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Breaking through the Inaccessibility Wall
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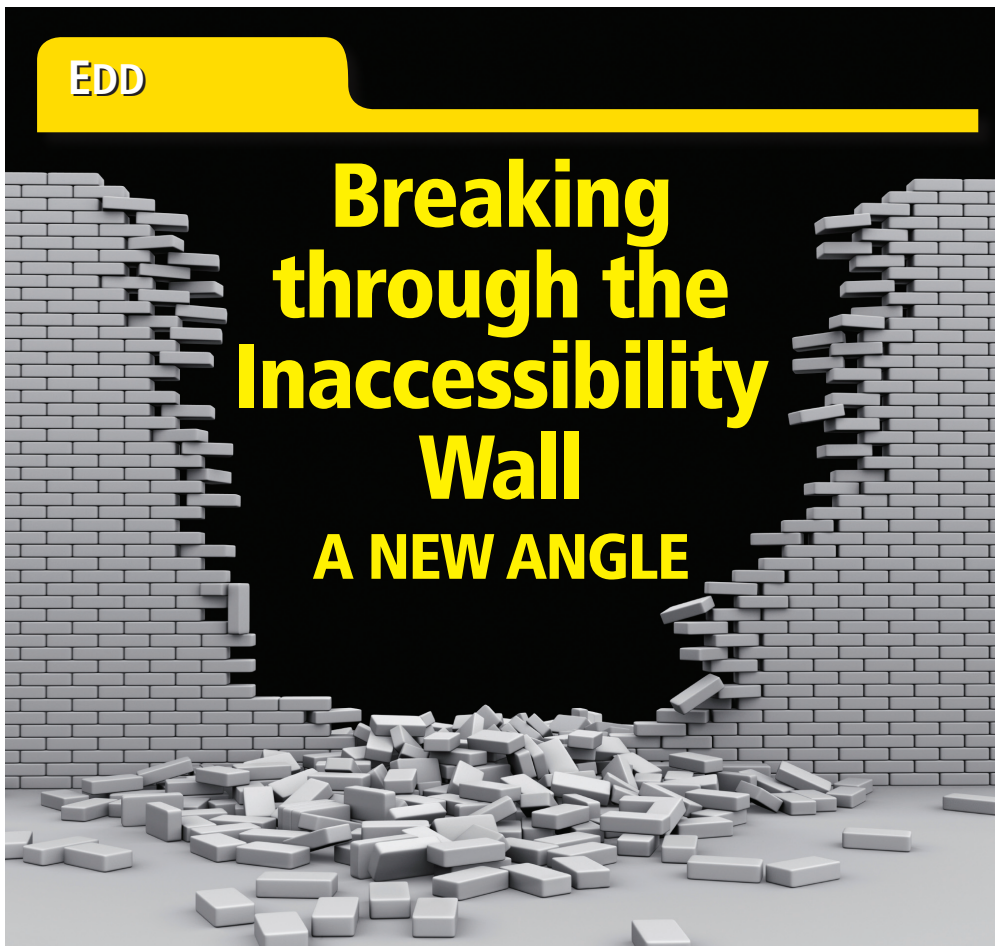
By Jeffrey J. Beard, J.D.

ESI, Inaccessibility, & Games People Play

Much discussion, debate, and even common misunderstandings have developed relating to the classification of "reasonably accessible" ESI (electronically stored information), particularly backup media. Rule 26 of the new Federal Rules of Civil Procedure (FRCP) and related Advisory Committee's notes provides the beginning framework as to whether a party needs to provide discovery of "inaccessible" [1] data. As such, FRCP 26(b)(2)(B) provides:

"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

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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."

In some cases, backup media can prove quite useful. For instance, it can verify when data has been created, changed, or deleted at various time points. This is particularly useful when foul play is suspected and the data flow needs reconstruction to prove it. Also, backup media can be valuable when the relevant data has rolled off the current data set due to any number of reasons, including automatic deletion mechanisms.

It needs to be said there may be easier and/or more cost-effective means to obtain the desired ESI without restoring or producing backup media. The rules are fairly clear that where the information sought is "is obtainable from some other source that is more convenient, less burdensome, or less expensive", then the court may limit the

discovery. So far, so good – that just makes sense economically.

In discovery situations and at the initial "meet and confer", responding counsel may state that the backup media or other data source isn't reasonably accessible. This may indeed be the case, or it may be a tactic to deter further efforts down that avenue for a number of reasons. However, there seems to be a common belief under the new rules that backup tapes are an inaccessible "safe harbor" media as long as one asserts they are only used for disaster recovery. However, that is not a safe assumption, as what is "reasonably accessible" varies with the facts of each case, and the court can still order its production regardless of that determination. For example, the decision in *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 245 F.R.D. 38 (D. Mass. 2007) demonstrates the need to consider the totality of burden and cost, which goes beyond the mere type of storage media. The court held that poorly-indexed images stored on a server, while found "not reasonably accessible" within the meaning of Rule 26, nonetheless met the multi-factor test. The court therefore ordered the data to be produced by the defendant at its own expense.

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up or other media is reasonably accessible. Under Rule 26, the producing party has the burden of proof for establishing that the ESI is not reasonably accessible because of undue burden or cost. Using business intelligence methods can help quantify these points in a logical time- and cost-effective manner. Rather than blindly relying upon subjective arguments and affidavits claiming excessive

time and expense are required, courts are demanding increasingly detailed information upon which to make their decision. It's also contemplated in the Committee Notes regarding sampling and other techniques.

