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Litigation

Navigating E-Discovery

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In modern commercial litigation, it is hard to conceive of a case that would not significantly involve electronic discovery. In cases of any size or complexity, e-discovery is expensive, time consuming, and rife with traps for the unwary. Generally speaking, as the size or number of the parties increases, and as the size or complexity of the transactions at issue grows, the scope of e-discovery issues also expands. Vastly increased storehouses of electronic information subject to the traditional broad "subject matter relevance" discovery standards is a main driver of e-discovery challenges and problems. Costs have skyrocketed, in part due to the need to gather evidence from many different electronic sources, some of which are difficult to access, and the labor-intensive process of reviewing large volumes of e-documents for privilege and relevance before production. More complexity is introduced as technology spawns, and commercial actors embrace, new forms of electronic information-keeping and communication, such as social media and cloud computing.

E-discovery is the subject of very extensive commentary.[1] Yet even experienced practitioners too often fail to focus early enough, consistently enough, and with sufficient energy and imagination on the range of e-discovery sources and issues that they may face in a case that they are bringing or defending. This can be a costly and perilous mistake, as courts have imposed serious discovery sanctions for negligent as well as deliberate or reckless disregard of e-discovery obligations. This article surveys the ground rules and some key problem areas affecting e-discovery in current commercial litigation, including the nature and scope of e-discovery preservation and production obligations, the potentially catastrophic consequences for failure to live up to those obligations, and the proportionality and cost-shifting concepts embedded in the e-discovery rules that, applied sensibly, can keep e-discovery burdens within manageable limits.

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Overview

The Relevant Federal Rules of Civil Procedure

When a party reasonably anticipates litigation, it has an affirmative duty to preserve potentially relevant evidence, including electronically stored information. Thus, even prior to the inception of litigation, a party needs to have an understanding of the scope of its potentially relevant electronic evidence. To comply with its preservation duty, a party must know or take appropriate and immediate steps to determine what electronic evidence it has and where it is located.

The Federal Rules of Civil Procedure were modified in 2006 to take specific account of increasingly important e-discovery issues (the 2006 amendments). Since 2006, initial disclosures are to include "a copy—or a description by category and location—of all . . . electronically stored information . . . that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses."[2] At the discovery conference, parties must consider "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[3]

In addition to requiring that the parties take stock of electronic evidence at the beginning of litigation, the 2006 amendments recognize the potentially sweeping scope of e-discovery obligations and attempt to set boundaries on the scope of electronic evidence that a party must review and disclose at the outset: "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."[4] While the party does not have to review and disclose such evidence, it must identify at least the nature and source of evidence believed to contain relevant information that is not reasonably accessible. In addition, the party from whom disclosure is sought bears the burden of showing "that the information is not reasonably accessible because of undue burden or cost" on a motion to compel or for a protective order.[5] Even "[i]f 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"[6] and by the express terms of Rule 26(b)(2)(C) must limit the discovery if it determines that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
>
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
>
> (iii) 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.

Notwithstanding these provisions, many lawyers "agree that discovery in the post-amendment world is more expensive, more complicated, and more contentious than ever,"[7] suggesting that in practice the 2006 amendments have not led, at least on a consistent basis, to good management of e-discovery issues in modern commercial litigation.[8]

What Constitutes Electronic Evidence?

Reflecting the march of technology, the categories of electronic evidence that need to be preserved and potentially collected, reviewed, and disclosed in connection with litigation seem to be ever-expanding. Knowing what constitutes electronic evidence is the first important step in ensuring that you and your clients comply with the rules, as well as ensuring that your opponent identifies and/or produces all the information that you are entitled to discover.

Sources

Some sources of electronic evidence are obvious: email; instant messages; data saved on individual computer hard drives (including office computers, laptops, and home computers of key employees); data saved on networks or company servers; data saved on removable storage media such as CDs, USB fobs, zip disks, memory sticks, SD/MMC cards, and floppy disks, to name a few; personal digital assistants (PDAs); and text messages.[9]

Many large businesses use peer-to-peer networks in which files can be stored on the individual hard drives of the networked computers as well as on the network server. Therefore, prudence requires checking, at a minimum, the network server and the hard drives of the computers of all (not just "key") employees likely to have had meaningful contact with the matters in, or about to be in, dispute.[10]

Less-obvious repositories of potential electronic evidence include temporary files that are saved when computer sessions are not terminated properly,[11] swap files containing fragments of emails, documents, and Internet activity; back-up tapes; mirror disks, electronic information that was once accessed by now obsolete devices; corporate intranets; and recoverable data such as recently deleted information.

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Of course, electronic evidence includes much more than just the electronic version of the documents or communication. It also includes meta-data embedded in documents from which one can learn when a document was last opened, edited, and by whom; audit trails and computer logs that tell by whom the system was accessed, along with when and where; and cookies and cache files that reveal information about computer users' online activity.[12]

New Technology, More E-Discovery

New complications continue to arise as the electronic landscape changes and businesses adapt to new information technology and electronic services. For example, litigants and courts now have to grapple with cloud computing and social media where parties have used Internet vendors and social networks to store and convey electronic information that does not also reside on a network or local server.

