Accessibility and Possible Cost-Shifting of ESI

By Rebecca Jennathan Luck

How much electronically stored information (ESI) must I produce? When should the cost of search and restoration be shifted to the requesting party? Will I have to produce data if my client is not presently actively using the material? How will the court decide these difficult questions?

The specter of the unknown and the unknowable, high stakes, expensive technical expertise, chance disclosures, highly trained investigators, and human failings, keeps some of us interested in the unfolding lines of case law on electronic discovery issues. Though we learn something with each new case, the underlying electronic facts remain a mystery to most of us. Where is electronic information stored, after all? Every day seems to disclose yet another place that it has been hidden, intentionally or inadvertently. What must we do to properly disclose and respond to discovery requests for electronic information? Are there any parameters that will provide a safe haven for the attorney acting in good faith?

One concept noted in the *Federal Rules of Civil Procedure* and discussed in certain federal court decisions that have been relied on by the Alabama Supreme Court is that a party may identify data as inaccessible and exclude it preliminarily from required disclosures on that basis. Inaccessibility is discussed herein, with the hope that this discussion will assist in determining your discovery obligations.

The Alabama Supreme Court's recent review of the limits of discovery of electronic information in *Ex Parte Cooper Tire & Rubber Company*, ___ So.2d ___, 2007 WL 3121813 (Ala.2007) considering a petition for writ of mandamus to force limitation of discovery orders pursuant to the defendant's requested protective order, recognized that the *Alabama Rules of Civil Procedure* have not, yet, been amended to include direction for production of electronic discovery. The *Cooper Tire* court adopted the test set out in *Wiginton v. CB Richard Ellis, Inc*., 229 F.R.D. 568 (N.D. Ill. 2004) to determine whether to shift the costs of searching and producing inaccessible data to the requesting party in order to protect the producing party from unduly burdensome e-discovery requests. *Id*., at 572.

The plaintiff in the *Cooper Tire* wrongful death action alleged a tire defect caused the deaths of three family members and caused serious injury to a surviving member.

The requested protective order would have provided relief from an order compelling production of extensive tire-defective design information regarding all models of the defendants' tires over a period of almost nine years in some instances, backup tapes of electronically stored information, and previously produced confidential litigation discovery.

The *Cooper Tire* court carefully reviewed and largely approved of the Marion County Circuit Court's analysis of recent federal case law regarding whether a party should be required to produce large quantities of electronic data. The *Cooper Tire* trial court applied *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C.2001); *Rowe Entertainment, Inc., v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002); *Byers v. Illinois State Police*, not reported in F.Supp.2d, 2002 WL 1264004 (N.D.Ill2002) [not reviewed herein, as it added little to the discussion); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003); and the *Federal Rules of Civil Procedure*, Rule 26(b)(2)(iii). The *Cooper Tire* trial court discussed the "marginal utility" test, the "proportionality test" and the presumption that a party responding to a discovery request normally pays for its own discovery production.

On review of the *Cooper Tire* trial court's order, the Alabama Supreme Court determined that a more recent federal court case, *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004), stated the proper test to be applied in determining whether the defendant should be required to comply with plaintiff's extensive discovery requests. The Alabama Supreme Court adopted the *Wiginton* test for use in Alabama to test the breadth of appropriate discovery and whether the costs associated with production of the requested information should be shared by the requesting party. On April 25, 2008, the Alabama Supereme Court affirmed its reliance on *Wiginton* and on the *Federal Rules of Civil Procedure* in *Ex Parte Vulcan Materials Company,* 2008 WL 1838309 (Ala.). The *Wiginton* test follows:

1) the likelihood of discovering critical information;
2) the availability of such information from other sources;
3) the amount in controversy as compared to the total cost of production;
4) the parties' resources as compared to the total cost of production;
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;
7) the importance of the requested discovery in resolving the issues at stake in the litigation; and
8) the relative benefits to the parties of obtaining the information.

Upon completion of its analysis, the Alabama Supreme Court *Cooper Tire* court first applied a broad discovery based relevancy analysis to eliminate any request for documents not relevant, nor likely to reveal relevant evidence. The court then instructed the trial court to apply the "recent federal guidelines" to determine whether ordering production of the requested e-mails would constitute undue burden.

Though the wording is somewhat different, the tests established in *Cooper Tire* and *Wiginton* do not vary greatly from the *Federal Rules of Civil Procedure, Rule 26*, as amended effective December 1, 2006, and Comments following. (The rules underwent subsequent amending, however, this portion of the rule does not appear to have changed.)