Help Desk Software, Business Intelligence, & Gathering the Data

In this regard, help desk applications can be very useful for tracking when many types of data have been accessed. So how does one make use of this "business intelligence"? Let's use the following example: Many mid-sized and large organizations use help desk software to track many kinds of activities within the organization. In its simplest terms, a help desk system is a database application with a defined set of system and custom data fields. It's used to record and track user support calls, escalate issues to higher-level technical support, and record when those issues have been resolved. There are common fields for the request type, date,

user name, support person involved, etc. In this regard, it generates data logs, which are maintained for some period of time in the database. However, help desk software can and has been used to track many other types of data, such as system access requests to support compliance with Sarbanes Oxley "General IT Controls", IT projects and events such as data migrations and system restorations, and much more.

Because of this depth of information, many help desk systems have robust reporting capabilities either built-in or when used with external reporting tools. If nothing else, most help desk centers are metrics-driven, which aids tremendously in managing a support organization. Reports are often routinely generated showing average call durations, peak call times, and top support issues.

So how does this relate to e-discovery and the accessibility of backup and other media? For one, it can objectively quantify,

and therefore help prove (or disprove) that a particular media and its data are accessible in normal business usage. Again, let's use a simple example: Opposing counsel replies that the media is only used for disaster recovery and is "inaccessible" [1]. Using some basic help desk queries and reports, we can quantify that assertion. Depending on how requests are classified in the help desk system, a fairly simple report can be generated that lists the dates and number of requests for data restoration, whether it be a word processing file, e-mail, a scanned image, or more structured data such as a complete database.

Let's say that the report shows that only two requests relating to the relevant backup media restoration were received by the help desk over the past year, and both were for business continuity purposes. That information could be used to support a claim that the backups were accessed infrequently and are used only for disaster recovery.

Conversely, let's say the report showed that 100 restoration requests were made over the past year, and a significant number were also user-driven requests (e.g., restoring files they accidentally deleted or were automatically deleted). One could easily make the argument it averaged roughly two requests per week. In other words, it was a near daily occurrence. In a very large organization, 100 requests may not be a high number, yet it tends to demonstrate the backup media was not used exclusively for disaster recovery. By also objectively demonstrating the backup data was restored in the normal course of everyday business operations, it severely weakens the producing party's "undue burden or cost" assertions.

These reports are not difficult to generate. Typically, there are already one or more professionals available in the organization

who create queries and run reports from the help desk system. In this regard, it's a reasonable and economic use of resources.

Beware the Shifting Backup Landscape

With certain technological advances, the backup landscape is changing dramatically. Some enterprises are shifting away from backup tapes as their main or only backup media. A number of live and near-line storage options exist, such as disk-to-disk backup, optical storage, and so on. These may also not be as inaccessible as parties may be led to believe. That's not to say there isn't a cost involved, but the dynamics are changing. It's also key to understand the format in which the backup data is stored, and the resources needed to convert it as needed for discovery and review purposes.

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Here's another tip regarding accessibility: Virtualization technology has caught a serious wave. Virtualization is a technology which enables a single host computer or server to run many different software systems at the same time. Each system is self-contained within its own virtual sandbox on the host computer, which makes it very portable. Thus virtualization is used in business continuity designs because a virtual server can be moved relatively quickly and easily to another physical server should the original hardware fail. For example, VMware and Microsoft Virtual Server are often used for exactly these purposes. They're also used for Proof-of-Concept testing for new systems. As further proof of portability, software sales professionals and consultants often run entire server-based systems directly on their laptops using these virtualization programs. As such, it would be more difficult to assert undue burden or cost due to the access issue alone. The producing party would then likely need to establish substantial burdens of searching and/or converting data from the virtualized systems. As the *W.E. Aubuchon*

Co., Inc. case above illustrates, however, if the requested data is key to the heart of the matter and more convenient sources cannot be found, the hosting entity may still be required to produce it.

This brings us to the importance of Records and Information Management (RIM). Help desk records would normally seem innocuous and perhaps even lower priority in the larger scope of things. However, if a savvy lit support manager knows how to use these applications for e-discovery, then consider what other information could be used for similar purposes – including data hosted by third parties. Given that the vast majority of data is created and maintained in electronic form, corporate counsel need to be proactive in working with their Records Manager and CIO to establish appropriate information lifecycle solutions to take these other systems and their associated data into account.

The new Rules provide a framework that allows for more efficient and cost-effective use of ESI. If you keep in mind that different data sets are sometimes interrelated, then imaginative legal and technical professionals will find new methods and uses for proving their case. Even mundane and seemingly non-relevant data can hold the key to unlocking the right electronic doors.

About the Author: Jeff Beard is an attorney, consultant, and a former Legal Services IT Manager with a Fortune 100 corporation. He is frequently involved in the more complex issues confronted by large firms and corporate law departments, including enterprise litigation readiness, electronic discovery, litigation support, records management, information security, and data privacy.

Mr. Beard also has extensive experience with matter management, electronic invoicing, and document and enterprise content management. He served on the ABA TECHSHOW Executive Board and is a frequent national author and presenter. His popular blog, LawTech Guru (www.lawtech-guru.com), regularly covers new developments in e-discovery.

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