 U.S. Dist. LEXIS 51962 (E.D. Mich. July 7, 2008).

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 requested 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 own Motion for a Protective Order . . . .

. . . [o]n 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. [20]

2. Content: What Must Be Identified

Rule 26(b)(2)(B) does not require the identification of inaccessible ESI, but only the identification of "sources" of inaccessible ESI.[21] There is no requirement, for example, to provide 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

[20] *Id.* at *5-*9 (quoting Fed. R. Civ. P. 26(b)(2)(B)); *Accord* Comm. Concerning Cmty. Improvement v. City of Modesto, No. CV-F-04-6121, 2007 U.S. Dist. LEXIS 94328 (E.D. Cal. Dec. 11, 2007) (explaining that the 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) (explaining that the 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).

[21] Fed. R. Civ. P. 26(b)(2)(B).

and defeat the essential purpose of Rule 26(b)(2)(B) — protecting against undue burden and cost in the production of ESI in litigation.

Although the rules do not define what constitutes sufficient specificity for identification, the level of the required details of what must be identified can be inferred from the functions to be served by the identification requirement: (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); and (2) to give the seeking party notice that additional relevant information may be available, at least at some cost, and thereby to give to the seeking party some choice in how much time and resources to invest in seeking inaccessible ESI.

> 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.[22]

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. The amount of detail required – for example, whether the responding party must quantify the volume of ESI on the sources claimed to be inaccessible – will depend upon the cost and burden entailed in analyzing and providing the detail. Any motion to compel or motion for a protective order to test the identification must be preceded by good faith negotiations to try to resolve any dispute about the identification. Limited discovery may be ordered to test whether the ESI identified is in fact inaccessible. The discovery might consist of sampling, inspection, or depositions.[23]

3. The Importance of Identification

The courts that have expressly analyzed the early identification requirement hold that early identification is important, because the failure to do so could have palpable negative consequences. On the other hand, several courts have analyzed the second, third, and fourth parts of Rule 26(b)(2)(B) – the inaccessibility, good cause, and conditions steps – without expressly requiring compliance with the first step of the rule, the identification requirement.[24] This raises the question whether Rule 26(b)(2)(B)

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[22] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment; *See also* Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532RSL, 2008 U.S. Dist. LEXIS 35166 (W.D. Wash. Apr. 21, 2008).

[23] *Id.*

[24] *E.g.*, Baker v Gerould, No. 03-CV-65586, 2008 U.S. Dist. LEXIS 28628 (W.D.N.Y. Mar. 27, 2008); U & I Corp. v. Advanced Med. Design, Inc., 251 F.R.D. 667 (N.D. Fla. 2008); Petcou v. C.H. Robinson Worldwide, Inc., No. 1:06-CV-2157-HTW-GGB, 2008 U.S. Dist. LEXIS 13723 (N.D. Ga. February 25,

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 ESI.[25]

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."[26] 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 question, though, is: Does "information" in this context mean (1) ESI from sources that the responding party has timely identified as not reasonably accessible (the identification-is-important rule), or (2) ESI, even where the responding party did not identify sources of inaccessible ESI (the "early-identification-step-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. Under this view, the failure to trigger the protections of Rule 26(b)(2)(B) will leave the issues subject to resolution under other rules —namely the traditional grounds for a motion for protective order under Rule 26(c) and for a motion to compel under Rule 37(a). Given that Rule 26(b)(2)(B) offers more protection against the duty and the expense of producing inaccessible ESI than would Rules 26(c) and 37(a), a party failing to identify sources of inaccessible ESI in a timely manner will have lost real protection.

If the latter reading prevails, the early-identification-step-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. In that case, there may be little incentive for the holder of inaccessible ESI to notify its opponent of additional sources of potentially relevant ESI that the holder is not producing.

The following weighs the arguments on each side of this debate. Early identification is important, even the key rationale for the enactment of Rule 26(b)(2)(B). The Committee explained that the new requirement for a responding party to identify

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2008); Commerce Benefits Group, Inc. v. McKesson Corp., No. 1:07-CV-2036, 2008 U.S. Dist. LEXIS 15181 (N.D. Ohio Feb.13, 2008); Ameriwood Indus., Inc. v. Liberman, No. 4:06-CV524-DJS, 2007 U.S. Dist. LEXIS 10791 (E.D. Mo. Feb. 12, 2007).

