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The Award of E-Discovery Costs to the Prevailing Party: An Analog Solution in a Digital World

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THE AWARD OF E-DISCOVERY COSTS TO THE PREVAILING PARTY: AN ANALOG SOLUTION IN A DIGITAL WORLD

STEVEN BAICKER-MCKEE*

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I. INTRODUCTION

The spiraling cost of discovery driven by the explosion in electronically stored information is the single most significant problem with the current civil litigation system in the United States.¹ An anecdotal example illustrates this problem.

A company was defending a lawsuit in which the plaintiff was seeking \$4 million in damages.² As required, the company undertook the process of identifying records

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¹ Some might counter with the decline in jury trials as a result of the settlement of such a high percentage of the cases. *See, e.g.,* Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. REV. 1935, 1943 (1997); Stanley Marcus, J., “*Wither the Jury Trial*,” 21 ST. THOMAS L. REV. 27, 30 (2008). The response would be that the cost of discovery is at least one of the root causes of the settlement or alternative resolution of these cases prior to trial. Others blame summary judgment for the demise of the jury trial. *See, e.g.,* Steven B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 622 (2004); JOE S. CECIL ET AL., FED. JUDICIAL CTR., TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS 1 (2001), available at <https://bulk.resource.org/courts.gov/fjc/summjudg.pdf>. However, as noted below, only a small fraction (perhaps 5%) of cases are disposed of by summary judgment, whereas the prospect of expensive discovery is present in almost every case that survives the motion to dismiss stage. Thus, one could argue that the effects of summary judgment on the decline in jury trials is dwarfed by the effects of settlements to avoid expensive discovery and the other costs, burdens, and uncertainties of the litigation process.

² An in-house lawyer described this experience at the Mini-Conference on Preservation and Sanctions held in Dallas in 2011. DISCOVERY SUBCOMM. OF THE ADVISORY COMM. ON

custodians and preserving their electronically stored information (“ESI”).³ The company identified fifty-seven records custodians, and spent approximately \$3 million just to preserve the ESI (most of which the opposing party did not review).⁴ That \$3 million is currently not recoverable, even if the company prevails on every claim and issue in the litigation. The incentive to make a significant payment to settle even a wholly frivolous case is apparent when one limited aspect of the e-discovery process can cost \$3 million in a case where \$4 million is at issue.

These numbers are not unique to that particular matter, and they add up system wide. The cost to produce one gigabyte of data has been estimated at between \$5,000 and \$7,000.⁵ A significant federal court case may involve the production 500 gigabytes of data.⁶ Accordingly, the producing party can spend between \$2.5 and \$3.5 million on e-discovery production in such a case.⁷ According to a 2010 report, litigants spent \$2.8 billion on e-discovery in 2009.⁸ With e-discovery costs increasing every year,⁹ it is not surprising that these costs have an enormous effect on civil litigation.

Against this backdrop of the spiraling cost and burden of the discovery process, an issue is percolating through the lower and intermediate courts—the recoverability of e-discovery expenses as a component of the costs awarded to the successful party under Rule 54(d).¹⁰ Two divergent approaches have emerged in the judicial opinions and in the limited scholarship addressing the application of Rule 54(d) to e-discovery costs.

CIVIL RULES, REPORT OF MINI-CONFERENCE ON PRESERVATION AND SANCTIONS 2 (Sept. 2011) [hereinafter DISCOVERY].

³ “Electronically stored information,” or ESI, is the term of art under the Federal Rules of Civil Procedure for all of the emails, spreadsheets, word processing documents, and other information stored on computers and other electronic media. The term was introduced in the amendments to the Federal Rules of Civil Procedure that went into effect on December 1, 2006. *See generally* STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III (2007 ed.) and the Advisory Committee Notes to the 2006 Amendments to the Federal Rules of Civil Procedure for a more detailed discussion of the 2006 amendments.

⁴ DISCOVERY, *supra* note 2, at 2.

⁵ Jacqueline Hoelting, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a “Loser Pays” Rule for E-Discovery Costs*, 60 CLEV. ST. L. REV. 1103, 1112 (2013); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008) [hereinafter ELECTRONIC DISCOVERY].

