THE SECOND TIER OF DISCOVERY: PERMISSIBLY DOWNGRADING ESI TO LESS ACCESSIBLE FORMATS

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Federal Rule of Civil Procedure 26(b)(2)(B) permits a party to withhold from discovery "electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." On the other hand, Fed. R. Civ. P. 34(a)(1)(A) requires production of documents or electronically stored information (ESI) "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 format." The timing of the migration of data from active to less accessible sources will likely have a direct bearing on whether a court will require the producing party to "translate" the data for production, force the responding party to bear the cost of production, shift the cost of production to the receiving party, or impose sanctions. "Downgrading" relevant data to less accessible sources after the duty to preserve attaches is often frowned upon by courts—but not always. Implementation of retention procedures that make active data difficult to search and retrieve also may invoke the ire of a court. Likewise, downgrading data in order to make discovery of the information more difficult will probably not protect the producing party from bearing the costs and burdens of producing such "not reasonably accessible" data. Thus, despite the provisions in Rule 26, businesses must be wary of the risks of downgrading and retaining data in a "not reasonably accessible" format.[3]

Basic rules of discovery allow parties to seek production of documents and ESI without regard to where those documents or data are stored. Rule 34(a)(1)(A) sets forth the basic principle that 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; . . .

Fed. R. Civ. P. 34(a)(1)(A). Rule 26(b)(2)(B) governs the scope and limits of the discovery of ESI. The rule states:

> *Specific Limitations on Electronically Stored Information.* A party need not provide discovery of electronically stored information from sources that the party

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> 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.

Fed. Civ. P. 26(b)(2)(B).

At first blush, Rule 26(b)(2)(B) seems to provide an incentive to downgrade data as much as possible to protect it from discovery. Such an approach, however, has little to no business practicality. If data is to be useful to a company, it must be quickly and cheaply accessible. The purpose of Rule 26(b)(2)(B), therefore, is to protect litigants from expending vast sums of money and time extracting data from inaccessible sources such as legacy systems, backup tapes, and "erased, fragmented or damaged data"[4] that were created in the regular course of business. Although active on-line data, near-line data and archived data is generally considered to be accessible,[5] rigid determinations of accessibility based on the type of media upon which ESI is stored should be discouraged. Active on-line data may be considered "not reasonably accessible" if undue burden or costs are associated with its discoverability.

For instance, in *W.E. Aubuchon Co. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007), plaintiff sought all medical claims files, including the actual medical bills in BeneFirst's custody or control. BeneFirst's "method of storage and lack of an indexing system" made it prohibitively expensive to retrieve the requested information. *Id.* at 43.[6] Therefore, the court ruled that the data was "not reasonably accessible." The court then undertook the required good cause analysis and considered whether:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Id. (citing Fed. R. Civ. P. 26(b)(2)(C)). The court noted that the Advisory Committee Note to Rule 26 recommends the following factors that courts may also consider when determining whether burdens and costs of producing "not reasonably accessible" ESI can be justified:

> (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

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> 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.

Fed. R. Civ. P. 26(b)(2) advisory committee note. The court then weighed these factors (taking into consideration that some are duplicative) and determined that BeneFirst must produce the requested data and bear the entire cost of production. *Id.* at 43-45.

The *Aubuchon* case demonstrates that there are times when a responding party will be required to "translate" ESI it produces into a "reasonably useable" form. The Advisory Committee Note to Rule 34 further clarifies the responsibilities of a responding party:

> Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form.

Fed. R. Civ. P. 34(b) advisory committee's note. Thus, when a party like BeneFirst in the regular course of business keeps active ESI in a way that make it difficult or expensive to access, courts may require that party to bear the expense and burden of producing the ESI in a reasonably useable form.

