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# 'Peskoff,' Cost-Shifting and Accessible Data

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• ELECTRONIC DISCOVERY •

**Although Rule 26(b)(2)(B) now provides that "conditions"—such as cost-shifting—can be imposed when inaccessible data is sought, it remains an open and critically important question whether cost-shifting may be appropriate when requesting parties seek access to the vast stores of accessible data that many parties possess.**

**BY H. CHRISTOPHER BOEHNING AND DANIEL J. TOAL**

Now that the Federal Rules of Civil Procedure have been modified to acknowledge explicitly the role electronic information plays in contemporary legal disputes, the uneasy process of adapting rules written in the era of typewriters and mimeographs to a world of e-mail and metadata has been replaced by a new task: determining how the recent amendments have—and have not—altered the existing legal landscape concerning electronic discovery.

A recent opinion in *Peskoff v. Faber* provides an early look at how the process of integrating the new federal rules into the prior e-discovery framework is proceeding.[1] The opinion addresses an area of e-discovery law that had been the subject of numerous detailed judicial analyses—the propriety of shifting the costs of e-discovery from the responding to the requesting party—and attempts to draw from the recent amendments, as well as past precedents, support for the proposition that such cost-shifting is only permissible when so-called "inaccessible" electronically stored information is requested.

The question of when cost-shifting is appropriate is one that is only becoming more pressing as organizations and individuals accumulate larger and larger stockpiles of electronic information, much of which is fully discoverable even under the new rules. Although the new Rule 26(b)(2)(B) now provides that "conditions"—such as cost-shifting—can be imposed when inaccessible data is sought, it remains an open and critically important question whether cost-shifting may be appropriate when requesting parties seek access to the vast stores of accessible data that many parties possess.

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As a matter of statutory interpretation and public policy, it is debatable whether the *Peskoff* decision correctly resolved this question. But however one views the issue, this decision should make clear that the decisions made during this crucial period will have significant repercussions for counsel and clients alike for years to come.

The factual scenario that gave rise to the e-discovery dispute in this matter is fairly straightforward. Plaintiff Jonathan Peskoff and Defendant Michael Faber had been managing members of a venture capital fund, NextPoint Partners, and had shared control of various related entities. Faber was also the sole shareholder of an additional entity, Plaza Street Holdings, which had been paid approximately $400,000 by NextPoint for consulting services. Shortly after leaving NextPoint in early 2004, Peskoff brought suit against his former partner alleging common law and statutory claims arising out of Faber's management of the various NextPoint entities, including allegedly diverting funds from NextPoint to Faber personally through Plaza Street.

In his initial document requests, Peskoff asked Faber to produce all e-mails Peskoff had written or received while he was employed at NextPoint, a period that stretched from 2000 to early 2004. As detailed in Peskoff's subsequent motion to compel, the production Peskoff received in response to this request did not include any e-mails Peskoff received between mid-2001 and mid-2003 or any of Peskoff's "sent mail." Peskoff argued that these files, many of which he considered relevant to his mismanagement claims, must exist somewhere on NextPoint's systems.

Magistrate Judge John M. Facciola of the U.S. District Court for the District of Columbia, to whom discovery disputes in the case had been referred, initially sought to resolve this dispute by ordering Faber to file an affidavit describing the search he had conducted for electronic documents in response to Peskoff's request, which would then allow Magistrate Judge Facciola to determine whether the 2001-2003 e-mails might be located elsewhere on NextPoint's systems. The magistrate judge also offered detailed guidance to Faber's counsel as to the locations that should be searched, including (1) Peskoff's e-mail account; (2) the e-mail accounts of other NextPoint employees; (3) the hard drive of Peskoff's computer, including the "slack space" that might contain deleted files; (4) any central depository of NextPoint e-mails; and (5) any backup tapes maintained by NextPoint.[2]

Faber filed the requested affidavit, which Magistrate Judge Facciola reviewed and found wanting in his opinion of Feb. 21, 2007. He was particularly troubled that Faber had failed to pick up on the strong hints provided in his previous opinion regarding where he should look for the missing e-mails, as it appeared that Faber had not searched the e-mail accounts of other employees, the "slack space" on Peskoff's hard drive, or any of NextPoint's backup tapes. Faber indicated that he was prepared to search the "slack space" of Peskoff's hard drive, but only if Peskoff paid for the search.

Calling the two-year gap in Peskoff's e-mail records "inexplicable," Magistrate Judge Facciola ordered Faber to conduct yet another search, this time of "all depositories of electronic information in which one may reasonably expect to find all emails to Peskoff, from Peskoff, or in which the word 'Peskoff' appears.'" In the key passage of the opinion, Magistrate Judge Facciola also implicitly rejected Faber's cost-shifting request, reasoning that under recent amendments to the Federal Rules of Civil Procedure:

> [T]he producing party is relieved of producing specifically identified inaccessible data only upon a showing of undue burden or cost. ...The obvious negative corollary of this rule is that accessible data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus, it 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.

