Passing the Buck

COST-SHIFTING UNDER THE NEW e-DISCOVERY RULES

By Neal H. Lewis and Kathryn E. Kransdorf

The shift to electronic discovery as a primary mechanism for identifying relevant information has created unexpected results in litigation. The low cost of electronic document creation, modification, and retention has led companies to save everything, "just to be safe." This new mentality, coupled with constantly changing technology, has created enormous headaches for litigators—headaches that stand to get worse following the new amendments to the federal rules.

The new amendments to Rule 26(b)(2)(B), identifying a new category of "not reasonably accessible" documents, creates a new battle ground in the fight to shift the cost of production to the requesting party. And the new provisions, combined with the save everything approach to document management, may even provide responding parties with a means of avoiding the discovery of materials altogether. For the requesting party, the amendments stand to create disincentives for issuing broad discovery requests.

The White Elephant in the Room

The problems with electronic discovery are legion. Software changes across an organization over time—compare Unix, Microsoft 95 and XP with Office 95, 98, 2000, XP, and 2003. Backup media also changes over time—compare 5¼ Floppy, Jaz Drives, and CD-ROMs with mirror servers, DAT tapes, RAID arrays, and SANs. And perhaps most importantly, employees and their responsibilities change over time—compare personal assistants, helpdesk personnel, and backup administrators with employee attrition, NT certified MCSEs, UNIX admins, and Oracle DBAs.

Does sorting all this out sound expensive? It is. Especially where litigation is concerned. Depending on the statute of limitations, a discovery request can force a company to access storage media that it can no longer read, which triggers the need to identify new employees or third-party contractors with the ability to access old data. And all of this prior to ever reviewing a single electronic document for privilege. The costs add up quickly.

Pay for Play in the American System

The American rule requires the producing party to bear the costs of producing information responsive to a discovery request. Application of this rule is not limited to the parties at issue—even strangers to the litigation must bear the cost of discovery requests. The Advisory Committee Notes to the 1970 Amendments to Rule 45 provide that the scope of discovery between parties to the litigation and non-parties is governed by Rule 26. *See Gonzalez v. Google, Inc.,* 234 F.R.D. 674, 679 (N.D. Ca. 2006).

The American rule is tempered by an opportunity for the producing party to request that a court shift some of the costs to the requesting party under Rule 26(c). *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S.340 (1978), established the basis for cost-shifting under the Federal Rules. The court stated that "the presumption is that the responding party must bear the expense of complying with discovery requests," but when confronted with an undue burden under Rule 26, the responding party can request that the court shift the cost of the discovery request by "conditioning discovery on the requesting party's payment of the costs of discovery." *Oppenheimer Fund, Inc.,* 437 U.S. at 358.

Cost-shifting, when appropriate, is directly related to the burden that a responding party must face when confronted with a discovery request. It does not address the discoverability of the material—just who will pay the costs associated with obtaining the information.

The *Zubulake* Touchstone

Prior to December 1, 2006, the mechanism for cost-shifting in electronic discovery disputes was encapsulated in the *Zubulake v. UBS Warburg* family of cases. Although different cost-shifting paradigms exist, *Zubulake* has provided a well-recognized model for determining when cost-shifting is justified in the electronic discovery context.

Under the analysis in *Zubulake*, cost-shifting depends on burden and "[w]hether production of [electronic] documents is burdensome or expensive turns primarily on whether it is kept in an *accessible* or *inaccessible* format." *Zubulake v. UBS Warburg LLC (Zubulake I)*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003). Simply put, if the electronic information that is requested is accessible, there is no reason to engage in any cost-shifting at all. The American rule will apply in its basic form.

After deciding that information is inaccessible, a reviewing court can perform additional analysis to determine

whether or not to pass the burden of production on to the requesting party. *Zubulake I* modified a test previously established in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002). (See sidebar.) Just as with the traditional cost-shifting analysis, the discoverability of electronic information is not considered under the *Zubulake I* court's mode of analysis.

Changing Discoverability Terrain

The amendments address the question of accessibility and, impliedly, the applicability of cost-shifting. The language of the *Zubulake I* court has become part of the new lexicon of the Federal Rules of Civil Procedure, creating a threshold for production that should impliedly automatically trigger the implementation of cost-shifting.

The amended federal rules state 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." Fed. R. Civ. Proc. 26(b)(2)(B).

Under this new rule, during discovery a producing party can claim, as an initial defense to production, that the information requested is not reasonably accessible. Recall that under *Zubulake I*'s cost-shifting analysis, accessibility was the touchstone for shifting costs, not for determining discoverability. However, the new paradigm presented by the federal rules indicates that, presumptively, inaccessible material need not be produced at all—that such material is not subject to discovery.

