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The Two-Tier Discovery Provision Of Rule 26(B)(2)(B) - A Reasonable Measure For Controlling Electronic Discovery?

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THE TWO-TIER DISCOVERY PROVISION OF RULE 26(B)(2)(B) - A REASONABLE MEASURE FOR CONTROLLING ELECTRONIC DISCOVERY?

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I. INTRODUCTION

[1] One of the most innovative provisions in the newly-effective amendments to the Federal Rules of Civil Procedure addressing electronic discovery may be the creation of a two-tier system for the discovery of electronically stored information, under new Rule 26(b)(2)(B).[1] This rule states that "[a] party need not provide discovery" of such information "from sources that the party identifies as not reasonably accessible because of undue burden or cost."[2] This provision offers litigants the opportunity to work toward agreement, rather than impasse, in defining

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[1] FED. R. CIV. P. 26(b)(2)(B). The Supreme Court Order, in addition to the Rule itself, can be found in the Supreme Court's April 12, 2006 transmittal to Congress, *Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice, The Supreme Court of the United States, transmitting Amendments of the Federal Rules of Civil Procedure that have been adopted by the Court, Pursuant to 28 U.S.C. § 2072*, http://www.supremecourtus.gov/orders/courtorders/frcv06p.pdf, [hereinafter *April Transmittal*]. The Committee Note to the amended rule can be found at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf [hereinafter *Committee Note*].

[2] FED. R. CIV. P. 26(b)(2)(B).

the scope of discovery for the various sources of electronically stored information potentially discoverable in their case. In theory, the parties can agree that discovery of electronically stored information will be derived from sources that are reasonably accessible to the producing party (the first tier) but not from sources that are *not* reasonably accessible (the second tier).[3] At the very least, the responding party's invocation of the Rule should define more clearly the dispute between the parties as to which specific sources of information should be searched and produced. Thus, if the parties reach an impasse concerning the discovery of the second tier of information sources, the district court has the opportunity to resolve the dispute by applying the Rule and the guidance provided in the Committee Note.

[2] Part I of this article describes Rule 26(b)(2)(B) and describes how the Civil Rules Advisory Committee ("Committee") expected its two-tier feature to operate.[4] Part II describes the Rule's practical implications. Finally, Part III suggests how practitioners can use the new Rule effectively, whether they are making discovery demands or responding to those demands.

II. RULE 26(B)(2)(B) IN THEORY

[3] While crafting the electronic discovery amendments, which became effective on December 1, 2006,[5] the Civil Rules Advisory Committee took

[3] Daniel B. Garrie, Matthew J. Armstrong & Bill Burdett, *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 116-18 (2006).

[4] The federal judicial rulemaking process is set forth in the Rules Enabling Act, 28 U.S.C. §§ 2071-72. Under that process, advisory committees, such as the Civil Rules Advisory Committee, develop proposed rules, which are submitted for review and approval to the Committee on Rules of Practice and Procedure (the so-called "Standing Committee"). The Standing Committee in turn makes recommendations to the Judicial Conference. The Conference submits proposed Rules changes to the Supreme Court. If the Court approves them, the changes are submitted to Congress; such changes take effect unless Congress enacts legislation to reject, modify or defer the Rules. *See* James C. Duff, *The Rulemaking Process: A Summary for the Bench and Bar,* FEDERAL RULEMAKING, Apr. 2006, http://www.uscourts.gov/rules/proceduresum.htm.

[5] The Supreme Court's April 12, 2006 Order states that the new Rules "shall take effect on December 1, 2006, and shall govern in all proceedings thereafter commenced and,

notice of the "difficulties in locating, retrieving, and providing discovery of some electronically stored information."[6] It recognized that electronic storage systems "often make it easier to locate and retrieve information" and that "[t]hese advantages are properly taken into account in determining the reasonable scope of discovery in a particular case."[7] The Committee added that "some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible."[8] The Committee thus recognized the existence of a range of information sources with varying levels of accessibility. The storage of information in electronic format, in some situations, could "provide ready access to information used in regular ongoing activities," and information systems also "may be designed so as to provide ready access to information that is not regularly used."[9] At the same time, however, the Committee observed that such information systems "may retain information on sources that are accessible only by incurring substantial burdens or costs."[10] The Rule thus reflects an implicit premise by the Committee that private and public organizations collect and retain electronically stored information in a variety of sources with different levels of ease or difficulty in accessing, retrieving, or producing such information.

[4] The Rule also reflects a second premise by the Committee, which is explained in the Committee Note, that "the volume of – and the ability to search – much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs."[11] The Committee Note then explains that "[i]n many circumstances the requesting party should obtain and evaluate the information from such

insofar as just and practicable, all proceedings then pending." *April Transmittal, supra* note 1, at 3.

[6] *Committee Note, supra* note 1, at 13.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 14.

sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible."[12]

[5] New Rule 26(b)(2)(B) states 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."[13] The Rule does not purport to define or describe what sources of information are reasonably accessible, and which are not. The Committee Note implicitly recognizes that such a definition would be impractical, stating, "[i]t 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."[14] That statement reflects the Committee's conclusion that the difficulties in accessing electronic information "may arise from a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time."[15] In

[12] *Id.*

[13] FED R. CIV. P. 26(b)(2)(B).