Another example of active data that was not reasonably accessible appeared in *Static Control Components, Inc. v. Lexmark International, Inc.*, No. Civ. A. 04-84-KSF, 2006 WL 897218 (E.D. Ky. Apr. 5, 2006). This case was a declaratory judgment action seeking a judgment that plaintiff had not violated the Copyright Act or the Digital Millennium Copyright Act. Plaintiff, Static Control Components ("SCC"), sought from Lexmark production of a database containing certain customer information. Lexmark asserted that it was not reasonably possible to produce the database because it was maintained: "(a) in a form that is not text-searchable; (b) using software that is no longer commercially available; and (c) software which it modified for its own use." *Id.* at *3. Lexmark offered to provide SCC with access to the database at Lexmark's facilities. SCC responded that Lexmark's offer would not allow SCC to gain "meaningful access" to the relevant information because "the only way to retrieve information from this database is by inputting a specific caller's name, phone number, or call reference number (which is an internal designation created by Lexmark.)" *Id.* SCC did not have this necessary information. The court granted SCC's motion to compel and ordered Lexmark to produce the database in a reasonably useable format. The court reasoned, in part, that the "Federal Rules do not permit Lexmark to hide behind its peculiar computer system as an excuse for not producing this information to SCC." *Id.* at *4 (citing *Dunn v. Midwestern Indem.*, 88 F.R.D. 191, 197 (S.D. Ohio 1980) (stating that at an evidentiary hearing the court "will not be receptive to defendants' impossibility contentions insofar as they are grounded in the peculiar manner in which defendants maintain their computer systems"); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 75 (D. Mass. 1976) ("To allow a defendant whose business generates massive records to

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frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.")).

A similar situation appeared in *Zurich American Insurance Co. v. Ace American Reinsurance Co.*, No. 05 Civ. 9170 RMB JC, 2006 WL 3771090 (S.D.N.Y. Dec. 22, 2006), a reinsurance case in which Zurich American alleged that its reinsurer, ACE, breached its obligation to pay its share of a settlement reached by Zurich with its insured. Zurich filed a motion to compel ACE to produce all documents relating to any claims denied by ACE on the basis of allocation. ACE objected on the grounds that such production would be unduly burdensome. Its computer system was incapable of segregating claims by the amount of the claim, the type of the claim, identity of the claimant, or the reason the claim may have been denied. The court did not hesitate to criticize ACE for its less than optimal computer system: "A sophisticated reinsurer that operates a multimillion dollar business is entitled to little sympathy for utilizing an opaque data storage system, particularly when, by the nature of its business, it can reasonably anticipate frequent litigation. At the same time, the volume of data accumulated by ACE makes a search of its entire database infeasible." *Id.* at *2. The court then ordered the parties to propose a protocol for sampling ACE's claims files and allowed the deposition of the affiant who was familiar with ACE's computer system.

Static Control Components was decided before the 2006 amendments to the Federal Rules and presumably the result would not be different if the case was decided again today. *Zurich* was decided 21 days after the Rules went into effect—the amendments were not applicable when the parties briefed the motion. Presumably, in similar cases presented today a court would undertake an analysis to determine first whether the active ESI is "not reasonably accessible." If it is, then the "good cause" analysis from Rule 26(b)(2)(B) is invoked. As seen in *Aubuchon*, even if a court determines that the active data sought is "not reasonably accessible," under a good cause analysis a responding party will not be rewarded for using technology that makes discovery of the party's *active* ESI burdensome or costly.

The results may differ, however, with respect to data that is made truly inaccessible: "Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is 'legacy' data that can be used only by superseded systems. The question is whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B)." Rule 34(b) advisory committee note. Thus, ESI that is backed-up for disaster recovery purposes, erased or deleted in the regular course of business, or preserved on defunct hardware or storage media is generally considered to be "not reasonably accessible" and must be produced only if good cause is shown by the requesting party. In contrast to the inconveniently accessible active data discussed in *Aubuchon* and *Static Control Components* such data is usually not used for any regular business purpose other than recovery after calamitous events. Before a party's common law duty to preserve documents or ESI due to threatened or pending litigation or investigation attaches, the party is normally free to follow its written document retention guidelines—including putting ESI into a format that is inaccessible or difficult to access. For instance, absent a required legal hold, a party can perform back ups of its email servers and

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delete active email on a regular schedule. *See Oxford House, Inc. v. City of Topeka, Kansas*, No. 06-4004-RDR, 2007 WL 1246200, *3-*4 (D. Kan. Apr. 27, 2007).

