

THE “TWO-TIERED” APPROACH TO E-DISCOVERY: HAS RULE
26(B)(2)(B) FULFILLED ITS PROMISE?

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I. INTRODUCTION

[1] We have now had more than a year to assess the impact of the 2006 Amendments of the Federal Rules of Civil Procedure (“the Amendments”) on discovery of electronically stored information.¹ At the core of these provisions is the “two-tiered” discovery process.² Under Rule 26(b)(2)(B),³ restyled as “Specific Limitations on Electronically Stored

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¹ The 2006 Amendments to Rule 34(a) added “electronically stored information” as a distinct category of discoverable information to update the 1970 amendments, which had expanded the definition of “documents” to include “data compilations” from which information could be obtained by use of “detection devices.”

² See Final Report of the Civil Rules Advisory Committee of May 25, 2005 (revised July 27, 2005), at page C-42, included as Appendix C to the September 2005 Standing Committee Report to the Judicial Conference, *available at* <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter “Final Report (2005)”]

³ Fed. R. Civ. 26(b)(2)(B) regulates all forms of discovery but identical provisions were added to Fed. R. Civ. 45(d)(1)(D) relating to subpoenas. The reference to Rule 26(b)(2)(B) in this article refers to both provisions.

Information,”⁴ a party is permitted to utilize information from “reasonably accessible” sources of electronically stored information to respond to all forms of discovery without seeking information from inaccessible sources, provided that they are identified.⁵ Reasonably accessible sources are those which are available without “undue burden or cost.”

[2] What can be said of Rule 26(b)(2)(B) after one year?⁶ The approach was motivated by the observation that “more easily accessed sources – whether computer-based, paper, or human – may yield all the information that is reasonably useful for the action.”⁷ Are parties actually producing and reviewing accessible information first in the average cases?⁸ Is it helpful to require a court to evaluate “accessibility” and “good cause” as a condition of second tier discovery rather than simply directing the courts to apply Rule 26(b)(2)(C)⁹? Whether a source is “reasonably accessible” or not, the “proportionality principle” found in Rule 26(b)(2)(C) – weighing the perceived benefits against the burdens involved – may prevent discovery from being ordered.¹⁰ Isn’t the “good cause” requirement creating unnecessary work for the courts?

⁴ Descriptive titles, but no text changes, were added to both rules by “stylistic” amendments effective as of December 1, 2007. All references and quotations in this article are to post-stylistic revision versions unless otherwise noted.

⁵ The Rule provides 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.” See *Peskoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007) (explaining that Rule 26(b)(2)(B) makes “explicit” the “obligation to search available electronic systems for the information demanded” and is only relieved upon a showing of undue burden or cost).

⁶ I have previously described the Rule in the pages of this Journal as “an innovative and practical resolution to the concerns identified...about e-discovery.” Thomas Y. Allman, *The Impact of the Proposed Federal E-Discovery Rules*, 12 RICH. J. L. & TECH. 13 at *6 (2006).

⁷ Final Report (2005), *supra* note 2, at C-42.

⁸ FED. R. CIV. P. 26(b), Committee Note (2006) (a party “should obtain and evaluate information” from reasonably accessible sources before insisting on production from inaccessible sources”).

⁹ Fed. R. Civ. P. 26(b)(2)(C)(iii) requires that a “court *must* limit the frequency or extent of discovery otherwise allowed by these rules or local rules if it determines [that] “the burden or expense of the proposed discovery outweighs its likely benefit. . . .” (emphasis added).

¹⁰ See 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2008.1 at n.7 (2d ed. 2007) (Rule 26(b)(2)(C)(iii) is identical to former Rule 26(b)(iii)).

[3] Also, what has been the impact of the two-tiered approach on compliance with preservation obligations?¹¹

[4] This article seeks to answer these questions through the prism of the reported decisions and the actual conduct of parties under the Rule. The results of the reported cases to date are interesting. It is difficult to detect any change in the outcomes from what would have been anticipated before the Amendments. If a party is unable to sustain its burden of showing that the source of information is “not reasonably accessible,” discovery ordinarily proceeds.¹² “Good cause” for discovery from inaccessible sources is typically not found when substantially similar information may be available on more accessible sources¹³ or if accessible sources are unduly burdensome to produce because of the volume or other factors.¹⁴ Some courts continue to resolve objections to discovery of electronic

¹¹The scope of what must be preserved may be broader than that found on accessible sources and even inaccessible information may need to be listed in the initial disclosures required under Rule 26(a). See Frank P. DeGiulio, *Electronic Discovery: A Practicum for the Maritime Lawyer*, 19 U.S.F. MAR. L. J. 1, 21 (2006-2007).

¹² *Autoclub Family Insurance v. Ahner*, No. 05-5723, 2007 WL 248 0322 (E.D. La. Aug. 29, 2007) (“Rimkus must make an *evidentiary showing* that the data sought is not reasonably accessible because of undue burden or cost [and subpoenaing party] is not required to show good cause to overcome Rimkus’s unsupported assertions.”) (emphasis in original); *accord*, *Disability Rights Council v. WMTA*, 242 F.R.D. 139, 147-148 (D.D. C. 2007) (holding that the considerations for finding “good cause” listed in the Committee Note provide an “overwhelming case for production of the backup tapes”); *Ameriwood Industries, Inc. v. Lieberman (Ameriwood I)*, No. 4:06CV524-DJS, 2006 WL 3825291, at *4 (E.D. Mo. Dec. 27, 2006) (finding “good cause” to order inspection of hard drive).

¹³ *Best Buy Stores v. Developers Diversified Realty Corporation*, No. 05-2310 (DSD/JJG), 2007 WL 4230806, *1-2 (D. Minn. Nov. 29, 2007) (reversing Magistrate order finding “good cause” requiring restoration of inaccessible backup tapes because information could likely be found elsewhere); *see also* *Hunter v. Ohio Indemnity Co.*, No. C 06-3524 JSW (JL), 2007 WL 2769805, at *1 (N.D. Cal. Sept. 21, 2007) (citing Rule 26(b)(2)(B) for the proposition that “a court is [authorized] to limit discovery if it is obtainable from another source that is less burdensome or if the burden outweighs its likely benefit.”).

¹⁴ *See Ameriwood Industries v. Liberman (Ameriwood II)* No. 4:06CV524-DJS, 2007 WL 496716 (E.D. Mo. Feb. 12, 2007) (refusing discovery from accessible source because of undue burdens involved).

information by balancing burden and benefit without reference to Rule 26(b)(2)(B).¹⁵

[5] The two-tiered approach appears to have had, however, a positive impact on how parties manage their discovery responsibilities under the Amendments. Early discussions, case management orders,¹⁶ and local rules¹⁷ routinely encourage parties to focus on the burdens of access, and anecdotal evidence indicates that parties are accommodating reasonable demands for limitations based on accessibility.¹⁸ Moreover, courts appear to be showing heightened restraint when there has already been a full and adequate search¹⁹ or when a requesting party has not demonstrated the absence of reasonably accessible alternatives.²⁰

[6] In addition, there also seems to be recognition that preservation requirements for inaccessible information must be identified early or they

¹⁵ See, e.g., *Oxford House v. City of Topeka*, No. 06-4004-RDR, 2007 WL 1246200 at *5 (D. Kans. Apr. 27, 2007) (applying “marginal utility analysis” to backup media and determining that “[a]s the likelihood of retrieving these electronic communications is low and the cost high,” the objection to retrieval of the data should be sustained).

¹⁶ See *Celexa and Lexapro Product Liability*, No. MDL 1736, 2006 WL 3497757 (E.D. Mo. Nov. 13, 2006) (absent exceptional circumstances and showing of special need, no duty to restore sample backup tapes retained for purposes of litigation).

¹⁷ See NORTHERN DISTRICT OF OHIO DEFAULT STANDARD FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION, APP. K (“Prior to the Rule 26(f) conference, the parties [should discuss whether] . . . electronically stored information [is] of limited accessibility [such as] those created or used by electronic media no longer in use, maintained in redundant electronic storage media, or for which retrieval involves substantial cost.”), available at

http://www.ohnd.uscourts.gov/Clerk_s_Office/Local_Rules/AppendixK.pdf

¹⁸ When the author floated the question at a recent Georgetown Law Center E-Discovery Conference, numerous members of the audience asserted that the meet and confer process was yielding practical accommodations as a direct result of Rule 26(b)(2)(B).

¹⁹ See *Palgut v. City of Colorado Springs*, No. 06-dc-01142-WDM-MJW, 2007 WL 4277564, at *2 (D. Colo. Dec. 3, 2007) (“[A]n adequate and full search” had already occurred).

²⁰ *Nat’l Union Fire Ins. Co. v. Clearwater Ins. Co.*, No. 04-CV-5032, 2007 WL 2106098 (S.D. N.Y. July 21, 2007) (refusing to order restoration and search of backup-up tapes because the requesting party had not demonstrated that responsive e-mails existed on the tapes); *accord*, *Best Buy Stores v. Developers Diversitfied Realty Corporation*, No. 05-2310 (DSD/JJG), 2007 WL 4230806 (D. Minn. Nov. 29, 2007).

are waived,²¹ and that the principle of proportionality is equally applicable in the preservation context.

[7] Nonetheless, the “two-tiered” process can be cumbersome to implement, and there remain questions about its usefulness. Thus, the article includes practical suggestions on how to overcome the remaining barriers to reaching the full promise of the Rule.

II. BACKGROUND

[8] The ubiquity of computers in the storage and exchange of electronic information has led to an information explosion.²² The trend started with mainframe computers which had the ability to manipulate large volumes of information in the form of “databases.” This inevitably attracted requests for production of information in electronic form and, in 1970, Rule 34(a) was amended to include as discoverable documents, “data compilations from which information can be obtained.”

