

Hot Topics in E-Discovery

Kara A. Millonzi
millonzi@sog.unc.edu
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What is Discoverable?

- Federal Rule 26 & 34:
 - Electronically stored information (ESI)
- NC Rule 26 & 34:
 - Data compilations
- Proposed NC Rule 26 & 34:
 - ESI (but not metadata)

Hot Topic Areas

- Cost / Burden of Producing ESI
- Dispersion of ESI
- Form of Production
- Privileged ESI

Cost / Burden of Producing ESI

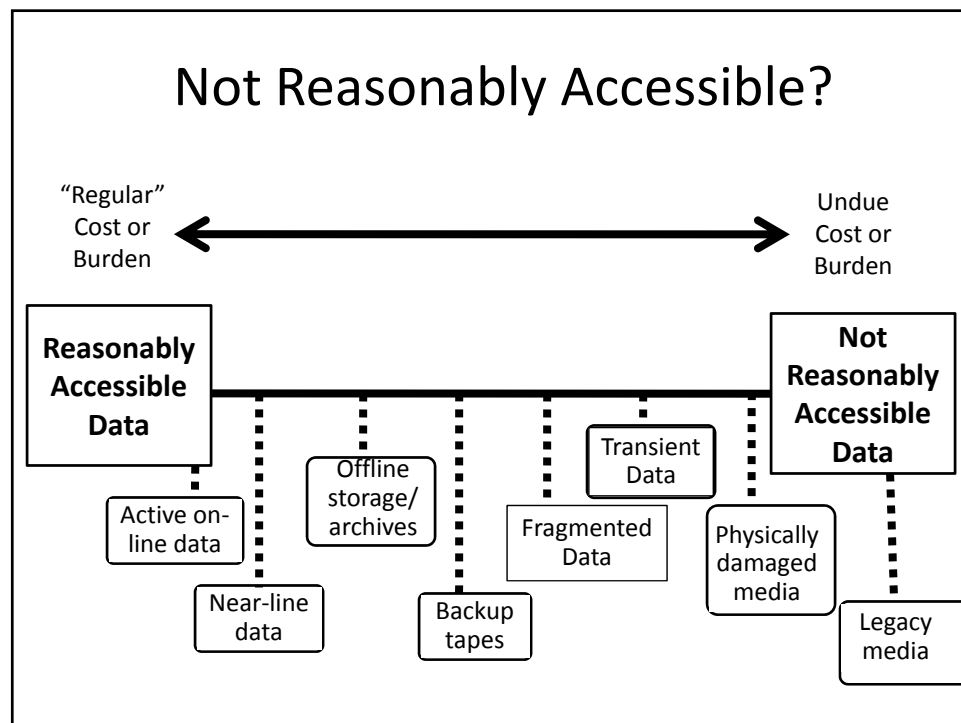
- Discovery Plans
- “Not Reasonably Accessible” ESI
- Search Protocols
- Testing/Sampling
- Cost-shifting
- Safe Harbor

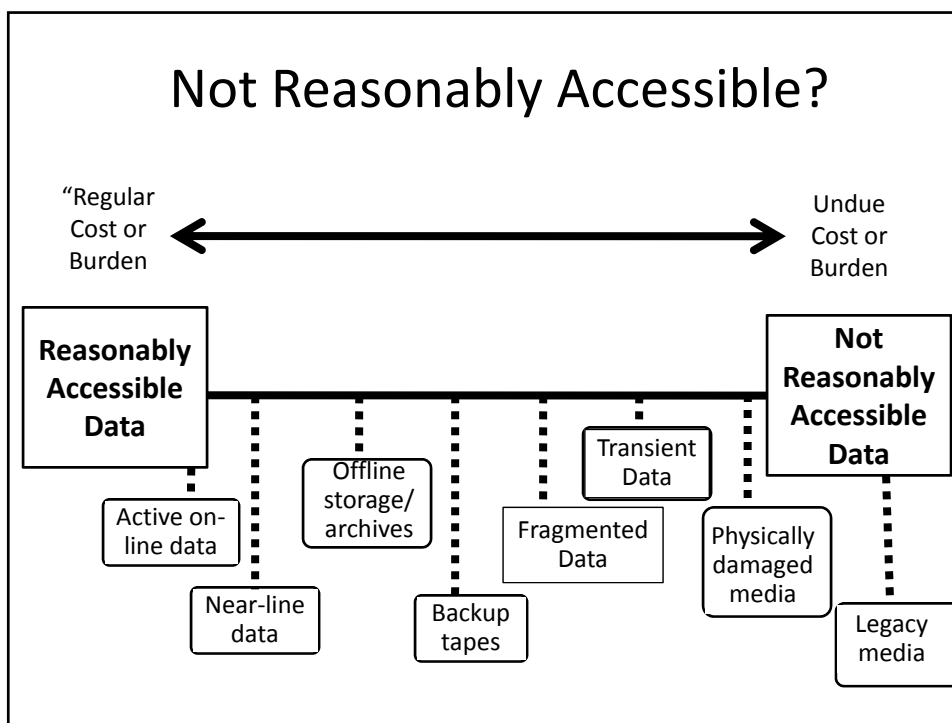
Cost / Burden of Producing ESI

- Discovery Plans
- **“Not Reasonably Accessible” ESI**
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FRCP 26:

- A party does not have to produce ESI that is not reasonably accessible due to undue burden or cost (unless good cause shown)





Cost / Burden of Producing ESI

- Discovery Plans
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- **Search Protocols**
- **Testing/Sampling**
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- Safe Harbor

• FRCP 34:

- Explicitly authorizes a party to request that certain sources of ESI be tested or sampled to determine likelihood of producing relevant information

• Search Protocols

- Parties should attempt to agree to specific search protocols—what to search and how to search it—to limit costs and burden

Cost / Burden of Producing ESI

- Discovery Plans
 - “Not Reasonably Accessible” Data
 - Search Protocols
 - Testing/Sampling
 - **Cost-shifting**
 - Safe Harbor
- Cost-shifting is not mandated under the federal rules
 - Courts are encouraged to consider cost-shifting as a condition to production

Cost / Burden of Producing ESI

- Discovery Plans
 - “Not Reasonably Accessible” Data
 - Search Protocols
 - Testing/Sampling
 - Cost-shifting
 - **Safe Harbor**
- FRCP 37:
 - Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide ESI lost as a result of the routine, good-faith operation of an electronic information system

Dispersion of ESI

- Where is the data?
 - Examine data collection and storage practices generally
 - Examine telecommuting policies and practices
 - Ensure compliance with pre-existing duties to preserve ESI
- Resource for ESI litigation hold instructions:
 - The Sedona Conference --
www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf

Form of Production of ESI

- FRCP 34:
 - Party may request form or forms
 - If producing party objects, or no form requested, produce ESI:
 - In form in which it is ordinarily maintained, or
 - In form that is reasonably usable

Privileged ESI

- FRCP 26:
 - Clawback / Quick Peek provisions
- FRE 502:
 - 2008 amendment to address waiver issue

