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Debra Lyn Bassett

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DEBRA LYN BASSETT*

Issues of reasonableness arise regularly throughout American law. Reasonableness is a concept central to tort law, which imposes a reasonable person standard in ascertaining duty. Criminal guilt turns on a reasonable doubt standard. And in civil discovery, the concept of reasonableness features prominently: discovery's scope reaches information that is reasonably calculated to lead to the discovery of admissible evidence, and discovery cannot be unreasonably cumulative or duplicative. Reasonableness standards require judges to undertake an objective, rather than subjective, evaluation. E-discovery specifically has two significant overarching reasonableness components: reasonable accessibility for production and reasonable care in preservation and disclosure. The interpretation of these two components plays a central and determinative role in the effectiveness and burdensomeness in discovering electronically stored information.

This Symposium Article addresses the first of these two components– reasonable accessibility– analyzing the guidance available on this issue from the case law and commentators and concluding that current approaches to reasonable accessibility often fail to employ the required objective reasonableness standard. Current approaches tend to err in two prominent ways: (1) by relying inappropriately on informational classifications, and (2) by merging distinct standards into a single standard. Of particular significance, Federal Rule 26 creates a twofold reasonableness interpretation– both with respect to what constitutes reasonable accessibility and also with respect to what constitutes undue burden or expense. However, rather than undertaking an objective, fact-specific inquiry of reasonable accessibility, some courts are relying on categories for presumptive accessibility or inaccessibility. In addition, many courts appear to be evaluating "undue burden or expense" as one conflated standard that considers only cost.

* Justice Marshall F. McComb Professor of Law, Southwestern Law School. Many thanks to the *Campbell Law Review* for inviting me to participate in this e-discovery symposium, and to Rex Perschbacher for his comments on a previous draft.

INTRODUCTION

"Reasonableness" is a common standard in American law, used in both civil and criminal contexts. Its popularity is perhaps somewhat surprising in light of its imprecise meaning. *Black's Law Dictionary* defines "reasonable" as "[f]air, proper, just, moderate, suitable under the circumstances" and "[f]it and appropriate to the end in view."[1] However, the term's lack of precision is perhaps precisely the reason for its popularity, as it permits the flexibility to accord judgment based on what seems fair under the facts and circumstances of the particular case. Moreover, despite lacking a precise and specific meaning, reasonableness standards serve the purpose of requiring the use of an objective, rather than subjective, standard of evaluation.[2]

Despite our familiarity with reasonableness standards, e-discovery is a bit unusual with respect to the number of reasonableness standards layered into the evaluative process. The basic overarching scope of discovery in civil actions as a general matter requires that the information sought be "reasonably calculated to lead to the discovery of admissible evidence,"[3] and also dictates that discovery cannot be "unreasonably cumulative or duplicative."[4] When e-discovery is sought as part of general civil discovery, additional reasonableness standards come into play: reasonable accessibility for production,[5] reasonable care in preservation,[6] reasonable inquiry in terms both of requesting e-discovery and in responding to such a request,[7] and reasonable care in disclosure.[8]

These layers of reasonableness indeed give courts the flexibility to fashion and tailor e-discovery procedures, requests, and responses to fit the particular fact-specific circumstances in an attempt to achieve a proper result. However appealing this flexibility might appear on its face in terms of achieving individualized fairness or justice, underlying concerns remain. "Fairness" and "justice" are themselves flexible

1. BLACK'S LAW DICTIONARY 1138 (5th ed. 1979).

2. *See* Delaware v. Prouse, 440 U.S. 648, 654 (1979) ("[T]he reasonableness standard usually requires, at a minimum, that the facts . . . be capable of measurement against 'an objective standard' . . . ."); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 579 F.3d 143, 152 (2d Cir. 2009) (referring to the "objective reasonableness standard").

3. FED. R. CIV. P. 26(b)(1).

4. FED. R. CIV. P. 26(b)(2)(C)(i).

5. FED. R. CIV. P. 26(b)(2)(B).

6. FED. R. CIV. P. 26(a)(1), 33-35.

7. FED. R. CIV. P. 26(g)(1).

8. FED. R. CIV. P. 26(b)(5)(B); *see also* FED. R. EVID. 502 (providing that the disclosure of privileged information does not constitute a waiver of the privilege under specified circumstances).

terms that often shift with perspective. What seems fair and just from a plaintiff's perspective may differ when evaluated from a defendant's perspective. One of law's purposes is to provide consistency and predictability so that actors may conform their behavior to what is legally required. Initially, vague standards such as reasonableness face legal challenges; but over time, as such legal challenges are raised, evaluated, and ruled upon, definite standards emerge and gain acceptance.

As a relatively recent concept, e-discovery's reasonableness standards are still developing. The significance of these standards, however, can hardly be overestimated. The interpretation of these reasonableness standards will determine both the effectiveness and the burdensomeness of discovering electronically stored information. The ramifications are, in short, crucial to the success of the federal discovery devices. The ubiquitous nature of electronic documents and communications renders discovery of such information, to the extent relevant, necessary for the effectiveness of the discovery process. However, the massive numbers of electronic documents and communications raise issues of burdensomeness that, if left unchecked, can result in exorbitant expense and inconvenience.