In *Oxford House*, plaintiff requested the court to compel the defendant to produce certain emails. According to the defendant, the e-mails were no longer available because they were deleted. The court found no spoliation of evidence since the emails were deleted in June 2005 before defendants received notice of the pending litigation on August 12, 2005. Thus, the deletion occurred before the duty to preserve arose. Moreover, the e-mails were no longer recoverable because they were backed up by a tape back up system and the tapes were overwritten every six weeks. The court found no evidence indicating that at the time plaintiffs' demand letter was received the backup tapes in the server's system contained the deleted e-mails. Notably, the court opined that even if there was evidence that the back up tapes still contained the desired emails, defendants would not be required to produce them:

> "[A]s a general rule, a party need not preserve all backup tapes even when it reasonably anticipates litigation." . . . When parties put a litigation hold policy on destruction of documents in response to pending litigation, "that litigation hold does not apply to inaccessible back-up tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy." . . . The record in this case indicates that the back-up tapes are used for disaster recovery purposes. Therefore, it is the court's view that defendant had no duty prior to August 12, 2005, to retain or recover the deleted electronic messages.

Id. at 4 (citing *Zubulake v. UBS Warburg LLC,* 220 F.R.D. 212, 217 (S.D.N.Y. 2003)).

Petcou v. C.H. Robinson Worldwide, Inc., No. 1:06-CV-2157-HTW-GGB, 2008 WL 542684 (N.D. Ga. Feb. 25, 2008) was an employment discrimination action in which plaintiffs were seeking production of emails "of a sexual or gender derogatory nature sent from 1998 through 2006." *Id.* at *1. Pursuant to defendant's regular information retention policies, current employees emails that had not been deleted by those employees was still on the defendant's active email server. Email that had been deleted by a user, however, remained retrievable for only eight days. The email for employees who left the employ of defendant was preserved for ten days, then deleted from the servers. Deleted email was preserved companywide on back-up tapes. Three to five days worth of email for approximately 5300 users was preserved on each tape. Defendant estimated that the cost of retrieving two years' worth of email for a single employee would cost approximately $79,000. *Id.* The court, therefore, determined that the email was not reasonably accessible. It further conducted a marginal utility test pursuant to Rule 26(b) and ruled that defendant was not required to produce the email. Significantly, with respect to defendant's downgrading of its email to back-up tapes, the court stated:

> In this case, Defendant deleted its employee's e-mails in accordance with its normal retention and destruction schedule even after an EEOC complaint alleging company-wide sexual harassment had been filed in June of 2001. However, the plaintiffs in *that* case did not request company-wide preservation of e-mails, nor

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> did they provide Defendant with the names of individuals in Atlanta whose e-mails should be preserved. It does not appear that Defendant acted in bad faith in following its established policy for retention and destruction of e-mails.

Id. at 2 (emphasis added).

In a similar situation, Best Buy Stores sought review of a magistrate's order compelling it to produce a database that it had prepared for discovery in an unrelated litigation. *Best Buy Stores, L.P., v. Developers Diversified Realty Corp.*, No. 05-2310(DSD/JJG), 2007 WL 4230806 (D. Minn. Nov. 29, 2007). After instituting the lawsuit against Developers Diversified, Best Buy had downgraded the unrelated litigation database to avoid a monthly fee of over $27,000. Downgrading the database destroyed the ability to search the ESI, and the data could only be restored from original sources such as back up tapes. *Id.* at *2.