[25] *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 (2008) http://law.richmond.edu/jolt/v14i3/article7.pdf; Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J.L. & TECH., 1, 13 (2006) http://law.richmond.edu/jolt/v12i4/article13.pdf (arguing that the identification requirement is the only real change to Rule 26(b)(2)).

[26] Fed. R. Civ. P. 26(b)(2)(B) (emphasis added).

sources of potentially responsive ESI that the party was not searching or producing "is an improvement over the present practice, in which responding parties simply do not produce electronically stored information that is difficult to access."[27] 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 temporary reprieve from the requirement to 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.

The counterargument – that Rule 26(b)(2)(B) can apply and provide protection without early, affirmative identification of inaccessible sources – exists because several cases have applied Rule 26(b)(2)(B) in the absence of early, affirmative identification of inaccessible sources of ESI.[28] By implication, these cases seem[29] to suggest that the 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 a party asserts to be not reasonably accessible, even after a motion to compel is filed, is discoverable only if the requesting party can establish good cause.[30]

To date, all four reported decisions that have squarely addressed the identification requirement[31] hold that real consequences flow from a failure to identify sources of inaccessible ESI.[32]

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[27] David F. Levi et al., Summary of the *Report of the Judicial Conference Committee on Rules of Practice and Procedure* app. C at C-31 (2005) http://www.uscourts.gov/rules/Reports/ST09-2005.pdf ("2005 Report").

[28] Ameriwood Indus., No. 4:06CV524-DJS 2007 U.S. Dist. LEXIS 10791 (finding plaintiff's responsive ESI to be inaccessible apparently based solely upon volume – 52,125 emails and 4,413 other files from 12 employees – and refusing 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, No. 03-CV-6558L, 2008 U.S. Dist. LEXIS 28628.

[29] 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.

[30] Ameriwood Indus., No. 4:06CV524-DJS 2007 U.S. Dist. LEXIS 10791 (finding plaintiff's responsive ESI to be inaccessible apparently based solely upon volume – 52,125 emails and 4,413 other files from 12 employees – and refusing 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, No. 03-CV-6558L, 2008 U.S. Dist. LEXIS 28628.

[31] 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 240 F.R.D. 26 (D.D.C. 2007).

In the aforementioned *Cason-Merenda*, 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 the plaintiff.[33] Two other cases, *Committee Concerning Community Improvement*[34] and *Semsroth*,[35] reach similar conclusions.

In the fourth case, *Phoenix Four, Inc. v. Strategic Resources Corp.*,[36] Judge Harold Baer, Jr. relied in part upon the identification requirement of Rule 26(b)(2)(B) for his findings. He determined that a party had a duty to identify a server with responsive ESI, and that the breach of that duty contributed to the court's finding of spoliation and entry of monetary sanctions for spoliation: "I emphasize that the duty in such cases is not to retrieve information from a difficult-to-access source, such as the server here, but rather to ascertain whether any information is stored there."[37]

Clearly, to be safe, a party seeking the protection of Rule 26(b)(2)(B) should affirmatively identify inaccessible sources at least by the time of serving the response to a Rule 34 request or a subpoena.

II. Inaccessibility

This section discusses how the responding party may assert inaccessibility under Rule 26(b)(2)(B)[38], and 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

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[32] Cason-Merenda, No. 06-15601, 2008 U.S. Dist. LEXIS 51962; Semsroth, 239 F.R.D. 630; Comm. Concerning Cmty. Improvement, No. CV-F-04-6121, 2007 U.S. Dist. LEXIS 94328; Phoenix Four, Inc. v. Strategic Res. Corp., No. Civ. 4837, 2006 U.S. Dist. LEXIS 32211 (S.D.N.Y. May 22, 2006).

[33] Cason-Merenda, No. 06-15601, 2008 U.S. Dist. LEXIS 51962.