Commentators have addressed a number of e-discovery issues, but have tended to focus primarily on the impact of the amended Federal Rules of Civil Procedure[9] (which now include specific references to electronically stored information) or on the impact of new Rule 502 of the Federal Rules of Evidence.[10] This Article addresses an issue more neglected in the legal literature to date: the precondition of reasonable accessibility.

Rule 26(b)(2)(B) of the Federal Rules of Civil Procedure contains a dual reasonableness interpretation that creates flexibility in the original assessment as to whether electronically stored information is, or is not, reasonably accessible. Current court approaches tend to employ categories of sources characterized as presumptively accessible or presumptively inaccessible, together with a conflation of the two alternatives for challenging or confirming the presumptive categorization. I conclude that both of the foregoing constitute error. The courts' use of

9. *See, e.g.*, Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215 (2009) (discussing the impact of e-discovery amendments to the Federal Rules of Civil Procedure); Richard L. Marcus, *E-Discovery & Beyond: Toward* Brave New World *or* 1984?, 25 REV. LITIG. 633 (2006) (same).

10. *See, e.g.*, Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, 66 WASH. & LEE L. REV. 673 (2009) (discussing the impact of new Federal Rule of Evidence 502 pertaining to privilege and waiver in e-discovery).

presumptive categories violates the objective reasonableness standard that the rule commands; the conflation of the alternative challenges compounds the danger of using presumptive categories and rewrites the rule to provide only one alternative rather than applying the rule as written. These errors are especially problematic due to the discovery context. The vast majority of discovery issues do not result in a published opinion, which reduces the amount of interpretive guidance available from thoughtful judicial decisions, so the relatively few published decisions carry disproportionate influence. In addition, the lack of direct appeal from discovery rulings increases the likelihood that litigation may take a course (such as settlement) that concomitantly reduces the likelihood of eventual appellate guidance.

Part I of this Article explains the source of the reasonable accessibility requirement and its potential interpretations.[11] Part II analyzes the guidance on this issue that is available from case law and commentators.[12] Part III concludes that current approaches to reasonableness standards in e-discovery often fail to employ an objective standard and, accordingly, proposes an alternative approach to reasonable accessibility more consistent with the language of Rule 26 of the Federal Rules of Civil Procedure.[13]

I. THE REASONABLE ACCESSIBILITY REQUIREMENT

Rule 26 imposes, as a specific limitation on the discovery of electronically stored information, a precondition of reasonable accessibility. The rule provides, in pertinent part:

> 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 the discovery.[14]

The Advisory Committee's note explains that information systems "are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may

11. *See* text accompanying *infra* notes 14-17.
12. *See* text accompanying *infra* notes 19-53.
13. *See* text accompanying *infra* notes 54-74.
14. FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

retain information on sources that are accessible only by incurring substantial burdens or costs."[15] The note explains that a responding party should provide responsive electronically stored information that is "relevant, not privileged, and reasonably accessible," and that often information from those sources that are reasonably accessible will be sufficient.[16] However, the Advisory Committee did not attempt to define reasonable accessibility beyond the rule's reference to undue burden or cost, and stated only 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."[17]

The rule's use of "undue burden or cost" as the only articulated distinction between that which is reasonably accessible and that which is not invites an inquiry as to how reasonable accessibility relates to burden and cost, and whether challenges to discovery requests seeking electronically stored information are limited to relevancy, privilege, and claims of undue burden or cost. The next part of the discussion addresses this inquiry by analyzing the guidance available from case law and commentators.

II. INTERPRETATIONS OF REASONABLE ACCESSIBILITY

If electronically stored information is not reasonably accessible, the information is sheltered from discovery absent a showing of good cause.[18] Accordingly, the meaning of the term "reasonably accessible" has significant implications for e-discovery.

The first sentence of the reasonable accessibility provision, standing alone, might initially lead one to believe that the holder of electronically stored information wields a great deal of power over its classification as reasonably, versus not reasonably, accessible. Indeed, one commentator has opined that the provision "gives parties the ability to determine data's accessibility and, therefore, their own production responsibilities."[19] Of course, it is important that parties *not* have

15. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf.

16. *Id.*

17. *Id.*

18. FED. R. CIV. P. 26(b)(2)(B).

19. Rebecca Rockwood, Comment, *Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era*, 12 RICH. J.L. & TECH. 16, ¶ 30 (2006), http://jolt.richmond.edu/v12i4/article16.pdf.

such control over whether information is deemed accessible,[20] and the drafters of Rule 26 built several protections into the rule in an attempt to avoid such potential. Not only does Rule 26 attempt to restrict issues of reasonable accessibility to those involving "undue burden or

20. 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, ¶ 28 (2007), http://jolt.richmond.edu/v13i3/article12.pdf (noting that "several commentators contend that the rule will be subject to abuse"). Despite these concerns, the courts have appeared to require more than a party's mere assertion of undue burden or cost. For example, in *Mikron Industries, Inc. v. Hurd Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727 (W.D. Wash. Apr. 21, 2008), the court remarked that

> [i]n alleging that continued discovery of their [electronically stored information, or "ESI"] would be unduly burdensome, defendants offer little evidence beyond a cost estimate and conclusory characterizations of their ESI as "inaccessible." . . . . Beyond the estimated costs, defendants have not demonstrated an unusual hardship beyond that which ordinarily accompanies the discovery process. Therefore, the Court finds that defendants have not met their burden of demonstrating that the requested ESI is "not reasonably accessible because of undue burden or cost."