⁶ ELECTRONIC DISCOVERY, *supra* note 5, at 5.

⁷ *Id.*

⁸ Hoelting, *supra* note 5, at 1112; George Socha & Tom Gelbmann, *Climbing Back*, LAW TECH. NEWS (2010).

⁹ Socha & Gelbmann, *supra* note 8 (noting that the \$2.8 billion spent in 2009 was up 10% from 2008).

¹⁰ As discussed below, Rule 54(d) authorizes the court to award “costs”—but not attorney’s fees—to the prevailing party. *See infra* pp. 15-16. Precisely which costs are recoverable is the subject of this article.

The first contingent contends that Rule 54(d) is only intended to reimburse the prevailing party for a small subset of the total costs that the party has incurred.¹¹ These jurists and scholars reason that Congressional intent and Supreme Court authority so limit the intended scope of the Rule so as to advance the policies underlying the American Rule (providing that each party bears its attorney's fees).¹² The other camp argues for broad transfer of costs to the unsuccessful party, arguing that such transfer would help incentivize litigants to be more efficient and measured in the manner in which they conduct discovery.¹³

This article advocates for a third option—a middle ground between these two polar positions that vests the courts with discretion to balance the competing concerns and award the prevailing party a greater portion of its costs in appropriate circumstances. Such an approach would potentially influence the parties to be more measured in their e-discovery requests, and would equip the courts with the tools to allocate those costs appropriately among the parties at the end of an adjudication. Given the weight of case law that seems to be settling on the narrow interpretation of Rule 54(d), this proposal would likely require amendment of the rule, but the Supreme Court has not been reluctant to propose rules changes over the last eight years, and Congress has allowed each proposed change to go into effect.¹⁴

This article will start with an overview of the e-discovery process, to explain the differences between paper discovery (for which Rule 54(d) and the applicable case law were designed) and the current discovery processes. The article will then provide some additional evidence of the impacts of this e-discovery on the judicial process. Next, the article will examine the evolution of Rule 54(d) and the companion statute, 28 U.S.C. § 1920 in the legislature and the courts. The article will conclude with a discussion of the policy concerns implicated by this issue and a proposal to address those concerns in a balanced, flexible approach.

A. Brief Overview of the E-Discovery Process

Before diving into the case law regarding the recoverability of e-discovery costs, it may be helpful to provide a brief overview of the nature of those costs. One model for understanding the e-discovery process, and how it differs from the paper discovery process, is the Electronic Discovery Reference Model, a model created by

¹¹ See, e.g., Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining Zubalake and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1838 (2010); John M. Blumers, *A Practice in Search of a Policy: Considerations of Relative Financial Standing in Cost Awards Under Federal Rule of Civil Procedure 54(d)(1)*, 75 B.U. L. REV. 1541, 1566 (1995); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 169 (3d Cir. 2012); *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 261 (4th Cir. 2013); *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1327 (11th Cir. 2013).

¹² See, e.g., Mast, *supra* note 11, at 1846; Blumers, *supra* note 11, at 1561; *Race Tires*, 674 F.3d at 164; *Country Vintner*, 718 F.3d at 255; *CBT Flint Partners*, 737 F.3d at 1327.

¹³ See, e.g., Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 555 (2010); *Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGRx), 2011 WL 3759927, at *7 (C.D. Cal. Aug. 22, 2011); *Parrish v. Manatt, Phelps, & Phillips, LLP*, No. C 10-03200 WHA, 2011 WL 1362112, at *2 (N.D. Cal. Apr. 11, 2011); *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011).

¹⁴ See the discussion of the 2006, 2007, 2009, 2010, and 2013 amendments and the 2015 proposed amendments *infra* Section II.