Although no further opinions have been issued in the case, a declaration submitted in April indicates that Faber has conducted a further search for Peskoff's e-mails in the e-mail accounts of current NextPoint employees. It appears, however, that Peskoff remains unwilling to pay for a forensic analysis of the "slack

space" on Peskoff's hard drive, which conceivably could uncover deleted files.

## Recent Amendments

There are several intriguing aspects of the *Peskoff* opinion, including Magistrate Judge Facciola's apparent demand that Faber search the "slack space" on Peskoff's hard drive, a potential source of deleted files that is generally considered to be "not reasonably accessible."[3]

But by far the most significant portion of the opinion is the broad language that endorses a per se rule that cost-shifting can never be ordered, or even considered, when "accessible" data is sought. Universal adoption of such a rule would have far-reaching consequences for discovery under the rules, and it is therefore worthwhile to examine Magistrate Judge Facciola's reasoning in some detail to determine if such a rule is warranted.

Magistrate Judge Facciola cites three sources in support of his view that cost-shifting is limited to inaccessible data: the U.S. Supreme Court's opinion in *Oppenheimer Fund, Inc. v. Sanders*,[4] the influential *Zubulake v. UBS Warburg* series of decisions,[5] and, most importantly, the new federal rules themselves. A review of these authorities demonstrates, however, that this per se rule is neither required by nor, in most instances, consistent with their letter or spirit and, as a result, there is reason to question whether such a rule merits wider adoption.

First, while *Oppenheimer Fund* is often cited for the proposition that, "[u]nder [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests," it is sometimes forgotten that this language simply recognizes a presumption and not an absolute rule. Indeed, this oft-quoted sentence goes on to recognize the possibility of cost-shifting, concluding that, despite this presumption, a judge "may invoke...Rule 26(c) to grant orders protecting [the producing party] from 'undue burden or expense'...including orders conditioning discovery on the requesting party's payment of the costs of discovery." Thus, while *Oppenheimer* provides an important background principle concerning cost-shifting, it does not significantly limit—indeed, it affirmatively recognizes—the district court's discretion to shift costs when appropriate.

Second, Southern District Judge Shira A. Scheindlin's *Zubulake* opinions, which provided the most significant guidance on e-discovery cost-shifting prior to the recent amendments, are somewhat inconsistent on the question of whether cost-shifting can be considered when accessible data is requested. Although the *Zubulake* opinions do contain language supportive of a per se rule similar to that adopted by Magistrate Judge Facciola, the opinions also—often in the same breath—endorse a more flexible approach.

For example, while Judge Scheindlin wrote in *Zubulake III* that "cost-shifting is potentially appropriate only when inaccessible data is sought," the very next sentence of the opinion reads, "When a discovery request seeks accessible data...it is typically inappropriate to consider cost-shifting."[6] In sum, then, although these opinions contain some language supportive of Magistrate Judge Facciola's per se rule, when that language is read in context it is not immediately apparent where, precisely, the *Zubulake* opinions come down on the question at hand.

## Federal Rules

Third and most importantly, however, a look at the federal rules themselves makes fairly clear that the drafters of the e-discovery amendments specifically intended to vest judges with the discretion to consider cost-shifting even when accessible data is sought.

A district court's authority to order cost-shifting is derived from a combination of Rule 26(b)(2)(C), which allows a judge to limit discovery when "the burden or expense of the proposed discovery outweighs its likely benefit," and Rule 26(c), which similarly permits judges to enter protective orders imposing "terms and conditions" on discovery under those same circumstances.

In considering the impact of the amendments on the cost-shifting debate, then, it must be noted at the outset that these provisions were left unchanged by the recent amendments. Although the new Rule 26(b)(2)(B) now explicitly acknowledges that "conditions" can be imposed on the discovery of inaccessible data, neither it nor any other rule states, explicitly or implicitly, that cost-shifting or other conditions cannot be considered when accessible data is at issue. Indeed, since courts clearly retain the discretion to deny discovery outright under Rule 26(b)(2)(C), it stands to reason that they necessarily have the lesser power to condition production on the requesting party's payment of the costs of production.

Put differently, *Peskoff*'s "obvious negative corollary" does not find any support in the rules themselves. In fact, the Advisory Committee Notes accompanying the amendments to Rule 26 specifically observe that discovery of accessible data is still "subject to the (b)(2)(C) limitations that apply to all discovery," indicating that judges' existing discretion on this issue has not been disturbed.