[34] Comm. Concerning Cmty. Improvement, No. CV-F-04-6121, 2007 U.S. Dist. LEXIS 94328.

[35] Semsroth, 239 F.R.D. 630.

[36] Phoenix Four, No. Civ. 4837, 2006 U.S. Dist. LEXIS 32211.

[37] *Id.* at *18.

[38] The law of accessibility that develops under Rules 26(b)(2)(B) and 45(d)(1)(D) will influence or even determine accessibility for many other purposes in litigation. For example, the accessibility of various formats of production required by rules and case management orders will likely be tested against the law of accessibility that develops under Rules 26(b)(2)(B) and 45(d)(1)(D). *See* In re Seroquel Prods. Liab. Litig., 244 F.R.D. 650 (M.D. Fla. 2007).

Inaccessibility must be proven by evidence and will not be presumed. 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."[39]

The burden of proving inaccessibility can only be carried with real evidence, not just argument.[40]

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."[41]

If the responding party fails to meet the burden of proving inaccessibility, the seeking party has no burden to demonstrate good cause.[42]

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. Of course, the mere fact that information is in electronic form does not make the information inaccessible.[43]

The burden and cost of providing discovery of ESI are essentially a function of volume and searchability.[44] While the format of the data, of course, affects searchability,

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[39] Fed. R. Civ. P. 26(b)(2)(B). *See also* Canon U.S.A., Inc. v. S.A.M., Inc., No. 07-01201, 2008 U.S. Dist. LEXIS 47712 (E.D. La. June 20, 2008); Semsroth, 239 F.R.D. 630.

[40] Victor Stanley, Inc. v. Creative Pipe, Inc.,250 F.R.D. 251, 261 (D. Md. 2006); Auto Club Family Ins. Co. v. Ahner, No. 05-5723, 2007 U.S. Dist. LEXIS 63809 (E.D. La. Aug. 29, 2007) (explaining that the subpoenaed nonparty, like the requested party, has the burden of proving inaccessibility by admissible evidence, not argument). Mere conclusions and cost estimates will not suffice. Mikron Indus, No. C07-532RSL, 2008 U.S. Dist. LEXIS 35166.

[41] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 Amendment.

[42] Ahner, No. 05-5732, 2007 U.S. Dist. LEXIS 63809.

[43] Rule 26(b)(2)(B); Knifesource, LLC v. Wachovia Bank, N.A., No. 6:07-677-HMH, 2007 U.S. Dist. LEXIS 58829 (D. S. Car. August 10, 2007).

[44] 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) [hereinafter *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)."); Not all searchable ESI is per se accessible. If the scope of the request is broad, the volume of searchable, responsive ESI may be so great that it is unduly burdensome or costly to search, and is therefore inaccessible.

format alone is not dispositive of accessibility. In its September 2005 report to the Judicial Conference, the Committee 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; data 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.[45]

The 2006 Committee Notes make it clear, however, that the type of medium will not by itself determine whether the medium is accessible:[46] "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."[47] The more reliable test is functional, not categorical – i.e., whether the burden or cost of searching and producing the data is undue.[48]

The Sedona Conference suggests twelve factors to consider in determining accessibility, six of which are "media based factors."[49]

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."[50] If the parties do not meet and confer to attempt in good faith to resolve the accessibility dispute, a

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[45] Levi et al., *supra* note 27, at C-42.

[46] A recent case cites Judge Shira A. Scheindlin's opinion in *Zubulake I* for the proposition that "backup tapes and erased, fragmented, or damaged data is not accessible." Canon, No. 07-01201, 2008 U.S. Dist. LEXIS 47712. *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.

[47] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment.

[48] *See*, Commerce Benefits Group, No. 1:07-CV-2036, 2008 U.S. Dist. LEXIS 15181 (explaining that relevant ESI on backup tapes, like relevant ESI on any other medium, is presumptively discoverable, subject to the holder's ability to carry the burden of proving inaccessibility); Semsroth, 239 F.R.D. 630 (holding that a backup tape that can be restored to a searchable format for approximately $3,000 was reasonably accessible).