George Socha and Tom Gelbmann in 2005, and which is now widely accepted and employed by many e-discovery specialists.¹⁵

The Electronic Discovery Reference Model breaks the e-discovery process into nine steps: information management, identification, preservation, collection, processing, review, analysis, production, and presentation.¹⁶ Information management addresses steps to take before litigation occurs to be better prepared for e-discovery, and is therefore not relevant to this discussion. Presentation refers to the process of using the electronic information at trial or in other legal proceedings, and thus falls outside, and after, the discovery process.¹⁷

To some degree, the remaining seven steps involve activities that are part of the e-discovery litigation process. Some of them are primarily legal in nature—activities that traditionally have been conducted by lawyers and paralegals such as reviewing documents for responsiveness and privilege—others are purely technical, and some are hybrids. See Figure 1 for a graphic illustration of this process.

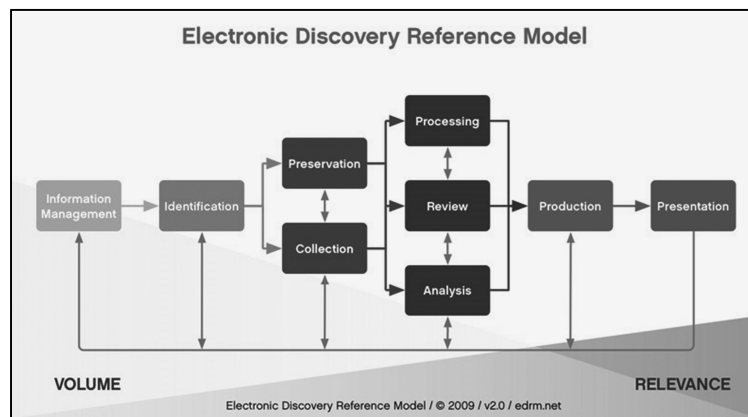


Figure 1.

The *identification process* entails determining the record custodians—those individuals who potentially might have discoverable ESI, and whose records will be searched—as well as those technical repositories of ESI that will be searched, such as file servers, email servers, desktop and laptop computers, smart phones, backup tapes, the cloud,¹⁸ etc.¹⁹

¹⁵ Harrison M. Brown, *Searching for an Answer: Defensible E-Discovery Search Techniques in the Absence of Judicial Voice*, 16 CHAP. L. REV. 407, 416 (2013).

¹⁶ See *EDRM Stages*, ELECTRONIC DISCOVERY REFERENCE MODEL, <http://www.edrm.net/resources/edrm-stages-explained> (last visited Oct. 29, 2014).

¹⁷ But note that the costs of presentation are arguably costs that might be recovered under 28 U.S.C. § 1920(4) (2012) as fees for “exemplification.”

¹⁸ In this context, the “cloud” refers to the storage of ESI—not on computers or servers owned by the party—but instead on servers or media owned by a service provider, which are then accessible by any computer or device at any location that has access to the internet. See PETER MELL & TIMOTHY GRANCE, NAT’L INST. OF STANDARDS AND TECH., THE NIST DEFINITION OF CLOUD COMPUTING, U.S. Dept. of Com. 2 (2011) for a more technical explanation of cloud computing.

¹⁹ RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 10 (2012).

The next stage of the process includes *collection and preservation*.²⁰ In this stage, the discoverable ESI is captured and preserved, because even accessing files without editing them or altering them can change some of their properties (such as the field that keeps track of when the document was last opened).²¹

After the ESI is collected and preserved, the next stage involves the *processing, review, and analysis* of the ESI. The review and analysis tasks are the processes for determining which documents are responsive and for culling privileged documents. Parties may use manual reviewers, word searches, or more sophisticated technologies like predictive coding,²² alone or in combination. Processing entails converting the files into a format that allows the producing party to access the data with the software the party uses for its review and analysis.²³

Production is the process of producing the ESI to opposing parties. Production may entail converting the ESI to a format that the requesting party has designated, and may also include appending electronic bates labels to the documents.²⁴

This e-discovery process is much more complex than the paper discovery process. In the paper world, attorneys and paralegals gather and manually review documents for responsiveness and privilege. Although this process can be quite expensive depending on the volume of paper, the majority of the expense is readily discernable as legal fees, which are generally not recoverable under the American Rule.²⁵ The only expenses that many courts consider recoverable “costs” are the actual charges for copying the documents necessary for use in the case, which are plainly awardable as costs under Rule 54(d).²⁶ Therefore, in the paper discovery arena, the parties and courts can easily determine which costs are potentially eligible for recovery under Rule 54(d).