Id. at *2 (quoting FED. R. CIV. P. 26(b)(2)(B)). The District Court of Kansas recently reached a similar conclusion:

> Clearly, there are multiple approaches to electronic discovery and alternatives for reducing costs and it appears that defendant asserts the highest estimates possible merely to support its argument that electronic discovery is unduly burdensome. . . .
>
> . . . .
>
> The court is not persuaded that defendant has carried its burden of showing that the discovery is "not reasonably accessible because of undue burden or cost." . . . . [D]efendant's cost estimates are greatly exaggerated in an attempt to fall within the parameters of Rule 26(b)(2)(B).

Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2009 WL 2168892, at *3, 4 (D. Kan. July 1, 2009) (quoting FED. R. CIV. P. 26(b)(2)(B)); *see also In re* Zurn Pex Plumbing Prods. Liab. Litig., No. 08-1958-ADM/RLE, 2009 WL 1606653, at *2 (D. Minn. June 5, 2009) ("The affidavit of . . . an attorney [who is] not an expert on document search and retrieval, is not compelling evidence that the search will be as burdensome as Zurn avers.").

Instead, the courts have tended to require a detailed showing. *See, e.g.*, Petcou v. C.H. Robinson Worldwide, Inc., No. 1:06-CV-2157-HTW-GGB, 2008 WL 542684 (N.D. Ga. Feb. 5, 2008) (evaluating cost and accessibility of e-mail by examining number of employees, employee status as current or former employee, location of e-mail as on server or backup tapes, the level of examination required in order to respond to the specific discovery requests, and prior knowledge and retention of specific responsive e-mail messages); Semsroth v. City of Wichita, 239 F.R.D. 630, 637-38 (D. Kan. 2006) (analyzing expenses in detail after noting that backup tapes "must be restored before they can be searched for relevant data[,] . . . [which] *suggests* that the process of producing such data could constitute an undue burden," but emphasizing that "inaccessibility must be '*because* of undue burden or cost'" (quoting FED. R. CIV. P. 26(b)(2)(B)) (citation omitted) (second emphasis added)).

cost," but it also places the burden of proof on the party asserting that the information is not reasonably accessible.[21] In addition, even if a party can establish a lack of reasonable accessibility to the court's satisfaction, the court may still order discovery upon a showing of good cause.[22] As always, however, the practical interpretation of reasonable accessibility has fallen to the courts, and the next section reviews the judicial applications of the reasonable accessibility provision.

A. *Reasonable Accessibility in the Case Law*

One of the best-known court decisions to address e-discovery is *Zubulake v. UBS Warburg LLC*.[23] Although *Zubulake* was penned more than three years before the electronic discovery amendments to the Federal Rules of Civil Procedure became effective,[24] its thorough and thoughtful analysis has aided many subsequent courts facing e-discovery issues.[25] The central issue in the *Zubulake* case concerned the discoverability of e-mail messages archived on backup tapes, and if discoverable, which party should bear the cost of recovering them.[26]

The *Zubulake* court offered a lengthy discussion regarding the attributes of accessible versus inaccessible electronic data, and observed that

> whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible* or *inaccessible* format (a distinction that corresponds closely to the expense of production) . . . . [T]hanks to search engines, any data that is retained in a machine readable format is typically accessible.[27]

"Whether electronic data is accessible or inaccessible," the court continued, "turns largely on the media on which it is stored."[28] Then, the court identified five categories of data: (1) active, online data,[29]

21. *See* FED. R. CIV. P. 26(b)(2)(B).

22. *See id.*

23. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

24. *Id.* at 309. *Zubulake* was decided on May 13, 2003. *Id.* The e-discovery amendments to the Federal Rules became effective on December 1, 2006. H.R. DOC. NO. 109-105, at 1 (2006), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_documents&docid=f:hd105.109.pdf.

25. A Westlaw search of citations to the *Zubulake* decision found 1497 such references as of February 3, 2010.

26. *Zubulake*, 217 F.R.D. at 312.

27. *Id.* at 318.

28. *Id.*

29. *Id.* As the court explained, "'[o]n-line storage is generally provided by magnetic disk" and "is used in the very active stages of an electronic record[']s life—when it is being created or received and processed, as well as when the access frequency is

(2) near-line data,[30] (3) offline storage/archives,[31] (4) backup tapes,[32]

high and the required speed of access is very fast, *i.e.*, milliseconds.'" *Id.* (quoting Cohasset Associates, Inc., White Paper, *Trustworthy Storage and Management of Electronic Records: The Role of Optical Storage Technology* 10 (Apr. 2003) [hereinafter Cohasset White Paper]). Examples of online data include hard drives. *Id.*

30. *Id.* at 318-19. The court observed that "near-line" data

> "typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10-30 seconds for optical disk technology, and between 20-120 seconds for sequentially searched media, such as magnetic tape."

Id. (quoting Cohasset White Paper, *supra* note 29, at 11).

31. *Id.* at 319. The court explained that an offline storage or archival device

> is [a] removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered "archival" in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility. The principled difference between nearline data and offline data is that offline data lacks the coordinated control of an intelligent disk subsystem, and is, in the lingo, JBOD ("Just a Bunch of Disks").

