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## TRENDS

Backup tapes have often been treated by courts as inaccessible sources of electronic evidence. Jones Day partner Steven Bennett addresses some of the practical and legal effects of new technologies that might change that approach.

### Backup Tapes in E-Discovery: Implications of New Technologies

BY STEVEN BENNETT

**W**hen a party seeks access to electronic information stored by another party, Rule 26(a)(1)(B) of the Federal Rules of Civil Procedure (The Rules) permits discovery of relevant electronic evidence. The Rules require parties to disclose the description and location of electronically stored information (ESI) early in litigation, even before a discovery request has been served.

**Basic Rules Regarding ESI.** Under Rule 26, Courts generally authorize discovery if the information requested is relevant or reasonably calculated to lead to the discovery of admissible evidence, and the material sought is not unduly burdensome to produce, or protected

from discovery under a privilege. A court may compel a party to produce relevant documents, but ordinarily may not require the responding party to sort or analyze data.<sup>1</sup> The 2006 Amendments to the Rules (2006 Amendments) provide that discovery of ESI stands on an equal footing with discovery of paper documents. Thus, a requesting party is no more or less entitled to ESI than to paper files.<sup>2</sup>

**The Accessibility Divide.** The 2006 Amendments to the Federal Rules also divide ESI into two categories: “reasonably accessible” and “not reasonably accessible.” Subject to privilege, “reasonably accessible” data is discoverable.

A party that seeks discovery of information “not reasonably accessible” must obtain a court order based on a showing of good cause. Although not defined in Rule 26, the Advisory Committee Notes suggest that “reasonably accessible” information includes any information the responding party routinely accesses or uses,

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<sup>1</sup> Recovery and Reconstruction of Electronic Mail as Evidence, 41 Am. Jur. Proof of Facts 3d 1 (2006).

<sup>2</sup> *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio 2007).

but does not include disaster recovery data, or other data that requires significant cost, effort, or burden to produce.

**Demonstrating ‘Good Cause.’** Even when a court finds that certain data is not “reasonably accessible,” the court may order discovery of the data if the requesting party shows good cause, weighing the costs of discovery against its benefits. In deciding whether the requesting party has shown good cause to produce inaccessible data, courts must balance up to seven factors identified in the Advisory Committee Notes:

- (1) the specificity of the discovery request;
- (2) the quantity of information available from other more easily accessed sources;
- (3) failure to produce relevant information that likely existed but is no longer available from 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 additional information;
- (6) the importance of the issues at stake in the litigation; and
- (7) resources of the parties.

**Costs.** As for which party bears the e-discovery retrieval costs, the Rules presume that the party with access to the documents must bear the cost of production. Because the cost of retrieving inaccessible electronic data can be high, however, costs may be shifted to the requesting party, based on consideration of the factors outlined in the Rules and the Advisory Committee Notes. Earlier cases suggested a similar framework of analysis; the new Rules to a large extent codify that framework.<sup>3</sup>

**Basic Backup Tape Retrieval Technology.** Traditional backup tape recovery is often prohibitively time-consuming and costly. First, each backup tape’s content must be profiled: information is prepared as to what software (including which version) was used to back up the information, and how much storage capacity is required to restore the tape. If the company has gone through a merger or acquisition, often different forms of backup may be associated with various tapes, which can add an additional dimension to the challenge.

Second, the data restoration process begins. This is the most time-consuming step of the process, due to the volume of data and the technical resources required to manage a restoration project.

Third, indexing begins: keywords and metadata are indexed and made searchable.

Fourth, system files and duplicates are filtered out. Finally, queries can be applied to find responsive data.

With traditional tools and methods, there is no easy way to determine which backup tapes contain valuable information. Thus, for completeness, the producing party must retrieve every tape, recreate the original backup environment, restore each backup tape, and search through every tape to find the requested information.

The process can be very lengthy and expensive. The alternative is sampling of backup tapes, which may not provide assurance of completeness.

**New Backup Tape Solutions.** The main obstacle to overcome in the traditional backup tape recovery method is how to shorten the time it takes before a user can begin to search the data. The biggest time and cost associated with offline tape processing is the effort to gain access to data, so that it can be indexed and searched.

With new e-discovery solutions, however, the traditional method of moving all data off tape before processing need not occur. A user can index data directly from tape, without copying it or moving data off tape. After indexing, a user can determine which tapes carry the required information, and then restore only those tapes.

Some solution providers offer appliances that may perform full content and metadata indexing at the speed of tape, for both old and current backups, even as backup tapes are created. The resulting index can be keyword-searched, and then particular tapes restored based on tape location information provided by the appliance.

**Variations.** Substantial time, cost, and other resource savings may result from using such an appliance, as compared with traditional backup tape recovery methods. Exact comparisons in methods may be difficult, because speeds for recovery of information using traditional methods vary, depending on such things as how many different types of backup formats the company uses for its backup tapes.

Using traditional methods, however, a company may spend months and millions of dollars to retrieve information from backup tapes, even if (ultimately) only a few files are required. Why? The most time-intensive step is tape restoration, and because typically *all* the tapes must be restored before searching can begin, the traditional process is generally lengthy and costly regardless of the amount of information to be retrieved.

New data appliances, however, may index data at tape speed, without restoring the information on the tapes. At such rates, a company could index hundreds or even thousands of tapes in a month, as compared to many months or even up to a year using traditional e-discovery methods.

**Clustering.** Further time (and cost) reduction may derive from clustering such appliances together. An index engine appliance system thus could provide significant cost savings, in addition to saving time. A company’s installation of such appliances, for example, could reduce the need to use outside consultants to perform backup tape restoration and review.