Many of the e-discovery functions are not so easily categorized, lying somewhere in between traditional legal work and the purely mechanical process of copying paper documents. These hybrid functions may not be performed by law firms or anyone with legal training, but rather are often contracted out to firms employing people with computer or related technical training.

Some of these hybrid tasks are the functional equivalent of the legal work performed by lawyers on paper documents. After the electronic data is gathered, an e-discovery consultant may run word searches to select documents that are likely to be responsive or relevant. Attorneys or paralegals typically then review the selected documents and make the final determination as to whether to make those documents available to the opposing party. In many ways, running these searches is simply using a computer to make the first pass through the documents for responsiveness—a traditionally legal task. Yet the task is performed by people who have technical

²⁰ *Id.*

²¹ *Id.* at 11.

²² See the discussion of predictive coding *infra* p. 7.

²³ RAND INST., *supra* note 19, at 11.

²⁴ *Id.* at 12.

²⁵ Under the American Rule, each party generally bears its own attorney’s fees regardless of which party prevails. See *infra* p. 15.

²⁶ See, e.g., BDT Prods., Inc. v. Lexmark Int’l, Inc., 405 F.3d 415, 420 (6th Cir. 2005).

training, not legal training, and the legal review still occurs in a separate step. Should the expenses of conducting the search be considered legal fees or costs?

Searching using predictive coding is perhaps incrementally closer to legal analysis because it is not purely mechanical.²⁷ With predictive coding, the software uses artificial intelligence to identify potentially responsive documents, not simple Boolean searches.²⁸ The program essentially learns the case from information that the lawyers input, and can find responsive documents that word searches or people might miss. Again, however, the task is performed by people who have technical training, not legal training, and the legal review still occurs in a separate step.

Other tasks have no analog in the paper discovery process. For example, unless the parties have agreed not to produce metadata,²⁹ technical personnel must take steps to preserve the metadata, because otherwise the metadata may be altered by the processes used to review the ESI.³⁰ Likewise, if the parties are not producing documents in their native format,³¹ technical personnel must take additional steps to associate the metadata with the document images.³² The concept of metadata is foreign to the paper document process, so the courts have no historical basis to categorize metadata costs as more like traditional legal work or more like traditional costs.³³

²⁷ For a description of predictive coding and some of the issues it raises, see, for example, Charles Yablon & Nick Landsman-Roos, *Predictive Coding: Emerging Questions and Concerns*, 64 S.C. L. REV. 633 (2013).

²⁸ *Id.* at 637.

²⁹ “Metadata” refers to the data that many programs or computers store in hidden fields that pertain to the document in question. For example, many word processing programs store information about who created the document, when the document was created, who modified the document, when it was modified, etc. Discovery parties often want access to this metadata, as well as to the underlying document. For a detailed description of metadata, see NAT’L INFO. STANDARDS ORG., UNDERSTANDING METADATA (2004).

³⁰ See 126 AM. JUR. PROOF OF FACTS 3d 281 (2014); *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1329 (11th Cir. 2013).

³¹ “Native format” refers to the default format in which an application typically stores data. For example, Excel stores data in a spreadsheet with a .xls or .xlsx file name. A spreadsheet produced in that format will contain all of the formulae used to make the calculations in the spreadsheet. A spreadsheet that is printed out on paper or saved in a different format that simply creates an image (such as a pdf or a tif) ordinarily will not contain the formulae. See LEXISNEXIS, THE TRUTH ABOUT NATIVE FILE REVIEW 3 (2006).

³² *Id.*

³³ See Marjorie A. Shields, Annotation, *Discoverability of Metadata*, 29 A.L.R. 6TH 167 (2007):

The group of judges and attorneys comprising the Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production (Sedona Electronic Document Working Group) identified metadata as one of the primary ways in which producing electronic documents differs from producing paper documents. The Sedona Electronic Document Working Group also recognized that understanding when metadata should be specifically preserved and produced represents one of the biggest challenges in electronic document production.”)