Discovery of information that resides only in the cloud is complicated by the Stored Communications Act (SCA), enacted in 1986 as part of the Electronic Communication Privacy Act.[13] Aimed at privacy concerns, the SCA restricts disclosure of information by online providers of electronic storage, as well as providers of electronic communication.[14] In varying fact situations, subpoenas addressed to online electronic storage vendors, seeking discovery of a litigants' stored electronic information, have been found unenforceable due

to the SCA.[15] That includes subpoenas to third-party email servers for user emails.[16]

Flagg v. City of Detroit illustrates one possible path through the SCA thicket: directly compelling the litigant, who uses cloud storage, to obtain and produce the information contained therein.[17] In that case, the US District Court for the Eastern District of Michigan explained that text messages of employees of the defendant via defendant-issued text messaging devices stored in the cloud were discoverable. Although the vehicle used to discover the text messages was a subpoena to the third-party storage provider, the court found that the plaintiff could have received the same result by requesting the text messages from the defendant directly. The defendant had "'control' over the text messages preserved by [the] third party . . . pursuant to its contractual relationship" and therefore would have been required to produce the text messages under Rule 34 Federal Rules of Civil Procedure.[18] The court sidestepped the defendant's argument that the SCA prohibited the third party from divulging the electronic information by instructing the plaintiff to "prepare and serve a Rule 34 request for production of the relevant text messages maintained by [the third party] on behalf of the Defendant . . . ."[19]

In recent years, social media has also impacted the e-discovery landscape. More and more commercial actors use social media in the course of their businesses, and more and more employees are active on social media in ways that often involve their businesses as well as their personal lives. A recent study found that "Americans spend over 20% of their online time on social networks and blogs."[20] This makes Web sites such as *Facebook* and *Twitter* significant sources of potentially relevant information.[21]

Discovering information on social networks, however, can pose unique problems. As with email service providers, subpoenaing social media site operators can implicate privacy concerns protected by the SCA. Recently, in *Crispin v. Christian Augigier, Inc.*, a case of first impression, the Central District of California quashed subpoenas to *Facebook* and *MySpace* to the extent that they sought private messages sent through the social networking sites, holding that they were protected by the SCA.[22] To the extent that the subpoenas sought *Facebook* wall postings and *MySpace* comments, the court remanded for further development of the evidentiary record regarding whether the wall postings and comments were public or private, taking into account the user's privacy settings.[23]

Crispin illustrates that there are still uncharted e-discovery waters when it comes to information resident only online. The *Flagg* court's pragmatic approach—requiring the cloud user to obtain and produce the information—may not be a complete solution to obtaining relevant and non-public information uploaded to a social media site:

> Lawyers can request social network information directly from users, but there may be problems with information access and formatting. Because social network users do not have access to the native format, they are only able to produce screenshots of their social network pages. Additionally, it is impossible to know whether users have included all relevant information, because they may not have access to all of it.[24]

Determining what to preserve is equally challenging. The general requirement is simply that parties must preserve all electronic evidence that they reasonably believe contains relevant information.

The *Crispin* court noted that the SCA is a quarter-century old and was never updated to reflect emerging technology and social practices.[25] That court's distinction between information that has been publicly posted and information subject to privacy restrictions is a coherent way to *narrow* the SCA's potential frustration of legitimate discovery requests. It leaves future courts or Congress, however, to fully reconcile the SCA with reasonable requests for discovery of important non-public information held by online vendors that, for whatever reason, is not accessible by the users who initially put it online.

Putting the Brakes on Document Destruction Policies

Obligation to Preserve

When?

The duty to preserve evidence, including electronic evidence, attaches before litigation even begins. It arises as soon as litigation is "reasonably anticipate[d]"[26] or the party "knows or should have known, that litigation was imminent."[27] Determining when litigation is "reasonably anticipated," however, is not always easy. The Federal Rules of Evidence provide no guidance on how much knowledge is enough to "reasonably anticipate" litigation and courts often disagree as to the triggering event.[28] Suffice it to say that, by the time a plaintiff

is considering potential litigation, he or she had better have initiated procedures to preserve all potentially relevant evidence. From the first time a defendant is aware that a claim may be filed against it, he or she should similarly start preserving evidence. Waiting for the complaint to be filed, to receive a preservation letter from the opposing party, or a court order is very likely to be too late.[29]

What?

Determining what to preserve is equally challenging. The general requirement is simply that parties must preserve all electronic evidence that they reasonably believe contains relevant information.[30] To do this, parties and their attorneys need to have a good understanding of the client's potential sources of electronic evidence as well as what information is stored on the various sources. Counsel should take advantage of their own in-house expertise by consulting with the law firm's IT personnel about electronic access, storage, format, and preservation issues.

When the client is an entity, experienced counsel will consider involving their law firm's IT personnel in discussions with the client's IT department regarding ways to make the identification and preservation process for electronic evidence both comprehensive and efficient. This helps to ensure that the attorneys and the client are aware of all sources of potential electronic evidence and the steps that need to be taken to maintain such sources. It also allows the attorneys to consider this information when developing a discovery plan and ensures that the client's IT personnel, who will likely be responsible for implementing the preservation mechanisms, are immediately aware of the client's obligation to preserve evidence. As Judge Scheindlin of the Southern District of New York explained in *Zubulake v. UBS Warburgh, LLC*, a seminal series of e-discovery decisions, "Proper communication between a party and its lawyer will ensure (1) that all relevant information (or at least all sources of relevant information) is discovered [and] (2) that relevant information is retained on a continuing basis."[31]

How?

Having determined the sources of evidence that need to be preserved, counsel and client should immediately take steps to prevent its destruction. The client's IT personnel should immediately suspend automatic electronic management systems from routinely deleting or weeding out any storage sources that potentially contain relevant electronic information. Counsel must distribute a "litigation-hold" memo to employees, instructing them to take steps to preserve their emails and electronic documents.[32] Involving a client's IT staff in the litigation hold process, such as by seeking input and guidance on the content of the litigation-hold memo, is a prudent way to increase the likelihood that the instructions will be accurate and easy to follow.