[9] By the mid to late 1990s, however, the growth in discovery of e-mail and other forms of electronic information had overwhelmed the discovery rules. An enormous volume of information²³ was potentially available for discovery on active systems, backup media and, in some cases, as fragments on hard drives, greatly impeding the ability to manage discovery in rational ways. The problem was especially acute because of

²¹ See *Columbia Pictures v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 WL 2080419, at *14 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443, 447-48 (C.D. Cal. Aug. 24, 2007 (denying sanctions for failure to preserve information temporarily stored in RAM, where based on good faith belief, it was not required and no “specific request” had been made).

²²George Paul and Jason Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J. L. & TECH. 10 at *47 - 49 (2007); *Id.* at *9 (“[caused by the] quick succession of advances clustered or synced together [including]...digitization,; real time computing; the microprocessor; the personal computer; e-mail; local and wide-area networks leading to the Internet; the evolution of software, which has ‘locked in’ seamless editing as an almost universal function; the World Wide Web; and of course people and their *technique*.”)

²³ *Id.* at *12. Other types of information phenomena, some of which “may yet even eclipse total e-mail traffic,” include instant messaging, word processing with hyperlinks, integrated voice mail in ‘.wav’ file format, structured databases of all kinds, Web pages, blogs, and e-data in all conceivable form[s].” *Id.* at *21.

the impact of preservation obligations on business practices involving routine overwriting of information.²⁴ When set against the requirements of Rule 1, the practice of discovery under existing rules presented serious issues.²⁵

[10] When the Civil Rules Advisory Committee and its Discovery Subcommittee²⁶ turned to electronic discovery in 2000, it was confronted with a variety of conflicting proposals.²⁷ Clearly, the discovery rules had to be updated to effectively carry out their historic mission.²⁸

[11] For a variety of reasons, including uncertainty of the technologies which might emerge in the future, the Advisory Committee chose to make only modest changes designed to clarify that electronically stored information stood on the same footing as documents and reflecting best managing practices.²⁹ As noted by one commentator, the Amendments

²⁴ See *Public Hearing on the Proposed Amendments to the Federal Rules of Civil Procedure: Hearing Before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States* (Feb. 11, 2005) (statement of Lawrence La Sala, Assistant General Counsel, Textron Corporation) (stating that the threat that implementing even a legitimate policy could subject a company to sanctions, has delayed or even scuttled the implementation of corporate electronic data retention policies), available at <http://www.uscourts.gov/rules/e-discovery/CVHearingFeb2005.pdf#page=369> (last visited Feb. 9, 2008).

²⁵ See FED R. CIV. P. 1. Rule 1 of the Federal Rules of Civil Procedure requires that the rules be “construed and administered to secure the just, speedy, and inexpensive determination of every action.” *Id.*

²⁶ The Advisory Committee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States charged with proposing rules under the authority of the Enabling Act.

²⁷ Professor Marcus, the special Consultant to the Committee, has identified some of the ideas as including: (1) declaring that e-mail was not discoverable, since not a “document;” (2) mandating “reasonable” electronic recordkeeping; (3) requiring that backup tapes always be searched; (4) requiring that the requesting party always pay for restoration of backup tapes; and (5) mandating the exact form of production of electronically stored information. Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 236 F.R.D. 598, 609-610 (2006).

²⁸ See Prof. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L. J. 561, 627 (2001) (arguing that “[t]o continue to employ pre-computer discovery standards . . . would be the technological equivalent of driving a horse and buggy down Interstate 94”).

²⁹ See Final Report (2005), *supra* note 2, C-44 (“Parties sophisticated in discovery first look in the reasonably accessible places that are likely to produce responsive information.

“are intended to fill in gaps in the existing rules so that the task of conducting (and responding to) electronic discovery is less burdensome and more cost-effective.”³⁰

[12] Included among the Amendments was a unique provision for the sequence of the discovery of electronically stored information embodied in Rule 26(b)(2)(B). Appendix A [Evolution of the Two-Tiered Approach (1983 - 2007)] to this article details the steps in the amendment process, with links to the relevant materials.

III. THE TWO-TIERED APPROACH

[13] The Federal Rules permit discovery as to “any matter, not privileged, that is relevant to the claim or defense of any party.”³¹ From the high point of open-ended discovery prior to 1983,³² successive amendments in 1993³³ and 2000³⁴ increased the managerial role of courts in discovery and the 2006 Amendments continue that trend.³⁵

. . . In many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case. If [not], the proposed rule allows that party to obtain additional discovery . . . subject to judicial supervision.”)

³⁰ Robert K. Lu, *New Federal Rules on E-Discovery*, 29 L.A. LAW 12 (June 2006)

(“Strictly speaking, these new rules are not so much amendments as they are additions to the existing rules governing pretrial civil discovery.”)

³¹ FED. R. CIV. P. 26(b)(1). The discovery rules “allow[s] the responding party to search his records to produce the required, relevant data [but generally do] not give the requesting party the right to conduct the actual search.” *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003).

³² The 1983 amendments introduced the “proportionality” principle to Rule 26(b)(2)(iii) requiring limitations on discovery when the “burden or expense” of the proposed discovery “outweighs its likely benefit.” FED. R. CIV. P. 26(b)(2)(C)(iii).

³³ The 1993 amendments limited the frequency of the use of specific discovery tools while adding initial disclosure requirements to Rule 26(a). *See* FED R. CIV. P. 26(a), Committee Note on 1993 Amendments.

³⁴ The 2000 amendments limited the scope of discovery under Rule 26(b)(1) to material which is relevant to the “claims or defenses” of any party, subject to expansion for “good cause” to encompass any matter relevant to the “subject matter” involved in the action. *See* FED. R. CIV. P. 26(b), Committee Note on 2000 Amendments.

³⁵ Scholarly comment has tended to see an inevitable trend towards increased managerial judging in this process. *See* Thomas D. Rowe, Jr., *Authorized Managerialism Under the Federal Rules – And the Extent of Convergence with Civil-Law Judging*, 36 SW. U. L. REV. 191, 198-202 (2007) (“Discovery must be a fearsome Gulliver to require all those strings, and others that I may have overlooked, to tie him down.”).

[14] Courts are required to limit all forms of discovery when the burden or expense of the proposed discovery outweighs its likely benefit. Thus, a court must limit or deny unduly burdensome discovery whether the information sought is accessible or not.³⁶ Even “active data or information” in electronic form can be unduly burdensome to discover.³⁷

[15] In the 2006 amendment to Rule 26(b), the Advisory Committee established the principle, uniquely applicable to electronically stored information, that a producing party may ignore “sources”³⁸ of electronically stored information which are not reasonably accessible in their initial discovery responses. Rule 26(b)(2)(B) authorizes them to do so, provided that they “identify” any such sources to the requesting party which arguably contain discoverable information.³⁹ The Advisory Committee believed that this was reflective of current best practices and that “stating in the rule that initial production of information that is not reasonably accessible is not required simply recognizes reality.”⁴⁰

³⁶ FED. R. CIV. P. 26(b)(1) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).”). The Committee Note to Rule 26(b)(2)(B) observes that “[t]he limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible sources.” FED. R. CIV. P. 26(b)(2)(B), Committee Note (2006).

³⁷ See BARBARA J. ROTHSTEIN, RONALD J. HEDGES, AND ELIZABETH C. WIGGINS, *MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES* at 8 (2007), available at <http://www.uscourts.gov/rules/eldscpkt.pdf> (last visited Feb. 9, 2008) (stating that “active data may involve substantial burdens to produce – for example, when vast amounts are requested or when data are requested in a form that requires the reprogramming of databases.”).

³⁸ Final Report (2005), *supra* note 2, at C-50. The reference to “sources” was added after the Public Hearings in recognition of the concern that a party cannot describe the precise nature of inaccessible information for which it has not searched. The Advisory Committee also added the qualification that the sources must be inaccessible because of “undue burden or cost.”

³⁹ *Id.* at C-44.

⁴⁰ Given that sources of information which are regarded as inaccessible may be subjected to discovery, a party must consider its preservation obligations even if it identifies a source as inaccessible. FED. R. CIV. P. 26(b)(2), Committee Note (2006) (“Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstance of each case. It is often useful for the parties to discuss this issue early in discovery.”).

[16] A requesting party may nonetheless obtain discovery from inaccessible sources by filing a motion to compel and “showing good cause, considering the limitations of Rule 26(b)(2)(C).”⁴¹ Because the Rule is coupled to and includes the requirement that the court “consider” the limitations of Rule 26(b)(2)(C), it “carries forward to today’s electronic world the concepts of proportionality, balance and common sense embedded in the 1983 amendment to Rule 26(b).”⁴²

[17] This “two-tiered” approach deliberately mirrors the structure included in Rule 26(b)(1) in 2000, which also invokes “good cause” as a necessary condition to enhanced discovery beyond that relevant to “claims or defenses.”⁴³

[18] If party managed discussions regarding the scope of discovery do not succeed, either party – not just the requesting party – may bring any remaining dispute to the reviewing court by filing a motion to compel or a motion seeking a protective order.⁴⁴

IV. REASONABLY ACCESSIBLE SOURCES

[19] The underlying concept of the two-tiered approach is a distinction between information found on sources which are “not reasonably accessible because of undue burden or cost” and information available on their opposite, i.e., “reasonably accessible” sources. Inaccessible sources may be ignored in party managed discovery although their existence must be disclosed through the identification process if they may contain

⁴¹ While that Rule has three distinct segments to it, by far the most important and relevant one for these purposes is (iii), which provides that discovery should be limited if “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.”

⁴² Letter from Arthur Miller, Professor, Harvard Law School and former Reporter to the Advisory Comm., to Peter G. McCabe, Sec’y Comm. on Rules of Practice and Procedure (Feb. 10, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-219.pdf>.

⁴³ Final Report (2005), *supra* note 2, at C-43 (“The amendment builds on the two-tier structure of scope of discovery defined in Rule 26(b)(1) and applies this structure to discovery of electronically stored information.”).

⁴⁴ *Id.* at C-50 (noting that the ability to seek a protective order was added to guarantee that either party could raise the issue).

discoverable information. And, of course, if “good cause” exists, an inaccessible source may still have to be utilized in discovery.