Id. (citations omitted).

Sometimes, the particular steps that a party takes in the e-discovery process are individually determined by that party, using its judgment as to the most substantively effective and cost-effective method. In the paper world, that was almost always the case. In the e-discovery context, however, parties increasingly reach agreement before the fact as to how they will handle ESI. Rule 26(f) requires the parties to meet and discuss a variety of discovery issues and to prepare a proposed discovery plan that they submit to the court.³⁴ The manner of handling ESI is on the list of topics that parties must discuss.³⁵

In the e-discovery era, however, sometimes the court specifies the e-discovery processes the parties must employ. Typically, in these cases, the court uses the parties' Rule 26(f) discovery plan as a starting point and issues a case management order with a high level of detail regarding the parties' ESI obligations, something that would be almost unheard of in the paper discovery environment. For example, in one of the cases discussed below, the case management order addressed the following e-discovery topics: the manner for determining keyword search terms and the parties' satisfaction of their obligations through the keyword searching process; the format for ESI production and preparation for use in e-discovery software packages; electronic Bates labeling; unitization of the documents; production of specific metadata; and the generation of an extracted text file or searchable version for each electronic document.³⁶

The costs of these tasks vary widely depending on factors such as the quantity and nature of the data. In a case study of these costs, the Rand Institute for Civil Justice reported costs ranging from a low of \$17,000 in an intellectual property case to a high of more than \$20 million in two products liability cases.³⁷ These are the costs that prompted the Supreme Court to write, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."³⁸ The next section will consider which of these costs are recoverable to the prevailing party under the cost recovery provisions of the Federal Rules of Civil Procedure.

III. EVIDENCE OF THE CONCERN OVER THE EFFECTS OF HIGH DISCOVERY COSTS ON THE LITIGATION PROCESS

Evidence of the degree of concern over this issue is manifest on many fronts. Two examples serve to illustrate this point.

In 2007 and 2010, the United States Supreme Court issued two landmark decisions on the pleading standard in federal court, *Bell Atlantic Corporation v. Twombly*³⁹ and *Ashcroft v. Iqbal*.⁴⁰ In *Bell Atlantic*, the Supreme Court announced

³⁴ FED. R. CIV. P. 26(f).

³⁵ FED. R. CIV. P. 26(f)(3)(C) (the parties should discuss "any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced").

³⁶ See the discussion of *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (2012) *infra* pp. 20-22.

³⁷ RAND INST., *supra* note 19, at 17.

³⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

³⁹ *Id.* at 544.

⁴⁰ 556 U.S. 662 (2010).

the plausibility standard for pleading, and in *Iqbal* the Court confirmed that the new plausibility standard applies generally to all cases, not only to antitrust cases.

Rule 8 of the Federal Rules of Civil Procedure requires a complaint to contain a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁴¹ This standard is often referred to as “notice pleading,” and contrasted with “fact pleading” regimes.⁴² In 1957, the Supreme Court issued the definitive opinion interpreting this language in *Conley v. Gibson*.⁴³ In *Conley*, the Court wrote, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴⁴ In the ensuing years, lower courts have recited that language thousands of times when adjudicating motions to dismiss.⁴⁵ This was *the* language explaining the pleading standard under Rule 8.

In *Twombly*, the court characterized the “no set of facts” language as “best forgotten,”⁴⁶ and substituted a standard where the complaint must allege sufficient facts so as to state a claim that the court deems to be, not just possible (*i.e.*, passing the “no set of facts” test), but “plausible.”⁴⁷

So, in 1957, the Supreme Court instructed that Rule 8’s “short and plain statement” language meant that a complaint survived a motion to dismiss unless the court could conceive of no set of facts that would support the claims in the complaint. That standard stood, unchanged just as the language in Rule 8 was unchanged, for 50 years. Then, in 2007, the Court announced that the same language in Rule 8 would henceforth be construed to mean something new. Essentially, one could argue, the Court amended Rule 8 unilaterally, bypassing the established process for amending the rules by proposing rule amendments to Congress for its approval.⁴⁸

⁴¹ FED. R. CIV. P. 8.