Judge Scheindlin's decision in *Zubulake* also teaches that "[a] party's discovery obligations do not end with the implementation of a 'litigation hold'—to the contrary, that's only the beginning. Counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce the relevant documents."[33]

Judge Scheindlin recognized several steps that a party's attorney should take to guarantee that evidence is preserved:

1. "identify all sources of discoverable information" by talking to the key players and the IT personnel;

2. "put in place a litigation hold";

3. make the litigation hold "known to all relevant employees by communicating with them directly";

4. repeat the litigation-hold instructions on a regular basis;

5. monitor compliance with the litigation hold;

6. "call for employees to produce copies of relevant electronic evidence"; and

7. segregate and safeguard "any archival media (*e.g.*, backup tapes)."[34]

Judge Scheindlin reaffirmed these now well-established mandates in a recent and much-noted opinion that she whimsically subtitled "*Zubulake Revisited: Six Years Later.*"[35]

Failure to Preserve

The failure to preserve evidence can have disastrous consequences: Key and perhaps outcome-determinative evidence—helpful as well as hurtful—might be lost forever. Whether or not a failure to preserve in fact results in the loss of anything important, it will *always* create the risk of discovery sanctions that could determine the outcome of the case against a client. As Judge Scheindlin observed in *Zubulake Revisited*: "By now, it should be abundantly clear that the duty to preserve means what it says and that a failure to preserve records—paper or electronic—and to search in

the right places for those records, will inevitably result in the spoliation of evidence."[36] Judges have generally been hard on litigants and their counsel who fail in this duty.

Nuts and Bolts of Spoliation

"*Spoliation* is defined as the intentional destruction or alteration of evidence, or the knowing failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."[37] To prevail on a motion for sanctions, the moving party must prove that the spoiling party "(1) had control over the evidence and an obligation to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense."[38] "Assessing the quantum of fault becomes appropriate when determining the appropriate sanction, not in deciding whether spoliation has taken place."[39] Bad faith destruction of evidence, however, is sufficient to infer that lost evidence was relevant.[40]

Courts have issued the following sanctions for spoliation of evidence:

1. Dismissal or default judgments;

2. Preclusion of certain evidence;

3. Orders deeming specified facts to be established;

4. Instructing the jury that it may draw an inference adverse to the spoiling party;

5. Monetary awards; and

6. Striking the defendant's defenses.[41]

> [A] sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the prejudiced party to the same position he or she would have been in absent the wrongful destruction of evidence by the opposing party.[42]

A (Small) Safe Harbor

Although the 2006 amendments included a safe harbor provision for litigants that fail to provide electronic evidence, the protection is limited: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."[43] As the Advisory Committee explains, the rule "applies only to information lost due to the 'routine operation of an electronic information system'—the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs."[44] It does not liberate a party from its obligation to "interven[e] in the routine operation of an information system" to preserve electronic information when it is under a duty to do so.[45]

How Bad Is Bad Enough?

According to a study of 401 sanction cases prior to January 1, 2010, sanction motions and sanction awards increased, especially over the last five years of the study.[46] The study also found that defendants were sanctioned nearly three times more often than plaintiffs were.[47] The failure to preserve electronically stored information (ESI) was "the most common misconduct" for which sanctions were awarded.[48] Given the expanding universe of sources of electronic evidence, it is not surprising that e-discovery disputes are escalating despite the 2006 amendments' encouraging cooperation between parties. Some courts have imposed serious sanctions even without evidence of willful conduct. The quantum of bad conduct necessary to trigger sanctions for e-discovery inadequacies is currently a matter of some uncertainty among the circuit courts.

The sanctions of greatest concern are terminating sanctions (either dismissal or default judgments) and an adverse inference instruction. "[T]he presence of willfulness, bad faith, or fault by the offending party" is required to impose terminating sanctions.[49] The majority of courts require a similar degree of culpability to issue an adverse inference instruction.[50] In some circuits, however, active bad faith is not essential, and courts have approved adverse inference instructions based on reckless disregard,[51] gross negligence,[52] and even mere negligence.[53]

Judge Scheindlin weighed in on this issue in *Zubulake Revisited*. There, defendants found "substantial gaps" in 13 plaintiffs' document productions.[54] This did not involve "litigants purposefully destroying evidence" but instead was a "case where plaintiffs failed to timely institute written litigation holds and engaged in careless and indifferent collection efforts after the duty to preserve arose."[55] In a lengthy decision, Judge Scheindlin concluded that each plaintiff was either negligent or grossly negligent in meeting his or her discovery obligations, warranting sanctions. She granted an adverse inferences instruction against the plaintiffs who were grossly negligent but allowed plaintiffs to attempt to rebut the inference.[56]

According to Judge Scheindlin, if the spoliating party was grossly negligent, relevance of the destroyed evidence and prejudice to the innocent party may be, but does not have to be, presumed; in contrast, if the party was "merely negligent," the moving party has to prove relevance and prejudice.[57] Judge Scheindlin also wrote, however, that, "[n]o matter what level of culpability is found, any presumption is rebuttable and the spoliating party should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information."[58]

Judge Scheindlin sought to illustrate the difference between gross and "mere" negligence this way:

> For example, the failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the key players, could constitute negligence.[59]

That may have been true when Judge Scheindlin first said it in 2010, but now? A practitioner familiar with the opinion knows that the obligation includes preserving all such records, and a post-*Zubulake Revisited* failure to do so could easily be seen as being at least grossly negligent. Indeed, *Zubulake Revisited* itself notes that the earlier *Zubulake* opinions changed the e-discovery ground rules such that conduct that was perhaps "merely negligent" pre-*Zubulake* became gross negligence in *Zubulake*'s wake.[60] This highlights the inherent uncertainties and risks involved in managing an e-discovery process in complex cases as the scope and standards of preservation obligations continue to develop. These uncertainties and risks, in turn, highlight the desirability, discussed below, of taking necessary steps at the beginning of a matter to focus your adversary and, if necessary, the court on any e-discovery issues that may be problematic.

