

COMMENT

Cost-Shifting in Electronic Discovery

The presumption in U.S. litigation is that each party will bear its own costs of production during discovery.¹ However, the surge in the creation and retention of electronically stored information (ESI) has revealed fundamental inequities in the traditional allocation of discovery costs.² While cost-shifting has always been an option for a judge seeking to limit overly aggressive or intrusive discovery requests,³ no generally applicable framework for determining when cost-shifting is appropriate has yet emerged.⁴ Instead, district courts have focused specifically on the problems posed by ESI and developed a patchwork series of tests to determine when the requesting party should bear some or all of the costs of production. In 2006, the Federal Rules of Civil Procedure were amended in an attempt to more explicitly account for the peculiarities of the discovery of ESI and to unify the various district court approaches.

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1. See, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests . . .”).
 2. This is due partly to the sheer volume of information that has been produced and stored as a result of widespread adoption of information technologies. See Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 1, ¶¶ 2–5 (2007), <http://law.richmond.edu/jolt/v13i3/article11.pdf>. Moreover, ESI has a number of distinct characteristics—such as dynamism and the difficulty of complete erasure—that implicate concerns that do not arise in the production of paper documents. See *id.*
 3. See *Oppenheimer Fund, Inc.*, 437 U.S. at 358 (“[The responding party] may invoke the district court’s discretion under Rule 26(c) to grant . . . orders conditioning discovery on the requesting party’s payment of the costs of discovery.”).
 4. See Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 60–61 (2007) (noting that courts have not vigorously enforced the provisions currently codified as Federal Rule of Civil Procedure 26(b)(2)(C)).

This Comment will explore the developing body of case law pertaining to cost-shifting in electronic discovery and its relationship to the guidelines accompanying the 2006 amendments. Due to the close relationship between the cost-shifting test embedded in the 2006 amendments and the leading doctrines in case law, courts have continued to apply prior case law directly, either alongside or within the amendment framework. While the leading doctrine in case law bears a structural similarity to the amendment test, the two approaches are distinct and have different implications for the substantive protections afforded to responding parties. Moreover, the tendency of courts to apply the tests interchangeably has undermined the development of a unified nationwide approach to cost-shifting in electronic discovery.

I. PRE-AMENDMENT DOCTRINE

The multifactor balancing test set down in *Zubulake v. UBS Warburg LLC*⁵ has emerged as the leading approach for managing cost-shifting requests arising in the course of discovery of ESI.⁶ *Zubulake* requires a sequential three-step inquiry. First, a court determines whether the requested data is accessible or inaccessible. The accessibility test in *Zubulake* is predicated primarily on the *physical* accessibility of the requested information, defining five categories based on how much effort is required to retrieve the data for analysis.⁷ If the requested information is deemed inaccessible, *Zubulake* calls for the production and examination of a representative sample of the requested information to refine the parties' estimates of the costs and benefits of full production.⁸ Finally, the court uses this information to inform a seven-factor test to

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5. 217 F.R.D. 309 (S.D.N.Y. 2003). Broadly speaking, federal district courts have adopted three strategies for managing cost-shifting inquiries: bright-line rules, economics-based approaches, and multifactor balancing tests, as in *Zubulake*. See Patricia Groot, Note, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 DUKE. L. & TECH. REV. 2, ¶¶ 16-28, <http://www.law.duke.edu/journals/dltr/articles/pdf/2009dltr002.pdf>. However, this Comment will focus on balancing tests as the amended Rules of Civil Procedure employ a similar structure.
 6. See Mazza, Quesada & Sternberg, *supra* note 2, ¶ 131; Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in the Digital Age*, 58 DUKE L.J. 889, 901 (2009).
 7. Ranked from most to least accessible these are: (1) active, online data, (2) near-line data, (3) offline storage/archives, (4) backup tapes, and (5) erased, fragmented, or damaged data. 217 F.R.D. at 318-20. *Zubulake* holds that the first three categories will generally be considered accessible and that the last two will be considered inaccessible. *Id.* at 319-20.
 8. *Id.* at 324. This test is based on the economic approach to cost-shifting advocated in *McPeck v. Ashcroft*, 202 F.R.D. 31, 34-35 (D.D.C. 2001).