⁴² *Veazey v. Commc’ns and Cable of Chi., Inc.*, 194 F.3d 850, 854 (7th Cir. 1999).

⁴³ 355 U.S. 41 (1957).

⁴⁴ *Id.* at 45-46.

⁴⁵ Although the courts intoned this language over and over again, there is some disagreement as to whether the trial courts ever followed the *Conley* language literally. See William M. Janssen, *Iqbal “Plausibility” in Pharmaceutical and Medical Device Litigation*, 71 LA. L. REV. 541, 550 (2011) (describing Judge Posner’s statement that although “the exceedingly forgiving attitude toward pleading deficiencies that was expressed . . . in *Conley v. Gibson* . . . continues to be quoted with approval, it has never been taken literally.”).

⁴⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

⁴⁷ *Id.* at 570.

⁴⁸ Courts, legislators, and legal scholars differ markedly in their assessment of *Twombly* and *Iqbal* and their likely effects on federal litigation, with some decrying them as “an assault on our democratic principles” and others seeing the opinions as having “little or no impact” on dismissals. See Janssen, *supra* note 45, at 566-69. Certainly, not everyone would agree that the Court’s *Twombly* and *Iqbal* opinions amounted to an *ultra vires* amendment of Rule 8. While reasonable minds can differ about the ultimate effects of these cases, it is beyond peradventure that these cases received a degree of national attention that few procedural cases achieve and that the basis for the Court’s decision was the high cost of discovery.

What led the Court to take such an extraordinary measure? The Court told us. In explaining why the courts should use the pleading standard to weed out cases that do not meet the heightened plausibility standard, rather than counting on the discovery process to identify cases that lack support, the Court noted that “discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed.”⁴⁹ The court also observed that, “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”⁵⁰ Then, in *Iqbal*, the court wrote, “Rule 8 marks a notable and generous departure from the hyper-technical, code pleading regime of a prior era, but **it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.**”⁵¹ Thus, the Court stated very clearly that it (unilaterally and without Congressional approval) raised the bar for pleading a claim in order to prevent plaintiffs with “anemic” cases from extracting settlements from defendants seeking to avoid the high costs of discovery.⁵²

More evidence of the concerns about the increasing costs of discovery and the effects of such costs on our judicial system can be found in the recent amendments to the Federal Rules of Civil Procedure. The last ten years have seen a remarkable number of substantive revisions to the Rules, and the focus of many of these amendments has been the discovery rules. 2006 brought the e-discovery amendments. These amendments: clarified that all ESI is subject to discovery; required early attention to details regarding e-discovery through the discovery conference and discovery plan process; limited discovery of ESI that is not “reasonably accessible”; added procedures for recalling inadvertently produced privileged matter (a particular risk with ESI); and created a safe harbor for the destruction of ESI as the result of the routine operation of computer systems.⁵³

The 2007 and 2009 amendments included, but did not focus on, the discovery rules. 2007 brought the “Restyling Project,” in which virtually every rule was rewritten.⁵⁴ The 2009 amendments changed the computation for many of the time periods in the Rules.⁵⁵ But the 2010 amendments returned the focus to discovery, with the expert discovery amendments that shielded draft reports and certain other

⁴⁹ *Twombly*, 550 U.S. at 559 (citing Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000)).

⁵⁰ *Id.*

⁵¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2010).

⁵² *Twombly*, 550 U.S. at 559.

⁵³ See STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN CORR, *supra* note 3 for a more detailed discussion of the 2006 amendments.

⁵⁴ See STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III (2008 ed.) and the Advisory Committee Notes to the 2007 Amendments to the Federal Rules of Civil Procedure for a more detailed discussion of the 2007 amendments.