[14] *Committee Note, supra* note 1, at 13.

[15] *See* Memorandum from Honorable Lee H. Rosenthal, Chair, Advisory Committee on the Federal Rules of Civil Procedure to Honorable David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, 34, (May 27, 2005), *available at* http://www.uscourts.gov/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter *May 2005 Memorandum*]. In that memorandum, the Civil Rules Committee transmitted the proposed Rules amendments to the Standing Committee. It gave several examples of "difficult-to-access" sources:

> 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.

Id. at 34. In its September 2005 Report to the Chief Justice and to the Judicial Conference, the Standing Committee provided a similar description to such sources. Excerpt from THE REPORT OF THE JUDICIAL CONFERENCE, COMMITTEE ON RULES ON PRACTICE AND PROCEDURE, TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, 11, (2005), *available at* http://www.uscourts.gov/rules/supct1105/Excerpt_STReport_CV.pdf ("Examples under current technology include deleted information, information kept on some backup-tape systems for disaster recovery purposes, and legacy data remaining from systems no longer in use").

addition, the Committee may have assumed that practitioners can address that problem without needing more specific guidance.[16]

[6] Although the Rule does not specify the kinds of sources of electronically stored information that might not be reasonably accessible in litigation, it will be the responsibility of the responding party to produce the electronically stored information that is relevant and reasonably accessible and articulate what sources of information it does not intend to search or produce. The Committee Note explains that the responding party "must . . . identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing."[17] This 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."[18]

[7] Assuming that the responding party provides the required identification of information sources to the requesting party, the parties can then try to resolve whether the production of that information should proceed and, if so, in what manner.[19] The Rule establishes a procedure for the resolution of any dispute stating that, "[o]n 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

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[16] *See May 2005 Memorandum*, *supra* note 15. There, the Civil Rules Committee explained:

> [M]ore easily accessed sources – whether computer-based, paper, or human – may yield all the information that is reasonably useful for the action. Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

Id. at 34. *See also id.* at 12 (expressing the same conclusion).

[17] *Committee Note, supra* note 1, at 14.

[18] *Id.*

[19] Another provision of the recent electronic discovery amendments is an amendment to Rule 34, which incorporates the term "electronically stored information" into the list of information that can be the subject of a document request. FED. R. CIV. P. 34(a). As amended, Rule 34(b) also establishes a procedure for the identification of the form in which such information will be produced. FED R. CIV. P. 34(b)(i)-(iii); *see* Thomas Y. Allman, *The Impact of the Proposed E-discovery Rules*, 12 RICH. J.L. & TECH. (2006), http://law.richmond.edu/jolt/v12i4/article13.pdf.

because of undue burden or cost."[20] As the text makes clear, the burden of proof is on the non-producing party to demonstrate that the requested information is not reasonably accessible.[21]

[8] If the non-producing party establishes that point, then the burden shifts to the requesting party to establish "good cause" for the discovery. "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)."[22] That reference incorporates pre-existing limits on discovery in Rule 26(b)(2), for example, a court may limit "the frequency or extent of use" of discovery methods permitted under the Rules if it determines that:

> (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought, or (3) 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.[23]

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[20] FED. R. CIV. P. 26(b)(2)(B).

[21] The Rule does not address a party's duty to preserve potentially responsive information from sources of information that are not reasonably accessible. The Committee Note cautions, however:

> A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. 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. It is often useful for the parties to discuss this issue early in discovery.

Committee Note, supra note 1, at 14.

[22] FED. R. CIV. P. 26(b)(2)(B).

[23] FED. R. CIV. P. 26(b)(2)(C).

[9] The Committee Note provides guidance for the resolution of this issue, emphasizing that Rule 26(b)(2)(C) "balance[s] the costs and potential benefits of discovery."[24] The Committee Note explains that whether a court will require a responding party to search 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."[25] The "[a]ppropriate considerations" may include:

> (i) the specificity of the discovery request; (ii) the quantity of information available from other and more easily accessed sources; (iii) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (iv) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (v) predictions as to the importance and usefulness of the further information; (vi) the importance of the issues at stake in the litigation; and (vii) the parties' resources.[26]

[10] As noted above, Rule 26(b)(2)(B) describes two ways in which a dispute over the challenged discovery may be resolved: by a motion to compel the discovery, filed by the requesting party, or by a motion for a protective order, filed by the nonproducing party.[27] As is the case with other discovery disputes under the Rules, the parties must confer before filing either motion.[28] Although the Rule clearly describes the respective burdens of proof for resolution of this issue and identifies the applicable

[24] *Committee Note*, *supra* note 1, at 16.
[25] *Id*.
[26] *Id*.
[27] A controversy over the implementation of the two-tier system could arise, however, in the context of sanctions proceeding under Rule 37. If, for example, a party produces evidence for its affirmative case from a source of information that it previously identified as not reasonably accessible, it is foreseeable that the other party could assert that the information should be excluded. FED. R. CIV. P. 37(c).
[28] *Committee Note*, *supra* note 1, at 14-15 ("The 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.").

