

Issue: Is Cost Allocation Available if the ESI is "Not Reasonably Available." **Answer:** Yes

§ 3.12 ACCESSIBILITY OF ESI AND COST ALLOCATION

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- A. Overview

Rule 26(b)(2) allows for the possible shifting of the cost of processing ESI depending on its accessibility. The scope of discovery for ESI under Rule 26(b)(2) provides that:

(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.

The Rule 26(b)(2) amendment has been labeled a “two-tiered” system for discovery of ESI — “accessible” vs. “not reasonably accessible.” The first tier is “accessible” electronic information which is discoverable. The second tier pertains to “not reasonably accessible” ESI. . . . Even if the producing party can show that the ESI is not “reasonably accessible,” Rule 26(b)(2)(B) provides that the court can still order discovery if “good cause” is found after taking into consideration the limitations imposed by Rule 26(b)(2)(C). The Advisory Committee Note sets forth 7 factors a court should consider with considering a “good cause” motion . . .

Generally, it will be necessary to hold two hearings; one to determine if the ESI is accessible and; two, to determine if “good cause” exists to require disclosure even if ESI is “not reasonably accessible.” . . . Types of ESI that may be “not reasonably accessible:” . . .

Cross-references

- § 3.6(B), *Classification of Data*
- § 7.4(G)(1), *Not Reasonably Accessible — Rule 26(b)(2)(B)*
- § 7.4(G)(3), *Cost Allocation*
- § 7.4(G)(2), *Burdensome — Rule 26(b)(2)(C)*

B. Sampling

Amended Rule 34(a) provides that a party may “request . . . to inspect, copy, test, or sample . . . electronically stored information . . . (emphasis added).” The opposing party may request or the court may order a sampling of backup tapes or other archival or legacy data to establish the likelihood that relevant data is contained within this media.

Cross-references

- § 2.6(C)(3)(d), *Sampling and Restoration* (backup tapes)
- § 7.7(C), *Inspect, Copy, Test, or Sample*
- § 7.3(G)(3), *Cost Allocation — 26(b)(2)(iii)*

- § 7.4(G)(4), *Sampling*

C. Requesting Party Strategy

- Obtain the requisite knowledge of issues surrounding “cost shifting” and the sharing of costs required to locate and retrieve data.
- The producing party has the obligation to disclose accessible ESI.
- The legal presumption is that a producing party must bear the expense of complying with discovery requests.

* * * D. Producing Party Strategy

- Argue that the discovery request of “not reasonably accessible” ESI is to force settlement because of the significant cost of restoring the ESI.
- Argue that the costs of accessing deleted or residual data should be borne by the requesting party since it is “not reasonably accessible.”
- Argue that the massive amount of “accessible” ESI is not a choice but a competitive and business necessity, and to process and review the ESI is an undue burden and cost and, therefore, “not reasonably accessible.” * * *

E. Checklist

Has the producing party reviewed the ESI data sources to determine if ESI may be “not reasonably accessible”?

If so and “not reasonably accessible” sources have been found, has the producing party provided factual justification for this characterization?

Will the parties be able to work out a resolution regarding the “not reasonably accessible” ESI?

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* * * and . . . connote omitted information