In determining an appropriate sanction, Judge Scheindlin agreed that "a terminating sanction is justified in only the most egregious cases."[61] She then articulated a range of forms of adverse inferences of varying intensities tied to the levels of spoliating culpability, including (1) instructing a jury that "certain facts are deemed admitted and must be accepted as true," which is appropriate when the spoliation was willful or in bad faith; (2) imposing a "mandatory presumption," which is rebuttable and appropriate when the spoliation was willful or reckless; and (3) instructing the jury that it may but is not required "to *presume* that the lost evidence is both relevant and favorable to the innocent party."[62] While Judge Scheindlin's *Zubulake Revisited* analysis of e-discovery culpability and sanctions cannot be understood as definitive across the board, given present differences in e-discovery sanction standards around the circuits,[63] she has once more provided a thoughtful and detailed resource for parties and counsel seeking to navigate e-discovery minefields.

The Holy Grail: Proportionality in E-Discovery

As noted already, there is widely reported frustration with the current state of e-discovery, skyrocketing costs, the often mind-boggling amount of electronic data, and, at times, inconsistent case law governing standards for preservation and sanctions.[64] This need not be so. The 2006 amendments provide a meaningful, if as yet underdeveloped, standard for confining and distributing the burdens of e-discovery appropriately in light of the circumstances of particular cases. This is the "proportionality" concept articulated not once but twice in Rule 26(b)(2): Limitations on Frequency and Extent [of Discovery]. Rule 26(b)(2)(B)'s Specific Limitations on Electronically Stored Information states that a party need not provide e-discovery from sources that are "not reasonably accessible because of undue burden or cost."

The 2006 amendments provide a meaningful, if as yet underdeveloped, standard for confining and distributing the burdens of e-discovery appropriately in light of the circumstances of particular cases.

Further, Rule 26(b)(2)(C)(iii) *requires* courts to limit the frequency or extent of proposed discovery 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." As former Magistrate Judge (now Dean) John L. Carroll has summarized, "If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."[65] For these provisions to be useful and effective, however, practitioners and judges must be familiar with and proactive in invoking them.[66]

The Rules Require Proportional Discovery

Rule 26(b)(2)(B) establishes a two-step process to permit discovery of evidence that is not "reasonably accessible" due to the "substantial burden and cost" incurred in accessing the information. First, a party responding to a request for production should produce all relevant, non-privileged, and reasonably accessible electronic evidence. It has no duty to search inaccessible sources.[67] It "must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing," however.[68] This 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."[69]

Second, if contested by the requesting party, the producing party has the burden to show that the electronic evidence is not accessible because of undue costs and burdens. To be "undue," "they must be disproportionate to the issues at stake in the litigation."[70] Even evidence proven to be unreasonably accessible may still have to be produced if the requesting party shows "good cause."[71] Under Rule 26(b)(2)(C), in determining whether there is good cause to require the production of difficult-to-access evidence, a court must conduct a proportionality analysis and limit discovery to the extent that

1. The discovery is "unreasonably cumulative" or can be obtained from a "more convenient, less burdensome, or less expensive" source;

2. The requesting party "had ample opportunity to obtain the information by discovery";

3. "[T]he burden or expense of the proposed discovery outweighs its likely benefit."

In determining whether the burden/expense is outweighed by the benefit, a court considers "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."[72]

Other appropriate considerations in determining good cause may include:

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[73]

These explicit provisions provide "courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties' resources."[74] And of course, a court's power to limit discovery that is not proportionate to the case exists side-by-side with its authority, discussed below, to make it proportionate by conditioning discovery on the requesting party's bearing some or all costs involved in discovery of difficult-to-access e-information.[75]

Cooperation

Properly understood and implemented, Rule 26(b)(2) should encourage parties to cooperate with each other and agree to proportionate discovery. There is certainly nothing radical about the notion that litigants should, on their own, act reasonably in the demands that they make on one another. By signing a discovery request, an attorney or party certifies that it is "neither unreasonably nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action."[76] Judicial willingness to impose meaningful limitation of discovery of marginal e-information is a necessary check on the ability of parties to use e-discovery, in effect, as a war-of-attrition weapon.

The Advisory Committee counsels that practitioners should have discussions about the scope of electronic discovery with their clients and their opponents as soon as possible:

> [T]he parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.[77]

It is in a producing party's self-interest to ensure that these discussions lead to agreement on what evidence that it deems not reasonably accessible should nonetheless be preserved, so as to minimize exposure to spoliation risks. Noting that such early proportionality

consultations are not specifically mandated by the Rules, one experienced commentator recommends that the courts should not leave this up to the parties, but should instead, by protocol or local rule, "simply require the parties, in the planning stages of discovery, to discuss the burdens and expenses of the proposed discovery and the likely benefit."[78]

Cost-Shifting

When the parties cannot reach an agreement appropriately limiting the scope of electronic discovery, they can turn to the court for relief. Rule 26(b)(2) provides the court with a "mechanism to confine the discovery of ESI to that which is most useful to the resolution of the controversy."[79] In lieu of limiting discovery, in appropriate circumstances, the court can shift some or all of the cost onto the requesting party.[80] Cost-shifting in appropriate cases was a well-understood part of that flexibility and discretion even prior to the 2006 amendments,[81] and there are cogent reasons to conclude that the 2006 amendments should be understood as expanding the discretion of courts to use cost-shifting to alleviate the e-discovery burdens on responding parties.[82]

The responding party is presumed to bear the expense of complying with a discovery demand, which can make an effort to obtain cost-shifting challenging.[83] Cost shifting is appropriate only when "electronic data is relatively inaccessible, such as in backup tapes" and when "discovery imposes an undue burden and expense on the responding party."[84] And heed this caution: If you believe that reviewing and producing hard-to-get-at data will be unduly burdensome and warrants cost-shifting, seek a cost-shifting order before you incur the costs or risk waiving the issue.[85]

Nonetheless, the Advisory Committee made clear its view that the burden on the producing party was to be a real consideration in whether discovery should be allowed and that cost-shifting would not necessarily be a solution in all such situations: "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. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."[86]