Nevertheless, the cost of such an appliance must be low enough to avoid negating benefits. At present, the cost of some of these appliances approaches \$50,000 or more. Compared to the millions of dollars that a company could spend in traditional backup tape recovery, this may seem a relatively modest price. Yet, the relatively infrequent use of such appliances may not justify the cost. Thus, the precise cost/benefit calculus for such appliances remains to be established.

<sup>3</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006).

**Potential Effects on E-Discovery Law.** New appliances could provide a more robust method to conduct sampling of backup tapes than can occur with prior technologies. These appliances could provide a much less costly and time-consuming method to extract needed information from backup tapes. A court, in appropriate circumstances, might hold that the reduced cost and resource requirements of using such an appliance could render production of backup tape information not significantly more burdensome than production of active online information.

If the use of such appliances becomes widespread, courts may begin to reject the argument that information on backup tapes is inaccessible, or too burdensome and costly to produce. In addition, it may become easier for a requesting party to show good cause to request production of backup tapes, because the expected benefits of the requested information could outweigh the minimal burden and cost of production.

Another area of e-discovery law that could be impacted by development of more effective backup tape e-discovery solutions involves cost-shifting. If the cost of backup tape production is significantly reduced by such new solutions, at least three of the seven factors in the cost-shifting test might be affected, all in favor of the requesting party.<sup>4</sup>

Thus, the third factor—the total cost of production, compared to the amount in controversy; the fourth factor—the total cost of production, compared to the resources available to each party; and the fifth factor—the relative ability of each party to control costs and incentives to do so—all might disfavor cost shifting.

If the cost of producing backup tapes is greatly reduced, courts may not shift the cost of production from the producing party to the requesting party. In effect, in many instances, the responding party might bear the whole cost of producing backup tapes.

#### **Are Backup Tapes Solely Disaster Recovery Solutions?**

The 2006 Amendments to Rule 26(b)(2) distinguish between “reasonably accessible” information, which the responding party ordinarily must produce, and “not reasonably accessible” information, which, absent a showing of good cause by the requesting party, a responding party need not produce. Backup tapes that serve document retrieval purposes may contain “reasonably accessible” information, while backup tapes used solely for disaster recovery purposes may not contain “reasonably accessible” information.

But, how can a court determine whether particular backup tapes fall in the “document retrieval” or “disaster recovery” category? A court might consider several factors.

First, how does the responding party actually use the backup tapes? If the party uses the backup tapes to retrieve deleted files (absent some disaster), then information on the tapes might be considered reasonably accessible. For example, a company might restore backup tapes to retrieve e-mails or files accidentally deleted by employees. If the party could retrieve such documents for its own use, it might also be required to produce such documents for litigation. However, if the responding party never uses the backup tapes, or uses them

solely for disaster recovery, information on the backup tapes might be considered not reasonably accessible.

Second, how does the responding party structure its information technology (IT) policies? Such IT policies may outline the purposes for using backup tapes.

Finally, how old are the backup tapes? Backup tapes kept for disaster recovery typically are used solely when something happens to an active server. Backup tapes held for a long period of time may be less related to disaster recovery than to pure document storage. Tapes that are frequently rotated, by contrast, may appear more related to pure disaster recovery.

Again, new technologies may change this calculus. The ready ability to restore and use backup tapes may encourage some companies to treat backup tapes as storage devices rather than disaster recovery mechanisms. Courts, in turn, may revise their view of the uses and functions of such tapes.

#### **Will Some Companies Deliberately Avoid The New Technology?**

Traditionally, with documents maintained only in hard copy form, small companies could often afford to wait until they became involved in a lawsuit to worry about discovery. Today, with e-mail, electronic word processing, and other advances, even small companies can maintain many more files in storage. The existence of such files may require even small companies to prepare for e-discovery, as the Rules make no distinctions between large and small companies (other than referring to unreasonable cost and burden) in terms of their e-discovery obligations.

The Rules create obligations to locate, preserve, and produce, in a timely manner, digital information relevant to the subject matter of a lawsuit. While the Amended Rules allow courts to consider the relative abilities of parties to bear the costs of electronic discovery and to shift costs in some circumstances, even small companies probably must take at least some reasonable pre-litigation measures to comply with the law. Modern backup tape recovery appliances, which could lift much of the burden associated with backup tape e-discovery, may make it difficult for even small companies to argue that backup tape e-discovery is too costly or burdensome to perform. Thus, some companies may choose to forgo use of such technology, to avoid additional e-discovery obligations in litigation.

Yet a company that seeks to shift the cost of backup tape recovery to an adversary may need a more effective argument than mere small size. Even a smaller company will have to demonstrate that data is not reasonably accessible and that the cost or burden in man-hours would be excessive in the context of the particular litigation.

The smaller company’s in-house and outside counsel will need detailed knowledge of the company’s IT system to argue the point. In effect, the company may need to be prepared to show that it should not be required to adopt new backup tape recovery technology solely for purposes of the particular litigation.

**Planning for the Future.** Failure to plan and prepare is a large driver of e-discovery costs, as companies waste resources in creating ad hoc solutions to e-discovery problems that can disrupt their business and IT operations. Here, new backup tape technology may be adopted by many companies, without thought to the e-discovery implications of such technology. The better approach, for companies large and small, is to ensure

<sup>4</sup> See, e.g., *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006).

that such technologies are adopted (or not) with a full understanding of the complete range of costs and benefits, including effects on e-discovery in litigation.