determine the equities of shifting costs. These factors, in order from most to least important, are:

- (1) the extent to which the request is specifically tailored to discover relevant information;
- (2) the availability of such information from other sources;
- (3) the total cost of production, compared to the amount in controversy;
- (4) the total cost of production, compared to the resources available to each party;
- (5) the relative ability of each party to control costs and its incentive to do so;
- (6) the importance of the issues at stake in the litigation; and
- (7) the relative benefits to the parties of obtaining the information.⁹

Zubulake is an ideal candidate for comparing pre-amendment case law with the 2006 amendments. The decision is widely recognized as defining the leading cost-shifting test in use in the district courts,¹⁰ and though later courts have occasionally modified and adapted the *Zubulake* formula,¹¹ the overall structure of the original formulation has generally been accepted without significant alteration. Moreover, the original *Zubulake* test, more so than its subsequent refinements, has retained vitality even after the 2006 amendments came into effect.¹²

II. THE 2006 AMENDMENTS

On December 1, 2006, a number of amendments to the Federal Rules of Civil Procedure pertaining to electronic discovery came into effect. Rules 26(b)(2)(B) and 26(b)(2)(C) delineate a district court's authority to limit and modify discovery requests for electronically stored information. Rule 26(b)(2)(B) contemplates a two-step test for determining whether or not the requesting party should bear a portion of the costs of production. First, the responding party must demonstrate that the information sought is "not reasonably accessible because of undue burden or cost."¹³ Once this showing is made, the burden of proof shifts to the requesting party, who must show that

9. 217 F.R.D. at 322.

10. See *supra* note 6 and accompanying text.

11. See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (recombining the *Zubulake* factors with an earlier balancing test established in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002)).

12. See *infra* note 34 and accompanying text.

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

there is “good cause” for requiring that the information be produced.¹⁴ The rules specify that “good cause” is to be evaluated “considering the limitations of rule 26(b)(2)(C),”¹⁵ but due to the vague, generalized provisions of rule 26(b)(2)(C), a precise formulation of the test has remained elusive.¹⁶

To help concretize the good-cause test, the Advisory Committee provided a list of factors in the note accompanying the amended rules that it considered relevant to the determination of whether or not good cause exists. These are:

- (1) the specificity of the discovery request;
- (2) the quantity 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.¹⁷

The resemblance to the *Zubulake* factors is clear. Though the test set down in the Advisory Committee’s note is not binding, it serves as an important indicator of the reasoning underlying the rules and should be afforded considerable weight by district courts.¹⁸ As the next Part will show, the *Zubulake* test and the test suggested by the Advisory Committee cannot be readily reconciled in light of the goals motivating the adoption of the 2006 amendments.

14. *Id.*

15. *Id.*

16. See Noyes, *supra* note 4, at 87-91; Rachel Hytken, Note, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 890-91 (2008).

17. FED. R. CIV. P. 26(b)(2)(B) advisory committee’s note (2006).

18. See *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) (“The Advisory Committee’s view, although not determinative, is ‘of weight’ in our construction of the Rule.”); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (“Although the Advisory Committee’s comments do not foreclose judicial consideration of the Rule’s validity and meaning, the construction given by the Committee is ‘of weight.’”); *Mississippi Publ’g Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (“[I]n ascertaining [the] meaning [of the Federal Rules,] the construction given to them by the Committee is of weight.”); see also 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1029 (3d ed. 2002) (“In interpreting the federal rules, the Advisory Committee Notes are a very important source of information and direction and should be given considerable weight.”).