motions practice, the Rule, as implemented, may involve additional proceedings. The Committee Note explains that "[t]he requesting party may need discovery to test th[e] assertion" by the responding party that specific sources of information are not reasonably accessible.[29] The Committee Note adds that "[s]uch discovery might take the form of requiring the responding party to conduct a sampling of information contained 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."[30]

[11] In addition to the potential for discovery to resolve the accessibility dispute, the Rule contemplates that there may be discovery relevant to the question of whether "good cause" would support the challenged information demand. The Committee Note acknowledges that in some cases the parties' dispute can be resolved "through a single proceeding or presentation," but that will not be universally true.[31] The Committee describes such possible situations:

> The good-cause determination, however, may be complicated because the court and 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. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.[32]

[12] Finally, if the requesting party demonstrates "good cause" for the production of the information, the court may "specify conditions for the

[29] *Id.*
[30] *Id.*
[31] *Committee Note*, *supra* note 1, at 16.
[32] *Id.*

discovery." The Rule does not specify those "conditions," but the Committee Note explains:

> The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. 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.[33]

III. RULE 26(B)(2)(B) IN OPERATION

[13] Rule 26(b)(2)(B) must be considered in the context of the other electronic discovery amendments. The sources of information to be searched will be among the topics discussed by counsel at their Rule 26(f) conferences, and will be a central issue in formal document requests under Rule 34.

A. THE PARTIES' DUTY TO "MEET AND CONFER"

[14] Under amended Rule 26(f), counsel for the parties will have to confer in order to devise a proposed discovery plan and to provide their views and proposals, *inter alia*, as to "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced."[34] Accordingly, when a case involves the discovery of electronically stored information, the parties must address such issues, "depend[ing] on the nature and extent of the contemplated

[33] *Id.*

[34] FED. R. CIV. P. 26(f)(3). The parties are to submit their proposals to the district court, which, under Rule 16(b), may enter a scheduling order that will include provisions for disclosure and discovery. Rule 16(b) has been amended to provide that the order may include "provisions for disclosure or discovery of electronically stored information." FED. R. CIV. P. 16(b).

discovery and of the parties' information systems."[35] The Committee Note explains that "[i]t may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems."[36]

[15] Rule 26(f) also contemplates that the parties will do more than simply exchange information about their information systems at the "meet and confer" session.[37] For example, the Committee Note explains that "the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information."[38] With specific reference to Rule 26(b)(2)(B), the Committee Note adds that the parties should discuss "whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information."[39]

[16] The threshold question for practitioners is whether they will be able to conduct an educated exchange of detailed information and views on whether, and under what conditions, they will provide access to specific sources of electronically stored information. The effective operation of both Rule 26(f) and 26(b)(2)(B) assumes that counsel will be able to speak knowledgeably about their client's respective information systems, including the system's operations and limitations. If that investigation has been thorough, the parties may be in a position to discuss which sources of electronically stored information *may* be reasonably accessible – and, as importantly, which may *not* be reasonably accessible.[40] At the very

[35] *Committee Note*, *supra* note 1, at 21.
[36] *Id.* The Committee Note adds that "[i]n appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful." *Id.*
[37] FED. R. CIV. P. 26(f).
[38] *Id.*
[39] *Id.*
[40] The Committee Note implicitly recognizes that it may be unrealistic to expect that the "meet and confer" process will resolve the issues addressed in Rule 26(b)(2)(B). The Note simply states that the parties "*may* identify" the various sources of information in a

beginning of the litigation process, however, counsel may lack comprehensive knowledge of the clients' information systems and, therefore, counsel may not be in a position to commit itself to a position on what sources of information should be searched.[41]

B. DISCLOSURE UNDER RULE 26(A)(1); DISCOVERY UNDER RULE 34

[17] The parties also will have to address how the two-tier discovery provisions of Rule 26(b)(2)(B) will be incorporated into the overall discovery process. First, under Rule 26(a)(1)(B), the parties have a duty of making an initial disclosure. They must provide the other party with "a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment." Because each party must identify the electronically stored information that it may use in support of its claims or defenses, counsel may need to address early in the process what sources of information will be reasonably accessible in order for it to make that disclosure.[42]

[18] When formal discovery begins, resolving the issue of what sources of information are reasonably accessible takes on critical importance. If the parties were not able to resolve this issue during the Rule 26(f) process, a

party's control that should be searched, and that the parties "*may* discuss whether the information is readily accessible to the party that has it." *Committee Note*, *supra* note 1, at 21 (emphasis added).

[41] An additional agenda item for the counsels' meeting is whether they wish to enter into an agreement concerning the assertion of privilege or work product protection in conjunction with the exchange of information during discovery. Such an agreement can be incorporated into the court's Rule 16(b) scheduling order. FED. R. CIV. P. 16(b). New Rule 26(b)(5) establishes a procedure under which a party can make such an assertion after allegedly privileged information has been disclosed. FED. R. CIV. P. 26(b)(5)(B). The negotiation of an agreement for presentation to the court may consume considerable time and resources, but a court-approved agreement, memorialized in a protective order, may be of assistance to the parties if there is a dispute as to whether an applicable privilege has been waived due to the disclosure of the information. *See* Hopson v. City of Baltimore, 232 F.R.D. 228, 239-40 (D. Md. 2005) (describing the importance of the parties' agreement being memorialized into a court order).