Despite the 2006 amendments, courts have continued to apply tests developed previously to determine whether cost-shifting is appropriate,[87] under which marginal utility—"the more likely it is that the search will discover critical information, the fairer it is to have the responding party search at its own expense"[88]—is the driving factor.[89] As case law develops, more focus on the remedial aspects of the amendments and the Advisory Committee's comments may lead to cost-shifting's becoming available in a wider set of circumstances.[90]

Third Parties and Cost-Shifting

While third parties are generally expected to bear the cost of responding to a subpoena,[91] they traditionally have had an easier time than parties in shifting at least some of the costs. Rule 45(d)(1)(D), limiting a third party's obligation to producing only reasonably accessible electronic evidence unless good cause is shown, mimics Rule 26(b)(2)(B). But, third parties have the added protection that "[a] party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."[92] A "non-party can be required to bear some or all of the expenses where the equities of the particular case demand it," however.[93]

In general, three factors are considered to determine how much of the cost should be shifted to the requesting party: "(1) whether the non-party has an interest in the outcome of the litigation; (2) whether the non-party can more readily bear the costs than the requesting party; and (3) whether the litigation is of public importance."[94] In analyzing whether a non-party has an interest in the case, the court will examine whether the non-party "was substantially involved in the underlying transaction and could have anticipated that the failed transaction would reasonably spawn some litigation," if the non-party is "involved in litigation . . . arising out of the same facts," and whether the non-party is an innocent third party.[95] When cost-shifting is appropriate, third parties are generally entitled to reasonable charges.[96] This may even include attorney's fees.[97]

Conclusion

E-discovery is a significant and often challenging element of modern commercial litigation. Generally speaking, the bigger the case, the bigger the e-discovery challenges. But e-discovery need not be an overwhelming or long-lasting problem even in the biggest cases. Rule 26 and the implementing case law make the basic e-discovery ground rules understandable. The proportionality and cost-shifting provisions of the Federal Rules of Evidence, if timely invoked by counsel and sensibly applied by judges, facilitate a scaling and shaping of discovery appropriate to the nature and magnitude of particular disputes, and to the relative resources of the particular parties involved. While important e-discovery uncertainties do exist, such as in defining the outer bounds of e-discovery preservation

obligations and in the culpability required for serious sanctions, such uncertainties can largely if not entirely be avoided simply by facing e-discovery issues squarely and comprehensively at the very beginning of a matter, first addressing them concretely with your opponent and then, to the extent that differences over significant matters cannot be resolved voluntarily, putting them to the court for early resolution by a motion to compel or for a protective order.

Notes

1. *See, e.g.,* Bennett B. Borden, *et al.*, "Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System," 17 Rich. J.L. & Tech. 10 (2011); Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (2009), *http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053*; Thomas Y. Allman, "Managing E-Discovery After the 2006 and 2008 Amendments: The Second Wave," Electronic Discovery Guidance 2009: What Corporate and Outside Counsel Need to Know, 2009, at 129 (Practising Law Inst., Litig. & Admin. Practice Course Handbook Series No. 804 Litig.); Lee H. Rosenthal, "A Few Thoughts on Electronic Discovery After December 1, 2006," 116 Yale L.J. Pocket Part 167 (2006) (pt. 3); Geoffrey A. Vance and Courtney I. Barton, "Drowning in Zubulake: The Rules, Pitfalls, and Benefits of Electronic Discovery," *Briefly . . . . Perspectives on Legislation, Regulation and Litigation* (Nat'l Legal Center for the Public Interest), April 2006, *http://www.mwe.com/info/pubs/gvance0406.pdf*.
2. Fed. R. Civ. P. 26(a)(1)(A)(ii).
3. *Id*. at 26(f)(3)(C). Whether or not the parties agree on the form of electronic discovery, the party requesting the electronic evidence "may specify the form or forms in which electronically stored information is to be produced," *id*. at 34(b)(1)(C), and the producing party may object to the form and "state the form or forms it intends to use." *Id.,* at 34(b)(2)(D). "If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms." *Id.,* at 34(b)(2)(E)(ii).
4. *Id.,* at 26(b)(2)(B).
5. *Id*.
6. *Id*.
7. Dan H. Willoughby, Jr., *et al.,* "Sanctions for E-Discovery Violations: By the Numbers," 60 Duke L.J. 789, 792 (2010).
8. "Our respondents told us that electronic discovery is a nightmare and a morass." Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, *supra* note 1, at 14.
9. *See generally* Michael Overly, *Overly on Electronic Evidence in California* 38-71 (Thomson Reuters 2010-2011).
10. *See* discussion *infra,* notes 59-60.
11. *See* Columbia Pictures Inc. v. Bunnell, 245 F.R.D. 443, 447 (C.D. Cal. 2007) (explaining "[a]s information can be obtained from RAM, it is within the scope of Rule 34 and subject to discovery under the appropriate circumstances").
12. *See* Overly, *supra* note 9.
13. 18 U.S.C. § 2701 *et seq*.
14. "The SCA prevents 'providers' of communication services from divulging private communications to certain entities and individuals." Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 971-973 (C.D. Cal. 2010).
15. *See generally* Timothy G. Ackerman, "Consent and Discovery under the Stored Communications Act," The Federal Lawyer (Nov./Dec. 2009).
16. *See, e.g.,* Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2004).
17. Flagg v. City of Detroit, 252 F.R.D. 346 (E.D. Mich. 2008).
18. *Id*., at 354-55.
19. *Id.,* at 366.
20. Ryan A. Ward, "Discovering Facebook: Social Network Subpoenas And The Stored Communications Act," 24 Harv. J. Law & Tech. 563, 563 (2011) *citing* "What Americans Do Online: Social Media and Games Dominate Activity," Nielsen Wire (Aug. 2, 2010).
21. "Facebook, for example, currently has over five-hundred million active users, and the '[a]verage user creates 90 pieces of content each month.'" *Id.,* at 564 *quoting* "Statistics," *Facebook, http://www.facebook.com/press/info.php?statistics* (last visited May 6, 2011).
22. *Crispin, supra*, 717 F. Supp. 2d, at 991. The court held that an account holder has a sufficient personal stake in the matter to have standing to move to quash a subpoena seeking to obtain information from a social media site. *Id.,* at 976. *See* Mark S. Sidoti, *et al.*, "How Private Is Facebook under the SCA?," NY Law Journal (Oct. 5, 2010), *available at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202472886599&slreturn=1&hbxlogin=1.*
23. *Crispin, supra*, 717 F. Supp. 2d, at 991. Interestingly, despite the SCA and case law prohibiting it from doing so at least in the United States, *Facebook's* privacy statement provides: "We may disclose information pursuant to subpoenas, court orders, or other requests (including criminal and civil matters) if we have a good faith belief that the response is required by law." *http://www.facebook.com/policy.php* (last visited September 4, 2011).
24. Ward, *supra* note 20, at 564.
25. *Crispin, supra*, 717 F. Supp. 2d, at 972 n. 15 ("The fact that the statutory framework governing online communication is almost a quarter century old and has not been amended to keep pace with changes in technology since that time has not escaped the notice of legal scholars.").
26. Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs, LLC, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist.

