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ESI Accessibility and Proportionality

November 2017

Scenario

A large manufacturing company employs thousands of people and generates a staggering amount of electronically stored information (ESI) daily. A plaintiff sues the company, alleging fraud based on events that occurred nearly 10 years ago, and serves document requests seeking electronic communications and other ESI from current and former employees as well as from other data sources. Some of the requested information can be collected from active and legacy databases sitting on servers located on three continents. Other data has long since been archived or overwritten under established business procedures. The general counsel seeks your advice about the company's legal obligations in responding to these discovery requests.

Is the Data Reasonably Accessible?

Certain types or sources of ESI are presumed to be "inaccessible." The seminal case of *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*) provided an avenue for litigants to resist production of ESI kept in an inaccessible format. Courts often cite *Zubulake I*'s five tiers of accessibility (from most to least accessible): (1) active, online data; (2) near-line data; (3) offline storage and archives; (4) backup tapes; and (5) erased, fragmented or damaged data.

Federal Rule of Civil Procedure 26(b)(2)(B) codified the idea that some information sources are less accessible than others, explaining that "[a] party need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible because of undue burden or cost." Therefore, the accessibility test is based not solely on the type of media or whether the producing party has technical difficulties in accessing the information but also on whether access is difficult "because of undue burden or cost."

Is the Discovery Proportional to the Needs of the Case?

The principle of proportionality in the discovery process had been incorporated into the Federal Rules of Civil Procedure (FRCP) since 1983. The 1983 Rules Committee Note explained that the change was intended "to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry." The Rules Committee addressed proportionality again in 1993 (noting that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery") and in 2000 (emphasizing "the need for active judicial use of subdivision (b)(2) to control excessive discovery").

But many practitioners felt that previous amendments to the FRCP did not sufficiently limit discovery. FRCP 26(b)(1), as amended in December 2015, returned the proportionality factors to Rule 26(b)(1) in an effort to make proportionality an explicit component of the scope of discovery.

Tension Between What Is Accessible and What Is Proportional

There is inherent tension between the "not reasonably accessible" concept and the "proportionality" principle. The former is written in the negative: a party is authorized *not to* collect and produce ESI from sources the party deems to be *not* reasonably accessible. In contrast, the latter is written in the positive: a party *may obtain* relevant, non-privileged discovery that *is* proportional to the needs of the case. With the renewed emphasis on the proportionality principle, parties seeking discovery may now be in a better position to contend that the information sought is proportional to the needs of the case where litigants were once successful in resisting discovery deemed not reasonably accessible.

Conversely, the proportionality principle sometimes allows parties to limit discovery. In other words, proportionality applies even before the "not reasonably accessible" test: even information from accessible sources need not be produced if the discovery itself fails the proportionality test.

Among the limited number of cases issued since the adoption of the 2015 amendments that addressed both the proportionality principle and the accessibility rule, the one major commonality is that courts appear to be deferring to the traditional burden evaluation, a factor common to both analyses. And, as usual, "who wins" will depend on the details.

Key Considerations for Litigants

Litigants should remember that:

- When an adversary seeking discovery advances an argument that the requested information is proportional to the needs of the case, a persuasive "inaccessibility" counter-argument should detail the costs and burdens associated with gathering relevant data. A conclusory assertion that the requested information is cumulative, duplicative, or even burdensome—without supporting evidence—might not defeat a motion to compel.

- A burden can be established by means other than monetary expense. For example, in one case the defendant submitted a declaration explaining that it would require at least 10 employees working full-time for many weeks to even begin the effort to collect responsive documents. In denying the plaintiff's motion to compel, the court accepted the burden rationale even though the defendant did not quantify the burden with a dollar value. Diverting manpower from other business duties is another factor that can support a burden finding.

- However, the need to review documents for privileged information will generally not satisfy the "undue burden or cost" element of Rule 26(b)(2)(B). In one case, the court deemed certain requests to be proportional to the needs of the case and ordered discovery, rejecting the notion that the plaintiff had demonstrated inaccessibility simply because it would have to conduct a privilege review.

- Even ESI from otherwise accessible sources may be found to be not reasonably accessible due to undue burden or cost.

Conclusion

Whether there are grounds for a litigant to refuse to produce some of the requested ESI will depend on a host of factors, including, *inter alia*, the nature of the case and the requesting party; the purported relevance of the data; and the expense associated with identifying, collecting, formatting, reviewing and producing the data. The litigant should marshal its evidence to demonstrate that at least certain requested information is not reasonably accessible due to undue burden or cost and

should be prepared to argue further that such information is not proportional to the needs of the case. Because burden and expense often hinge on technological capabilities and limitations, the accessibility inquiry may ultimately depend on a standard that evolves as technology evolves.

For inquiries related to this Tip of the Month, please contact Noah Liben at nliben@mayerbrown.com or Ethan Hastert at ehastert@mayerbrown.com.

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