[42] The initial disclosures must be made at, or within, fourteen days after the parties' Rule 26(f) meeting, "unless a different time is set by stipulation or court order," or unless the party states an objection to such disclosures. FED. R. CIV. P. 26(a)(1).

party's Rule 34 requests likely will accelerate that resolution if only by court intervention. Rule 34 requests may elicit the objection that some sources of information should not be searched or produced because they are not reasonably accessible.[43] The parties' disagreements on accessibility may lead to discovery.[44] The requesting party might issue a deposition under Rule 30(b)(6) directing the responding party to identify deponents knowledgeable about the relevant information systems, in order to probe the basis for the objection that the sources of information are not reasonably accessible. In the alternative, counsel for the requesting party may issue a more targeted Rule 34 request, directed at requiring a sample of information from those sources.

[19] Finally, some parties may reach an impasse over whether the identified second tier sources need to be searched or even on the scope of first tier discovery. The rule may create situations in which some discovery is proceeding while the parties are at odds over other discovery. Such situations are the inevitable by-product of a rule that tries to balance the competing interests of the two adverse parties.

IV. HOW PRACTITIONERS SHOULD USE THE RULE

[20] Rule 26(b)(2)(B) is part of an ambitious package of rules directed at assisting litigants (and judges) in addressing the challenges of electronic discovery. To some practitioners, the two-tier system of discovery may be totally unfamiliar in its language and expected operation.[45] How the "Rule" will operate in practice inevitably will be the function of give-and-take in the parties' formulation of their specific discovery plans and their objections to those of the opposing party. Until a substantial body of case law develops that gives specific guidance to practitioners,[46] counsel will

[43] *Committee Note, supra* note 1, at 14.
[44] *Id.* at 15.
[45] *But cf. May 2005 Memorandum*, *supra* note 15, at 34 (stating that practitioners already manage discovery with a two-tier system of accessibility in mind).
[46] A few courts have cited the new Rule in the context of resolving a discovery dispute, requiring a party to permit the mirror imaging of its computer equipment. Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2006 WL 3825291, at *1 (E.D. Mo. Dec. 27, 2006); Cenveo Corp v. Slater, C.A., No. 06-CV-2632, 2007 WL 442387, *1 (E.D. Pa. Jan. 31, 2007) (citing that Rule in permitting the mirror imaging of hard drives); DE Technologies, Inc. v. Dell, Inc., No. Civ.A.704CV00628, 2007 WL 128966, *2 (W.D.

have to apply the Rule against the backdrop of existing case law on weighing the burdens of discovery against the potential benefits of the requested information to the parties' claims or defenses in the litigation.[47] Nevertheless, practitioners will be able to work effectively to advance their clients' interests if they apply the Rule and the guidance in its Committee Note in a systematic fashion.

A. THE ROLE OF THE "MEET AND CONFER" SESSIONS

[21] For the two-tier system to operate effectively, counsel for each side first will need to undertake a careful evaluation of their respective client's information systems. At the early stage of litigation, the first priority for counsel will be to become conversant about those systems. In that way, counsel can exchange detailed information about such systems at the Rule 26(f) conferences. Given the extensive agenda of issues for discussion at the conferences, counsel may try to determine what sources of information will be reasonably accessible.[48] The subsequent "meet and confer" session will be productive to the extent that counsel can master that task.[49]

Va. Jan 12, 2007) (stating that the new Rules "provide instructions" in resolving a dispute over the form of production of specific documents).

[47] Courts already recognize that Rule 26(b)(2) "imposes general limitations on the scope of discovery in the form of a 'proportionality test.'" Ferguson v. Lion Holdings, Inc., No. 02Civ.4258(PKL)(JCF), 2005 WL 1216300, at *3 (S.D.N.Y. May 23, 2005) (quoting Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). *See, e.g.*, Convolve, Inc. v. Compaq Computer Corp., 223 F.R.D. 162, 167-68 (S.D.N.Y. 2004) (quoting *Zubulake* 217 F.R.D. at 316); Hagemeyer N. Am., Inc. v. Gateway Data Sci. Corp., 222 F.R.D. 594, 600 (E.D. Wis. 2004); Robin Singh Ed. Serv., Inc. v. Excel Test Prep, No. C-03-5039 JSW(JCS), 2004 WL 2554454, at *1 (N.D. Cal. Nov. 9, 2004). Other courts have used what has been described as "marginal utility" analysis. McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) [hereinafter *McPeek I*].

[48] Amended Rule 26(f) requires the parties to confer on "any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced," and "any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order." FED. R. CIV. P. 26(f)(3)-(4).

[49] Counsel's knowledge of a party's information systems presumably will improve over time, particularly if the party encounters litigation implicating its information systems frequently.

