E-Discovery And The Evolution Of Cost-Shifting

by
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You represent Widget Co. in a collective action brought under the Fair Labor Standards Act. Widget Co.'s employees seek to recover unpaid wages for the time it takes to "don and doff" special safety equipment needed to run the company's widget-making machines. Several hundred employees have already opted into the class, and you continue to receive new consent forms by the day.

Then it arrives – Plaintiffs' first request for production of documents. Among their other requests, Plaintiffs request that Widget Co. produce all of its payroll records, as stored in their original electronic format, as well as all emails relating to Widget Co.'s safety policies and payment procedures.

An assessment of Widget Co.'s data systems reveals the following: it will cost $150,000 to restore archived data from company backup tapes; $30,000 for computer forensics experts to cull active data from company servers; and $320,000 to process roughly 150 gigabytes of data. The $500,000 price tag does not even include attorney review time, which could easily double this amount.

Widget Co.'s CEO calls you in a panic. She asks, "Can we get the other side to foot this discovery bill?"

Your answer: "Possibly."

A Perfect Storm: The Problem Of Rising Discovery Costs And A Liberal Discovery Standard

Reallocating discovery costs from the responding party to the requesting party breaks from the general rule, that "the responding party must bear the expense of complying with discovery requests." *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 358 (1978). This presumption holds true even in cases involving e-discovery. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).

Cost-shifting within the e-discovery context finds its genesis in the confluence of two factors: a liberal discovery standard and the sky-rocketing costs associated with the production of electronically stored information, commonly known as "ESI."

Under Federal Rule 26(b)(1), a party may obtain discoverable information regarding "any matter, not privileged, that is relevant to the claim or defense of any party . . .." Fed. R. Civ. P. 26(b)(1). This liberal discovery standard poses significant challenges in today's modern business environment, where, as of 2006, some 98% of businesses created and stored their records using some form of electronic media. A break from days-of-old – where "discoverable information" could generally be found as hardcopy documents in company file cabinets or boxed up in company warehouses – today, "discoverable evidence" could be found in any number of different data source locations. While obvious sources for ESI include a computer hard drive or a company's server, lesser known sources may include a cell phone, an instant messenger account, an internet message board, global positioning systems, metadata, a hand-held PDA device (like a Blackberry or iPhone), voice mail systems, or a portable flash drive.

As the sources for potential discovery increase, so does the volume of discovery collected. Processing costs have increased in tandem. And while the tools for sifting out irrelevant ESI have improved greatly over the past couple years, by and large, discovery costs remain high, and exorbitantly high in some cases. *See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 2002) ($6.2 million for backup tape restoration); *Medtronic Sofamor Danek, Inc. v. Sofamor Danek Holding, Inc.*, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. May 13, 2003) (estimated $16.5 million to $70 million for privilege review); *In re Fannie Mae Secs. Litig.*, 2009 U.S. App. LEXIS 9 (D.C. Cir. Jan. 6, 2009) ($6 million to comply with stipulated order); *Viacom Int'l, Inc. et. al. v. YouTube, Inc. et. al.*, S.D.N.Y., Case No.: 1:07-cv-02103-LLS (vendor estimates processing for 12 terabytes of data will cost $12 million).

In one study, the Radicati Group – a market research firm in the telecommunications industry – found that a company with 1,000 employees generates roughly 10 gigabytes of emails per day. With processing costs averaging $1,500 to $2,000 per gigabyte, discovery costs can quickly spiral out of control. According to a Fulbright & Jaworski client study, corporate counsel with companies generating over $100 million in revenues each year cite soaring e-discovery costs as their number one concern. Similar sentiments are re-echoed by litigators in private practice. A survey taken jointly by the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the American Legal System found that 85% of attorney respondents thought that discovery had become too expensive, and that soaring e-discovery costs were largely to blame. Further, 83% of those respondents believed that e-discovery costs were used by their opponents as a hammer to force settlement, rather than to narrow the issues or move the case toward trial.

Recognizing the rising tide of concern related to e-discovery, Congress amended the Federal Rules of Civil Procedure in 2006 to offer guidance as to many of the problem areas. The provisions discussing cost-shifting may be found at Federal Rule 26(b)(2)(B) and (C).

The Cost-Shifting Solution

Federal Rule 26(b)(2)(B) describes a two-tier system:

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for discovery.

Federal Rule 26(b)(2)(C), in turn, offers a balancing test, providing a list of factors that the court can consider in determining whether or not to shift costs. These factors include:

- whether the discovery sought is unreasonably cumulative or duplicative;
- whether the information sought is obtainable from a source that is more convenient, less burdensome or more inexpensive;
- whether the party seeking the information already has had adequate opportunity to obtain the information; and
- whether the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' respective resources, the importance of the issues at stake in the litigation and whether the discovery sought will resolve those issues.

To summarize, if the responding party can show that a data source is truly "inaccessible" (for example, the data is found to be deleted or fragmented), then the burden shifts to the requesting party to show that there is nevertheless "good cause" for requiring production from those inaccessible sources. Although "good cause" is not defined in the rule, the Advisory Committee Notes indicate that "good cause" balances the "need" and "justification" against the costs of accessing the data source. *See* Fed. R. Civ. P. 26(b)(2), Advisory Committee Notes (2006). If the responding party is required to produce inaccessible data, then the court is encouraged to consider cost-shifting, or at least cost-sharing, after balancing the factors listed in Federal Rule 26(b)(2)(C).