[49] The Sedona Conference, *supra* note 9, at 12.

[50] Fed. R. Civ. P. 26(b)(2) advisory committee's note to 2006 amendment.

motion for protective order or a motion to compel may be denied for that reason alone.[51] Good faith discussions to try to resolve the issues might involve, for example, substantive discussions of the difficulties of producing the requested ESI, the extent of the searches conducted to date, and details on why additional searches are likely to yield only information duplicative of that already produced.[52]

In *Mikron*, Judge Robert Lasnik emphasized that the test for sufficiency of the showing of inaccessibility is whether the responding party has shown "details sufficient to allow the requesting party to evaluate the costs and benefits of searching and producing the identified sources."[53] In concluding that the responding party had failed to prove that backup tapes were inaccessible, Judge Lasnik gave examples of what proof would have been pertinent:

> (1) the number of back-up tapes to be searched; (2) the different methods defendants use to store electronic information; (3) defendants' electronic document retention policies prior to retaining an outside consultant; (4) the extent to which the electronic information stored on back-up tapes overlaps with electronic information stored in more accessible formats; or (5) the extent to which the defendants have searched ESI that remains accessible.[54]

Further, the advisory committee's notes to the 2006 amendment suggest that:

> 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. [55]

2. The Relationship Between Inaccessibility and the Preservation Duty

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

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[51] Mikron Indus., No. C07-532RSL, 2008 U.S. Dist. LEXIS 35166, at *2.

[52] *Id.* at *2-*3.

[53] *Id.* at *4.

[54] *Id.* at *6.

[55] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

not reasonably accessible does not relieve the party of its common-law[56] or statutory[57] duties to preserve evidence."[58]

The long answer is that there is a complex relationship between inaccessibility and the preservation duty. The following are examples of that relationship.

If relevant ESI is available only on relatively inaccessible media (such as backup tapes) because the ESI in a more accessible format was destroyed in violation of a preservation duty, Rule 26(b)(2)(B) does not offer protection against the need to produce and pay for the production of inaccessible ESI. As Magistrate Judge John Facciola put it:

> While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: "that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan."[59]

While it is clear that the inaccessibility provision of Rule 26(b)(2)(B) does not "relieve" the preservation duty, it is possible that identification of sources of inaccessible ESI might increase spoliation risks in some circumstances. For example, identification of sources of potentially relevant but inaccessible ESI might provide proof on a motion for

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[56] The "common-law . . . dut[y] . . . to preserve evidence" refers to the duty grounded in federal or state tort law or to 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 to which the ESI may be relevant.

[57] "[S]tatutory duties to preserve evidence" appear to include document retention duties created by statutes or regulations, and usually 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 appears not to have been well-founded.

[58] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

[59] Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 139, 147 (D.D.C. 2007) (quoting Leo Rosten, The Joys of Yiddish 92 (1968)); *See also* Keithley v. The Home Store.com, Inc., No. C-03-04447, 2008 U.S. Dist. LEXIS 61741 (N.D. Cal. Aug. 12, 2008) (indicating that a party that spoliates may not rely upon the inaccessibility provision to justify spoliation).

spoliation sanctions that the party knew of spoliated ESI and that such knowledge is relevant to intent or good faith as an element of spoliation.

The inaccessibility may well be the basis for seeking protection against spoliation sanctions by obtaining an order declaring that ESI on inaccessible sources need not be preserved.[60] A Committee Note invites this possibility: "Whether a responding 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."[61]

III. Good Cause

A significant feature of the inaccessibility provision is that it places upon the party seeking inaccessible ESI the burden[62] 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."[63] 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.[64] 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,

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[60] 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.

[61] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment. The Electronic Discovery Reference Model (EDRM) has emerged as the leading model of the sequence of steps in the typical electronic discovery process, from (1) identification (not necessarily identical to Rule 26(b)(2)(B) identification) (2) preservation, (3) collection, (4) processing, (5) review and (6) analysis – though the (7) production and (8) 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." Using the EDRM, this normally will mean that Rule 26(b)(2)(B) identification will excuse the need to take any of steps 3 through 8 above.