[20] The Committee Note to Rule 26(b)(2)(B) observed that “[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.” Ultimately, the concept is an elastic one which has as its focus the burden and costs involved in providing discovery. In *Parkdale America LLC v. Travelers*,⁴⁵ a producing party sought to use the burdensome nature of privilege review as an argument for a finding of inaccessibility. Had the argument succeeded,⁴⁶ production could nonetheless have been ordered for “good cause,” taking into account the proportionality principle, but with limitations on the scope or timing of the discovery.

[21] At least three approaches are currently in use to help determine which side of the “reasonably accessible” line (actually more of a sliding scale) a particular source may fall.

A. ACTIVE DATA

[22] One end of the accessibility scale is firmly anchored by sources of “active data.” Information which is “active” is “immediately accessible without restoration or reconstruction,” and is typically stored on local hard drives, networked servers, distributed devices, or offline archival sources.⁴⁷ *Principle 8 of The Sedona Principles (Second Edition 2007)*⁴⁸ contrasts

⁴⁵ *Parkdale Am., LLC v. Travelers Cas. & Sur. Of Am., Inc.*, No. 3:06CV78-R, 2007 WL 4165247, at *12 (W.D.N.C. Nov. 19, 2007) (stating that the party did not establish that e-mails were not reasonably accessible under Rule 26(b)(2)(B) “particularly in light of the Court’s ability to apportion costs....”).

⁴⁶ *But cf. Stanziale v. Pepper Hamilton LLP*, No. M8-85 (PART 1) (CSH), 2007 WL 473703 (S.D.N.Y. Feb. 9, 2007) (transferring a similar argument for decision to District Court where underlying action was pending).

⁴⁷ *The Sedona Conference Glossary: E-Discovery & Digital Information Management 2* (2d ed. Dec. 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf; see also RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1996) (defining “accessible” as “able to be used, entered, or reached.”).

⁴⁸ THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, PRINCIPLE EIGHT ii (2d ed. 2007),

“active data and information,” with “disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible.”

[23] Some of the more exotic forms of active data have been found to be accessible where they can be accessed with minimal effort. In the case of *Columbia Pictures v. Bunnell*,⁴⁹ information which was temporarily stored in RAM was held to be accessible and thus subject to discovery.⁵⁰ The District Judge upheld a Magistrate Judge’s order to compel production after applying Rule 26(b)(2)(B),⁵¹ while simultaneously agreeing that no duty to preserve existed.⁵²

[24] However, even active data can be inaccessible for Rule 26(b)(2)(B) purposes when undue burden or cost attends its use in discovery. As

available at

http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf; see also Thomas Y. Allman, *The Sedona Principle (2d ed.): Accommodating the 2006 Amendments*, FED. CTS. L. REV. (forthcoming Spring 2008). *The Sedona* approach is analogous to that adopted by the *Guidelines for State Trial Courts* adopted by the Conference of State Chief Justices.

⁴⁹ *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJXC, 2007 WL 2080419 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443 (Aug. 24, 2007) (requiring future production of information temporarily stored in RAM for less than six hours).

⁵⁰ *Id.* at * 7 (“[T]he court finds that it would not be an undue burden on defendants to employ a technical mechanism through which retention of Server Log Data in RAM is enabled”).

⁵¹ *Id.* at *13 (“[D]efendants have failed to demonstrate that the Server Log Data is not reasonably accessible because of undue burden or cost [and, in any event] plaintiffs have shown good cause to order discovery of such data . . . and the burden and expense of the proposed discovery does not outweigh its likely benefit. . .”).

⁵² *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 448 (C.D. Cal. 2007)

[This decision] simply requires that the defendants in this case, as part of this litigation, *after* the issuance of a court order, and following a careful evaluation of the burden to these defendants of preserving and producing the specific information requested in light of its relevance and the lack of other available means to preserve it, begin preserving and subsequently produce a particular subset of the data in RAM under Defendants’ control.

noted earlier, in *Parkdale America LLC v. Travelers*,⁵³ a producing party unsuccessfully argued that e-mail was inaccessible because of the heightened need for review to determine privilege. While the argument failed in that case,⁵⁴ other cases may require sufficiently excruciating review to lead to a different result.⁵⁵

B. COST-SHIFTING ANALOGIES

[25] The Advisory Committee borrowed the “reasonably accessible” concept from cases that used it to exclude sources from eligibility for cost-shifting.⁵⁶ Not surprisingly, courts have continued to consult cases from that context, such as *Zubulake v. UBS Warburg* (“*Zubulake I*”),⁵⁷ for possible analogies. In *Zubulake I*, the court identified five categories of data, from most accessible to least accessible, as “active, online data;” “near-line data;” “offline storage/archives;” “backup tapes;” and “erased, fragmented or damaged data.”⁵⁸ In *W.E. Aubuchon Co. v. Benefirst*,⁵⁹ the

⁵³ *Parkdale Am., LLC v. Travelers Cas. & Sur. Of Am., Inc.*, No. 3:06CV78-R, 2007 WL 4165247, at *12 (W.D.N.C. Nov. 19, 2007) (e-mails were reasonably accessible under Rule 26(b)(2)(B) “particularly in light of the Court’s ability to apportion costs....”).

⁵⁴ *But cf.* *Stanziale v. Pepper Hamilton LLP*, No. M8-85 (PART 1)(CSH), 2007 WL 473703 (S.D.N.Y. Feb. 9, 2007) (transferring a similar argument for decision to District Court where underlying action was pending).

⁵⁵ *See In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 789, 806 (E.D. La. 2007) ([quoting from Special Master Report] “Merck cannot be permitted to deprive adversaries of discovery by voluntarily choosing to electronically superimpose [its] legal advice on the non-privileged and, therefore, discoverable, communications”).

⁵⁶ Under Rule 26(b)(2)(B), however, the concepts of accessibility and cost-shifting are “decoupled;” if undue burden or cost is involved in regard to discovery, a court may deny or otherwise adjust discovery or condition it on payment of discovery costs, regardless of the accessibility of the source involved.

⁵⁷ *Zubulake v. USB Warburg, LLC (Zubulake I)*, 217 F.R.D. 309, 321-322 (S.D.N.Y. 2003)(ordering sample consisting of any five backup tapes as selected by Zubulake and announcing a seven factor test to be applied after results of the sample became available); *see also* *Zubulake v. USB Warburg, LLC (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003)(ordering production from all backup tapes based on sample).

⁵⁸ *Zubulake I*, 217 F.R.D. at 318-19. The court drew the line between accessible and inaccessible at “backup tapes, “because [they] must be restored using a process [as described] all before the data is usable. That makes such data inaccessible.” Some of the technological assumptions employed may no longer be applicable in the highly regulated and predictable storage classification world in which the *Zubulake* decision was decided.

⁵⁹ *W.E. Aubuchon Co. v. Benefirst*, 245 F.R.D. 38, 43 (D. Mass. 2007).

court held that information was inaccessible by analogy “because of BeneFirst’s method of storage and lack of an indexing system.”

[26] Some commentators have suggested that parties should “game” the cost shifting cases to favor their accessibility positions, given that the cost shifting cases were driven by considerations which differ from those underlying Rule 26(b)(2)(B).⁶⁰

C. STORAGE TYPES

[27] The Advisory Committee listed representative storage types which were inaccessible in its 2005 Final Report.⁶¹ Thus, removable backup tapes, which require a burdensome restoration process before the contents are accessed, were listed as inaccessible sources of information.⁶² Other examples cited were databases not programmed to provide answers, legacy data, and deleted information requiring forensic retrieval.⁶³ Some courts have applied these examples as accessibility benchmarks. In *Phoenix Four v. Strategic Resources Corporation*,⁶⁴ for example, information in a partitioned section of a hard drive was found to be not reasonably accessible by analogy to the “legacy” systems described in the Final Report.⁶⁵

⁶⁰ In a candid article appearing in the publication of the Association of Trial Lawyers of America, it was suggested that “if a producing party cites case law applying cost-shifting tests to particular types of data, plaintiff lawyers should argue that these cases are not directly relevant to the tier-one analysis.” Marian K. Riedy & Suman Beros, *Win the Battle for Access to E-Data*, 42 TRIAL 49, 53 (Dec. 2006)(noting that “[o]n the other hand,” a plaintiff lawyer should cite cost-shifting cases if they hold that it is “inappropriate for certain types of electronic data.”) (emphasis in original).

⁶¹ See Final Report (2005), *supra* note 2, at C-42.

⁶² See generally Eric Friedberg, *To Recycle or Not to Recycle, That is the Hot Backup Tape Question*, 201 PLI/CRIM 205, 211-212 (2006) (discussing when and how to preserve relevant e-mails on backup media).

⁶³ See WRIGHT, MILLER, & MARCUS, *supra* note 10, at §2008.2.

⁶⁴ *Phoenix Four v. Strategic Res. Corp.*, No. 05 Civ 4837 (HB), 2006 WL 1409413, at *2, *6 (S.D.N.Y. May 23, 2006) (stating that “proposed Rule 26(b)(2)[sic] reinforces the concept that a party must identify even those sources that are ‘not reasonably accessible,’ but exempts the party from having to provide discovery from such sources unless its adversary moves to compel discovery.”).

⁶⁵ See Final Report (2005), *supra* note 2, at C-42 (referring to “legacy data that remains from obsolete systems and is unintelligible on the successor system.”); see also Palgut v. City of Colo. Springs, No.06-cv-01142-WDM-MJW, 2007 WL 4277564, at *3 (D. Colo.

V. "GOOD CAUSE" FOR DISCOVERY

[28] Rule 26(b)(2)(B) permits discovery from sources which are not reasonably accessible if the requesting party establishes "good cause, subject to the limitations of Rule 26(b)(2)(C)."⁶⁶ The invocation of a "good cause" requirement expresses a substantial hurdle to discovery.⁶⁷ The court must not only determine if need and relevance exists, but must also balance the "burden or expense of the proposed discovery [to determine] if it outweighs its likely benefit," taking into account a number of considerations.⁶⁸

Dec. 3, 2007) (refusing to order restoration of inaccessible backup tapes because "the Defendant City of Colorado [does] not have the hardware to access them.").