Defendant argued that despite being created for an unrelated litigation, Best Buy had a duty to preserve the database when it sued defendant. The court found that Best Buy should have been on notice that defendant would seek discovery of some of the information in the database, but Best Buy did not have a duty to preserve it with respect to the instant litigation. "The database . . . would have been potentially relevant to virtually any litigation involving Best Buy because of the quantity and nature of the information it contained. Absent specific discovery requests or additional facts suggesting that the database was of particular relevance to this litigation . . . Best Buy did not have an obligation to maintain the . . . database at a monthly cost of over $27,000." *Id.* at 3. The court further observed that by downgrading the database, Best Buy did not destroy the information it contained but rather simply removed it from a searchable format. Thus, Best Buy was not required to restore the database given the defendant's inability to show good cause.

Downgrading ESI after the duty to preserve has attached is not necessarily a violation of the duty. ESI is not destroyed or spoliated by downgrading. The consequence of downgrading is usually that it is just more costly to produce the information in discovery. Like a party that maintains an active data set that is relatively difficult to access, courts will require parties to bear the cost of "upgrading" data for production if the data has been downgraded after the duty to preserve has attached. This view is not universally held; two magistrate judges in the Southern District of New York have taken opposite sides of this issue. *Compare Quinby v. WestLB AG*, 245 F.R.D. 94 (S.D.N.Y. 2006) and *Quinby v. WestLB AG*, No. 04 Civ. 7406 (WHP) (HBP), 2005 WL 3453908 (S.D.N.Y. Dec. 15, 2006) *with Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006).

Commenting on the steps that the defendant took to preserve relevant evidence, the court in *Treppel v. Biovail Corp.*, stated that "Biovail 'froze' the information so that in the future it would be neither destroyed beyond recovery nor downgraded from an accessible format to an inaccessible one." *Id.* at 372. The magistrate judge went on to disagree with his colleague who issued the *Quinby* opinions: "permitting the downgrading of data to a less accessible form – which systematically hinders future discovery by making the recovery of the information more costly and burdensome – is a violation of the preservation obligation." *Id.* at 372 n.4. In reaching this conclusion, the court relied on *Residential Funding Corp. v. DeGeorge Financial*

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Corp., 306 F.3d 99, 110 (2d Cir. 2002) for the proposition that "conduct that hinders access to relevant information is sanctionable, even if it does not result in the loss or destruction of evidence. *Treppel* at 372 n.4.

Quinby was an employment discrimination case in which defendant sought to shift the costs of restoring back-up tapes and searching emails of six former employees. WestLB's retention policy was to delete departing employees' email from its accessible database and maintain the email only on back-up tapes. *Quinby* at 99. WestLB deleted and backed-up the six former employees' email after plaintiff commenced her lawsuit against the company. Arguing that WestLB had violated its duty to preserve by not keeping the email in an accessible format, plaintiff asserted that she should not have to bear any cost associated with restoring tapes and searching for email. WestLB argued that it satisfied its duty to preserve by maintaining the email on back up tapes. *Id.* at 102-03.

In a separate opinion (which was criticized in *Treppel*), the court had already declined to sanction WestLB for converting the data from an accessible to an inaccessible format. *Quinby*, 2005 WL 3453908, at *8 n.10. The court stated that a party should be free to preserve ESI in any format it chooses, including inaccessible formats. *Quinby*, 245 F.R.D. at 104 (citing *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 217, 218 (S.D.N.Y. 2003) ("In recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task is accomplished.")). The court reasoned that party that chooses to preserve ESI in an inaccessible format does not spoliate the evidence, it merely makes it more expensive and burdensome to restore and produce it. *Id.* Disagreeing with his colleague who decided the *Treppel* case, the magistrate judge argued that *Residential Funding* addressed standards for giving an adverse inference for a party's sluggish disclosure of email. *Id.* at 103 n.12. "The Second Circuit did not hold that sanctions were appropriate for downgrading into an inaccessible format electronic evidence that was subject to a litigation hold." *Id.*

