Legal Backgrounder
Vol. 40 No. 10 August 18, 2025

Washington Legal Foundation
Advocate for Freedom and Justice®
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Shifting the Burden: How Courts Consider Requests to Re-Balance eDiscovery Costs

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Discovery—and particularly eDiscovery—is costly and time-consuming. Indeed, "[a]s contrasted with traditional paper discovery, e-discovery has the potential to be vastly more expensive due to the sheer volume of electronic information that can be easily and inexpensively stored . . . ." *See Wiginton v. CB Richard Ellis*, 229 F.R.D. 568, 572 (N.D. Ill. 2004). Under the Federal Rules of Civil Procedure, parties responding to discovery typically bear their own costs. Nevertheless, under certain circumstances, courts have discretion to shift costs to the requesting party. While recent decisions demonstrate some courts' willingness to rebalance discovery costs in the context of eDiscovery, particularly in light of proportionality considerations, cost-shifting remains the exception.

The Federal Rules Permit eDiscovery Cost-Shifting

Federal Rule of Civil Procedure 26 provides the foundation for cost-shifting in discovery. Rule 26(b)(1) provides that discovery should be proportional to the needs of the case, considering the importance of the issues, the amount in controversy, party resources, the parties' access to relevant information, and the burden versus benefits of proposed discovery. With respect to electronically stored information ("ESI"), Rule 26(b)(2)(B) states that a party need not produce ESI from sources that are not reasonably accessible, considering undue burden or cost. A court, however, "may nonetheless order discovery from such sources if the requesting party shows good cause," and may "specify conditions for the discovery," which sometimes include cost-sharing. Pursuant to Rule 26(c)(1)(B), courts can also issue protective orders that include an "allocation of expenses" to protect parties from undue burden or expense. *See also Uhlig LLC v. CoreLogic, Inc.*, No. 21-2543, 2023 WL 4405012, at *2 (D. Kan. July 7, 2023) ("'[C]ourts have broad discretion to protect a responding party from undue burden by conditioning discovery on the requesting party's payment of . . . costs . . . .'").

The Producing Party Must Establish That eDiscovery Cost Shifting Is Warranted Based on Proportionality Factors

In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), the Supreme Court explained that under the Federal Rules, "the presumption is that the responding party must bear the expense of complying with discovery requests." *See also* Fed. R. Civ. P. 26(c)(1)(B), Advisory Committee Notes (2015) ("Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding [to discovery requests]."). However, a party "may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from 'undue burden or expense'

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. . . ." *Oppenheimer*, 437 at 538. Thus, when eDiscovery imposes an "undue burden or expense" on the responding party, a court may shift production expenses to the requesting party. *See e.g.*, *Lawrence v. Paducah Ctr. for Health & Rehab., LLC*, No. 5:21-cv-00092, 2023 WL 4552285, at *11 (W.D. Ky. July 14, 2023) (discussing authority to shift costs but denying request); *Nanjing CIC Int'l Co., Ltd v. Schwartz*, No. 6:20-CV-07031, 2025 WL 1688376, at *8 (W.D.N.Y. June 17, 2025) (same). The producing party bears the burden to establish good cause to shift production expenses to the requesting party. *See Bilek v. Fed. Ins. Co.*, 344 F.R.D. 484, 495 (N.D. Ill. 2023) (defendant did not meet burden where it "offered no support for its assertions, such as affidavits, transcripts, declarations, logs, search results, or invoices, to substantiate its cost-allocation request").

In considering cost-shifting requests, courts typically apply the factors set forth in *Zubulake v. UBS Warburg*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003), including: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the cost of production compared to the amount in controversy; (4) the cost of production compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Id.* at 322; *see also Bilek*, 344 F.R.D. at 484.

One court recently explained that "expense shifting should be the exception . . . ." *See Panteleakis v. Waypoint Res., LLC*, Case No. 25-cv-80008, 2025 WL 1865772, at *2 (S.D. Fla. May 20, 2025) (citing Fed. R. Civ. P. 26 Advisory Committee Note to 2015 Amendment ("Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.")). To that end, cost-shifting motions are still often denied. *See, e.g., Rusoff v. Happy Group, Inc.*, No. 21-cv-08084, 2023 WL 114224 (N.D. Cal. Jan. 5, 2023) (denying motion to shift costs of applying new search terms to custodial data where defendant failed to rebut presumption that responding parties bear production costs and assumed risk by applying search terms prior to court's search-term ruling); *see also Lawrence*, 2023 WL 4552285, at *11; *Nanjing*, 2025 WL 1688376, at *8; *Bilek*, 344 F.R.D. at 495.

Expanding Cost-Shifting Beyond Cases Involving Inaccessible Data to Focus on Proportionality

In the past, when considering eDiscovery cost-shifting motions, courts treated the inaccessibility of information (such as data stored on backup tapes or legacy systems) as a threshold factor that had to be met before applying the *Zubulake* cost-shifting factors. For example, in *Nanjing*, the court declined to apply the *Zubulake* factors because the movant failed to make a threshold showing that "the documents at issue are kept in an inaccessible format and thus that their reproductions were or will be unduly burdensome or expensive." *Id.*, 2025 WL 1688376, *8 (citing *Novick v. AXA Network, LLC*, No. 07 CIV. 7767, 2013 WL 5338427, at *3 (S.D.N.Y. Sept. 24, 2013) and denying motion). *See also Bailey v. Brookdale Univ. Hosp. Med. Ctr.*, No. 16-CV-2195 (ADS) (AKT), 2017 WL 2616957, at *4 (E.D.N.Y. June 16, 2017) (noting *Zubulake* factors should be considered after "threshold determination is made that the electronic data sought is 'relatively inaccessible'"); *C.K. v. Bassett*, No. 22-CV-1791, 2023 WL 4086333 (E.D.N.Y. June 20, 2023) (denying cost-shifting because documents were collected and stored in accessible formats).