⁶⁶ FED. R. CIV. P. 26(b)(2).

⁶⁷ See *Schlagenhaff v. Holder*, 379 U.S. 104, 121 (1964)(while the Federal Rules should be liberally construed to grant discovery, "they should not be expanded by disregarding plainly expressed limitations" such as a "good cause" requirement). A court should carefully weigh any potential disruption to business and information system activities which may result. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, PRINCIPLE EIGHT (2d ed. 2007), available at

http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf

Resort[ing] to disaster recovery backup tapes and other sources of electronically stored information that are not reasonably accessible requires the requesting party to demonstrate need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources, including the disruption of business and information management activities.

Id.

⁶⁸ FED. R. CIV. P. 26(b)(2)(C)(iii). The Committee Note suggests factors which may be appropriate for a court to "consider" in reaching its decision :

Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantify 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.

FED. R. CIV. P. 26(b)(2), Committee Note (2006).

A. CASES FINDING GOOD CAUSE

[29] In December, 2006, shortly after the Rule went into effect, the court in *Ameriwood Industries, Inc. v. Lieberman* (“*Ameriwood I*”),⁶⁹ concluded that good cause existed to authorize the creation of a mirror image of a hard drive. The 2006 Amendments had “clarified” that Rule 34 authorizes direct access to this type of information.⁷⁰ The same result was reached in *Thielen v. Buongiorno USA, Inc.*⁷¹ because the moving party had demonstrated a “viable reason” for the discovery.

[30] In *W.E. Aubuchon Co. v. Benefirst, L.L.C.*,⁷² the court found good cause to order production of inaccessible claim files based on the “considerations” listed in the Committee Note to Rule 26(b)(2)(B). In the case of *In re Veeco Instruments, Inc. Securities Litigation*,⁷³ a court held that there was “good cause” to order restoration of e-mail backup tapes because “it has not been demonstrated that [the e-mails sought are] reasonably available from any other easily accessed sources” and resources “are not an issue.”⁷⁴ Similarly, in *Disability Rights Council v.*

⁶⁹ *Ameriwood Indus., Inc. v. Liberman (Ameriwood I)*, No. 4:06CV524-DJS, 2006 WL 3825291 (E.D. Mo. Dec. 27, 2006).

⁷⁰ Rule 34(a) added an express right to “inspect, copy, test or sample” designated “electronically stored information” to the existing right to do so with respect to “tangible” things. See FED. R. CIV. P. 34(a), Committee Note (2006) (“The current rule [was] not clear that such testing or sampling is authorized; the amendment expressly permits it.”). The Note further cautioned that “[a]s with any other form of discovery, issues of burden and intrusiveness raised by [such requests] can be addressed under Rules 26(b)(2) and 26(c) [but] [t]he addition of testing and sampling to Rule 34(a) . . . is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.”).

⁷¹ *Thielen v. Buongiorno USA, Inc.*, No. 1:06-CV-16, 2007 WL 465680, at *2 (W.D. Mich. Feb 8, 2007).

⁷² *W.E. Aubuchon Co. v. Benefirst, L.L.C.*, 245 F.R.D. 38 (D. Mass. 2007).

⁷³ *In re Veeco Instrumetns, Inc. Sec. Litig.*, No. 05 MD 1695, 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007).

⁷⁴ *Id.* at *2. It can be argued that the burden with regard to other sources of information should have been placed on the requesting party to show that the information was not so available.

WMTA,⁷⁵ the Court held that there was an “overwhelming case for production of the backup tapes.”⁷⁶

[31] The logic used to reach these outcomes is consistent with that employed by the decisions rendered prior to the 2006 Amendments. In *Concord Boat Corporation v. Brunswick Corporation*,⁷⁷ the court concluded that restoration of backup media was not warranted because the “questionable” gains were “outweighed by the substantial burden and expense of conducting the search.”⁷⁸ In *Zubulake I*,⁷⁹ however, the court ordered restoration of a sample of backup media selected by the requesting party, the results of which were subsequently held to justify full restoration.⁸⁰

[32] Good cause has also been found in other factual contexts. In *Guy Chemical Company v. Romaco AG*,⁸¹ the court noted that “there [was] no other location where [the requesting party] could turn to acquire the requested discovery.” Similarly, the District Judge in *Columbia Pictures v. Bunnell*⁸² upheld a Magistrate Judge’s ruling that good cause existed to compel production of information temporarily stored in RAM because “it would not be an undue burden on defendants to employ a technical

⁷⁵ Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 129, 148 (D.D.C. 2007).

⁷⁶ *Id.* The court applied the factors listed in the Committee Note but expressed reservations about whether the benefits of Rule 26(b)(2)(B) could be claimed by a party which failed to disable features which automatically deleted e-mail after sixty days.

⁷⁷ *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 WL 33352759, at *9 (E.D. Ark. Aug. 29, 1997).

⁷⁸ *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) (adopting a marginal utility test utilizing sampling to determine if the necessity existed to order burdensome restoration, an approach echoed in *Zubulake v. USB Warburg, LLC (Zubulake I)*, 217 F.R.D. 309 (2003)).

⁷⁹ *Zubulake I*, 217 F.R.D. 309, 323-34 (S.D.N.Y. 2003).

⁸⁰ *See Zubulake v. USB Warburg, LLC (Zubulake III)*, 216 F.R.D. 280, 287 (2003) (ordering production from backup tapes based on results of sample).

⁸¹ *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310, 312 (N.D. Ind. 2007).

⁸² *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093, 2007 WL 2080419, at *3-6 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443 (Aug. 24, 2007) (requiring future production of information temporarily stored in RAM for less than six hours).

mechanism through which retention of Server Log Data in RAM is enabled.”⁸³

B. CASES DECLINING TO FIND GOOD CAUSE

[33] Courts have refused to find “good cause” to order discovery from inaccessible sources where the potential benefits did not outweigh the burdens and costs. The results in those cases are also consistent with decisions rendered under similar circumstances prior to the Amendments.

[34] In *Best Buy Stores v. Developers Diversified Realty Corporation*⁸⁴ the District Court reversed a Magistrate Judge’s order requiring restoration of inaccessible backup tapes⁸⁵ after carefully analyzing the elements of the “good cause exception.” It noted that the defendants had not argued or shown that the information was uniquely available from the database at issue or that it could not be more easily obtained from another more accessible source. Similarly, in *Ameriwood Industries, Inc. v. Liberman* (“*Ameriwood II*”), the defendants failed to demonstrate good cause “to order disclosure of [voluminous] communications and documents.”⁸⁶

[35] Other cases have reached similar results by simply referencing the proportionality principle. In *Oxford House v. City of Topeka*,⁸⁷ the court denied discovery because “the likelihood of retrieving these electronic communications [from backup media] is low and the cost high.” Similarly, a District Judge ruled in *National Union Fire Insurance v.*

⁸³ *Id.* at * 7. (“[D]efendants have failed to demonstrate that the Server Log Data is not reasonably accessible because of undue burden or cost [and, in any event] plaintiffs have shown good cause to order discovery of such data . . . and the burden and expense of the proposed discovery does not outweigh its likely benefit. . .”). *Id.* at*13

⁸⁴ *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, No. 05-2310, 2007 WL 4230806, at *1 (D. Minn. Nov. 29, 2007).

⁸⁵ *Id.* at *3. The court held that because of the high cost to restore and maintain the information the tape “is not at present reasonably accessible” and refused to hold that a duty had existed to preserve the information in accessible form merely because it was “potentially relevant to virtually any litigation . . . because of the quantity and nature of the information it contained.”

⁸⁶ *Ameriwood Indus., Inc. v. Liberman (Ameriwood II)*, No. 4:06CV524, 2007 WL 496716 (E.D. Mo. Feb.13, 2007).

⁸⁷ *Oxford House, Inc. v. City of Topeka*, No. 06-4004-RDR, 2007 WL 1246200, at *5(D. Kans. Apr. 27, 2007).

Clearwater Insurance Company,⁸⁸ that restoration of e-mails from backup tapes was not required under the facts of that case since “the expense of the proposed discovery outweighs its likely benefit.” In *Palgut v. City of Colorado Springs*,⁸⁹ the court refused to order restoration of backup tapes where “an adequate and full search” had occurred and the “cost of restoration outweighs the possible yield of relevant and probative information.”

VI. THE IDENTIFICATION REQUIREMENT

[36] Rule 26(b)(2)(B) requires “identification” of unsearched sources as a condition of treating electronically stored information as not reasonably accessible. The duty to identify extends only to those sources reasonably believed to contain discoverable information. The Rule does not spell out exactly when or how “identification” must occur,⁹⁰ although the Committee Note suggested listing the “category or type” of the source.⁹¹

[37] Failure to comply with this unique requirement could, in theory, have serious consequences.⁹² Some have, accordingly, argued that preparation of detailed “privilege-type” logs is advisable or even required.⁹³ However,

⁸⁸ Nat’l Union Fire Ins. Co. v. Clearwater Ins. Co., No. 04-CV-5032, 2007 WL 2106098, at *3 (S.D.N.Y. July 21, 2007)

⁸⁹ *Palgut v. City of Colo. Springs*, No. 06-cv-01142, 2007 WL 4277564, at *2 (D.Colo. Dec. 3, 2007).

⁹⁰ The purpose of “identification” is to assist the requesting party to determine if further steps should be taken. It was added to offset criticisms that “self-designation” of inaccessible sources is likely to be abused. See Final Report (2005), *supra* note 2, at C-44 (stating that the identification requirement is “an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information....”).

⁹¹ FED. R. CIV. P. 26(b)(2), Committee Note (2006) (“The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.”).