Extending the conclusion in *Treppel* and the implications of *Residential Funding* to hard copy documents, the court exposed the flawed reasoning of determining that downgrading ESI violates the duty of preservation:

> [I]f, as *Residential Funding* implies, any document storage practice that makes the recovery of documents more burdensome constitutes a violation of the preservation obligation, then a whole range of document storage practices, such as off-site storage in "dead" files, microfilming and digital imaging, would violate the preservation obligation because these practices also increase the burden of retrieving documents. I respectfully submit that construing the preservation obligation this broadly is inappropriate because it creates the potential for punishing routine business practices that do not destroy documents or alter them in any material sense. . . .
>
> Converting electronic documents into an inaccessible format is comparable to a scenario in which a responding party moves hard copies of documents to an off-site storage facility in a remote location. Although retrieving the documents

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> would be more expensive and take more time than if they had never been moved, there is no question that there has been no spoliation since the documents are still retrievable.
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> There is a theoretical possibility that storage of documents on backup tapes may, on rare occasions, result in the documents becoming truly inaccessible. This possibility however seems remote because such an eventuality would defeat the purpose of maintaining backup tapes. I submit that this risk is analogous to the risk that a document warehouse may suffer a fire or flood and is not a sufficient basis for a blanket rule that equates use of backup storage media with the destruction of documents.

Id. at 103 n.12, 104 at n.13.

The court concluded that due to the particular circumstances of the lawsuit, WestLB could have reasonably foreseen only that five of the six former employees' email would be at issue in the suit prior to downgrading the ESI. Thus, WestLB was fully responsible for restoring and searching the five former employees' email. After undertaking a cost-shifting analysis, the court held that plaintiff must bear 30% of the costs of restoring and searching the sixth former employee's email. *Id.* at 106-12.

The Federal Court of Claims also found no violation of the duty to preserve where the United States downgraded ESI after the duty to preserve had attached. *See AAB Joint Venture v. United States*, 75 Fed. Cl. 432 (Fed. Cl. 2007). In *AAB Joint Venture*, defendant preserved email on back-up tapes, but did not retain active email after the duty to preserve arose. Defendant estimated that it would cost between $85,000 and $150,000 to restore the back-up tapes in order to search for responsive email. Defendant did not request cost-shifting, it merely attempted to avoid restoring the tapes arguing that some of the email had already been produced in other formats. The court was not sympathetic:

> The Court agrees that Defendant was under a duty to preserve e-mails from July 2002 to the present, and that Defendant's decision to transfer the e-mails to back-up tapes does not exempt Defendant from its responsibility to produce relevant e-mails. . . . To permit a party "to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results."

Id. at 443 (citing *Zubulake v. UBS Warburg LLC,* 217 F.R.D. 309, 316-17 (S.D.N.Y. 2003); *In re Brand Name Prescription Drugs,* Nos. 94 C 897, MDL 997, 1995 WL 360526, at * 1 (N.D. Ill. July 15, 1995) and quoting *Linnen v. A.H. Robins Co.,* No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. Ct. June 16, 1999)). In light of the cost to restore the tapes and the lack of direct evidence that responsive email was contained on the tapes, the court ruled that defendant was required to restore one-quarter of the tapes and then evaluate whether they contained responsive information.

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A party who attempts to rely only on downgraded ESI, and has not put in place a proper litigation hold, will likely face dire consequences. In *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007), disabled individuals and an advocacy group sued the Washington Metropolitan Transit Authority ("WAMTA"), alleging that inadequate paratransit services constituted disability discrimination. Defendant admitted that it had not implemented a proper litigation hold. It did, however, permanently retain back-up tapes that take a snapshot of the system on the day of the back up. (Daily and weekly back-up tapes were routinely overwritten.) The plaintiffs moved the court to order WAMTA to produce backup tapes of certain electronic documents written and received since the initiation of the lawsuit. Plaintiffs argued the WAMTA failed to instruct employees to retain potentially responsive electronic documents and hence should pay to restore the backup tapes. The WAMTA admitted it did nothing to stop its email system from obliterating all emails after sixty days until over two years after the suit was filed. As a result, with the exception of only three employees, there had been a universal purging of all possibly relevant and discoverable emails every sixty days since the complaint was filed.