> (B) Specific Limitations on Electronically Stored Information. 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.

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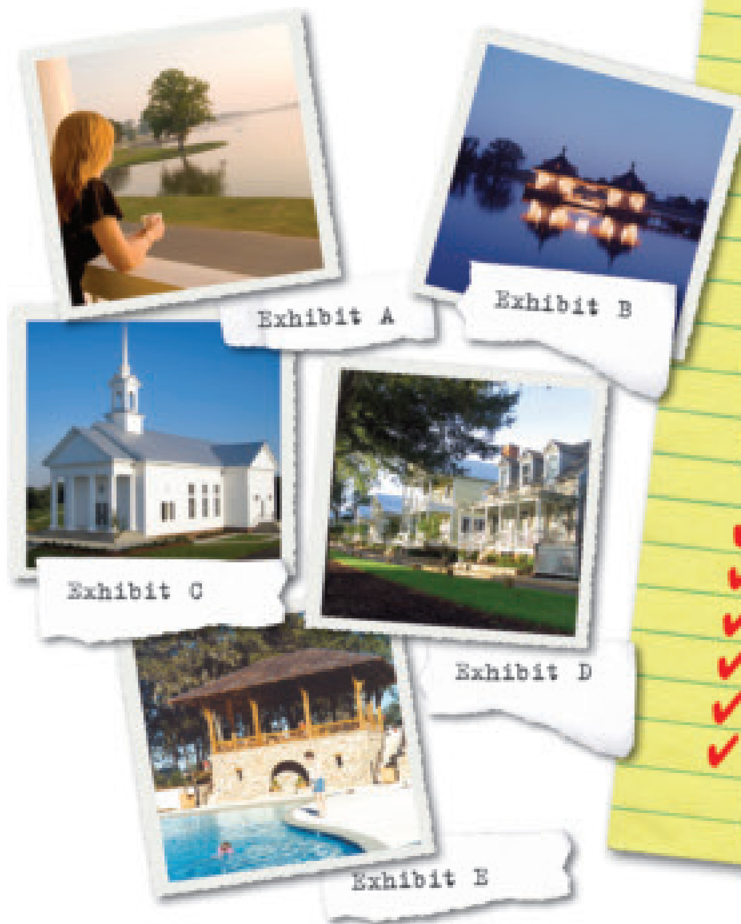