⁹² Compare the result in *Comm. Concerning Cmty. Improvement v. City of Modesto*, No. CV-F-04-6121 LJO DLB, 2007 WL 4365584, at *5 (E.D. Cal. Dec. 11, 2007), where a court refused to entertain a motion to recover the costs of an e-discovery vendor because of a failure to raise the accessibility concerns by objection or motion during the discovery process.

⁹³ *But see* Lee H. Rosenthal, “A Few Thoughts on Electronic Discovery After December 1, 2006,” 116 YALE L.J. POCKET PART 167, 178 (2006) (“[P]rivilege logs epitomize the

in most cases, identification needs will be met through use of one or more of the opportunities available under the Amendments to disclose the information.

[38] In some cases, for example, identification will be part of the initial disclosures under Rule 26(a).⁹⁴ Initial disclosures of potential sources not being searched, known to otherwise be within the scope of the rule, must be made “at, or within, fourteen days” of the Rule 27(f) meeting,⁹⁵ unless delayed by stipulation or court order. Perhaps more typically, however, identification will occur as a byproduct of the informal exchanges about potential sources which naturally occur during development of a discovery plan prior to or at⁹⁶ the Rule 26(f) conference. Finally, formal responses to discovery can, and should, articulate or “identify” sources not being searched if they arguably may contain discoverable information.⁹⁷ As suggested by *Sedona Principle 4*, “responses and objections to discovery” should clearly articulate “the scope and limits of what is being produced,” thus satisfying the intent of the Rule.

[39] No reported decisions have yet involved allegations of a failure to make “identification.”

worst features of discovery: they are expensive; they take forever; and when finished they are rarely used.”).

⁹⁴ See Final Report (2005), *supra* note 2, at C-23 (“The obligation [under Rule 26(a), as amended by the 2006 Amendments] does not force a premature search, but only requires disclosure, either initially or by way of supplementation, of information that the disclosing party has decided it may use to support its case.”). Compare the discussion in Frank DeGiulio, *Electronic discovery: A Practicum for the Maritime Lawyer*, 19 U.S.F. MAR. L. J. 1, 21 (2006-2007) (“[T]he committee notes state that even sources of electronic information that are claimed to be ‘inaccessible’ under amended Rule 26(b)(2) must be identified categorically in a party’s initial disclosures under Rule 26(a).”).

⁹⁵ See FED. R. CIV. P. 26(a)(1)(C) (“[U]nless a different time is set by stipulation or court order.”).

⁹⁶ See THE UNITED STATES COURT FOR THE DISTRICT OF KANSAS: GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION (2006), available at <http://www.ksduscourts.gov/guidelines/electronicdiscoveryguidelines.pdf> (“If the responding party is not searching or does not plan to search sources containing potentially responsive information, it should identify the category or type of such information.”).

⁹⁷ It would make sense to articulate the planned limits on discovery from inaccessible sources in sufficient detail to ensure that the position is preserved.

VII. CONDITIONS OF DISCOVERY/COST-SHIFTING

[40] Courts usefully employ cost-shifting as a nuanced tool to adjust court ordered discovery where the balance between benefit and burden is uncertain.⁹⁸ The authority to issue protective orders under Rule 26(c) necessarily includes the ability to deny discovery or shift costs, regardless of the type of discovery sought or the accessibility of the information to the responding party.⁹⁹

[41] A court which orders discovery from inaccessible sources for “good cause” under Rule 26(b)(2)(B) “may [also] specify conditions.” The court can, for example, limit the scope and extent of the discovery sought;¹⁰⁰ stagger the sequence of discovery by requiring resort to the most accessible sources; order sampling of inaccessible sources to further assess the likely burdens and costs¹⁰¹ or utilize cost shifting to mitigate some of the costs or burdens involved. Costs have been shifted, since the Amendments, in cases involving discovery of information on backup media¹⁰² and on hard drives,¹⁰³ subject to a third party subpoena.¹⁰⁴

[42] The Committee Note to Rule 26(b)(2)(B) has been construed as cementing a linkage between a finding of inaccessibility and cost

⁹⁸ See Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1 (2007).

⁹⁹ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978)(A party “may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.”).

¹⁰⁰ See *Semsroth v. City of Wichita*, 239 F.R.D. 630, 641 (D. Kan. 2006) (restricting scope of search required).

¹⁰¹ *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 444 (2007)(“[R]estoration of one-fourth of the backup tapes should be adequate to determine whether the tapes are likely to possess relevant evidence”); see also *In re Natural Gas Commodity Litig.*, 235 F.R.D. 199, 220 (S.D.N.Y. 2005) (stating that legacy computers are to be tested by sampling).

¹⁰² *In re Veeco Instruments Sec. Litig.*, No. 05 MD 1695 (CM) (GAY), 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007).

¹⁰³ *Thielen v. Buongiorno USA, Inc.*, No. 1:06-CV-16, 2007 WL 465680 (W.D. Mich. Feb. 8, 2007).

¹⁰⁴ *Guy Chem. Co. v. Romaco AG*, 243 F. R. D. 310 (N.D. Ind. 2007).

shifting.¹⁰⁵ However, “[t]he amended rule does not say that judges may only consider cost allocation if the subject of the discovery . . . is not reasonably accessible.”¹⁰⁶ The result turns on the burden or cost of discovery, not the lack of accessibility of the source.¹⁰⁷ Early cases refused to use “an ironclad formula” in light of the need for a case by case resolution.¹⁰⁸ Not until 2003 did a court create a hierarchy of application of the factors while tying the right to consider cost shifting to the lack of accessibility of the information sought.¹⁰⁹

[43] Pre-amendment multi-factor tests create unnecessary confusion. As one court wryly observed, the considerations cited in the Committee Note merge the multi-factor cost shifting tests from prominent pre-Amendment decisions with a “duplicate[ion] [of] a step or two.”¹¹⁰ In *Guy Chemical Company v. Romaco*, however, the court noted that it was not required to follow any particular test or formulate where the need for allocation was clear under the circumstances - and exercised its discretion to do so.¹¹¹ It

¹⁰⁵ *Peskoff v. Faber*, 240 F.R.D. 26, 31 (D.D.C. 2007) (“The obvious negative corollary of [the Advisory Committee Note to Rule 26(b)(2)(B)] is that accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a finding of inaccessibility.”). In a subsequent opinion, the court appeared to affirm its conclusion. *See Peskoff v. Faber*, 224 F.R.D. 54, 64 (D.D.C. 2007) (leaving open the possibility that an alternative ground-waiver by failure to timely raise Rule 26(b)(2)(B) - also applied).

¹⁰⁶ Rosenthal, *supra* note 93, 116 YALE L. J. POCKET PART 167 at 180.

¹⁰⁷ *See* David Lender, *Cost Shifting Under the New Rules: Is The Landscape Changing?*, THE FED. LAW., Aug. 2007, at 4, 5-6; *see also* Christopher Boehning and Daniel J. Toal, ‘*Peskoff*,’ *Cost-Shifting and Accessible Data*, N.Y.L.J., June 26, 2007, at 5 (questioning the validity of confining cost-shifting to inaccessible sources regardless of burdens involved).

¹⁰⁸ *See* *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 463 (D. Utah 1985) (listing the reasons which persuaded the court to exercise its discretion).

¹⁰⁹ *See* *Zubulake v. USB Warburg, LLC (Zubulake I)*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (announcing a seven factor test).

¹¹⁰ *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, 2007 WL 2687670, at *11, n. 6 (N.D. N.Y. Sept. 7, 2007) (refusing to shift costs incurred when a discovery vendor separated e-mail from its attachments).

¹¹¹ *See* *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310, 312 (N.D. Ind. 2007) (“This Court has discretion in determining the appropriate remedy, and finds is unnecessary to engage in such an analysis.”).

also left open the possibility that attorneys' fees might be shifted under some circumstances.¹¹²

[44] The costs to cull and review material for relevance and privilege are as much of the costs of discovery as restoration, and can be unduly burdensome or expensive where the volume is high.¹¹³ Advanced techniques, which supplement the traditional model of individual human review on a document by document basis, are increasingly deployed either internally at a corporation or through hosted vendor service providers.¹¹⁴

[45] In *Chemie v. PPG Industries, Inc.*,¹¹⁵ the court held that because privilege review in that case was such a “daunting task,” the costs of searching for documents and preparing a privilege log would be “open to further discussion [and] [i]t may be that some cost sharing is warranted.” In *Stanziale v. Pepper Hamilton LLP*,¹¹⁶ a party sought to shift all review costs, including “such privilege-related filters as [a] court may impose,” and *Principle 13* of the Sedona Principles¹¹⁷ emphasizes that the “costs of retrieving and reviewing” electronic information may be shifted in appropriate cases.

¹¹² *But see* *Zubulake v. USB Warburg, LLC* (“*Zubulake III*”), 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (expressing the courts opinion that “only the costs of restoration and searching should be shifted” because, among other reasons, “any cost of reviewing” can be avoided by entering into “claw-back” agreements allowing parties to forgo privilege review altogether).

¹¹³ Laura E. Ellsworth & Robert Pass, *Cost Shifting in Electronic Discovery*, 5 Sedona Conf. J. 125, 131 (2004).

¹¹⁴ At the risk of over-simplification, these technologies, informed by knowledge of the issues in dispute, help identify key relationships and terminology and permit early analysis of and reduction in the volume (“culling”) of individual information requiring manual review for relevance or privilege. The degree to which this process is well suited for accurate identification or exclusion of privileged information is very much at issue, with a spectrum of competing opinions in existence.

¹¹⁵ 218 F.R.D. 416, 422 (D. Del. Oct. 8, 2003).

¹¹⁶ *Stanziale v. Pepper Hamilton LLP*, No. M8-85 (PART 1)(CSH), 2007 WL 473703 (S.D.N.Y. Feb. 9, 2007) (transferring case to Delaware District Court).

¹¹⁷ *Sedona Principle 13*, *supra* note 48, provides, in relevant part, that “[i]f the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information may be shared by or shifted to the requesting party.”

