

Courts Begin Interpreting the E-Discovery Amendments to Federal Rules of Civil Procedure: Two Recent Opinions on Not Reasonably Accessible Sources

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On December 1, 2006, the new amendments to the Federal Rules of Civil Procedure – focused primarily on electronic discovery – went into effect. Now, more than six months later, courts are starting to issue opinions interpreting the new amendments. In fact, during a two-week span, two separate courts issued opinions regarding searching and producing data from not reasonably accessible sources.

On May 22, Judge Nuechterlein of the District Court for the Northern District of Indiana issued an opinion regarding third-party discovery under Rule 45(d) that closely resembles Rule 26(b)(2)(B) in *Guy Chem. Co. v. Romaco AG*, 3:07-MC-016 RLM, 2007 U.S. Dist. LEXIS 37636 (N.D. Ind. May 22, 2007). Ten days later, on June 1, Judge Faciola of the District Court for the District of Columbia – the same Magistrate Judge who issued the seminal e-discovery opinions in *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001) and 212 F.R.D. 33 (2003) – issued an opinion regarding the interplay between a party's failure to preserve evidence on active systems and Rule 26(b)(2)(B) in *Disability Rights Council of Greater Washington v. Washington Metropolitan Transit Authority*, No. 04-498 (HHK/JMF), 2007 U.S. Dist. LEXIS 39605 (D.D.C. Jun. 1, 2007) (hereinafter "*DRC*"). These two cases represent two of the first examples where a responding party, whether it is a litigant or a third party, has attempted to take advantage of the amendments regarding not reasonably accessible data sources – a new concept introduced to the Rules last December.

Rule 26(b)(2)(B)

Rule 26(b)(2)(B) adopts what has frequently been referred to as a "two-tier" system. The Rule states:

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 discovery.

Rule 26(b)(2)(B) authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonably accessible because of "undue burden or cost." The responding party has the burden to show that the sources are not "reasonably accessible."

Even if that showing is made, the court may nonetheless order discovery if the requesting party shows good cause. The Advisory Notes to the Rule list seven non-exhaustive factors to consider when examining "good cause":

- (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.

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Guy Chemical Synopsis

Guy Chemical is a breach of contract case pending in the U.S. District Court for the Western District of Pennsylvania. 2007 U.S. Dist. LEXIS 37636, at *1. The plaintiff, Guy Chemical Company, Inc., claimed, as part of its damages, the loss of business from various third parties. *Id.* at *2. The defendant, Romaco, served a subpoena on ABRO, a non-party, under Rule 45 of the Federal Rules of Civil Procedure. ABRO was a customer of Guy Chemical, and Romaco sought discovery to establish the extent of plaintiff's alleged damages. *Id.*

Romaco served its subpoena on the President of ABRO, requesting routine business documents including correspondences, orders, cancelled orders, or orders that could not be filled. *Id.* This information was stored electronically by ABRO, using an outside computer firm. *Id.* ABRO informed Romaco that the cost for searching and producing the records would be \$ 7,200. *Id.* ABRO objected to paying the cost, and Romaco filed a motion to compel.

The court first determined, under Rule 45(d), that the information sought was not reasonably accessible absent undue burden. *Id.* at *3. ABRO explained that it stores everything electronically and that it is a “complex task to search and locate specific documents.” *Id.* at *3. The court found that the “amount of money required for ABRO to search and locate the discovery Romaco requests indicates to this court that the information is not reasonably accessible absent undue burden.” *Id.* at *3-4.

However, the court also found that Romaco had shown “good cause” for the discovery because the information sought was “crucial to Romaco’s lawsuit with Guy Chemical.” *Id.* at *4. The question, therefore, was who should be required to pay the cost. The court acknowledged that there is a “presumption that the responding party must bear the expense of complying with discovery requests” and that the usual cost-shifting analysis involves multiple factors. *Id.* at *4-5. In this case, however, only one factor was controlling: ABRO’s non-party status. The court explained that this “is not ABRO’s lawsuit and they should not have to pay for the costs associated with someone else’s dispute.” *Id.* at *7. The court held, therefore, that Romaco would have to establish that ABRO’s burden was *de minimis* in order to force ABRO to bear its own costs of production. *Id.* Because Romaco did not establish that this burden was, in fact, *de minimis*, the Court granted Romaco’s motion to compel on the condition that Romaco would pay the entire cost of the production. *Id.* at *7-8.