Id. (internal quotation marks and footnotes omitted).

Subsequent commentary has criticized the use of JBOD as an example of offline media. *See, e.g.*, Philip Beatty, *The Genesis of the Information Technologist-Attorney in the Era of Electronic Discovery*, 13 J. TECH. L. & POL'Y 261, 274 (2008). Professor Beatty argues that *Zubulake* "incorrectly classif[ies] JBOD . . . as offline data, when, in fact, it is probably best described as active, online data," and contends that "placing JBOD into category three places it close to the line between accessible and inaccessible data, when it is properly viewed as one of the most accessible forms of media." *Id.*

32. *Zubulake*, 217 F.R.D. at 319. The court stated that a backup tape is a "'device, like a tape recorder, that reads data from and writes it onto a tape . . . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks.'" *Id.* (quoting Webopedia, http://inews.webopedia.com/term/t/tape_drive.html (last visited Apr. 5, 2010)). Therefore, the court explained, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure." *Id.* (internal quotation marks and citations omitted). In making this statement, the court quoted Kenneth J. Withers, Computer-Based Discovery in Federal Civil Litigation 15 (n.d.) (unpublished manuscript), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/elecdi01.pdf/$file/elecdi01.pdf, and referred to Executive Software, Inc., White Paper, *Identifying Common Reliability/Stability Problems Caused by File Fragmentation* (2002), *available at* http://www.pmialliance.com/white_paper_data/6.pdf (identifying problems associated with file fragmentation, including file corruption, data loss, crashes, and hard drive failures), and Stan Miastkowski, *When Good Data Goes Bad*, PC WORLD, Nov. 17, 1999, *available at* http://www.pcworld.com/article/

and (5) erased, fragmented or damaged data.[33] Of these, the court explained, "the first three categories are typically identified as accessible, and the latter two as inaccessible."[34] The court elaborated:

> The difference between the two classes [accessible and inaccessible] is easy to appreciate. Information deemed "accessible" is stored in a readily usable format. Although the time it takes to actually access the data ranges from milliseconds to days, the data does not need to be restored or otherwise manipulated to be usable. "Inaccessible" data, on the other hand, is not readily usable. Backup tapes must be restored . . . , fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible.[35]

The *Zubulake* court ultimately concluded that some of the requested electronic information, stored on backup tapes, was not reasonably accessible, but nevertheless ordered restoration and production of responsive documents from a small sample of the backup tapes to avoid any "exercise in speculation"—the sample would provide both "tangible evidence of what the backup tapes may have to offer" as well as "tangible evidence of the time and cost required to restore the backup tapes."[36]

Subsequent court decisions generally have concurred in *Zubulake*'s assessment that the expense of production corresponds to the level of accessibility,[37] and thus have found *Zubulake*'s formulations

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13859/when_good_data_goes_bad.html. *See Zubulake*, 217 F.R.D. at 319 (citing the sources just provided but using web addressed that have since become obsolete).

33. *Id.* at 319. The court explained that

> "[w]hen a file is first created and saved, it is laid down on the [storage media] in contiguous clusters . . . . As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk." Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.

Id. (first alteration in original) (quoting Sunbelt Software, Inc., White Paper, *Disk Defragmentation for Windows NT/2000: Hidden Gold for the Enterprise* 2 (2000), *available at* http://www.diskeeper.com/diskeeper/IDC-White-Paper.pdf).

34. *Id.* at 319-20.

35. *Id.* at 320.

36. *Id.* at 324.

37. Although *Zubulake* discussed accessibility, the discussion was in the specific context of the propriety of cost-shifting. In particular, *Zubulake* set forth seven factors to consider in the cost-shifting determination. *Id.* at 321-23. Courts regularly cite to *Zubulake*'s seven-factor analysis even though they sometimes make adjustments to that analysis in applying it to the case at hand. *E.g.*, OpenTV v. Liberate Technologies, 219 F.R.D. 474, 479 (N.D. Cal. 2003) (assigning different weights to the factors than those

useful in determining reasonable accessibility within the meaning of Rule 26(b)(2)(B).[38] Some courts have appeared to employ *Zubulake*'s five categories, and the characterizations of the accessibility of those five categories, in a conclusory manner.[39] Other courts have used the categories as a starting point but then have applied greater scrutiny.[40]

Some significant discussions of reasonable accessibility appear in sources other than judicial opinions, so the next section turns to those additional sources.

B. *Discussions of Reasonable Accessibility Outside the Case Law*

E-discovery has generated substantial commentary across a number of areas, including ethics,[41] cost shifting,[42] and general commentary regarding e-discovery and procedural rules.[43] Accessibility issues

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endorsed in *Zubulake*); Multitechnology Services, L.P. v. Verizon Southwest, No. Civ. A. 4:02-CV-702-Y, 2004 WL 1553480, at *2 (N.D. Tex. July 12, 2004) (discussing only five of *Zubulake*'s seven factors).

38. *See, e.g.*, W.E. Aubuchon Co. v. BeneFirst, LLC, 245 F.R.D. 38, 42-43 (D. Mass. 2007) (applying the *Zubulake* calculus, which determines "whether the production of electronic data is expensive or unduly burdensome [based] on whether it is maintained in an 'accessible' or 'inaccessible' format," in considering "whether electronic data is 'reasonably accessible' for purposes of the new Rule 26(b)(2)(B)").