III. CONFUSION IN POST-AMENDMENT DOCTRINE

The purpose of the electronic discovery provisions of the 2006 amendments is a matter of broad consensus. The use of electronic media for information storage has exploded, both as a proportion of the information created or stored¹⁹ and in absolute terms.²⁰ Responding to concerns that the escalating cost of responding to discovery requests for ESI was prejudicial to responding parties,²¹ the Judicial Conference recommended the adoption of new rules designed to provide a uniform, national framework, to reduce the overall cost of electronic discovery, and to protect responding parties from overly aggressive discovery requests.²²

However, post-amendment case law has not diverged significantly from pre-amendment doctrine, leading some scholars to conclude that the 2006 amendments did not meaningfully alter the rules governing electronic discovery.²³ While it is certainly true that the test outlined in the Advisory Committee's note for Rule 26 synthesized and built on the pre-existing body of case law,²⁴ it is not a wholesale codification of any particular approach.²⁵

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19. It has been estimated that today over ninety percent of information is first created in an electronic format. See SEDONA CONFERENCE WORKING GROUP ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES: BEST PRACTICES & RECOMMENDATIONS FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (JULY 2005 VERSION) (Jonathan Redgrave et al. eds., 2005) (on file with author).
 20. See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22-23 (2005) [hereinafter RULES COMMITTEE REPORT], available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> (noting that electronic information is often measured in terabytes, each equivalent to five hundred million printed pages).
 21. See *id.*
 22. See *id.* at 24; see also Noyes, *supra* note 4, at 67-68 (discussing the goals of the 2006 amendments); Hytken, *supra* note 16, at 880-82 (explaining the concerns that led to the adoption of amended rules).
 23. See, e.g., Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH. J.L. & TECH. 7, ¶ 63 (2008), <http://law.richmond.edu/jolt/v14i3/article7.pdf> ("[T]he 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."); Groot, *supra* note 5, ¶ 16 ("The 2006 amendments made only modest changes to prior practice under Rule 26, so prior cases regarding cost-shifting remain relevant in predicting the Rule's future application.").
 24. See Moss, *supra* note 6, at 904 ("The Advisory Committee's notes to [the 2006 amendments] built on *Zubulake* [] and other case law by prescribing an essentially similar cost-benefit analysis instructing courts to look to various factors relevant to the likely benefit and cost of a disputed discovery request.").

Indeed, the *Zubulake* test and the amendment test exhibit significant differences that preclude straightforward harmonization. The continued application of the *Zubulake* test may, therefore, render the 2006 amendments essentially nugatory, a result that cannot be reconciled with the purposes of the amendments as expressed by the Judicial Conference.

First, consider the gateway inquiry as to accessibility, present in both the *Zubulake* and amendment tests. *Zubulake* justifies its categorization of information into accessible and inaccessible²⁶ by asserting that it will generally track “whether production of documents is unduly burdensome or expensive.”²⁷ However, the *Zubulake* accessibility test hinges on whether it would be unduly burdensome or expensive to retrieve *any* information as opposed to the specific information sought.²⁸ This distinction is critical. To demonstrate inaccessibility under *Zubulake*, it does not appear to be enough to show that it would be tedious to search through available information to find what is relevant. Rather, *Zubulake* appears to be focused on the format of the information: if translation or recovery is necessary to make use of information stored in a particular format, then it is considered inaccessible.

This inquiry cannot be readily squared with the Advisory Committee’s understanding of the amended rules. The notes to rule 26(b)(2)(B) suggest that the concept of inaccessibility should be viewed as encompassing the time and expense required to produce *specific* information.²⁹ Since the 2006

25. Though the Rules Committee Report notes that the amendments to Rule 26(b)(2) are intended to “codif[y] the best practices of parties and courts with experience in these issues,” RULES COMMITTEE REPORT, *supra* note 20, at 31, this should not be taken as an indication that the committee intended to specifically adopt any particular court’s approach. Rather, the committee is speaking in general terms, noting that “[l]awyers sophisticated in these problems are developing a two-tier practice in which they first obtain and examine the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.” *Id.* Both the pre-amendment tests developed in district courts and the test ultimately endorsed in the Advisory Committee’s note to the amended rules share this basic structure, but the tests remain distinguishable in their particular implementation.