COST-SHIFTING ACCORDING TO *ZUBULAKE I*

THE SEVEN FACTORS

The *Zubulake I* court determined that seven factors should be considered when deciding whether to shift the costs of production to the requesting party:

1) the extent to which the request is specifically tailored to discover relevant information
2) the availability of that 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 the party's incentive to do so
6) the importance of the issues at stake in the litigation
7) the relative benefits to the parties of obtaining the information

Zubulake I, 217 F.R.D. at 322.

New Battleground for Experts

Under the amended rules, parties interested in shifting the costs of producing electronic material will be reaching for a new brass ring—a determination that the materials are "not reasonably accessible." Although the amended rules allow the disclosing party to identify information as not reasonably accessible, the new rules provide that a party claiming inaccessibility will shoulder the burden of proving its claim on a motion to compel: "The party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost." Fed. R. Civ. Proc. 26(b)(2)(B).

In *Zubulake I*, the focus of accessibility was based on the type of storage media utilized by the responding party. Five categories were outlined by the court, emphasizing their similarity with the principles outlined in The Sedona Principles. (For a list of these categories, see the sidebar on page 45.) The federal rules do not provide guidance on the mechanism to be used in determining accessibility, but it is plain from the Committee Notes that some level of discovery and, presumably, testimony will be associated with this determination. This discovery will include "taking depositions of witnesses knowledgeable about the responding party's information systems."

Given the evolving, cutting-edge nature of electronic systems technology, it is likely that accessibility will boil down to *Daubert*-style testing of experts culminating in a battle of technological expertise. The use of experts is further indicated by the Committee Notes: "The good-cause determination, however, may be complicated because the court and the parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation."

Rock/Scissors/Paper Discovery

Under the amended rules, what was once a battle for costs becomes a conflict over discoverability. Previously, the battle for costs could be used to effectively screen a requesting party from information by making a request too expensive to ever pursue completely. Cost, a tacit barrier to electronic information, has been replaced with inaccessibility, an affirmatively enumerated basis for denying a discovery request.

An exception to the discoverability of inaccessible information remains. The rules explicitly recognize that a requesting party, following a determination by the court that electronic information is not reasonably accessible, may still obtain electronic information. "The court may nonetheless order discovery from [not reasonably accessible] sources if the requesting party shows good cause considering the limitations of Rule 26(b)(2)(C)." Fed. R. Civ. Proc. 26(b)(2)(B).

Good cause trumps inaccessibility, but cost-shifting may still defeat good cause. There is nothing in the new rules to change the appropriateness of cost-shifting. To the contrary, "The court may specify the conditions for discovery" following a determination of good cause. Fed. R. Civ. Proc. 26(b)(2)(B). Under *Zubulake I*, a determination that the electronic information was not reasonably accessible would have subjected the requesting party to cost-shifting. Under the new rules, even if the requesting party has demonstrated "good cause," there is no reason not to subject the requesting party to cost-shifting. And considering that inaccessibility has already been established, the analysis should be an automatic determination following a finding of good cause. As the Committee Notes point out, "[a] requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause." Committee Notes at 17.

Under amended Rule 26(b)(2)(C), the seven factor test establishing the amount of costs that may appropriately be shifted to a requesting party has been augmented by three additional factors that seek to clarify the discovery methods, the use of which the court may decide to limit (See sidebar on page 28). Several of these principles overlap with the different tests articulated in *Rowe Entertainment, Inc.* and *Zubulake I*.

A Second Opportunity to Prevent Discovery

How courts will apply the changes enacted by the electronic discovery amendments to the Federal Rules of Civil Procedure remains to be seen. What is clear is that responding parties will now have two opportunities to prevent discovery. Where previously responding parties could only use costs to inhibit electronic discovery, the presumptive protection of "not reasonably accessible" can be used to preclude discovery altogether. Once a determination of "not reasonably accessible" is established, even if a requesting party establishes "good cause," cost-shifting might be triggered, establishing additional disincentive to pursue electronic information.

Ultimately, the new amendments to the federal rules establish that cost-shifting is no longer the strongest tool available for responding parties to use in resisting discovery. The principles associated with cost-shifting have been integrated into the federal rules in such a way that they act as a barrier to electronic discovery under conditions where the information sought is not reasonably accessible. Although a requesting party can still obtain access to electronic information that is not reasonably accessible on a showing of good cause, the cost-shifting provisions implied by the federal rules will make obtaining these materials more expensive for requesting parties than was previously the case.

NEAL H. LEWIS and KATHRYN E. KRANSDORF are associates with Hancock, Daniel, Johnson & Nagle PC in Glen Allen, Virginia.

COST-SHIFTING BY THE NEW RULES

THREE ADDITIONAL FACTORS

According to revised Rule 26(b)(2)(C):

> The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (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; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (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, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.