39. *See, e.g.*, Canon U.S.A., Inc. v. S.A.M., Inc., No. 07-01201, 2008 WL 2522087, at *5 (E.D. La. June 20, 2008) ("Here, the evidence suggests that the requested discovery is retained on a server, and therefore accessible because data stored on servers are typically machine-readable and in active format.").

40. Consider, for example, the following discussion by the Massachusetts district court:

> In this case, the records sought by the Plaintiffs are stored on [BeneFirst's] server . . . , which is clearly an accessible format. However, because of BeneFirst's method of storage and lack of an indexing system, it will be extremely costly to retrieve the requested data. . . . [T]he retrieval of the records will be costly and for the purposes of this decision, I find that such retrieval would involve undue burden or cost. Accordingly, the images are not reasonably accessible within the meaning of [Rule] 26(b)(2)(B).

W.E. Aubuchon Co., 245 F.R.D. at 43.

41. *See, e.g.*, Debra Lyn Bassett, *E-Pitfalls: Ethics and E-Discovery*, 36 N. KY. L. REV. 449 (2009) (outlining ethical issues arising in e-discovery); Joseph Gallagher, *E-Ethics: The Ethical Dimension of the Electronic Discovery Amendments to the Federal Rules of Civil Procedure*, 20 GEO. J. LEGAL ETHICS 613 (2007) (conducting a similar discussion).

42. *See, e.g.*, Robert E. Altman & Benjamin Lewis, *Cost-Shifting in ESI Discovery Disputes: A Five-Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569 (2009) (discussing cost-shifting considerations in e-discovery); Sonia Salinas, Developments in the Law, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, 38 LOY. L.A. L. REV. 1639 (2005) (same).

43. *See, e.g.*, Steven S. Gensler, *Some Thoughts on the Lawyer's E-volving Duties in Discovery*, 36 N. KY. L. REV. 521 (2009) (examining how e-discovery is changing law-

naturally arise in discussions of cost-shifting due to the prominence of the *Zubulake* decision,[44] but discussions of accessibility outside of cost-shifting are uncommon.[45]

Despite the general lack of commentary addressing accessibility outside of the cost-shifting context, there are two additional particularly relevant sources that have examined the discoverability of electronic data. The American Bar Association has published civil discovery standards, one of which lists factors to consider in ruling on e-discovery motions.[46] These factors include whether the responding party stores electronic data in a format "designed to make discovery impracticable or needlessly costly or burdensome," and whether the discovery request would require the responding party, through the creation of software or other means, "to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information."[47] Despite the references to accessibility and inaccessibility, the ABA Standards do not provide definitions or classifications.

The Sedona Conference also has published e-discovery guidelines, recommending that "[t]he primary source of electronically stored information for production should be active data and information."[48]

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yers' participation in discovery); Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004) (examining three historical changes relevant to e-discovery and the Civil Rules Committee's e-discovery approach); Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321 (2008) (examining e-discovery's broad impact and looking specifically at e-discovery in the state courts, federal local rules, and international limitations).

44. *See, e.g.*, Salinas, *supra* note 42, at 1649-50 (discussing *Zubulake* and accessibility).

45. One of the few exceptions is a comment written prior to the formal adoption of Rule 26(b)(2)(B). *See* Sarah A.L. Phillips, Comment, *Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for "Not Reasonably Accessible" Data?*, 83 N.C. L. REV. 984, 1014 (2005) (proposing a more strict good cause standard and "delineating electronic data into three categories: that which is accessible and thus discoverable, that which is not reasonably accessible and thus discoverable only upon a showing of good cause, and that which is deleted, which is not discoverable except upon a showing that the responding party intentionally deleted information to avoid discovery").

46. AMERICAN BAR ASSOCIATION, CIVIL DISCOVERY STANDARDS 59-61 (2004), *available at* http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf.

47. *Id.* at 60-61.

48. SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC PRODUCTION 45 (Jonathan M. Redgrave ed., 2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf. Principle 9 provides that "absent a showing

Pursuant to the Sedona Conference guidelines, such active data and information is generally discoverable.[49] In contrast, "disaster recovery backup tapes" and "deleted, shadowed, fragmented, or residual" data or documents generally are not discoverable absent a specified showing.[50] The showing necessary for backup tapes is a demonstration of "need and relevance that outweigh the costs and burdens of retrieving and processing the electronically stored information from such sources,"[51] while deleted and other residual data require only "a showing of special need and relevance."[52] Thus, the Sedona Conference's guidelines classify electronically stored information into categories of suggested accessibility or inaccessibility, much like the approach in *Zubulake*. However, the Sedona Conference recommends additional "data complexity factors" in accessibility analysis and recognizes that under some circumstances even active online data can be burdensome.[53]

With this background in place, the next part analyzes shortcomings in the current approaches to reasonable accessibility and proposes an alternative more consistent with the drafters' apparent intent.

III. REASONABLE ACCESSIBILITY: CONFLATING DETERMINATIONS AND ALTERNATIVE DIRECTIONS

In shielding electronically stored information that is not reasonably accessible from discovery, the Civil Rules Advisory Committee intended to create a flexible rule, adaptable to the specific circumstances of each case. Such flexibility has the benefit of adjusting to individual, unique, or unusual cases, as well as new or updated tech-

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of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual electronically stored information." *Id.* at 49.