26. See *supra* note 7 and accompanying text.

27. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

28. *Id.* at 320 (“The difference between the two classes [of information] 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.”).

29. The Advisory Committee’s note to rule 26(b)(2)(B) states that the responding party has the burden to show that “identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever *responsive* information may

amendments came into force, some courts have embraced the more holistic view of accessibility advanced in the Advisory Committee's note.³⁰ Nonetheless, some have continued to apply a hard-line approach to accessibility reminiscent of the *Zubulake* test.³¹ While the two tests are similar in their aims, the broader test envisioned by the 2006 amendments is somewhat friendlier to responding parties. Certainly any information rendered inaccessible under *Zubulake* would also fail the broader test of Rule 26(b)(2)(B), which also protects responding parties from unduly onerous searches of information that is physically accessible.³² Continued application of the *Zubulake* accessibility test therefore frustrates the purposes of the 2006 amendments by favoring the requesting party more than Rule 26(b)(2)(B).

Second, the factors that courts are instructed to consider when determining whether or not to shift the costs of producing inaccessible information differ materially under the *Zubulake* and amendment tests. While some courts have directly applied the test suggested by the Advisory Committee's note,³³ others

be found.” FED. R. CIV. P. 26(b)(2)(B) advisory committee's note (2006) (emphasis added); see also SEDONA CONFERENCE WORKING GROUP ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., THE SEDONA PRINCIPLES (SECOND EDITION): BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 67 (Jonathan M. Redgrave et al. eds., 2007) [hereinafter SEDONA PRINCIPLES 2007], available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (“[T]he ‘total cost of production’ includes the estimated costs of reviewing retrieved documents for privilege, confidentiality, and privacy purposes.”).

30. See, e.g., *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657, 2007 WL 2687670, at *10 (N.D.N.Y. Sept. 7, 2007) (recognizing “substantial burden” even though “physical accessibility to [the] information does not pose any trouble”); *Columbia Pictures Indus. v. Bunnell*, No. CV 06-1093FMCJCX, 2007 WL 2080419, at *6-*8 (C.D. Cal. May 29, 2007) (finding server log data normally stored only in RAM to be accessible because: (1) only a minor change to server settings would be required to enable permanent storage; and (2) the responding party did not adequately prove that enabling logging would substantially impair the server's normal operations); *W.E. Aubuchon Co. v. BeneFirst, LLC*, 245 F.R.D. 38, 42-43 (D. Mass. 2007) (finding data inaccessible under Rule 26(b)(2)(B) because, while the data were in an “accessible format” under *Zubulake*, the particular indexing scheme used made it difficult to retrieve the data required for litigation).
31. See, e.g., *Peskoff v. Faber*, 244 F.R.D. 54, 62 (D.D.C. 2007) (“[I]t cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.”).
32. See Rebecca Rockwood, *Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era*, 12 RICH. J.L. & TECH. 1, ¶ 30 (2006), <http://law.richmond.edu/jolt/v12i4/article16.pdf>.
33. See, e.g., *PSEG Power N.Y.*, 2007 WL 2687670, at *11 (finding that the specificity of the discovery request and the clear relevance of the requested information to the litigation outweigh the fact that some of the requested information had been produced in hard-copy); *W.E. Aubuchon Co.*, 245 F.R.D. at 43-44 (denying cost-shifting after finding that each factor

have continued to apply the *Zubulake* balancing factors directly despite the specificity of the test set down in the Advisory Committee guidelines.³⁴ Although the collections of factors considered by the two tests are similar, they are not identical, and inconsistent application undermines the development of uniform nationwide expectations. For example, the third factor of the amendment test, which considers the likelihood that the responding party may have deliberately rendered responsive information inaccessible, is absent from the *Zubulake* formulation. The explicit presence of this factor in the amendment test is a critical check on the behavior of responding parties given the Advisory Committee's intent that the amended rules should afford them more robust protections.³⁵