Lexis 4546, *15 (S.D.N.Y. Jan. 15, 2010). (Hereinafter "Pension Comm." or "*Zubulake Revisited*") *See also,* Micron Tech., Inc. v. Rambus Inc., 255 F.R.D. 135, 148 (D. Del. 2009) (explaining there is a duty to preserve when there is "a reasonable belief that litigation is foreseeable").

27. Haraburda v. Arcelor Mittal USA, Inc., No. 2:11 cv 93, 2011 U.S. Dist. Lexis 70937, *2 (N.D. Ind. June 28, 2011); UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.), 462 F. Supp. 2d 1060, 1069 (N.D. Cal. 2006) (duty to preserve is attached when a party "should reasonably have believed that litigation against it was probable").

28. *See* Borden, *supra* note 1, ¶ 48 & n. 197 ("[t]he Rules 'do not specifically address' preservation obligations" and "case law is not a model of clarity, especially in regard to its onset or 'trigger' of the duty [to preserve]") *quoting* Thomas Y. Allman, "Managing E-Discovery After the 2006 and 2008 Amendments: The Second Wave," Litig., Electronic Discovery Guidance, 2009, at 129, 134 What Corporate And Outside Counsel Need To Know (Practising Law Inst., Litig. & Admin. Practice Course Handbook Series No. 804).

29. *See, e.g., Haraburda*, *supra,* 2011 U.S. Dist. Lexis 70937 (ordering defendant to preserve evidence prior to the Rule 26(f) discovery conference based on defendant's refusal to issue litigation hold memo); Micron Tech., Inc. v. Rambus Inc., 255 F.R.D. 135, 150 (D. Del. 2009) (holding that destroying documents pursuant to a document retention policy established as part of a litigation strategy prior to the pending lawsuit was evidence of spoliation).

30. *Haraburda*, *supra,* 2011 U.S. Dist. Lexis 70937 at *2-3 (explaining "[t]he duty to preserve evidence is broad, encompassing any relevant evidence that the non-preserving party knew or reasonably could foresee would be relevant to the action").

31. Zubulake v. UBS Warburgh, LLC*,* 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*Zubulake V*). The *Zubulake* cases are a series of ground-breaking opinions that provided clarity on e-discovery issues, including the obligation to preserve electronic evidence, available sanctions for the failure to do so, and the role of outside counsel in the process.

32. *Pension Comm., supra*, 2010 U.S. Dist. Lexis 4546 at *15 ("'[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.'") *quoting* Treppel v. Biovail, 249 F.R.D. 111, 118 (S.D.N.Y. 2008).

33. *Zubulake*, 229 F.R.D. at 432. In *Zubulake*, the court granted plaintiff's motion for sanctions, including issuing an adverse inference instruction when the defendant's attorney failed to communicate the litigation hold to all of the key players and the defendant's employees continued to delete emails. *Id.* at 436-440.

34. *Id.* at 439.

35. *Pension Comm.*, 2010 U.S. Dist. Lexis 4546 at *32 ("[W]hen the duty to preserve has attached [a party/counsel is obligated to]: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.").

36. *Id.* at * 2.

37. Wayne D. Brazil, 7-37 *Moore's Federal Practice – Civil,* § 37.120[1] (Matthew Bender & Co. Inc., 2011). "Sanctions for spoliation of evidence as a violation of the rules of discovery have been awarded pursuant to: (1) Rule 37(b), for failure to comply with a discovery order . . . , (2) Rule 37(d), for failure to respond to discovery requests . . . , and (3) the court's inherent authority to maintain its institutional integrity." *Id.* at § 37.120[3].

38. *Pension Comm.*, *supra,* 2010 U.S. Dist. Lexis 4546 at *19.

39. E.I. du Pont de Nemours & Co. v. Kolon Indus., No. 3:09cv58, 2011 U.S. Dist. Lexis 79406, *74 (E.D.Va. July 21, 2011).

40. *Id.* at *77; *Pension Comm.*, *supra*, 2010 U.S. Dist. Lexis 4546 at *19.

41. Brazil, *supra* note 37, at § 37.121.

42. *Id. See also Micron Tech., Inc.*, *supra*, 255 F.R.D. at 148 (explaining that "[s]anctions serve three functions: a remedial function (by restoring the aggrieved party to its original position), a punitive function, and a deterrent function").

43. Fed. R. Civ. P. 37(e).

44. Notes of Advisory Committee on 2006 Amendments to Fed. R. Civ. Proc. 37.

45. *Id. See, e.g.,* Doe v. Norwalk Cmty. College*, infra,* 248 F.R.D. 372, 378 (D. Conn. 2007).