[62] 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 heavy as if the carrier of the burden had to satisfy each of a 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." Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

[63] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

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

retrieving, and producing the information."[65] Most courts that have addressed the Rule 26(b)(2)(B) allocation of burdens have held that, once the responding party proves inaccessibility, the seeking party has the burden of proving good cause for production of the inaccessible ESI.[66]

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)."[67] In addition, the Committee Notes to Rule 26(b)(2)(B) suggest that a court may consider the seven factors discussed below in weighing whether good cause exists for ordering the production of inaccessible data.[68]

No clear line has been drawn between the timing, sequence, or weight of these 26(b)(2)(C) factors and the seven 26(b)(2)(B) factors, partly because the "B" factors are somewhat duplicative and overlapping of the "C" factors. To date, most courts considering good cause for the production of inaccessible ESI have considered both the seven factors of Rule 26(b)(2)(B) and the Rule 26(b)(2)(C) "limitations" or factors.[69]

These seven factors are similar to those that Magistrate Judge C. Francis IV fashioned in *Rowe Entm't, Inc. v. William Morris Agency, Inc.*[70] and that Judge Shira Scheindlin modified in *Zubulake I*[71] to weigh whether production costs should be shifted to the seeking party, which in turn were based upon Rule 26(b)(2)(C).[72]

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[65] Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

[66] *See*, Cason-Merenda, No. 06-15601, 2008 U.S. Dist. LEXIS 51962; Peskoff, 251 F.R.D. 59.

[67] Fed. R. Civ. P. 26(b)(2)(B) (refering to the "limitations" of Rule 26(b)(2)(C), the latter rule says more about the factors to be considered than about what limits should be imposed. That is, Rule 26(b)(2)(C) provides that unspecified limits on the frequency or extent of use of the discovery may be limited after weighing the factors specified. Of course, as Rule 26(b)(2)(C) recognizes, there can be a relationship between factors to be considered in deciding whether to order production and limitations that can justly be imposed.)

[68] *Id.*

[69] Disability Rights Council, 242 F.R.D. 139; PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657, 2007 U.S. Dist. LEXIS 66767 (N.D.N.Y. Sept. 7, 2007) (noting that the 26(b)(2)(C) factors overlap somewhat with the 26(b)(2)(B) factors).

[70] Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).

[71] Zubulake, 217 F.R.D. 309.

[72] *See* PSEG Power, No. 1:05-CV-657, 2007 U.S. Dist. LEXIS 66767.

Some courts have applied the *Zubulake I* factors to evaluate cost-shifting,[73] and some have applied the *Zubulake I* factors in analyzing inaccessibility and good cause. The good cause factors are tools to balance the critical weights of benefit and burden and are not to be applied mechanically.[74]

Given the confusion that arises from these overlapping but somewhat disparate lists of factors, and given that the factors are discretionary, the test for whether production of inaccessible ESI should be ordered can be abstracted from the current cases cited herein and from the rules and Committee Notes as follows: If relevant and responsive but inaccessible ESI is the only source of the ESI because of spoliation by the responding party, the responding party must at its expense produce the ESI. If relevant and responsive but inaccessible ESI, properly and timely identified as inaccessible, is not reasonably accessible without the fault of the holding party, the ESI may nevertheless be ordered to be produced if (1) the request for the ESI is reasonably specific and clear; (2) a cost/benefit analysis shows that the ESI is foreseeably important to the case; (3) the relevant and important ESI cannot be obtained from more accessible sources; and (4) the production would be within the producing party's means. The court has discretion to impose conditions and limitations upon the ordered production, including discretion to shift costs to the requesting party if the production at the responding party's expense would otherwise not be justified by these four factors.

The following table summarizes the factors of Rules 26(b)(2)(B) and 45(d)(1)(D) and the factors of *Zubulake I* in these four categories.