[22] Although the parties may expect that such investigatory work has been done *before* they initiate formal discovery requests – such as Rule 34 production requests or Rule 33 interrogatories – the reality may be otherwise. Ascertaining and understanding a client's information systems will be an ongoing process. Optimally, the parties may be in a position to exchange *some* of this knowledge during the Rule 26(f) "meet and confer" sessions, but those sessions may need to focus on more immediate issues.

[23] There will be substantial pressure to resolve, as early as feasible, what sources of electronically stored information definitely will be produced and on what time table. There also will be pressure for counsel to know, or at least have a solid estimate, as to what sources will not be reasonably accessible and, therefore, presumptively off-limits for discovery. For that reason, counsel for a producing party will need to have conducted some inventory of the range of the client's information systems to know what sources of information fit respectively in the first tier or second tier. Making a mistake in either direction may have significant ramifications. For example, if counsel represents to the opposing party that specific sources are accessible, but learns from more investigation that the cited sources are *not* accessible, there will be considerable embarrassment. Similarly, to the extent that counsel misstates that certain sources are not reasonably accessible, but later learns that, in fact, those sources are reasonably accessible, the misrepresentations will compromise counsel's credibility and lead to mistrust in the discovery process. Given the potential for misinformation and misunderstanding, counsel for the non-producing party will need to be as thorough as possible in his or her investigation of the client's information systems prior to making representations.

B. FRAMING THE DISPUTE OVER REASONABLE ACCESSIBILITY

[24] The parties may be unsuccessful in resolving the question of what sources of information are reasonably accessible – they will disagree as to the categorization of such sources into the respective two tiers. At that point, there may be several means to resolve the dispute. First, if the responding party has identified the sources of information that it has determined are not reasonably accessible, it may decide to rest on that assertion and await action by the requesting party to challenge its position. At that point, the requesting party may seek discovery to test the non-

producing party's assertion that specific sources of information are not reasonably accessible or may move to compel production of the information itself.

[25] Second, the responding party may decide to be pro-active and file its motion for a protective order. Filing that motion means that the party has decided, based on sufficient investigation, that it has sound, reasonable objections to being forced to access the sources of information that are at issue. If the non-producing party has heeded the admonition in the Committee Note, it already has offered the requesting party information from the sources that it has identified as reasonably accessible. The non-producing party, hopefully, will have urged the requesting party to fully explore those sources for relevant information *before* demanding information from other sources.

[26] Motions practice, however, will be inevitable if the requesting party contends that the information it seeks *will not* be derived from the reasonably accessible sources of information. The requesting party also may argue that the information it expects to discover, even if it can be derived only from sources that are not reasonably accessible nevertheless should be produced. It will contend that the benefit of securing that information outweighs the burden or cost of production.

[27] The prospect of discovery will introduce complexity into the resolution of this issue. Discovery may be targeted at whether the sources of information are reasonably accessible or may involve a more intensive inquiry into the potential sampling of the underlying information.[50] Thorough preparation of information technology or records management personnel will be indispensable to the resolution of these issues. If depositions are to occur, both parties should try to make them as efficient and effective as possible. With that in mind, the inquiry into whether sources of information are (or are not) reasonably accessible, and the inquiry into the nature of the information sources themselves should

[50] *See generally* Zurich Am. Ins. Co. v. Ace Am. Reinsurs. Co., No. 05 Civ. 9170 RMB JCF, 2006 WL 3771090 (S.D.N.Y. Dec. 22, 2006) (permitting sampling of claims files on computer system, and deposition of an individual knowledgeable about that system); J.C. Assocs. v. Fidelity & Guar. Ins. Co., No. 01-2437(RJL/JMF), 2006 WL 1445173, at *1-2 (D.D.C. May 25, 2006) (permitting sampling of claim and litigation files).

proceed through a single round of depositions of the officials with knowledge of these topics.

[28] The potential for misunderstanding in the implementation of this rule already has engendered criticism; several commentators contend that the rule will be subject to abuse.[51] For example, one commentator has stated that the rule "gives parties the ability to determine data's accessibility and, therefore, their own production responsibilities."[52] Noting that Rule 26(b)(2)(B) does not adequately define the term "not reasonably accessible," the commentator asserts that "parties can easily claim that their data is not accessible for technical or monetary reasons."[53] The concern is that the non-producing party may be bluffing in claiming that accessing specific data would be "too costly or burdensome."[54]

[29] This criticism of the Rule is understandable, insofar as the Rule does not attempt to define which information systems are reasonably accessible, but the concern may be resolved in practice once the rule is implemented. First, because the Rule places the initial burden of proof on the non-producing party to justify why it does not intend to produce information from sources that it determines to be not reasonably accessible, that party will have to corroborate its contentions with affidavits or declarations.

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[51] Rebecca Rockwood, Comment, *Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era*, 12 RICH. J.L. & TECH. 16, ¶ 29 (2006), http://law.richmond.edu/jolt/v12i4/article16/pdf; Daniel B. Garrie et al., Comment, *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 121 (2006); Hon. Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 FEDERAL RULES DECISIONS 123, 129 (May 2005) (characterizing the then-proposed amendment as "simply unnecessary"); *but see* Thomas Y. Allman, *The Impact of the Proposed E-discovery Rules*, 12 RICH. J.L. & TECH. 13, ¶ 6 (2006) http://law.richmond.edu/jolt/v12i4/article13.pdf (describing the Rule as "an innovative and practical resolution to the concerns identified in the Public Hearings [held by the Advisory Committee] about e-discovery.").