46. Willoughby, *et al.*, *supra* note 7, at 794-795.

47. *Id.* at 803.

48. *Id.*

49. Halaco Engineering Co. v. Costle, 843 F.2d 376, 380 (9th Cir. 1988); *E.I. du Pont de Nemours & Co.*, *supra*, 2011 U.S. Dist. Lexis 79406 at *79-80; *see also,* Willoughby, *et al.*, *supra* note 7, at 808.

50. Willoughby, *et al.*, *supra* note 7*,* at 813 (explaining 34 of 52 cases in which an adverse inference was granted because it "involved intentional misconduct, bad faith, or both"). *See also E.I. du Pont de Nemours & Co.*, *supra*, 2011 U.S. Dist. Lexis 79406 at *108-109 ("To impose this [adverse inference] sanction requires a finding of bad faith, or a finding that the party willfully deleted or destroyed evidence known to be relevant to an issue in the litigation."); Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 614 (S.D.Tex. 2010) (explaining that in the Fifth Circuit, "the severe sanction[] of . . . giving adverse inference instructions may not be imposed unless there is evidence of 'bad faith'" and collecting cases from other circuits holding that "negligence [is] insufficient for an adverse inference instruction").

51. Plunk v. Vill. of Elwood, No. 07-C-88, 2009 U.S. Dist. Lexis 42952, *39-41 (N.D. Ill. May 20, 2009) (issuing an adverse inference instruction where the defendants were reckless because they did not stop "routine defragmentation and wiping" that "resulted in the destruction of some relevant documents").
52. *Napster*, *supra,* 462 F. Supp. 2d at 1077-78 (regardless of the fact that the defendant "took steps to preserve Napster-related communications, albeit inadequate ones, "imposing an adverse inference instruction based on party's gross negligence, which was "sufficient culpability"); *Doe, supra*, 248 F.R.D. at 379-80 (allowing an adverse inference where defendants were grossly negligent because "there [was] no evidence that the defendants did anything to stop the routine destruction of the backup tapes").
53. Lewis v. Ryan, 261 F.R.D. 513, 521 (S.D. Cal. 2009) (The "culpable state of mind" [required for an adverse inference] includes negligence.") quoting Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002); Dowling v. United States Gov't, No. 2000-CV-0049, 2008 U.S. Dist. Lexis 95455, *4 (D.V.I. Nov. 20, 2008) ("As long as there is some showing that the evidence is relevant . . . the offending party's culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced . . . . [N]egligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference.") *quoting* Mosaid Technologies, Inc. v. Samsung Electronics, Co., Ltd., 348 F. Supp. 2d 332 (D.N.J.).
54. *Pension Comm.*, *supra,* 2010 U.S. Dist. Lexis 4546 at *5.
55. *Id*. at *6.
56. *Id*. at *58-59.
57. *Id*. at 19.
58. *Id*. at *22.
59. *Id*. at *12.
60. *Id*. at *10.
61. *Id*. at *26.
62. *Id*. at *28-29.
63. *Rimkus Consulting*, *supra,* 688 F. Supp. 2d at 615 (explaining that "[t]he circuit differences in the level of culpability necessary for an adverse inference instruction limit the applicability of the Pension Committee approach").
64. A 2009 ABA survey revealed that 82% of respondents thought "that discovery is too expensive" and the respondents agreed "that e-discovery increases the costs of litigation, contributes disproportionately to the increased cost of discovery and is overly burdensome." Milberg LLP and Hausfeld LLP, "E-Discovery Today: The Fault Lies Not In Our Rules . . .," 4 *The Federal Courts Law Review,* 15-16 (2011) *citing* ABA Section of Litigation, Member Survey on Civil Practice: Full Report (ABA 2009), *http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf. See also,* Am. Coll. of Trial Lawyers & Inst. for the Advancement of the Am. Legal Sys., Univ. of Denver, *supra* note 1, at 14; Willoughby, *supra* note 7, at 792.
65. John L. Carroll, "Proportionality in Discovery: A Cautionary Tale," 32 *Campbell L. Rev.* 455, 460 (2010).
66. Milberg LLP and Hausfeld LLP, *supra* note 64, at 16 (explaining "the Rules provide certain sought-after protections, but in order to be effective, lawyers must be familiar with their applicability and use them where appropriate").
67. While not required to search inaccessible sources, a party may not "hamper discovery by intentionally placing relevant evidence on inaccessible sources." John K. Rabiej, 7 37A *Moore's Federal Practice - Civil* § 37A.35[1][b] (Matthew Bender & Co., Inc. 2011). *See, e.g.,* United States v. Universal Health Servs., No. 1:07cv000054, 2011 U.S. Dist. Lexis 86566, *15 (W.D.Va. Aug. 5, 2011) (not excusing production of inaccessible evidence when the "undue burden and cost was caused by [the party's] own negligent actions").
68. Notes of Advisory Committee on 2006 Amendments to Fed. R. Civ. P. 26.
69. *Id*. The fact that the responding party does not have to produce all electronic evidence does *not* alleviate it of its duty to preserve that evidence. *Id*.
70. Rabiej, *supra* note 67, at § 37A.35[1][c].
71. Fed. R. Civ. P. 26(b)(2)(B).
72. *Id*.
73. Notes of Advisory Committee on 2006 Amendments to Fed. R. Civ. P. 26.
74. Tamburo v. Dworkin, 2010 U.S. Dist. Lexis 121510, *7 (N.D. Ill. Nov. 17, 2010) *quoting* The Sedona Conference, The Sedona Conference Commentary on Proportionality in Electronic Discovery, 11 *Sedona Conf. J.* 289, 294 (2010).
75. Rabiej, *supra* note 67, at § 37A.36[1].
76. Fed. R. Civ. P. 26(g)(1)(B)(iii).
77. Notes of Advisory Committee on 2006 Amendments to Fed. R. Civ. P. 26. Of course, prior to seeking judicial intervention, the parties are required to discuss and attempt to resolve the issue in any event. Fed. R. Civ. P. 26(c).
78. Carroll, *supra* note 65, at 462-63.
79. Borden, *supra* note 1, at ¶ 30.
80. *See, e.g.,* Clean Harbors Envtl. Servs. v. ESIS, Inc., No. 09 C 3789, 2011 U.S. Dist. Lexis 53212 (N.D. Ill. May 17, 2011) (holding that parties split the cost of restoration and searching backup tapes); Major Tours, Inc. v. Colorel, No. 05 3091(JBS/JS), 2009 U.S. Dist. Lexis 97554 (D.N.J. Oct. 20, 2009) (ruling that defendants did not have to review all of their backup tapes and if plaintiffs requested defendants to search certain tapes plaintiffs and defendants would share the retrieval cost).
81. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).
82. *See* Bradley T. Tennis, "Cost-Shifting in Electronic Discovery," 119 *Yale L.J.* 1113 (2010).
83. *See, e.g.,* Hudson v. AIH Receivable Mgmt. Servs., No. 10-2287-JAR-KGG, 2011 U.S. Dist. Lexis 39993, *4-5 *(D. Kan*. Apr. 13, 2011) (declining to shift the cost of production but stating that the defendant could produce un-reviewed ESI, thus shifting the cost of software necessary for review); Dahl v. Bain Capital Partners, LLC, 655 F. Supp. 2d 146, 148-49