Factor		**Seven Good Cause Factors of Rule 26(b)(2)(C)**		**Limitations of Rule 26(b)(2)(C)**		**Seven Zubulake I Cost-Shifting Factors**
1. Specificity and clarity of the request		1. The specificity of the discovery request				1. The extent to which the request is specifically tailored to discover relevant information
2. Importance, including cost-benefit		5. Predictions as to the importance and usefulness of the further information 6. The importance of the issues at stake in the litigation		26(C)(iii) The burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy … [and] the importance of the		3. The total cost of production, compared to the amount in controversy 6. The importance of the issues at stake in the litigation

[73] *Id.* at *31.

[74] Zubulake, 217 F.R.D. 309.

				proposed discovery in resolving the issues 26(C)(iii) The importance of the issues at stake in the litigation		7. The relative benefits to the parties of obtaining the information
3. Other, more accessible sources		2. The quantity of information available from other and more easily accessed sources 2. 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		(C)(i) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive (C)(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought		2. The availability of such information from other sources
4. Parties' resources		7. The parties' resources		26(C)(iii) The parties' resources		2. 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

Several cases have applied these factors in determining that good cause existed to order the production of inaccessible ESI.[75]

[75] Disability Rights Council, 242 F.R.D. at 148 ("Application of these factors make for an overwhelming case for production of the backup tapes."); Petcou, No. 1:06-CV-2157-HTW-GGB, 2008 U.S. Dist. LEXIS 13723; PSEG Power, No. 105-CV-657, 2007 U.S. Dist. LEXIS 66767 (finding good cause for the

Another court applying these factors has found a lack of meeting the burden of proving good cause, and declined to order the production of inaccessible ESI.[76]

Another court considered these factors but postponed a determination of good cause until sufficient evidence could be presented on whether the ESI was available from more accessible sources.[77]

IV. Cost-Shifting and Other Conditions

The fourth and final sentence of Rule 26(b)(2)(B) provides that, if the court orders inaccessible ESI to be produced for good cause, "[t]he court may specify conditions for the discovery."[78] Cost-shifting is the most important of the conditions that may be imposed.

1. Cost Shifting

From 1970 to 2006, the Federal Rules of Civil Procedure did not 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 to protect responding parties against undue burden or expense.[79]

The text of the new inaccessibility provisions (Rules 26(b)(2)(B) and 45(d)(1)(D)) still does not expressly authorize cost-shifting as a condition of requiring a party or subpoenaed nonparty to produce ESI from inaccessible sources, but the Committee Notes specify that the condition that a court may impose upon the production of inaccessible ESI is cost-shifting: "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 . . . include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible."[80]

The new rules do not change the basic presumption that a party producing ESI in response to a Rule 34 request must pay for the production. The new rules do, however,

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production of inaccessible ESI); W.E. Aubuchon Co. v. Benefirst, LLC, 245 F.R.D. 38 (D. Mass. 2007) (finding good cause for production).

[76] Ameriwood Indus., No. 4:06CV524-DJS, 2007 U.S. Dist. LEXIS 10791 (emphasizing breadth of the request for ESI).

[77] Baker, No. 03-CV-6558L, 2008 U.S. Dist. LEXIS 28628.

[78] Fed. R. Civ. P. 26(b)(2)(B).

[79] Peskoff, 251 F.R.D. at 61.

[80] Fed. R. Civ. P. 26 advisory committee's note to 2006 amendment

provide a basis for shifting from one party to an action to the seeking party the cost of producing inaccessible ESI.

There is a close relationship between whether ESI is inaccessible and whether the cost of producing the ESI may be shifted to the requesting party. Inaccessibility may be a necessary condition for shifting discovery costs to the requesting party,[81] but inaccessibility alone is not sufficient.[82]

2. Other Conditions

The Committee Notes to Rule 26(b)(2) specify some of the other conditions that may be imposed in an order directing the production of inaccessible ESI: "The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced."[83]

V. Subpoenas of Inaccessible ESI

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.

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 that ESI could be 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 provision discussed above. Although the language of Rule 45(d)(1)(D) is similar to that of Rule 26(b)(2)(B), the impact of the language upon cost-shifting is significantly different for Rule 45 subpoenas for ESI from nonparties than for Rule 34 requests for ESI from parties.