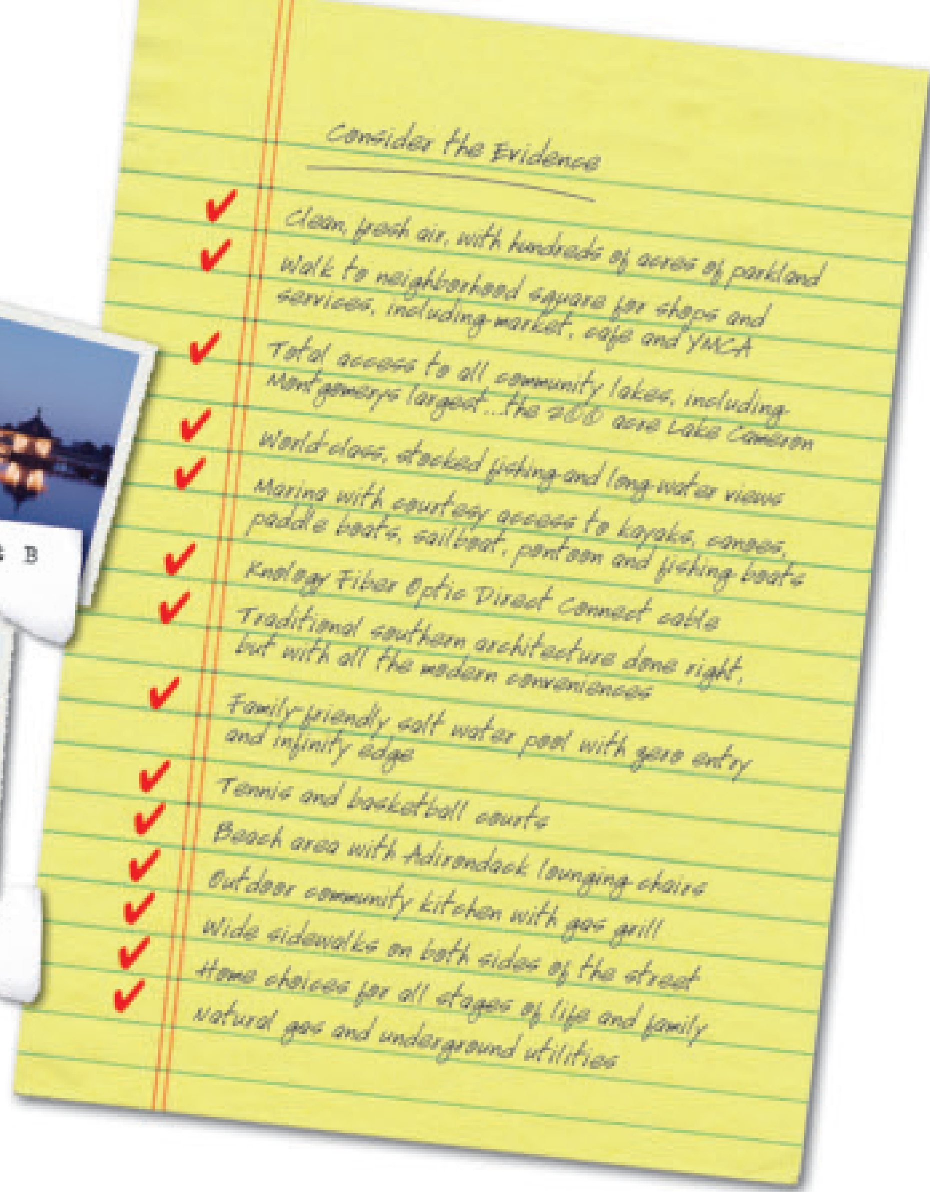

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All information is assumed correct but is not warranted.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering 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.

Federal Rules of Civil Procedure, Rule 26(b)(2)(B and C), after April 30, 2007 Amendment

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include:

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.

Federal Rules of Civil Procedure, Rule 26, *Comments,* December 1, 2006 Amendment (paragraph structure adjusted to highlight list)

We are watching the unfolding of a new application of the litigation process. Like electronic information itself, cases enforcing disclosure requirements and discovery requests appear to be searching for the consensus position. The amended *Federal Rules of Civil Procedure* do not significantly change existing fairness criteria developed over the years.

A computer performs its functions outside the understanding of most of us. Even if we manage to take off the tough casing, we cannot see the computer work its magic. Perhaps the search for a common legal language and an understanding of the nature of electronic information storage capabilities will begin to demystify electronic information discovery.

The courts and amended rules provide us with guidelines and precedents for compliance with current legal standards. Let's look at some cases referenced by the courts cited in Alabama in *Cooper Tire* to ground our search for direction. We will review the issues of both quantity and assignment of cost of production of electronic information. I'll address them in the sequential order they were issued.

There are two *McPeek* decisions from our nation's capital, demonstrating the court's use of what is now often called sampling. The *McPeek* court addressed a request for review and acknowledged the high expense of restoration of e-mails from numerous back-up tapes. *McPeek I* described the concepts that later courts used to limit discovery production based on undue burden, accessibility of electronic information and cost-shifting of electronic information production. The *McPeek* plaintiff wanted the Department of Justice to search backup systems for evidence of deleted information. The *McPeek* court analyzed difficulties associated with the plaintiff's request:

> ". . . the backup tapes have to be "restored" or rendered readable by returning the files to a source . . . from which they can be read by the application which originally created them. Then, someone would have to review the restored file . . . and determine whether it falls within one of plaintiff's document requests . . . . merely restoring the e-mail from a single backup tape would take eight hours . . .
> . . .
> " . . . Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter.
> . . .
> "Unlike a labeled file cabinet or paper files organized under an index, the collection of data by the backup tapes . . . was random. It must be remembered that the . . . use of a backup . . . system was not for the purpose of creating a

perfect mirror image of each user's hard drive. Instead, the system was designed to prevent disaster, i.e., the destruction of all the data being produced on a given day if the network system crashed.

"Once the day ended and the system had not crashed, the system administrator could breathe a sigh of relief. She may then have maintained that day's backup tapes for some period of time, but then eventually taped over them. . .

. . .

"It is . . . impossible to know in advance what is on these backup tapes. There is a theoretical possibility that there may be something on the tapes that is relevant to a claim or defense, for example, a subsequently deleted e-mail that might be evidence . . .

. . .

". . . I have decided to take small steps and perform, as it were, a test run"

McPeek v. Ashcroft (McPeek I), 202 F.R.D. 31, 32-34 (D.C.D.C. 2001) (selected phrases and sentences only).

Once the partial review of backup tapes had been completed, *McPeek II* ordered further argument, applying the principles articulated in the opinion and addressing why other backup tapes should be searched. *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C.2003).