Disability Rights Council Synopsis

DRC is a case where plaintiffs have sued the Washington Metro Transit Authority (“WMTA”) under the Americans with Disabilities Act for discrimination against people with disabilities. 2007 U.S. Dist. LEXIS 39605, *3. During discovery, plaintiffs learned that WMTA had failed to do anything to stop its e-mail system from obliterating e-mails older than sixty (60) days until June of 2006 – more than two years after the complaint was filed. *Id.* at *20-21. Judge Facciola found that “[a]s a result, with the exception of three individuals, there has been a universal purging of all possibly relevant and discoverable emails every sixty days at least since the complaint was filed three years ago.” *Id.* at *21. Judge Facciola described this failure as “indefensible.” *Id.* at *22.

WMTA argued that it should not be sanctioned under new Rule 37(f) because “the court may not impose sanctions on a party for ‘failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.’” *Id.* Citing the advisory notes to Rule 37(f), Judge Facciola rejected this argument outright implicitly finding that failure to institute a litigation hold of any kind is not a good-faith operation of the IT system. *Id.* Moreover, Judge Facciola found that the plaintiffs’ requested relief – the production of relevant data from WMTA’s back-up tapes – was not a sanction in any event but rather additional discovery which is specifically permitted in the advisory notes. *Id.* at *24. *See also* Rule 37(f), Advisory Notes.

The WMTA resisted the production of the back-up tapes because of undue burden and expense pursuant to Rules 26(b)(2)(B) and 26(b)(2)(C). Judge Facciola begins his analysis of WMTA’s argument by showing his skepticism and remarking:

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 * 26. Nonetheless, Judge Facciola, implicitly assuming that the back-up tapes are not reasonably accessible,

analyzed whether the plaintiffs could demonstrate good cause for their search and production using the seven factors described in the advisory notes to the new Rule. *Id.* at *27-28. Judge Facciola found that the first four factors weighed in plaintiffs' favor because the e-mails of specific employees that plaintiffs were searching for could only be found on the back-up tapes. *Id.* at *29. Judge Facciola also found that the last two factors supported the plaintiffs as well because "persons who suffer from physical disabilities have equal transportation resources to work and to enjoy their lives with their fellow citizens is a crucial concern of this community" and plaintiffs have no substantial financial resources. *Id.*

WMTA's only argument was factor #5 – predictions as to the importance and usefulness of the further information – and Judge Facciola did not find it persuasive. WMTA argued that the data related to WMTA's prior contractors and not their new contractor and, hence, was irrelevant. *Id.* Judge Facciola concluded, however, that plaintiffs had a right to review a "continuum of their treatment from a reasonable point in time to the present" to determine a baseline for WMTA's more recent conduct. *Id.* at 30. Therefore, Judge Facciola found that plaintiffs had overwhelming good cause

to require the searching and production of data from WMTA's back-up tapes. *Id.* at *28. Judge Facciola ordered a search of the back-up tapes and required the parties to create a protocol for the search. *Id.* at *31.

Conclusion

The analysis and results in *Guy Chemical* and *DCR* follow many of the predictions that commentators made when the amendments were debated and adopted. While *Guy Chemical* does not provide any analysis as to why \$7,000 in costs is an "undue burden," its conclusion that third parties must demonstrate a lower threshold for cost shifting as a condition for discovery follows historical practice and the letter and spirit of the new amendments. *DCR* concludes that a failure to preserve active or reasonably accessible data creates "good cause" to order the search and production of relevant data from not reasonably accessible sources. If WMTA had not failed to preserve almost all of its e-mails during the pendency of the litigation, the "good cause" factors 2 through 5 may not have weighed in plaintiffs' favor. Put another way, a party cannot complain that it must produce not reasonably accessible data if it was responsible for deleting essentially all data in an accessible format.

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