Perhaps most persuasively, Judge Lee H. Rosenthal, chair of the Advisory Committee on the Federal Rules of Civil Procedure that crafted the amendments, also recently addressed this specific issue and reached the same conclusion. In discussing the amended Rule 26, she stated that "[t]he amended rule does not say that judges may only consider cost allocation if...the electronically stored information is not reasonably accessible. ...Nor does the amended rule preclude producing parties from seeking to shift costs of producing electronically stored information that is reasonably accessible."[7]

In short, the sources relied upon by Magistrate Judge Facciola provide a dubious foundation for a supposed per se rule prohibiting cost-shifting when accessible data is sought. Rather, it appears that the more reasonable reading of both precedent and the federal rules is that judges retain the discretion provided to them by Rules 26(b)(2)(C) and 26(c) to ensure that discovery requests do not impose an "undue burden or expense" on the responding party and that judges therefore may order cost-shifting, regardless of the nature of the documents requested.

This approach is not only more consonant with the text of the federal rules, but also preferable as a matter of policy. According to one widely cited figure, approximately 99.9 percent of information in the world today is generated in non-paper form and, according to some experts, companies frequently store between 90 percent and 95 percent of their information in electronic form.[8] Given the nearly limitless amount of data parties may have accumulated by the time litigation begins, it is not difficult to imagine a request demanding that counsel search, review, and produce a truly massive amount of "accessible" data in the service of a relatively low-stakes claim or with little hope of finding relevant material.

In these circumstances, a district court should have the discretion to entertain either an outright limitation on the scope of the search under Rule 26(b)(2)(C) or a cost-shifting protective order under Rule 26(c). In the words of a leading treatise on federal practice, "it is not self-evident that every discovery request of electronically stored information on accessible active databases will not entail undue costs and burdens, solely because they are on an active database," and therefore "cost-shifting may be appropriate" even when accessible data is sought.[9]

Finally, leaving open the possibility of cost-shifting for all kinds of electronically stored information should help foster a more cooperative atmosphere during the Rule 26(f) conference, during which parties are now required to address e-discovery issues. If both parties understand that requests for accessible electronically stored information could reach a point at which cost-shifting will be imposed, it will create additional incentives for the parties to cooperate on e-discovery.

If that possibility is off the table from the start, however, the requesting party will be less likely to seek a compromise regarding their requests for accessible data, even where the "accessible" archive is overwhelmingly large and the required search tremendously burdensome. As Magistrate Judge Facciola wrote in an earlier opinion on e-discovery, "American lawyers engaged in discovery have never been accused of asking for too little. ...They hardly need any more encouragement to demand as much as they can from their opponent."[10]

## Conclusion

The *Peskoff* opinion stakes out a strong position on the crucial issue of the limits of cost-shifting, but if the discussion above is any guide, it is unlikely to be the final word. The relevant rules and precedents, as well as the wide variety of factual scenarios judges will face in the coming years, will create tremendous pressure on any ruling that purports to eliminate the discretion of judges to reach fair and reasonable results in e-discovery disputes.

As Judge Rosenthal recently noted, the combination of the "increase in costs that has accompanied electronic discovery" and the recent amendments will only "lead parties to be more creative and aggressive in seeking to shift costs,"[11] and it can therefore be expected that the debate over cost-shifting and accessible data is not nearly over.

1. No. 04-cv-00526, 2007 WL 530096 (D.D.C. Feb. 21, 2007).
2. 2006 WL 1933483 (D.D.C. July 11, 2006).
3. This aspect of the *Peskoff* opinion should be of some concern, as it has already been cited in support of the principle that a "producing party has the obligation to search available electronic systems for deleted emails and files." *Wells v. Expedx*, No. 05-cv-2193, 2007 WL 1200955, at *1 (M.D. Fla. Apr. 23, 2007).
4. 437 U.S. 340 (1978).
5. 217 F.R.D. 309 (S.D.N.Y. 2003) (*Zubulake I*); 216 F.R.D. 280 (S.D.N.Y. 2003) (*Zubulake III*).
6. 216 F.R.D. at 284.
7. Lee H. Rosenthal, "A Few Thoughts on Electronic Discovery After December 1, 2006," 116 YALE L.J. POCKET PART 167, 180-81 (2006).
8. Robert Douglas Brownstone, "Collaborative Navigation of the Stormy e-Discovery Seas," 10 RICH. J.L. & TECH. 53, ¶6 (2004) (citing sources).
9. MOORE'S FEDERAL PRACTICE §37A.36 (2007).
10. *McPeek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001).
11. Rosenthal, 116 YALE L.J. POCKET PART at 180.