(D. Mass. 2009) (declining to shift discovery costs but limiting production of metadata and ordering spreadsheets and privilege logs to be produced in native format).

84. *Major Tours, Inc.*, *supra*, 2009 U.S. Dist. Lexis 97554 at *16-17; *see also,* Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 U.S. Dist. Lexis 51962, *12 (E.D. Mich. July 7, 2008) ("the reasonable costs of retrieving and reviewing electronically stored information should be born by the responding party, unless the information sought is not reasonably available") *quoting The Sadona Principles: Second Edition,* June 2007.

85. *See, e.g.,Cason-Merenda*, *supra*, 2008 U.S. Dist. Lexis 51962 at *10 (denying motion to shift costs after defendant already produced responsive ESI and failed to raise "the issue of undue burden and cost before they were incurred"); *but see Clean Harbors Envtl. Servs.*, *supra*, 2011 U.S. Dist. Lexis 53212.

86. Notes of Advisory Committee on 2006 Amendments to Fed. R. Civ. P. 26.

87. *See* Tennis, *supra* note 82, at 1121 (explaining that "[s]ince the 2006 amendments came into effect, courts have continued to apply the *Zubulake* test").

88. Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 572 (N.D. Ill. 2004).

89. *Id.* (explaining the three different cost-shifting tests, under all of which "marginal utility . . . is the most important factor").

90. *See* Tennis, *supra* note 82, at 1121 ("the application of existing case law tends to frustrate rather than realize the purposes of the 2006 amendments").

91. Charles R. Richey & Jerry E. Smith, 9-45 *Moore's Federal Practice - Civil* § 45.33[2] (Matthew Bender & Co., Inc. 2011).

92. Fed. R. Civ. P. 45(c)(1). *See, e.g.,* Universal Del., Inc. v. Comdata Corp., No. 07-1078, 2010 U.S. Dist. Lexis 32158, *21-22 (E.D. Pa. Mar. 31, 2010) (some cost shifting was appropriate because the non-party was "entitled to protection against undue impositions" and the "data at issue" was "kept in an inaccessible format, *i.e.,* back-up tapes"); Guy Chem. Co., Inc. v. Romaco AG, 243 F.R.D. 310, 312-13 (N.D. Ind. 2007) (holding that data were "not reasonably accessible absent undue burden" but ordering production in light of good cause shown, with cost to be paid by the party who issued the subpoena).

93. Wells Fargo Bank, N.A. v. Konover, 259 F.R.D. 206, 207 (D. Conn. 2009).

94. *Id.* at 207; Behrend v. Comcast Corp., 248 F.R.D. 84, 86 (D. Mass. 2008).

95. First Am. Corp. v. Price Waterhouse LLP, 184 F.R.D. 234, 242 (S.D.N.Y. 1998) (internal quotation marks and brackets omitted). *See, e.g., Konover*, 259 F.R.D. at 207 (denying motion to shift costs where the non-party was not disinterested).

96. *See, e.g.,* Standard Chlorine, Inc. v. Sinibaldi, 821 F. Supp. 232, 265 (D. Del. 1992) (the nonparty was entitled to reasonable charges incurred in producing and copying documents at 50 cents per copy, not the $4.00 per copy that the nonparty charged for service).

97. *See First Am. Corp.*, 184 F.R.D. at 241 ("A nonparty's legal fees, especially where the work benefits the requesting party, have been considered a cost of compliance reimbursable under Rule 45(c)(2)(B)."); Angell v. Shawmut Bank Conn. Nat'l Ass'n, 153 F.R.D. 585, 590-91 (M.D.N.C. 1994) (attorney fees may be recovered, but the requesting party should provide clear notice if it intends to seek such costs because they are "extraordinary"). *But see* Universal Del., Inc. v. Comdata Corp., No. 07-1078, 2010 U.S. Dist. Lexis 32158 at *23-24 (E.D. Pa. Mar. 31, 2010) (the responding party was required to bear the cost of the privilege review while the vendor's cost to create a database was split between the requesting and responding parties); *Guy Chem. Co., Inc., supra*, 243 F.R.D. at 313 n. 2 (holding it inappropriate to award attorney's fees (in addition to cost) to the nonparty because of a lack of case law on the issue).