XIII. THE IMPACT ON PRESERVATION OBLIGATIONS

[46] One of the key goals of the 2006 Amendments was to encourage early discussion and agreement on preservation issues.¹¹⁸ A producing party can face a Hobson's choice between the burden and cost of preservation and the risk of sanctions for failing to adequately meet its obligations. The mandatory meet and confer process required by Rule 26(f) is intended to help by reducing post-discovery spoliation disputes.¹¹⁹

[47] The Amendments do *not* directly regulate the pre-discovery obligations to preserve potential sources of such information, a task left to the common law. The mere fact that information exists on sources which are not reasonably accessible does not resolve the preservation analysis.¹²⁰ Parties may not "exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."¹²¹

[48] Emerging post-Amendment cases have clarified, however, that a requesting party disregards the opportunity to raise a preservation issue at its peril. The triggering event is actual knowledge that the information will be sought in discovery. Absent awareness of the need to act to retain specific sources of electronic information, a presumption of reasonable

¹¹⁸ See Thomas Y. Allman, *Managing Preservation Obligations After the 2006 Federal E-Discovery Amendments*, 13 RICH. J. L. & TECH 9, 14-23, 26 (2007) ("[A]bsent agreement with opposing counsel, unilateral preservation decisions about inaccessible sources always carry some risk of post-production challenge for potential spoliation.").

¹¹⁹ See Michael R. Nelson & Mark H. Rosenberg, *A Duty Everlasting: The Perils of Applying Traditional Doctrines of Spoliation to Electronic Discovery*, 12 RICH. J. L. & TECH. 14, 44-45 (2006).

It should help to ensure that all parties are on notice as to the precise scope of their preservation obligations [and] encourage parties to strike reasonable compromises with regard to these obligations, in accordance with the . . . Committee Note's statement that "[t]he parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities.

¹²⁰ See FED. R. CIV. P. 26(b)(2), Committee Note (2006) ("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.").

¹²¹ See FED. R. CIV. P. 37, Committee Note (2006).

compliance attaches to steps undertaken by producing parties in good faith.¹²² In *Healthcare Advocates v. Harding, Early, Follmer & Frailey*,¹²³ no duty to retain electronic screen shots was found when the producing party neither “knew or should have known” that temporary cache files would be sought in litigation.¹²⁴ A similar result was reached in *Columbia Pictures v. Bunnell*,¹²⁵ where the court refused to find a duty to preserve information in RAM, where the producing party had no reason to anticipate the claim, and the requesting party first raised it in a motion for sanctions.¹²⁶ In *Petcouo v. C.H. Robinson Worldwide, Inc.*,¹²⁷ the court refused to sanction a party for failing to impose an entity-wide

¹²² See THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, PRINCIPLE SIX (2d ed. 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (“Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.”).

¹²³ *Healthcare Advocates v. Harding, Early, Follmer & Frailey*, 497 F. Supp. 2d 627, 640-41 (E.D. Pa. 2007).

¹²⁴ *Id.* at 641 (“[T]hey had no reason to believe that their activities would subject them to a lawsuit for ‘hacking,’ [and the failure to preserve] is not an action that shocks the conscience.”).

¹²⁵ *Columbia Pictures v. Bunnell*, No. CV 06-1093FMC-JCX, 2007 WL 2080419 (C.D. Cal. May 29, 2007), *motion to review denied*, 245 F.R.D. 443, 446 (C.D. Cal. 2007) (requiring future production of information temporarily stored in RAM for less than six hours); see Thomas Y. Allman & Kevin F. Brady, *Can Random Access Memory Make Good Law?*, NAT’L L.J., Dec. 10, 2007, at E1 (noting that a requirement to place information into a usable form for production under Rule 34 with a “modicum of cooperation” is consistent with existing legal principles, particularly when the information is not available elsewhere).

¹²⁶ The magistrate judge held that “the defendants’ failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required” because, *inter alia*, there had been “no specific request by the defendants to preserve Serve Log Data present solely in RAM.” *Columbia Pictures*, 2007 WL 2080419, at *14. During a colloquy about the case at the 2007 Georgetown Law Center E-Discovery Conference, the point was made by a magistrate judge that there may very well be occasions when the duty to preserve such information will be obvious, and steps may have to be undertaken to preserve well before discovery is sought.

¹²⁷ No. 1:06-CV-2157-HTW-GGB, 2008 WL 542684 (N.D. Ga. Feb. 25, 2008) (“It does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of e-mails.”).

preservation order on the deletion of e-mails, where the requesting party had not indicated the need to do so.¹²⁸

[49] The focus should be on the likelihood of unique and discoverable information residing on the source at issue. There is no duty to preserve duplicative information which may be available on more accessible sources. As explained by the former Chair of the Advisory Committee, “[a] primary factor to consider [in deciding whether or not to act to preserve inaccessible sources of information] is whether the information likely to be found on those sources is also available on other, reasonably accessible sources.”¹²⁹ Thus, in *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*,¹³⁰ the court held that the duty to preserve “would not automatically include information maintained on inaccessible computer backup tapes.”¹³¹ In that case, the court relied upon testimony by the General Counsel that he believed that the information was available on other accessible sources.¹³²

[50] Similarly, in *Escobar v. City of Houston*,¹³³ the court refused to issue sanctions based on the overwriting of a tape of police communications, where the information was available elsewhere, and there was no showing of bad faith in the operation of the system.

¹²⁸ See also *Marketfare Annunciation, LLC v. United Fire & Casualty Insurance Co.*, No. 06-07232, 2007 WL 3273440 (E.D. La. Nov. 5, 2007) (refusing to consider a motion for sanctions because the preservation issue was not raised in a timely manner “as opposed to bypassing this step in the discovery process and seeking sanctions directly.”).

¹²⁹ Lee H. Rosenthal, *Not Reasonably Accessible Information and Allocating Discovery Costs*, YALE L.J. POCKET PART 167 (2006).

¹³⁰ *Cache La Poudre Feeds, LLC v. Land O Lakes, Inc.*, 244 F.R.D. 614, 628 (D. Colo. 2007) (stating that a reasonable investigation to identify and preserve relevant materials does not generally include inaccessible back-up tapes).

¹³¹ In *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327, at *6 (D.D.C. Jan. 17, 2007), the court noted that *Sedona Principle 5* accurately captured the evolving case law and applied it to the case before it.

¹³² *Citing to Zubulake v. UBS Warburg (“Zubulake IV”)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

¹³³ *Escobar v. City of Houston*, No. 04-1956, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007).

[51] The presumption of rational activity in *Escobar* was reinforced by the provisions of Rule 37(e), formerly Rule 37(f).¹³⁴ This provision was added to the 2006 Amendments to regulate rule-based sanctions for losses incurred as the result of routine operations,¹³⁵ despite implementation of a reasonable litigation hold.¹³⁶ However, willful continuance of a routine operation involving destruction, when preservation obligations are known to apply, is not an example of “good faith” operation of that system.¹³⁷ In *Disability Rights Council v. WMTA*,¹³⁸ the Magistrate Judge noted a failure (which the court described as “indefensible”) to prevent the automatic deletion of e-mails, including “possibly relevant and discoverable e-mails.”¹³⁹

[52] Rule 37(e) represents a useful guidepost which balances the need for discovery with the practical constraints on information system operations. It is consistent with holdings in a majority of circuits,¹⁴⁰ which hold that destruction of information pursuant to a reasonable records retention

¹³⁴ Rule 37(e), as renumbered by the 2007 Amendments without change in textual matter, provides that “[a]bsent 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.”

¹³⁵ See Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor in Electronic Discovery*, 2 FED. CTS. L. REV. 65, 66-67, 77-78, 82 (2007).

¹³⁶ Comments 5c and 5d to *Sedona Principle 5* recommend use of a “repeatable, documented” process in implementing “legal” or “litigation” holds, a topic which is now the subject of *The Sedona Conference® Commentary on Legal Holds*. See *The Sedona Conference® Commentary on Legal Holds: The Trigger & The Process* (Aug. 2007 Public Comment Version), available at <http://www.thesedonaconference.org>; accord *In re Kmart Corporation*, 371 B.R. 823, 847 (Bkrcty. N.D. Ill. July 31, 2007) (finding no evidence that the party knew that discoverable evidence was been destroyed as part of the operation of its retention policies).

¹³⁷ It is clear that a party may not “exploit” a routine operation “in order to destroy specific stored information that it is required to preserve.” See Committee Note, Rule 37(f). The Committee Note points out that “good faith” may require active intervention in the routine operation of some inaccessible sources of information as part of a “litigation hold.”

¹³⁸ 242 F.R.D. 139 (D.D.C. June 1, 2007).

¹³⁹ *Id.* at *146 (noting that users may defeat the automatic deletion by archiving the email, which a majority of employees did not do).

¹⁴⁰ See *Stevenson v. Union Pacific Railroad Company*, 354 F.3d 739, 746 (8th Cir. 2004)(holding that “some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth” is required).

system is not spoliation absent a deliberate intent to interfere with litigation.¹⁴¹

[53] Finally, no duty to preserve inaccessible sources exists where disproportionate efforts are required which outweigh the potential benefits.¹⁴² Drawing that line is not easy. In *Cache La Poudre Fees, LLC v. Land O' Lakes, Inc.*,¹⁴³ the trial court faulted an entity for its failure to preserve hard drives of former key employees. For that reason, effective use of early opportunities to discuss and confirm preservation steps undertaken is advisable.

[54] Meeting preservation obligations should be treated as part of a commitment to effective compliance. Increasingly, entities that can afford to do so are dedicating IT personnel and counsel to the task of coordinating and managing the process. This is usually accompanied by improved consistency in approach, better training of internal personnel, and enhanced processes and procedures.

IX. METADATA OR EMBEDDED DATA

[55] Operating systems and software applications generate a variety of types of information, including “metadata and embedded data,” which are not typically visible to the viewer as part of the image visible on a

¹⁴¹ While *Residential Funding Corporation v. DeGeorge Financial Corp*, 306 F.3d 99, 107-8 (2d Cir. 2002) may be seen as more strict in regard to mere negligence, Rule 37(e) represents a collective judgment by the Rules Committees and Congress that a broader range of protection is preferable for policy reasons in the limited field of losses from routine, good faith operation of information systems.