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

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[81] That is, several courts have held that discovery costs may be shifted to the requesting party only if the ESI sought is inaccessible. Peskoff, 242 F.R.D. at 31 ("The obvious negative corollary of this rule is that *accessible* data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus, it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary."); Mikron Indus, No. C07-532RSL, 2008 U.S. Dist. LEXIS 35166.

[82] Fed. R. Civ. P. 26(b)(2)(B) clearly instructs that inaccessible ESI may not even need to be produced and, even if ordered produced, may be ordered produced without cost-shifting. Fed. R. Civ. P. 26(b)(2)(B) advisory committee's note to 2006 amendment.

[83] Fed. R. Civ. P. advisory committee's note to 2006 amendment.

expense on a person subject to the subpoena."[84] 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.[85] 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 . . . [c]ourts should guard against undue intrusiveness resulting from inspecting or testing such systems."[86]

The 2006 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."[87]

The four-phase process of Rule 26(b)(2)(B) (identification, proving inaccessibility, proving good cause, and considering conditions imposed upon any production of ESI that is ordered) applies to the identification and assertion of inaccessibility of subpoenaed ESI by a nonparty under Rule 45(d)(1)(D).[88]

For protection against the need to produce inaccessible ESI, the subpoenaed party must identify in writing the sources of responsive ESI, either in the objection or in the motion to quash.

The subpoenaed nonparty has the initial burden of proving inaccessibility, failing which the subpoenaed nonparty must produce the subpoenaed ESI without cost-shifting.[89] Whether the inaccessibility standard for subpoenaed ESI will differ from the inaccessibility standard applied to third party ESI is not yet clear. However, given that inaccessibility is at base a functional test that measures burden and benefit, however, it is likely that the inaccessibility bar for nonparties will be lower than for parties.

The factors to be considered in determining good cause and, if production is ordered, what conditions to impose (including cost-shifting), are similar to those to be considered in the context of a Rule 34 request for ESI from a party. Like Rule 26(b)(2)(B), good cause under Rule 45(d)(1)(D) is expressly subject to the limitations of

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[84] Fed. R. Civ. P. 45(c)(1) advisory committee's note on 2006 amendment.

[85] Fed. R. Civ. P. 45(a)(1)(B) advisory committee's note to 2006 amendment.

[86] *Id.*

[87] Fed. R. Civ. P. 45(c)(2)(B)(ii).

[88] Fed. R. Civ. P. 26(b)(2)(B).

[89] Ispat Island, Inc. v. Kemper Envtl., Ltd., No. 06-60, 2007 U.S. Dist. LEXIS 16718 (D. Minn. Mar. 6, 2007); Ahner, No. 05-5723, 2007 U.S. Dist. LEXIS 63809 (subpoenaed nonparty, like requested party, has the burden of proving inaccessibility).

Rule 26(b)(2)(C).[90] But the application of those factors in balancing the need and benefit for the seeking party against the burden and cost to the person with the ESI is vastly different for requested parties and for subpoenaed nonparties.

In general, unless the subpoenaed nonparty is affiliated with a party, the subpoenaed nonparty stands to receive no benefit from the subpoena, only burden. In particular, the balance of Rule 26(b)(2)(C)(iii) factors[91] will normally tilt in favor of protecting a nonparty from paying any substantial cost and from enduring a substantial burden in responding to a subpoena duces tecum seeking ESI.[92]

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 inaccessibility provision will result in many cases in the shifting of ESI production costs to the seeking party.

[90] Though the Committee Note to Rule 45 states that Rule 45(d)(1)(D) is "parallel" to Rule 26(b)(2)(B), the seven-factor test for inaccessibility discussed above that applies to party ESI is not repeated in the notes to Rule 26(b)(2)(B). *See* Fed. R. Civ. P. advisory committee's note to 2006 amendment.

[91] Discovery shall be limited if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

[92] To be sure, a subpoenaed nonparty must often bear expense that is minimal: a court "must protect a person who is neither a party nor a party's officer from significant expense resulting from . . . inspecting, copying, testing, or sampling any or all of the materials [commanded]." Fed. R. Civ. P. 45(c)(2)(B)-(B)(ii).