[52] Rockwood, *supra* note 51, at ¶ 29.

[53] Rockwood, *supra* note 51, at ¶30. This commentator cites *Zubulake v. UBS Warburg*, 217 F.R.D.309, 318-20 (S.D.N.Y. 2003), in which the district court identified five categories of data storage systems, of which two were considered inaccessible, but the commentator argues that "even data stored in the so-called accessible categories may be considered inaccessible because of undue burden or cost." Rockwood, *supra* note 51, at ¶30.

[54] *Id*. at ¶29.

Counsel will need such support from information technology or records management specialists, who will have to describe in detail the various information systems at issue. Accordingly, counsel's simple assertion that sources of information are not reasonably accessible will be insufficient. Its affidavits or declarations will have to thoroughly describe the information systems and sources, and their limitations. To the extent that they do not do so, the party seeking access to the information should prevail.

[30] In that respect, this new Rule does not differ substantially from the manner in which comparable discovery disputes must be resolved under existing law. The party opposing discovery has the burden of proof to show, for example, why discovery would be unduly burdensome.[55] Under Rule 26(c), a party must establish good cause for the issuance of a protective order against discovery.[56]

[31] A related criticism is that the non-producing party may fail to disclose specific sources of information.[57] The Committee was aware of this criticism when it developed the Rule. As it explained to the Standing Committee, however, self-designation of sources of information already is a facet of existing discovery practice.[58] Moreover, as one commentator

[55] E.*g.*, Peskoff v. Faber, Civ.A. No. 04-526 (HHK/JMF), 2007 WL 530096, at *4 (D.D.C. Feb. 21, 2006); Thompson v. U.S. Dept. of Housing and Urban Devel., 219 F.R.D. 93, 98 (D. Md. 2003) ("Conclusory or factually unsupported assertions by counsel that the discovery of electronic materials should be denied because of burden or expense can be expected to fail.").

[56] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2035 (2d ed.1994).

[57] Rockwood, *supra* note 51, at ¶ 31 ("If a producing party fails to disclose the existence of certain documents, a discovering party will not know they exist, making it hard to show good cause to compel production"). *See* Garrie et al, *supra* note 51, at 126 (arguing that "it is foreseeable that in specific situations where certain electronic documents are especially incriminating, litigants may be able to mischaracterize, re-characterize, or refrain from disclosing the existence of their data, thereby making it difficult, if not impossible, for requesting parties to obtain desired information.").

[58] All party-managed discovery and privilege invocation rests on "self-designation" to some extent. That is happening now, without the insights for the requesting party that the identification requirement provides. The responding party must disclose categories and types of sources of potentially responsive information that are not searched,

has observed, "[t]he silver lining for the critics of this rule is that responding parties will be required to identify the sources of electronically stored information that they are not considering to be within the scope of discovery because they are not reasonably accessible," which is preferable to "informal practice" under which requesting parties "were left to guess" about the issue or conduct "costly ancillary discovery to get a complete picture of the electronic discovery landscape."[59]

[32] A third criticism of the Rule is that it could lead organizations to re-design their sources of information to make them less accessible and thereby frustrate discovery efforts.[60] There are two responses to this concern. First, discovery could determine if a party had altered the operation of its information systems during the relevant time period. If that had occurred, presumably the requesting party could argue that issue to the court, and seek appropriate sanctions. Second, there are ample grounds to question whether the criticism has any substantial empirical foundation. The Committee took specific note of this concern:

> [M]any witnesses and comments rejected the argument that the rule would encourage entities or individuals to "bury" information that is necessary or useful for business purposesor that regulations or statutes require them to retain. Moreover, the rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes, not for a particular litigation. A party that makes information "inaccessible" because it is likely to be discoverable in

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> enabling the requesting party to decide whether to challenge the designation.

Committee Report, *supra* note 1, at 36. *See* Phoenix Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB) 2006 WL 1409413, at *6 (S.D.N.Y. May 23, 2006) (citing the Committee Note as "reinforc[ing] the concept that a party must identify even those sources that are 'not reasonably accessible,' but exempts the party from having to provide discovery unless its adversary moves to compel discovery.").

[59] Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 21 (2006).

[60] *See* Rockwood, *supra* note 51, at ¶ 17; *see* Garrie et al, *supra* note 51, at 124; *see* Hedges *supra,* note 51, at 129.