49. *Id.* at 45. Principle 8 provides:

> The primary source of electronically stored information for production should be active data and information. Resort 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.

50. *Id.* at 45, 49 (Principles 8 and 9).

51. *Id.* at 45 (Principle 8).

52. *Id.* at 49 (Principle 9).

53. *See* SEDONA CONFERENCE, COMMENTARY ON PRESERVATION, MANAGEMENT AND IDENTIFICATION OF SOURCES OF INFORMATION THAT ARE NOT REASONABLY ACCESSIBLE 11 (2008), *available at* http://www.thesedonaconference.org/dltForm?did=NRA.pdf.

nologies. However, in applying this intentionally flexible rule, some courts are unintentionally undermining the rule's purpose and effectiveness in two ways. First, some courts are inappropriately relying on categories instead of undertaking the objective reasonableness determination that the rule requires, which exacerbates existing issues due to the multiple layers of reasonableness built into the discovery rules. Second, the language of Rule 26 creates a twofold reasonableness interpretation—both with respect to what constitutes "reasonable" accessibility and also with respect to what constitutes "undue" burden or expense—but some courts are conflating what ultimately should be three assessments into one standard, which not only disregards the rule's directive but also compounds the effect of the use of categories, effectively creating not just categories of presumptive, but of conclusive, accessibility or inaccessibility. These errors of categories and conflation are the subjects of the sections that follow.

A. Categories

One of the potential concerns with current approaches to Rule 26 is not the mere fact of a dual reasonableness determination within the rule; the concern is the failure to acknowledge the dual nature of the determination. *Zubulake* was a well written and path-breaking decision that directly paired accessibility with format. *Zubulake* was, of course, examining the specific facts of that particular case in order to reach an appropriate resolution with respect to the parties to that litigation, and focused on the issue of cost-shifting. The shortcoming often exhibited in current approaches has nothing to do with any failure of *Zubulake* itself, but rather, has to do with the tendency of some subsequent courts to interpret *Zubulake* as creating categories of presumptive accessibility and presumptive inaccessibility. Such an approach is understandable—*Zubulake*'s categories aid judges who lack technological savvy by giving them a starting point for analysis. As a result, subsequent courts often have relied heavily on *Zubulake* and its five categories. However, *Zubulake* was decided before Rule 26(b)(2)(B) became effective, and thus *Zubulake* was not applying the rule's provisions. The helpful categories created in the case define accessibility through format—the accessibility of data is determined by the format in which the data is stored. The continued use of the *Zubulake* categories serves to freeze those format categories, despite a constantly evolving and shifting world of electronic technology. Thus, as discussed above, active online data is presumed reasonably accessible and backup tapes are presumed not reasonably accessible, even though these assumptions may be untrue in any given instance and

may generally become irrelevant or obsolete in the not-too-distant future. Even to the extent that the categories are correct in any given instance, it remains crucial, however, to remember that this is step one and not the final conclusion.

As helpful as *Zubulake*'s categories are, judges must ensure that the standard—and not just the category—is satisfied. Neither Rule 26 nor the Advisory Committee notes established presumptive categories; in fact, the Advisory Committee took care to explain 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,"[54] and further observed that the accessibility or inaccessibility of electronic data "may arise from a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time."[55] Heavy reliance on *Zubulake*'s categories, without more, could unintentionally subvert Rule 26's standard if applied without analyzing the specific case facts. Reasonable accessibility is an objective standard requiring an examination of the specific case facts, and a court abdicates its responsibilities pursuant to Rule 26 if it merely relies on *a priori* categories as determinative of accessibility.[56] The standard under Rule 26 refers to accessibility "because of undue burden or cost"; the format in which the data is stored suggests its likely accessibility and may well be tied to the cost of retrieving it, but the responding party must make an affirmative showing of the actual burden or cost to satisfy the rule. Thus, the connection between accessibility and cost discussed in *Zubulake* probably is an accurate assumption in most cases, but is subject to three caveats: first, over time, *Zubulake*'s categories likely will be

54. FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf.

55. Memorandum from Lee H. Rosenthal, Advisory Comm. on the Federal Rules of Civil Procedure, to David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure 34 (May 27, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/excerpt_cv_report.pdf.

56. Bearing in mind Rule 34, which pertains to the production of documents, the basic assumption of discoverability is evident in its provision permitting documents to be produced either by organizing in accordance with the categories in the request or by permitting inspection of the documents as they are kept in the ordinary course of business. *See* FED. R. CIV. P. 34. It is possible that at least in some cases, a party who contends that some electronic information is not reasonably accessible might be required to grant access to an opposing party to permit that opposing party to conduct her own search.

superseded by newer technologies,[57] and thus, second, the assumption must be tested under the rule's actual language before relying on it. Third, the rule refers to burden "or" cost, not burden "and" cost—and this issue is the subject of the next section.