Finally, the framework proposed by the Advisory Committee collapses the second step of the *Zubulake* procedure, which considers the likelihood that the production of the requested data will yield information relevant to the case at hand,³⁶ into the multifactor balancing test.³⁷ This disables the gating function of the second *Zubulake* step. The *Zubulake* formulation favors requesting parties by requiring the responding party to undertake a (potentially expensive) sample in order to even reach the balancing test. Although the Advisory Committee continues to recommend samples where appropriate,³⁸ the responding party may be shielded under the amendment test if the other factors militate in its favor. As with the accessibility inquiry, continued application of pre-amendment case law fails to adequately shield responding parties and impairs the development of a consistent nationwide approach to cost-shifting in electronic discovery.

except the importance of the issue at stake in the litigation and the parties' relative resources clearly favor the requesting party).

34. See, e.g., *Adele v. Filene's Basement, Inc.*, No. 06 Civ. 244RMBMHD, 2009 WL 855955, at *10 n.3 (S.D.N.Y. Mar. 24, 2009) (suggesting the *Zubulake* factors as an appropriate test for the "good cause" requirement); *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. Co7-532RSL, 2008 WL 1805727, at *2 n.3 (W.D. Wash. Apr. 21, 2008) (holding that the *Zubulake* test need not be applied as the responding party had not shown the requested information to be inaccessible).
35. See SEDONA PRINCIPLES 2007, *supra* note 29, at 46-47.
36. See *supra* note 8 and accompanying text.
37. The two relevant factors of the amendment balancing test are the fourth ("[T]he likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.") and the fifth ("[P]redictions as to the importance and usefulness of the further information."). FED. R. CIV. P. 26(b)(2)(B) advisory committee's note (2006).
38. See *id.* ("The requesting party *may* need discovery to test [the assertion that producing the requested information would impose an undue burden]. Such discovery *might* take the form of . . . a sampling . . .") (emphasis added).

CONCLUSION

Since the 2006 amendments came into effect, courts have continued to apply the *Zubulake* test, perhaps following the general scholarly conclusion that the amendments do not differ substantially from the tests embedded in the pre-existing body of case law. However, while the 2006 amendments are structurally similar to the approaches that had been crafted by district courts, the modified rules tend to protect responding parties more than prior case law. Therefore, the application of existing case law tends to frustrate rather than realize the purposes of the 2006 amendments. This is not to say that the 2006 amendments, even if carefully applied, are guaranteed to significantly reduce the burden of responding parties or be effective in reducing discovery costs overall.³⁹ Nevertheless, courts should recognize that the 2006 amendments did not simply codify the case law developed prior to their enactment. Courts should reject continued reliance on unmodified pre-amendment doctrine—or, perhaps worse, on a blend of the two approaches⁴⁰—and instead effectuate the test announced by the Advisory Committee.

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39. See Groot, *supra* note 5, ¶ 13 (arguing that the protections afforded by Rule 26(b)(2)(C) are essentially the same as those governing all discovery requests prior to the 2006 amendments and so may provide no additional protection); see also Colloquy, *Managing Electronic Discovery: Views from the Judges*, 76 *FORDHAM L. REV.* 1, 23 (2007) (“Frankly, if I were to conduct a hearing on the production of documents, I would have one hearing and not two. I am going to require the requesting party to have some arguments for good cause even before I have made a definitive determination about whether a particular set of data is accessible or inaccessible.”) (quoting Francis, J., S.D.N.Y.).
40. See, e.g., *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. C07-532RSL, 2008 WL 1805727, at *2 (W.D. Wash. Apr. 21, 2008) (performing a holistic analysis of accessibility in line with the amended rule 26(b)(2)(B) while continuing to cite the *Zubulake* factors as appropriate for determining whether or not “good cause” has been shown).