> litigation is subject to sanctions now and would still be subject to sanctions under the proposed rule changes.[61]

[33] Finally, the requesting party can argue that if a party has made sources of information less accessible in response to pending or anticipated litigation, then that party should not be able to argue that the information source is not reasonably accessible within the meaning of the Rule.[62]

C. FRAMING THE "GOOD CAUSE" ISSUE

[34] The Rule contemplates that a party will obtain discovery from sources of electronically stored information that are not reasonably accessible if it can establish good cause, subject to the limitations of Rule 26(b)(2)(C). The challenge for the requesting party will be how to demonstrate good cause, for example, why its demands are not "unreasonably duplicative or cumulative," and why the discovery is not obtainable from another source that is "more convenient, less burdensome, or less expensive."[63] The other factors in the Rule must be addressed, to resolve the critical question of whether "the burden of expense of the proposed discovery outweighs its likely benefit . . ." under Rule 26(b)(2)(C)(iii).[64]

[35] How should the requesting party marshal the facts and law so that it can "justify the burdens and costs" that it would ask the court to impose on the producing party? How can the responding party rebut these arguments

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[61] *May 2005 Memorandum*, *supra* note 15, at 36-37. *See* Semsroth v. City of Wichita, No. 04-1245-MLB-DWB, 2006 WL 3913444, at *3, (D. Kan. Nov. 15, 2006) (citing the Committee Note but observing that the storage media at issue was "reasonably related to the purposes for which the information is maintained. . . .").

[62] *See* Quinby v. WestLB AG, No. 04Civ.7406(WHP)(HBP), 2006 WL 2597900, at *9 (S.D.N.Y. Sept. 5, 2006) (rejecting a defendant's claim that the costs of restoring and searching e-mails that had been converted to a less accessible format should be shifted to the plaintiff-requester), *amended,* No. 04 Civ. 7406(WHP)(HB), 2007 WL 38230 (S.D.N.Y Jan. 4, 2007).

[63] A third factor is whether the requesting party has had "ample opportunity" by discovery to seek the information at issue. FED. R. CIV. P. 26(b)(2)(C)(ii). Presumably, the requesting party will be able to argue that it has not had that "ample opportunity" because the information was not available from the "tier one" discovery sources.

[64] FED. R. CIV. P. 26(b)(2)(C)(iii).

effectively, and thereby avoid the burdens and costs of being required to do a search of the second tier sources of information? How can the parties assist the court in deciding whether the benefits of the discovery are likely to outweigh its expected burdens and costs?

[36] The factors identified in the Committee Note provide helpful guidance.[65] Several of them address the discovery conducted to date, for example, the nature and extent of the first tier discovery. Counsel for both parties will need to inventory what information sources were actually searched from the first tier. A court will want specifics on "the quantity of information available from other and more easily accessed sources."[66] Counsel for the requesting party will want to be conversant with what relevant information the first tier of discovery yielded. The quality of that information will have to be assessed as well to support the requesting party's position that other information sources must be searched.

[37] The responding party can defend its position effectively if it has been careful and comprehensive in its previous responses to the first tier of discovery. Counsel will need to document how it has provided information from the reasonably accessible sources.[67] The more comprehensive the showing, the more reasonable a counsel's position will be that second tier sources should not be searched. Counsel for the responding party also should determine what information sources no longer exist, what kind of information was stored on them, and whether that information has migrated to other systems. That will be important because the court will evaluate "the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources."[68]

[38] Both parties, relying on the information they have from the first tier discovery, also will have to develop their positions on "the likelihood of finding relevant, responsive information that cannot be obtained from

[65] *See May 2005 Memorandum*, *supra* note 15, at 41. These factors overlap with the factors enumerated in Rule 26(b)(2)(C)(iii). Counsel may want to develop a "checklist" of these issues to guide its progress through discovery in anticipation of the "good cause" dispute.
[66] *Id.*
[67] *Committee Note, supra* note 1, at 16.
[68] *Id.*

other, more easily accessed sources."[69] This may involve discovery into the party's information systems to understand the full ambit of potential information sources. Finally, the parties will have to make "predictions as to the importance and usefulness of the further information," and submit their views on "the importance of the issues at stake in the litigation."[70] This will require the parties to articulate the context of the discovery at issue in the overall framework of their legal claims or defenses.

[39] Existing case law will be of considerable assistance in resolving these disputes. Courts, if given enough information about the information sources at issue, can use the Rule 26(b)(2) factors to resolve these disputes.[71] When, for example, the issue is whether relevant information *might* be stored on a specific information source, the court can weigh the likelihood of such information being located and contrast the expected yield of that new relevant information against the information the party already has obtained in discovery.[72] Courts have developed experience in evaluating the burdens imposed on a producing party to locate and retrieve information from electronic sources – where the producing party can demonstrate substantial burdens in connection with such location and retrieval, the requesting party must be able to demonstrate that there will be tangible benefits from access to that information and must be able to show how the requested information will be important to the resolution of the issues in the case.[73]

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[69] *Id.*
[70] *Id.*
[71] Thompson v. U.S. Dept. of Housing and Urban Devel. 219 F.R.D. 93, 98 (D. Md. 2003) ("[I]t . . . can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records.").
[72] In Convolve, Inc., v. Compaq Computer, Inc., 223 F.R.D. 162, 167, (S.D.N.Y. 2004). At issue was plaintiff's access to documents that might reflect specifically described disk drive information. The court observed that requiring the defendant to disclose all such information "would require an expenditure of time and resources far out of proportion to the marginal value of the materials to this litigation," and that "there has been no showing that it would go beyond the information already provided by [defendant] in summary form." *Id*. at 65.
[73] Jones v. Goord, No. 95 CIV. 8026(GEL), 2002 WL 1007614, *12-13 (S.D.N.Y. May 16, 2002). The court used the Rule 26(b)(2) factors to reject plaintiffs' request for access to various electronic data bases maintained by state prison authorities, emphasizing both the difficulties of extracting information from the databases and plaintiffs' failure to show that such access would advance plaintiffs' case.