B. *Layers of Reasonableness and Issues of Conflation*

The issues attendant in determining accessibility are exacerbated by the multiple levels of reasonableness built into Rule 26(b)(2)(B). The general standard for the scope of discovery includes a reasonableness component: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[58] Layered atop this reasonableness determination is the twofold reasonableness component in Rule 26(b)(2)(B) itself, which renders electronically stored information not discoverable if "the information is not reasonably accessible" due to "undue burden or cost."[59] If the requesting party seeks a good cause exception, thereby seeking to render information that is not reasonably accessible discoverable nevertheless, still another reasonableness determination comes into play as the court inquires whether "the discovery sought is unreasonably cumulative or duplicative."[60] Multiple layers of reasonableness enhance the opportunity for individual tailoring rather than imposing rigid, inflexible rules, but with a concomitant reduced protection. The basic scope of discovery—"reasonably calculated to lead to the discovery of admissible evidence"—is broad. Electronically stored information within this scope is generally discoverable unless the responding party can demonstrate that the data is "not reasonably accessible" due to "undue" burden or cost.

As noted above, courts generally have recognized the two-part inquiry that is necessary under Rule 26. However, there is an additional component within Rule 26 that has received less attention: the rule refers to burden "or" cost, not burden "and" cost. Undue burden may overlap with undue cost, but the rule's drafters chose to join the

57. *See* Beatty, *supra* note 31, at 275. (noting that "the complex and ever-changing storage technology landscape offers a fertile playground for the IT-educated attorney to challenge the *Zubulake* classification scheme and its conclusions" and predicting that "[e]ventually, evolving technologies will likely render the *Zubulake* classifications obsolete").

58. FED. R. CIV. P. 26(b)(1).

59. FED. R. CIV. P. 26(b)(2)(B).

60. FED. R. CIV. P. 26(b)(2)(C)(i).

two with the disjunctive "or" rather than the conjunctive "and."[61] Cost alone should not serve as the sole determinant of the discovery of electronically stored information; if cost were intended as the only factor, this would render the reference to accessibility superfluous and would be duplicative of Rule 26(b)(2)(C), which authorizes limits on the extent of any kind of discovery when the cost outweighs the benefit. Undue burden can exist without undue cost, and current interpretations of Rule 26 tend to ignore this possibility.[62]

The particular issue raised by these multiple layers of reasonableness is the potential for conflating determinations. For example, as noted above, all discovery is subject to the relevance requirement of Rule 26(b).[63] Accordingly, the Supreme Court has observed, standards articulated within the Federal Rules addressing discovery necessitate a showing beyond mere relevance:

> The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevance standard has already been imposed by Rule 26(b). Thus by adding the words [good cause], the Rules indicate that there must be a greater showing of need under Rules 34 and 35 than under the other discovery rules.[64]

Each layer of reasonableness, because it employs different language, must serve a distinctive purpose accomplished through a distinctive standard.[65] Discovery generally, and e-discovery specifically, invokes multiple layers of reasonableness, which is supposed to be an

61. The Advisory Committee contributed to this problem by referring to burden *and* cost in some places, and burden *or* cost in others. For example, its notes state that "some sources of electronically stored information can be accessed only with substantial burden *and* cost," and that in some cases "these burdens *and* costs may make the information on such sources not reasonably accessible." FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments, *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/EDiscovery_w_Notes.pdf (emphasis added). But the Advisory Committee also noted that "the responding party must show that the identified sources of information are not reasonably accessible because of undue burden *or* cost." *Id.* (emphasis added).

62. This tendency is illustrated by the focus on cost-shifting, which, although certainly important, in essence conflates undue burden with undue cost and thereby treats undue burden as being remedied through cost-shifting—which does nothing to offset a non-financial burden.

63. Schlagenhauf v. Holder, 379 U.S. 104, 117 (1964).

64. *Id.* at 117-18 (quoting Guilford Nat'l Bank of Greensboro v. S. Ry. Co., 297 F.2d 921, 924 (4th Cir. 1962)).

65. *See* Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253 (1992) (noting the canon of statutory construction to avoid interpretations that would render statutory language redundant or meaningless).

objective standard. However, multiple layers require additional analytical effort, and sometimes the distinctions between the standards are not clearly delineated and distinguished, creating a risk of conflating those standards. And specifically in the context of e-discovery, just as good cause has sometimes mistakenly been equated with relevance,[66] so also there is a risk of conflating undue burden with cost and the proportionality test.

Despite the plain language of Rule 26 referring to undue burden *or* cost, it appears that these two alternatives commonly are conflated into a single consideration—that of cost.[67] Because Rule 26's standard is "not reasonably accessible because of undue burden or cost," it is perhaps easy to see why the standard seems collapsible into an "inaccessible = costly" equation. However, to do so is to risk according the standard only one consideration, when in fact there are three: accessibility, undue burden, and undue cost. These three considerations may overlap—indeed, a court should only find inaccessibility if accessibility overlaps with either undue burden or undue cost. This overlap, however, does not justify a merger of considerations.

In particular, the meaning and impact of "undue burden" has largely been unexplored and unexamined due to the focus on cost. The cases discussing burdensomeness in the discovery context generally have been addressing the proportionality test of Rule 26(b)(2)(C)—a provision that limits discovery of all kinds (not just e-discovery) when "the burden or expense of the proposed discovery

66. *See Schlagenhauf*, 379 U.S. at 117-18. *See generally* Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 77 (2007) ("Unlike matters governed by other Rules, information governed by discovery rules is already subject to the relevance requirement. The relevance requirement makes the good cause standard particularly inappropriate for discovery. Indeed, there is a danger that good cause under Rule 26(b)(2)(B) could be mistakenly conflated with relevance.").