I believe the *McPeek* cases stand for the principle that a sampling may reveal the relative benefits of further ESI or document review and the nature of information which may be found and allow a proper cost-benefit analysis by the court. (Compare and contrast quick-peek agreements, concerning privilege, See, *Zubulake v. UBS Warburg LLC,* 216 F.R.D. 280,290 (S.D.N.Y.2003)).

We know that later both *Wiginton* and the *F.R.C.P., Rule 26* cited above, encourage such an analysis. *F.R.C.P., Rule 34(a)* specifically acknowledges that sampling is a reasonable procedure in connection with a production of documents, or ESI, as follows:

"(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or **sample** the following items in the responding party's possession, custody, or control:

(a) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or . . ."

Federal Rules of Civil Procedure, Rule 34(a) (selected portion only, bolding added).

Cost-shifting is fully analyzed in the *Rowe* case series. *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.,* 205 F.R.D. 421 (S.D.N.Y. 2002) provided an analysis of cost shifting provided for in *F.R.C.P., Rule 26(c)*. Plaintiff demanded production of electronic and other information, some of which resided on backup tapes. The *Rowe* court enumerated eight factors to be considered when determining whether discovery costs should be shifted. Those eight factors became the basis of the *Zubulake* and, then, the *Wiginton* analyses. The *Rowe* court noted general relevancy of the request and ordered cost-shifting for only costs of production, but reserved the expense of review regarding privileged or confidential materials to the producer. The decision was reviewed and approved by the assigned trial court judge, *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, not reported in F.Supp.2d, 2002 WL 975713 (S.D.N.Y. 2002), with more extensive analysis.

There are at least seven reported decisions in *Zubulake*. The *Zubulake* opinion cited in *Cooper Tire* is generally regarded as *Zubulake I* and reviews the reported *Rowe* decision regarding standards to use in determining the parameters of court-ordered discovery of electronic information and an analysis of the appropriate use of cost-shifting, *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, (S.D.N.Y. May 13, 2003). Significantly, *Zubulake I* describes the difference between accessible and inaccessible data; though *Rowe* did not use this terminology, the concepts are the same.

> "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 using a process similar to that previously described, fragmented data must be de-fragmented, and erased data must be reconstructed, all before the data is usable. That makes such data inaccessible."

Zubulake I, supra at 320 (bolding added).

What I will call *Zubulake III* painstakingly applied the concepts in *Zubulake I* for a completely transparent cost-shifting analysis. The decision reiterated the court's statements that the costs of production do not shift, only the costs of restoration and search. *Zubulake III* emphasized the rule that costs of production are normally assigned to the producing party. *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 290, (S.D.N.Y. July 24, 2003).

The *Federal Rules of Civil Procedure*, as amended effective December 1, 2006, address electronically stored information, but are less descriptive of the meaning of accessibility.

> "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 . . ."

portions of F.R.C.P., Rule 26(b)(2)(B)(bolding added).

However, 2006 Amendment, Advisory Committee Notes provide help in determining whether data should be considered accessible:

> ". . . some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably **accessible**.
>
> "It 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. 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 retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources . . ."

Advisory Committee Notes to F.R.C.P., Rule 26, 2006 Amendment, Subdivision(b)(2)(bolding added).

On October 10, 2007, the National Conference of Commissioners on Uniform State Laws approved and recommended for enactment the proposed *Uniform Rules Relating to the Discovery of Electronically-Stored Information*. Judge John L. Carroll, dean and professor of law at Cumberland School of Law, served as the reporter for this commission's draft of uniform rules for discovery of ESI. The commission drafts and promotes enactment of uniform state laws where they deem it appropriate to strengthen the federal system, interstate commerce and international commerce, while considering varying state concerns.

The proposed uniform rules of electronic discovery (found at *www.law.upenn.edu/bll/archives/ucl/udoera/2007_final.htm*) were discussed by George M. Dent, III in his article published in the March 2008 *Alabama Lawyer*, at page 107. Mr. Dent, who is the chair of the Alabama Supreme Court Standing Committee on the *Alabama Rules of Civil Procedure*, requested comments on the proposed rules or other issues of importance. My review of the proposed uniform rules relating to the discovery of ESI convinced me that they are fully compatible with the federal rules excepting only in a difference in the required time limits for required actions. The proposed uniform rules also gather all ESI discovery issues in one more manageable place than the dispersed requirements in the *F.R.C.P*.

Generally, I am persuaded that improved document management systems will be used in the future to make our discovery searches and productions more manageable. Until then, identify, preserve, confer, reach agreement, disclose, object, or produce! ▲▼▲

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