While the cost-shifting framework described in Federal Rule 26(b)(2) is not the only method employed by courts today in resolving issues related to cost reallocation (the others are discussed below), it is the approach likely to endure. Magistrate Judge Paul W. Grimm, in *Thompson v. United States HUD*, 219 F.R.D. 93 (D. Md. 2003), noted:

> In addition to the tests fashioned by these courts, it also 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.

The Evolution Of Cost-Shifting

Cost-shifting, as articulated in Federal Rule 26(b)(2), has evolved significantly since a version of a cost-shifting framework was articulated in *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 427 (S.D.N.Y. 2002).

In *Rowe,* Magistrate Judge James C. Francis IV fashioned an eight-factor test which worked to shift costs from the responding party to the requesting party.[1] Notwithstanding the court's ability to protect parties from "undue burden or expense," *see* Fed. R. Civ. P. 26(c), and the court's inherent power to shift costs, Judge Francis's cost-shifting analysis was nevertheless a noteworthy departure from the general rule that the responding party pays for the cost of production. In the age of ESI, Judge Francis recognized that "[t]oo often, discovery is not just about uncovering the truth, but about how much of the truth the parties can afford to disinter." *Rowe,* 205 F.R.D. at 423.

After *Rowe*, the floodgates to cost-shifting opened, albeit only briefly. Of the handful of courts faced with cost-shifting issues, *all* of them shifted cost, either in part or in whole. *See, e.g., Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 2002 U.S. Dist. LEXIS 3196 (E.D. La. Feb. 19, 2002); *In re Bristol-Myers Squibb*, 205 F.R.D. 437 (D.N.J. 2002); *Byers v. Ill. State Police*, 2002 U.S. Dist. LEXIS 9861 (N.D. Ill. May 31, 2002). However, the pendulum's swing in the opposite direction came to a decided halt with District Judge Shira A. Scheindlin's now-famous opinion in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 315 (S.D.N.Y. 2003) ("*Zubulake* IV").

In *Zubulake* IV, Judge Scheindlin criticized the *Rowe* test as "favor[ing] cost shifting," and set forth a revised seven-factor cost-shifting framework. The *Zubulake* IV factors are *not* weighed equally, as in *Rowe*, but are given priority and assessed in their descending order of importance. These factors include:

1. The extent to which the request is specifically tailored to discover relevant information;

2. The availability of such information from other sources;

3. The total cost of production, compared to the amount in controversy;

4. The total cost of production, compared to the resources available to each party;

5. The relative ability of each party to control costs and its incentive to do so;

6. The importance of the issues at stake in the litigation; and

7. The relative benefits to the parties of obtaining the information.

Zubulake IV, 217 F.R.D. at 322-23.

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[1] The eight "*Rowe*" factors, all weighed equally, include: (1) the specificity of the request; (2) the likelihood of a successful search; (3) the availability of the information from other sources; (4) the purposes of retention; (5) the benefit to the parties; (6) total costs; (7) the ability and incentive to control costs; and (8) the parties' resources. *Rowe*, 205 F.R.D. at 429-432.

Both cost-shifting approaches as stated under the Federal Rules and in *Zubulake* IV are used by the majority of courts today. In addition to these approaches, however, there is a third "marginal utility" test that a limited number of courts have used.

The "Marginal Utility" Test

Magistrate Judge John M. Facciola, in *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) ("*McPeek* I") and *McPeek v. Ashcroft*, 212 F.R.D. 33, 34 (D.D.C. 2003) ("*McPeek* II"), developed the "marginal utility" test, which states: "the more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [requesting party] search at its own expense . . . [t]he less likely it is, the more unjust it would be to make the [requesting party] search at its own expense." *McPeek* I, 202 F.R.D. at 34.

The Continued Evolution Of The Law Surrounding Cost-Shifting

In *Tierno v. Rite Aid Corp.*, 2008 U.S. Dist. LEXIS 58748 (N.D. Cal. July 31, 2008), the District Court for the Northern District of California held that the *Zubulake* IV cost-shifting framework was intended to apply "solely for electronic discovery," and not "for discovery of paper documents." In *Mikron Indus. v. Hurd Windows & Doors, Inc.*, 2008 U.S. Dist. LEXIS 35166 (W.D. Wash. Apr. 21, 2008), the District Court for the Western District of Washington declined to shift costs where the defendant (as the party responding to discovery) failed to discharge its meet and confer obligations under Federal Rule 26(c)(1). In *Toshiba America Electronics Components v. Superior Court*, 124 Cal. App. 4th 762 (Cal. App. 6th Dist. 2004), the California Court of Appeals did not consider *Zubulake* IV at all, deciding instead to shift costs based on the language of its own state statute, California Code of Civil Procedure § 2031(g).

Conclusion

Since Congress passed the 2006 amendments to the Federal Rules, courts have continued to struggle with cost-shifting, and the tug-of-war between the traditional discovery rules and the practical realities of cost imposed by the production of voluminous ESI. Given rising e-discovery costs, cost-shifting will continue to be a closely followed, hot-button topic. Although Federal Rule 26(b)(2) and *Zubulake* VI's cost-shifting framework are the principal approaches used by courts today in reallocating discovery costs, the marginal utility test has also been applied in a limited number of cases. Courts continue to wield broad discretionary powers in figuring out ways to better manage discovery, including reigning in the costs.