67. *See, e.g.*, Gallagher, *supra* note 41, at 620 ("[A] generalized approach has developed [in the courts] that interprets 'undue burden' to mean that the anticipated evidentiary value of the information is outweighed by the economic cost of producing that information."); PSEG Power N.Y, Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, at *9-11 (N.D.N.Y. Sept. 7, 2007) (predicating undue burden solely on the expense of producing 3000 e-mails); Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2006 WL 3825291, at *3 (E.D. Mo. Dec. 27, 2006) (describing the work involved to obtain the requested information, but concluding that "[g]iven the extensive cost involved in performing the tasks, the Court is persuaded that defendants have established that the information is not reasonably accessible because of undue burden and cost").

outweighs its likely benefit."[68] By analogy, because the proportionality test of Rule 26(b)(2)(C) applies to all discovery, and because the good cause standard in Rule 26(b)(2)(B) may also encompass the proportionality test,[69] it would make no sense to treat the reference to undue burden in Rule 26(b)(2)(B) as still another application of the proportionality test. Instead, undue burden pursuant to Rule 26(b)(2)(B) should constitute a standard distinctive from both cost (to avoid repetition within Rule 26(b)(2)(B)) and the proportionality test (to avoid repetition with Rule 26(b)(2)(C)).[70] Similarly, to overcome a showing that a source is "not reasonably accessible because of undue burden or cost" requires good cause—and the meaning of "good cause" suffers from similar conflation temptations. On the one hand, some courts might conflate good cause with relevance.[71] On the other hand, good cause also is commonly conflated with the proportionality test of Rule 26(b)(2)(C),[72] yet good cause must mean something more than the proportionality test to avoid redundancy because "all discovery is subject to the limitations imposed by Rule 26(b)(2)(C)."[73] One commentator has proposed that in applying the Rule 26(b)(2)(B) good cause standard, one possibility is that courts should "borrow from the Rule 26(c) good cause standard [for protective orders] and require a

68. FED. R. CIV. P. 26(b)(2)(C)(iii). The rule states that in making this assessment the court should consider "the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Id.*

69. *See* Noyes, *supra* note 66, at 71-72 (suggesting that the seven factors in the Advisory Committee's note accompanying the 2006 e-discovery amendments "may be simply another redundant reminder that all discovery is subject to the limitations of Rule 26(b)(2)(C)"); SHIRA A. SCHEINDLIN, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 17 (2006) (supplement to JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 2006)) (noting that those seven factors "overlap the proportionality considerations of Rule 26(b)(2)(C)").

70. One potential definition of burden in this context might be "time consuming"—a definition modified, of course, by the reference to "undue." Thus, if reviewing a source would be excessively time consuming, this should satisfy Rule 26(b)(2)(B)'s undue burden standard.

71. *See* Noyes, *supra* note 66, at 77-78 ("Because many courts do not interpret good cause to be a rigorous requirement, there is a danger that courts will conflate the standard with relevance.").

72. Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 222 (2009) ("Although 'good cause' is dutifully (and mechanically) referenced in many of the cases, the courts are, in fact, primarily focused on proportionality."). *But see* John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 463 (2010) (suggesting that Rule 26's proportionality analysis may be underutilized).

73. FED. R. CIV. P. 26(b)(1).

particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, that failure to permit discovery will cause a clearly defined and serious injury."[74]

An alternative approach to undue burden in the case law similarly involves the conflation of undue burden with another distinct Rule 26(b)(2)(B) consideration. This alternative approach incorporates the consideration of burden within the categorization of presumptively accessible and presumptively inaccessible sources. In other words, pursuant to this approach, *Zubulake*'s accessibility categories reflect an inherent assessment of undue burden: categories designated reasonably accessible are accorded that designation because they do not involve undue burden, whereas categories designated not reasonably accessible are accorded that designation because they involve undue burden. This approach conflates undue burden with accessibility, and is an undesirable interpretation for precisely that reason. The initial assessment of discoverability under Rule 26(b)(2)(B) requires an examination of accessibility, burden, and cost under the fact-specific case circumstances. The *Zubulake* categories, while a helpful starting point, cannot be merged with the consideration of undue burden or the categories; instead of being a starting point for further evaluation, they suddenly become determinative. It is no more appropriate to assume satisfaction of undue burden based on an accessibility category than it would be to assume satisfaction of undue cost based on the accessibility category. The responding party must affirmatively demonstrate undue burden or cost; it cannot be presumed through the accessibility category classification alone. Accordingly, as tempting as it is to conflate inaccessibility, burden, and cost, such an approach does not comport with the plain language of Rule 26.

Each reasonableness standard in Rule 26 requires a separate and distinct analysis in order to accord the literal language its due. Moreover, such a reading is consistent with the correct analysis of e-discovery pursuant to Rule 26's requirement of both a sensitive, case-specific analysis, and also an objective analysis.

CONCLUSION

The drafters of Rule 26 of the Federal Rules of Civil Procedure undertook a difficult task: to render electronically stored information subject to discovery while retaining sufficient flexibility in the rule's definitions and applications to enable the rule to accommodate technological developments. To accomplish its full potential, courts must

74. Noyes, *supra* note 66, at 92.

take care to apply an objective reasonableness standard and to avoid conflating the various separate and distinct standards within the rule.