¹⁴² “Electronic discovery burdens should be proportional to the amount in controversy and the nature of the case. Otherwise, transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.” THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 (2d ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf at 17.

¹⁴³ *Cache La Poudre Fees, LLC* 244 F.R.D. at 629 (“By wiping clean the computer hard drives of former employees who had worked on the [project], Land O’Lakes effectively eliminated a readily accessible source of potentially relevant information”).

screen.¹⁴⁴ Access to and production of that information may involve burdens and costs yet to be essential to the resolution of an issue.¹⁴⁵

[56] Discovery of metadata or embedded data is regulated by a hybrid and somewhat tentative approach in the 2006 Amendments, given the uncertainty of the Advisory Committee on the best way to proceed.¹⁴⁶ Increasingly, District Courts provide local guidance to ensure that the issue will be resolved by early agreement,¹⁴⁷ local rule,¹⁴⁸ or by the terms of a case management order.¹⁴⁹

¹⁴⁴ See FED R. CIV. P. 26(f), Committee Note (2006). The characteristics of the form of production roughly correspond to degree to which some or all of this type of data is included. See Electronic Discovery Reference Model, Production – Form of Production, available at http://www.edrm.net/wiki/index.php/Production_-_Form_of_Production (distinguishing between production of electronic information in the form of Paper, Quasi-Paper, Quasi-Native and Native production, with the least amount of metadata and embedded data (none) reproduced in “paper” production and the most in “native” production).

¹⁴⁵ There are valid reasons for a party to prefer to produce information as an “image” without metadata, even though it might be more expensive to do so than simply producing in “native” form. The process is complicated by concerns about the inadvertent production and receipt of metadata. See generally J. Brian Beckham, *Production, Preservation and Disclosure of Metadata*, 7 COLUM. SCI. & TECH. L. REV. 1 (2006).

¹⁴⁶ The minutes of the Civil Rules Advisory Committee reveal that the rule makers decided to remain silent on whether to require parties to produce metadata and preferred to leave the issue to the courts, presumably because electronic discovery was such a new and changing area of law that the Committee was not confident in setting down a firm and inflexible rule.

Lucia Cucu, Note, *The Requirement for Metadata Production Under Williams v. Sprint/United Management Co: An Unnecessary Burden for Litigants Engaged in Electronic Discovery*, 93 CORNELL L. REV. 221, 224 (2007) (citing FED. R. CIV. P. Advisory Committee’s minutes, Apr. 15, 2005, *25, available at <http://www.uscourts.gov/rules/Minutes/CRAC0405.pdf>). The Committee was concerned about having the “unintended effect” of implying that metadata and embedded should be automatically produced. FED. R. CIV. P. Advisory Committee’s minutes, Apr. 15, 2005 at *22, *25.

¹⁴⁷ “Meta-Data, especially substantive Meta-Data, need not be routinely produced, except [by agreement or] upon a showing of good cause in a motion filed by the Requesting Party.” See D. Md., *Suggested Protocol for Discovery of Electronically Stored Information*, 26 (unpublished report), available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> (alteration in original).

[57] For parties litigating without guidance from local rules, Rules 16(b), 26(f), and 34(b) collectively govern how parties are to frame the issue in advance of collection and processing. While a party need not specify preferred form or forms for production, it is encouraged.¹⁵⁰ The issue should be raised early if it is going to be material to a case.¹⁵¹ In *D’Onofrio v. SFX Sports Group, Inc.*,¹⁵² a failure of the original discovery requests to clearly request information in its original format, with metadata, was fatal to a motion to compel.¹⁵³

[58] A producing party is obligated by Rule 34 to state the form or forms it intends to use. Absent an agreement, Rule 34(a) provides that production should be made “in a form or forms in which [the information at issue] is ordinarily maintained or in a form or forms that are reasonably usable.”¹⁵⁴

[59] When a court must rule on the topic, a process of assessing good cause, subject to the proportionality principle of Rule 26(b)(2)(C), is

¹⁴⁸ See *Wyeth v. Impax Labs.*, No. Civ. A. 06-222-JJF, 2006 WL 3091331, at *3 (D. Del. Oct. 26, 2006) (applying Delaware Default Standard approving production in imaged files).

¹⁴⁹ See *In re Seroquel Prods. Liab. Litig.*, No. 1769, 2007 WL 219989, at *4 (M.D. Fla. Jan. 26, 2007) (specifying format for production including metadata fields and providing process for resolution of disputes).

¹⁵⁰ “Whether [metadata and embedded data] should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.” See FED. R. CIV. P. 26(f), Committee Note (2006) (alteration in original).

¹⁵¹ In *Kentucky Speedway v. NASCAR*, No. 05-138-WOB, 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006), the court noted the need for parties to discuss the topic in the Rule 26(f) conference and refused to require reproduction in native format where it had not occurred.

¹⁵² 247 F.R.D. 43 (D.D.C. Jan. 23, 2008).

¹⁵³ *Id.* at 48 (collecting cases and citing to blog arguing that “in order to obtain metadata, . . . you should specifically ask for it to begin with”).

¹⁵⁴ *In re ATM Fee Antitrust Litig.*, No. C-04-02676 CRB, 2007 WL 1827635, at *7 (N.D. Cal. June 25, 2007). “The rule . . . provides that the form of electronic production required under the new rule may be altered by agreement of the parties or by order of the Court.” *Id.* (quoting FED. R. CIV. P. 34(b)(2)(E)(i)-(ii)). The choice of form or forms necessarily dictates whether and to what extent metadata is sought under the circumstances.

employed. In *O'Bar v. Lowe's Home Centers, Inc.*,¹⁵⁵ for example, the local guidelines provided that even where "Meta-Data" is relevant, "it [may] not be reasonably subject to discovery given the Rule 26(b)(2)(C)" factors."¹⁵⁶ A court should take into account the role that metadata and embedded data are expected to play, balanced against the burden and costs involved.¹⁵⁷

[60] In performing the balancing required, a court should also consider the impact of any enhanced privilege review required if there is a credible risk implicating the privilege. For example, cases involving patent, unfair competition, trademark, and antitrust often raise disproportionate review concerns where metadata may include privileged material.¹⁵⁸

[61] Courts have successfully resolved a number of disputes since the 2006 Amendments using this hybrid approach. In *Michigan First Credit Union v. Cumis Insurance Society*,¹⁵⁹ the court sustained an objection to production "along with intact metadata" because "production of this metadata would be overly burdensome with no corresponding evidentiary

¹⁵⁵ *O'Bar v. Lowe's Home Ctrs., Inc.*, No. 5:04-cv-000190W, 2007 WL 1299180, at *4 n.2, n.4 (W.D.N.C. May 2, 2007) (basing Guidelines on D. Md., *Suggested Protocol for Discovery of Electronically Stored Information 25*, (unpublished report) available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf>).

¹⁵⁶ *Id.* at *4, n. 3.

¹⁵⁷ Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 (2d ed. 2007), available at http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2d_ed_607.pdf.

¹⁵⁸ See Jack E. Pace, III & John D. Rue, *Early Reflections on E-Discovery in Antitrust Litigation: Ten Months Into the New Regime*, 22 ANTITRUST 67, 69 (2007) ("[T]he costs associated with just the additional privilege review that would be necessary for each and every production of ESI (including metadata) could be staggering.").

¹⁵⁹ *Michigan First Credit Union v. Cumis Ins. Soc'y*, No. 05-74423, 2007 WL 4098213, at *2-3 (E.D. Mich. Nov. 16, 2007).

value.” Also, in the case of *Schmidt v. Levi Strauss & Co.*,¹⁶⁰ the court rejected a motion to compel reproduction in “native, electronic” format because the “the apparent burden and expense of such an undertaking” was held to “dwarf any benefit,” citing to Rule 26 (b)(2)(C).

X. ASSESSMENT AND RECOMMENDATIONS

[62] Astute observers were initially critical of the “two-tiered” approach because undue burden or cost in discovery could have been addressed by the existing limitations on discovery found in Rule 26(b).¹⁶¹ Some argued that the addition of a “good cause” requirement would not alter outcomes and constituted a meaningless cosmetic change.¹⁶²

[63] Fairly read, the results of the decisions applying Rule 26(b)(2)(B) are not much different from those which one would have expected under pre-Amendment case law. Although “good cause” is often dutifully (and mechanically) referenced, the courts are, in fact, focused primarily on Rule 26(b)(2)(C)(iii), since it ultimately determines whether electronically stored information is discoverable, regardless of the accessibility of the source.¹⁶³

[64] Thus, the question raised by the critics remains: was the Advisory Committee justified in introducing yet another a “good cause” requirement

¹⁶⁰ *Schmidt v. Levi Strauss & Co.*, No. C04-01026 RMW (HRL), 2007 WL 2688467, at *2 (N.D. Cal. Sept. 10, 2007).

¹⁶¹ See Comment 04-CV-179, The Association of the Bar of the City of New York, February 15, 2005, available at <http://www.uscourts.gov/rules/e-discovery/04-CV-179.pdf>. (“Rule 26(b)(2) already sets out the factors a court should consider in determining whether otherwise permissible discovery should be limited by the court.”).

¹⁶² See Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 1, 89-91 (2007), available at http://jolt.law.harvard.edu/articles/pdf/v21/NOYES_Good_Cause_Is_Bad_Medicine.pdf (suggesting that the Advisory Committee knew the good cause standard would be “toothless and meaningless” but was adopted as a “somewhat Solomonic action” to cater to demands of defense lawyers while reassuring plaintiffs’ lawyers that the court would rely on the “familiar and friendly mantra of liberal discovery to interpret the vague good cause standard.”).