The magistrate judge remarked:

> While the newly amended Federal Rules of Civil Procedure initially relieve a party from producing electronically stored information that is not reasonably accessible because of undue burden and cost, I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten's definition of chutzpah: "that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan."

Id. at 147 (citation omitted). Notwithstanding the foregoing observation, the court undertook an analysis pursuant to Rule 26(b)(2)(B) and 26(b)(2)(C) and determined that because "there is absolutely no other source from which the electronically stored information can be secured, thanks to WMATA's failure to impose a litigation hold" there was good cause to require the defendant to restore the backup tapes containing the desired emails. *Id.* at 148.

Well after the duty to preserve attaches, a party must be concerned about downgrading ESI prior to production. Although the mandate of Fed. R. Civ. P. 1 that the civil procedure rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action" rarely occurs in practice, Rule 34 attempts to further the aspiration. Parties must maintain a level playing field when exchanging ESI. Thus, if the responding party has the ability to electronically search and index responsive ESI, it may not downgrade that ability prior to producing it to the requesting party. The advisory committee note to Rule 34 counsels:

> [T]he option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the

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> litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Fed. R. Civ. P. 34 (b) advisory committee's note. The principles in this advisory committee note were exemplified in *3M Co. v. Kanbar*, No. C06-01225 JW (HRL), 2007 WL 1725448 (N.D. Cal. June 14, 2007). Plaintiff produced a large amount of hard copy print-outs of responsive ESI, thus, downgrading the data from a searchable, electronic format. Defendant moved to compel plaintiff to provide an index or categorization of the documents. The Court denied the motion for categorization or an index because Plaintiff had not been "purposefully producing documents in a disorganized manner" but rather "printed and produced as organized by electronic source." *Id.* at *2-*3. Nevertheless, the court ordered plaintiff to:

> produce all previously produced responsive electronically stored information ("ESI") to Defendant in an electronic and reasonably usable format. Although the electronic production does not provide Kanbar quite what it asked for, this order should enable Defendant to utilize commercially available software search engines to accomplish by its own undertaking at least some of what it unsuccessfully sought from the Court.

Id. at *3. *See also Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) ("While a printout might be 'reasonably usable' within the meaning of Rule 34, the production of a party's data in a form which is directly readable by the adverse party's computers is the preferred alternative.").

In *CP Solutions PTE, Ltd. v. General Electric Co.*, No. 3:04cv2150(JBA)(WIG), 2006 WL 1272615 (D. Conn. Feb. 6, 2006) defendants produced a large volume of disorganized documents. According to the plaintiff thousands of pages of electronic "gibberish" were produced. Plaintiff argued that the information was not produced "in the ordinary course of business" Defendants claimed that the "gibberish" was caused by a software incompatibility problem and that the problem could not be cured by "re-producing" the documents. Defendants also claimed that they received the documents from their clients in the same manner. The court stated that even if counsel received gibberish from their clients, "that does not obviate the need for Defendants to produce these documents in a readable, usable format. To the extent that these documents were created or received by any of the Defendants in a readable format, they must be produced for Plaintiff in a readable, usable format." *Id.* at *3.

Plaintiff also complained that thousands of e-mails were separated from their attachments. Defendants asserted that they had provided plaintiff with the information necessary to match the e-mails with their attachments. The court held:

> If that is *not* the case, Defendants, at their expense, are ordered **to provide Plaintiff with the information, data, or software needed to accomplish this**. Defendants chose to provide the documents in the manner in which they were

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> kept in the ordinary course of business. Attachments should have been produced with their corresponding e-mails. The Court appreciates the fact that the attachments were created with different software programs, but that does not provide Defendants with an excuse to produce the e-mails and attachments in a jumbled, disorganized fashion.