Some courts, however, have moved away from treating inaccessibility of data as a prerequisite for cost-shifting and have turned directly to proportionality factors. In *Uhlig*, for example, the court did not discuss whether a decommissioned database was "reasonably accessible," but instead analyzed the motion to divide production costs solely based on Rule 26(b)(1)'s proportionality

factors. *Id.*, 2023 WL 4405012, at *3-4 (plaintiff failed to meet burden of proof under Rule 26(b)(1) factors). *See also Bilek*, 344 F.R.D. at 495 (addressing proportionality factors without discussing accessibility of data); *Lawrence*, 2023 WL 4552285, at *11 (same); *Rusoff*, 2023 WL 114224, at *8 (considering and denying cost-shifting request without reference to data accessibility).

Courts Also Have Discretion to Shift Costs for Good Cause

While cost-shifting requests are most commonly reviewed within the framework of the *Zubulake* factors or Rule 26's proportionality factors, these "are not the exclusive means . . . for analyzing cost-shifting." *See In re Allergan Biocell Textured Breast Implant Prod. Liab. Litig.*, No. 2:19-md-02921, 2025 WL 900476 (D.N.J. Mar. 21, 2025) (citing cases that discuss courts' discretion to award cost-shifting based on "good cause").

Indeed, in *Allergan*, the district court affirmed the magistrate judge's order granting defendants' motion to shift more than $700,000 in document scanning costs to plaintiffs. *Id.* at *3. Notably, plaintiffs argued the magistrate judge erred by failing to apply the *Zubulake* factors or Rule 26(b)(2)(B)'s proportionality factors. The district court disagreed and held that "Rule 26(b) factors are merely one approach to analyzing whether the 'undue burden or expense' discussed in Rule 26(c) exists," such that "declining to consider them was not reversible error." *Id.* at *2, 11 (affirming finding of good cause to shift scanning costs to plaintiffs where defendants agreed to make hard copy documents available, plaintiffs were unwilling to review in person or narrow the request, and defendants warned they would seek cost-shifting if required to scan documents).

Similarly, in *In re Tasigna (Nilotinib) Prod. Liab. Litig.*, No. 6:21-md-3006, 2023 WL 3563615 (M.D. Fla., March 31, 2023), the court ordered Novartis to produce clinical trial data for use by plaintiffs' expert in analyzing potential unreported adverse effects of a drug. Novartis paid more than $335,000 to anonymize the data to preserve patient confidentiality. Plaintiffs' expert subsequently determined the data was unusable, and plaintiffs withdrew him as an expert. *Id.* at *1. Novartis moved to shift the costs of data anonymization to plaintiffs. The court explained that "there is no talismanic guidance as to which cases call for cost shifting nor a formula for determining the amount to be allocated." *Id.* at *2. The court found that both parties bore some responsibility for data anonymization costs being incurred "in vain," and should have discussed the cost issue earlier and controlled costs "by working cooperatively and in sufficient detail to assure efficient production of useful data." *Id.* The court therefore shifted some of the costs to plaintiffs, ordering them to pay $75,000, or approximately 22% of the costs.

Conclusion and Practical Tips

In short, cost-shifting in eDiscovery remains the exception. A request for cost-shifting is more likely to be granted, however, when the movant establishes that, despite a good faith effort to resolve the dispute, data is not "reasonably accessible," production will result in undue burden, or the discovery sought is not proportional to the needs of the case. Regarding efforts to resolve the dispute, courts consider whether the movant proactively attempted to address costs and other burdens, including early and cooperative discovery planning, which could ultimately support a request for cost-shifting. To that end, some federal courts, such as the Northern District of California, require parties to discuss potential allocation of costs during the initial Rule 26(f) conference. *See* N.D. Cal. Guidelines for the Discovery of Electronically Stored Information, at 2.02 (suggesting potential sharing of expenses such as joint document repositories). *See also* D. Col. Guidelines Addressing the Discovery of Electronically Stored Information, at Commentary 3.6 (discussing conditions on discovery including "allocation of cost."); D. Kan. Guidelines for Cases Involving Electronically Stored Information, at Par. 12 (same, but also noting presumptions that "producing

party will bear all costs for reasonably accessible ESI," and "there will be cost sharing or cost shifting for ESI that is not reasonably accessible"); W.D. Pa. Local Rules, Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information, Appendix LCvR 26.2.C-Checklist, at IV (discussing proportionality and shared costs such as "the use of a common electronic discovery vendor or a shared document repository").

Based on the foregoing, parties that may want to pursue eDiscovery cost-shifting should position themselves by addressing allocation of costs at the outset of a case, including: (1) at the Rule 26(f) conference; (2) in the parties' Joint Rule 26(f) Report; and (3) when formulating an ESI protocol (*see, e.g., Bilek, supra*, in which the ESI Protocol included a mechanism for potential cost-sharing). Then, throughout discovery, parties should ensure they address burden, cost, proportionality, and accessibility of data in responses and objections to discovery requests and meet-and-confers with opposing counsel (which should be well-documented), so they can ultimately seek relief in motions for protective orders and responses to motions to compel (which should be supported with evidence to substantiate any cost-shifting request).