D. IMPOSING OTHER CONDITIONS ON SECOND TIER DISCOVERY

[40] A final issue for counsel's consideration is evaluating whether the second-tier discovery should proceed in some limited manner, or only under specific conditions. The Committee Note suggests that, if the requesting party has shown "good cause," discovery may proceed subject to "limits on the amount, type, or sources of information required to be accessed and produced" and that sharing of costs may be a condition imposed for access to the second tier of discovery.[74]

[41] For the responding party, the prospect of limits on the discovery may sound attractive, but it will reasonably want those limits to be defined. In contrast, the requesting party may be disinclined to abide by firm limits, at least until some preliminary discovery of the information source(s) has begun. Once such limited discovery has occurred, whether by sampling or some other method, the parties will have to reevaluate their positions and decide on whether judicial intervention is still required.[75] Sampling also

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[74] *Committee Note, supra* note 1, at 17. The Committee Note explains, however, that the burdens on the producing party may still warrant denial of the discovery. *Id. See* Withers, *supra* note 59, at 21 ("Accessibility is applied to determine the presumptive scope of discovery of electronically stored information.

> The fundamental principle is that if electronically stored information resides on a source that is not reasonably accessible, such that the relevance of the information to either the claims or defenses or the general subject matter of the litigation cannot be determined without incurring 'undue' costs and burdens, then that electronically stored information is presumptively outside the scope of discovery."

Id. (footnote omitted). *See* Cognex Corp. v. Electro Scientific Indus., No. Civ.A. 01CV10287RCL, 2002 WL 32309413,*5 (D. Mass. July 2, 2002) (stating the willingness of requesting party to share or bear discovery costs did not outweigh the reasons against permitting the discovery).

[75] *See McPeek I*, 202 F.R.D. at 34 (applying "marginal utility" principles, court authorized a "test run" of a backup restoration of e-mails attributable to identified agency employee); McPeek v. Ashcroft, 212 F.R.D. 33, 35 (D.D.C. 2003) (*McPeek II*) (requiring restoration of an additional tape); THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, at 44 (2005), http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf. *But cf.* Laura E. Ellsworth & Robert Pass, *Cost Shifting in Electronic Discovery*, 5 SEDONA CONF. J. 125, 148 (Fall 2004) ("It seems likely that sampling will often yield simply inconclusive results – no 'smoking gun,' but a general indication that some additional discoverable,

implicates whether the parties will need to support their positions through the declarations or affidavits of information technology specialists or other experts, who may be able to provide opinions on the expected utility of the sampling, as well as the validity of the sampling methods. The courts have had considerable experience with sampling and have shown a willingness to permit searches that are narrower than requested using more targeted search terms or narrowing the scope of the searches.[76]

[42] A substantial issue in the world of electronic discovery will be the allocation of costs.[77] The Committee Note emphasizes that a requesting party's willingness to share or bear costs "may be weighed by the court," but the "producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."[78] The responding party, consistent with the Committee Note, will be wary of agreeing to cost-shifting unless the trade-off of money against time and effort is worthwhile. The requesting party will have to assess its willingness to share (or bear) the costs of the information search and retrieval against its other litigation costs, as well as the potential benefit of securing useful information. As with the other issues, decisions will have to be made based on some substantial amount of knowledge of the information sources and what data they will yield for review and analysis.

V. CONCLUSION

[43] Rule 26(b)(2)(B) has great potential to help parties focus and resolve their electronic discovery demands and responses. But, as is the case with all discovery issues, the parties' commitment to the process will determine how well the Rule will operate. In the early stages of counsels' exchange of information and views, reaching agreement on how the Rule will affect

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but probably not highly probative, information exists on the media not yet restored and searched.").

[76] *See* Semsroth v. City of Wichita, No. 04-1245-MLB-DWB, 2006 WL 3913444, *10 (D. Kan. Nov. 15, 2006) (permitting a search of employer's backup tapes but limiting scope of search to specific search words and the identification of fifty out of 1,177 identified mail boxes).

[77] There is extensive literature on cost-shifting or cost-sharing in electronic discovery. *See generally* Ellsworth & Pass, *supra,* note 75 (citing the cases and commentary).

[78] *May 2005 Memorandum, supra* note 15, at 42.

the parties' discovery demands may be difficult. Focusing on the resolution of discovery problems with first tier discovery may facilitate resolution of the Rule 26(b)(2)(B) balancing factors. Although the parties may not emerge at the end of their discovery dispute with a complete victory on what information is accessed or denied access, at the very least, this Rule should assist the parties and the court in establishing a reasonable path through the electronic discovery process.