Id. at *4 (italics in original, bold added) (citing 7 Moore's Federal Practice §§ 37A.30[3], 37A.31[1]); *see also PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, No. 1:05-CV-657 (DNH/RFT), 2007 WL 2687670, *11 (N.D.N.Y. Sept. 7, 2007) (ordering plaintiff to re-produce, at its expense, 3000 emails and attachments that had been separated in the first production).

Even when producing in native format, parties must take care not to "downgrade" ESI such that it is not useable by the receiving party. This was apparently the situation in *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 3128422 (N.D. Okla. Oct. 24, 2007). Ruling on defendant's motion to compel the court ordered that plaintiff "must produce the responsive ESI . . . in a reasonably useable format, which, in the case of a native format production, shall include providing the specific search queries, information, and technical support that would allow the Defendants to ascertain the ESI provided in response to their specific requests." *Id.* at *4.

Businesses must, back up, delete, purge, archive or take off-line vast amounts of data in order to keep their companies functioning. It is apparent from this survey of cases, however, that courts take varying positions regarding the downgrading of ESI. Obviously, the closer a party gets to a duty to preserve and produce, the less sympathetic a court will be to a decision to downgrade ESI. Companies are wise to have a written policy for eradicating unneeded ESI and explicitly stating that back up tapes are only for disaster recovery. Back up tapes should be used on a strict rotation policy and overwritten on a regular basis (purging old ESI with current ESI).

Business that have software or computer systems that organize and index ESI in a manner that does not allow for easy and inexpensive access must take a hard look at their litigation exposure. Such companies should keep in mind cases like *Aubuchon*, *Static Control*, and *Zurich* and realize that they will not be able to avoid the increased burden and expense due to their decision to utilize unwieldy software.

Conferring with opposing counsel early and often is another way to take control of the e-discovery situation, rather than leaving decisions to the whim of a court. For instance, in *Veeco Instruments, Inc. Securities Litigation*, No. 05 MD 1695(CM)(GAY), 2007 WL 983987 (S.D.N.Y. Apr. 2, 2007), the parties had failed to agree to an electronic discovery protocol and the court expressed its dismay: ". . . all parties were obligated in a case such as this to discuss the limits of electronic discovery given the certain need for a protocol here." *Id.* at *1. The court ultimately ordered defendant to restore and produce email from back up tapes at an estimated cost of $124,000. The court reserved ruling on cost-shifting.

Finally, counsel must remember to pick battles carefully. A requesting party faced with a declaration that a source is not reasonably accessible would likely earn favor with the court if it

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voluntarily narrows its request or offers to pay for a portion of the recovery efforts. *See Ameriwood Indus., Inc. v. Liberman,* No. 4:06CV524-DJS, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007). A responding party, on the other hand, should not overlook the additional cost and burden of reviewing for relevance, responsiveness, and privileged information extracted from a source that is not reasonably accessible—provided that the party did not create the problem by impermissibly downgrading the data.

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[3] For an excellent discussion on the conflicts between Rule 26(b)(2)(B) and Rule 34(a)(1)(A) see John M. Barkett, *E-Discovery: Twenty Questions*, ABA Joint CLE Seminar (Aspen, Jan. 2007).

[4] *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 318-19 (S.D.N.Y. 2003).

[5] *Id.*

[6] BeneFirst explained that its storage system "was designed to locate, within a reasonable amount of time, a particular claim if it became necessary to locate the associated image. However, the image itself was generally not required in the normal course of BeneFirst's claims processing operations. The organization of the image files was not designed for the wholesale retrieval of images on a group-by-group basis." *W.E. Aubuchon Co.*, 245 F.R.D. at 43 n.3.

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