¹⁶³ See Panel Discussion, *Managing Electronic Discovery: Views from the Judges*, 76 FORDHAM L. REV. 1, 23 (October 2007) (stating courts may “pass by” the “almost mechanical burden-shifting procedure” because “even if it is accessible, the value is so outweighed by the burden here that I am not going to require production.”) (Francis, J.).

in the Federal Rules?¹⁶⁴ It was certainly not a given. After the original proposal¹⁶⁵ was criticized, the Committee considered, but rejected, a draft which did not mention “good cause.”¹⁶⁶ Both the National Conference of Commissioners on Uniform State Laws (NCCUSL)¹⁶⁷ and the Conference of Chief Justices¹⁶⁸ have adopted that approach.¹⁶⁹

[65] The “good cause” requirement has come to play an important role in party-managed discovery. That process “offers litigants the opportunity to work toward agreement, rather than impasse, in defining the scope of

¹⁶⁴ See *Judges, Lawyers, and the New Rules*, 43 TRIAL 20, 22 (Apr. 2007) (“[I]n the end, we have to use the same test to determine whether discovery should go forward – the so-called proportionality rule, which had been Rule 26(b)(2) and is now 26(b)(2)(C). That rule provides that a judge can deny or limit or condition a discovery request that is too burdensome or expensive.”) (Hedges).

¹⁶⁵ It was originally proposed that a court may “order discovery of the [not reasonably accessible] information for good cause.” See REPORT OF THE ADVISORY COMMITTEE TO THE STANDING COMMITTEE at 6 (May 17, 2004, revised Aug. 3, 2004), available at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf>.

¹⁶⁶ *Id.* at lines 1435-1512 (“[a] requesting party may obtain an order for discovery of the [not reasonably accessible] information by showing that it is consistent with [then] Rule 26(b)(2)(B).”).

¹⁶⁷ See UNIF. R. RELATING TO THE DISCOVERY OF ELECT. STORED INFO. R. 8(c) (Nat’l Conference of Comm’rs on Unif. State Laws, Oct. 10, 2007), available at http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm.

The court may order discovery of electronically stored information that is from a source that is not reasonably accessible because of undue burden or expense if the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

¹⁶⁸ See GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECT.-STORED INFO. R. 5 (Conference of Chief Justices, Aug., 2006), available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf> (“If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as: [listing 13 factors].”).

¹⁶⁹ California has issued an Invitation to Comment on e-discovery proposals which adopt a “good cause” requirement for discovery from inaccessible sources in Code Civ. Proc., § 2031.060 (Protective Orders). See Invitation to Comment, (LEG-08-01/W08-01) (Jan., 2008), available at <http://www.courtinfo.ca.gov/invitationstocomment/documents/w08-01.pdf>. The proposal engrafts the amendment on a structure built on the NCCUSL Uniform Rules, Rule 8 (Limitation on Discovery), subdivision (c).

discovery for the various sources of electronically stored information potentially discoverable in their case.”¹⁷⁰ Increased efficiency in that effort was at the forefront of the Committee concerns.¹⁷¹ Professor Marcus, the Consultant to the Committee, has explained that the Advisory Committee felt that absent an explicit “two-tiered” approach, a party would be required to filing motions for protective orders each time the accessibility issue was sought to be raised.¹⁷²

[66] Thus, the answer to the criticism is not to be found by examining the outcomes of contested cases - they have not changed - but by looking at the day to day conduct of party managed discovery.

[67] Anecdotal evidence shows that parties have absorbed the value judgment involved. The “good cause” requirement acts as a proxy for the judgment that discovery should concentrate on accessible sources and careful attention to be paid to balancing potential benefit against any burdens, if it is to go beyond them. There appears to be a heightened attention to discovery from accessible sources before burdensome electronic discovery is required. Parties are increasingly tempering their demands and reaching practical and effective accommodations under circumstances which did not exist before.

[68] On balance, therefore, and despite the cumbersome nature of the Rule, it would appear that the benefits more than justify the decision by the Advisory Committee to introduce the “two-tiered” system of electronic discovery.

¹⁷⁰ See Theodore C. Hirt, *The Two-Tier Discovery Provision of Rule 26(B)(2)(B) – A Reasonable Measure for Controlling Electronic Discovery?*, 13 RICH. J. L. & TECH. 12 at ¶ 1, ¶43 (2007), available at <http://law.richmond.edu/jolt/v13i3/article12.pdf> (“[T]his Rule should assist the parties and the court in establishing a reasonable path through the electronic discovery process.”).

¹⁷¹ “Rule 26(b)(2)(B) does not create new authority for judges to limit discovery or to allocate the costs of that discovery.” Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 181 (2006).

¹⁷² Richard L. Marcus, *E-Discovery & Beyond: Toward Brave New World or 1984?*, 236 F.R.D. 598, 614 (2006) (“Requiring a motion or court action every time a Rule 34 request sought information that might be contained on backup tapes or in legacy data could be a gross waste of judicial and litigant time.”).

APPENDIX
Evolution of the Two-Tiered Approach (1999 – 2007)

Date	Meeting, Report or Action
1983	Rule 26(b)(2)(iii)(the “proportionality principle”) added to limit discovery when “burden or expense” of proposed discovery outweighs its likely benefit
1999	E-Discovery issues first raised at Public Hearings on then-current Discovery Amendments
2002	Initial Sedona Conference on E-Discovery held in Phoenix, Arizona
2003 March	Public Comment version of <i>The Sedona Principles</i> issued
April 14	Discovery Subcommittee Memo suggests adapting Texas Rule 196.4 relating to “reasonably available” information for use in Federal Rules (<i>available at</i> http://www.kenwithers.com/rulemaking/index.html) (navigate to Memo) (last visited Jan. 28, 2008)
May 1- 2	Advisory Committee authorizes Subcommittee to begin drafting e-discovery proposals (Minutes <i>available at</i> http://www.uscourts.gov/rules/Minutes/CRAC0503.pdf) (last visited Jan. 28, 2008)
Sept 15	Discovery Subcommittee Memo raises issue of requiring good cause for production of inaccessible data (<i>available at</i> http://www.kenwithers.com/rulemaking/civilrules/marcus091503b.pdf) (last visited Jan. 28, 2008)
2004 Feb 20-21	“Conference on Electronic Discovery” held at Fordham Law School, New York City [Draft Proposals furnished to participants] (<i>available at</i> http://www.uscourts.gov/rules/EDiscovery_Conf_Agenda_Materials.pdf)
April	<i>The Sedona Principles</i> (First Edition) issued
April 5	Discovery Subcommittee Memo recommends requiring a court order before obtaining information that is not reasonably accessible (<i>available at</i> http://www.kenwithers.com/rulemaking/civilrules/marcus040604.pdf) (last visited Jan. 28, 2008)
April	Advisory Committee approves concept of limitation keyed

15-16	to reasonable accessibility with good cause for discovery (Minutes <i>available at</i> http://www.uscourts.gov/rules/Minutes/CRAC0404.pdf) (last visited Jan. 28, 2008)
May 17	Advisory Committee Report (contains draft Rule and Committee Note) (<i>available at</i> http://www.uscourts.gov/rules/Reports/CV5-2004.pdf) (last visited Jan. 28, 2008)
June 17-18	Standing Committee Meeting approves draft proposals for publication (Minutes <i>available at</i> http://www.uscourts.gov/rules/Minutes/june2004.pdf) (last visited Jan. 28, 2008)
August 3	Advisory Committee Report (May 17, revised August 3) (revised draft Rule 26(b) and Rule 45(d) and Committee Notes (Report <i>available at</i> http://www.uscourts.gov/rules/comment2005/CVAug04.pdf) (last visited Jan. 28, 2008)
2005 Jan/Feb	Public Hearings on Proposed E-discovery Amendments held in San Francisco, Dallas, and Washington (index to comments and transcripts <i>available at</i> http://www.uscourts.gov/rules/e-discovery.html) (last visited Jan. 28, 2008)
April 14-15	Advisory Committee revises proposed Amendments and Committee Notes (Minutes <i>available at</i> http://www.uscourts.gov/rules/Minutes/CRACO405.pdf .) (last visited Jan. 28, 2008)
May 27	Advisory Committee Report (contains revised Amendments and Committee Notes) (<i>available at</i> http://www.uscourts.gov/rules/CV5-2005.pdf) (last visited Jan. 28, 2008)
June 15-16	Standing Committee approves and revises Rules and Notes (Minutes <i>available at</i> http://www.uscourts.gov/rules/MinutesST_June_2005.pdf) (last visited Jan. 28, 2008)
July 27	Amended Advisory Committee Report (May 27, revised July 27) (contains Final Rule 26(b) and Rule 45(d) and Committee Notes, as revised after Standing Committee Meeting [“Final Report 2005”])(see September, 2005).

Sept	Standing Committee Report to Judicial Conference (includes: Standing Committee Memo, with Final Advisory Committee Report of May 27, 2005 (revised July 25, 2005) as Appendix C, together with Appendix F summarizing pros and cons of amendments) (<i>available at</i> http://www.uscourts.gov/rules/Reports/ST09-2005.pdf) (last visited Jan. 28, 2008)
Sept 20	Judicial Conference approves Amendments and Committee Notes
Sept 30	Judicial Conference Report to Chief Justice (recommending approval) (<i>available at</i> http://www.uscourts.gov/rules/Supct1105/Summary_Proposed_Amendments.pdf) (last visited Jan. 28, 2008)
2006 April 12	Supreme Court approves Final Rules and Committee Notes and transmits to Congress. (<i>available at</i> http://www.uscourts.gov/rules/Letters_Orders.pdf) (last visited Jan. 28, 2008) (full text of Rules and Committee Notes available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf) (last visited Jan. 28, 2008)
Dec 1	Effective Date of the 2006 E-Discovery Amendments (<i>available at</i> http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf) (last visited Jan. 28, 2008)
2007 Dec 1	Effective Date of 2007 “sylistic” Amendments (Text of amended Rule 26 and Rule 45 remains essentially identical; new descriptive headings are added) (<i>available at</i> http://www.uscourts.gov/rules/supct1106/CV_CLEAN_FINAL5-30-07.pdf) (last visited Jan. 28, 2008)