⁵⁵ See STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III (2010 ed.) and the Advisory Committee Notes to the 2009 Amendments to the Federal Rules of Civil Procedure for a more detailed discussion of the 2009 amendments.

communications with testifying experts.⁵⁶ And the 2013 amendments changed the process for issuing subpoenas under Rule 45 and for sanctioning non-compliance under Rule 37.⁵⁷

Moreover, the Advisory Committee has proposed amendments to the discovery rules that are currently on schedule to go into effect in 2015 that would make the most significant changes to the discovery process since the addition of the automatic disclosures twenty years ago.⁵⁸ Those proposed amendments would change “proportionality” from a component of the Rule 26(c) process for protective orders to the core definition for discoverability, and allow parties to object to discovery on the grounds that the burden of the requested discovery outweighs its likely benefits.⁵⁹ They would also reduce the presumptive limits for interrogatories (from 25 to 15) and depositions (from ten depositions at up to seven hours to five depositions at up to six hours), and add a new limit of 25 requests for admission.⁶⁰

Although the proposed amendments do not add a limit on document requests, they do change some important procedures for document discovery. They would allow parties to serve document requests at an earlier stage of the proceeding.⁶¹ They also change the rules for objecting to document requests, adding an express requirement that objections be stated with specificity⁶² and requiring the objecting party to specify whether it was withholding any documents on the basis of its objections.⁶³ The amendments further require that, when a party is producing the

⁵⁶ See STEVEN BAICKER-McKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III (2011 ed.) and the Advisory Committee Notes to the 2010 Amendments to the Federal Rules of Civil Procedure for a more detailed discussion of the 2010 amendments.

⁵⁷ See STEVEN BAICKER-McKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III (2014 ed.) and the Advisory Committee Notes to the 2013 Amendments to the Federal Rules of Civil Procedure for a more detailed discussion of the 2013 amendments.

⁵⁸ See Marc A. Goldich, David R. Cohen & Emily J. Dimond, *FRCP Amendments Could Change Discovery As We Know It*, LAW360 (June 4, 2013), <http://www.law360.com/articles/447209/frcp-amendments-could-change-discovery-as-we-know-it>.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Currently, no discovery requests may be served prior to the parties' discovery conference under Rule 26(f). Under the proposed amendment, parties could serve document requests prior to the conference, and they would be deemed served on the date of the conference, enabling the parties to start document discovery earlier and to discuss issues raised by document discovery at the Rule 26(f) conference and with the court at the initial Rule 16 conference. ADVISORY COMM. ON CIVIL RULES, AGENDA BOOK 81-82 (Apr. 2013).

⁶² Unlike Rule 33, which requires objections to interrogatories to be stated with specificity, Rule 34 does not contain that express requirement. Many courts have imposed it nonetheless. See STEVEN BAICKER-McKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK Pt. III, Rule 34 (2013 ed.); *U.S. v. Philip Morris Inc.*, 347 F.3d 951, 954 (D.C. Cir. 2003). The proposed amendment makes this requirement explicit and consistent.

⁶³ Currently, parties often interpose objections to document requests, and then state that, without waiving the objections, they will produce nonprivileged responsive documents. This

documents rather than permitting inspection of them, the party must produce them at the time of the response or at another reasonable time specified in the response, and authorizes sanctions for failure to do so.⁶⁴

Lastly, the proposed amendments change the sanctions in Rule 37(e) for spoliation of evidence. Currently, Rule 37(e) shields a party from sanctions for the loss of ESI “as a result of the routine, good-faith operation of an electronic information system.”⁶⁵ That safe haven would be deleted, and instead the rules would expressly authorize spoliation sanctions if the loss of the evidence was willful, in bad faith, grossly negligent, or negligent, but only if the loss of evidence caused “substantial prejudice” or “irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action.”⁶⁶

These proposed 2015 amendments, like the expert discovery amendments of 2010 and certain aspects of the e-discovery amendments of 2006, contrast with the historical trend of expanding discovery; these amendments represent a significant reversal of that trend.⁶⁷ Thus, after years and years of expanding federal court discovery and judicial references to the “liberal” nature of discovery⁶⁸ under the Federal Rules of Civil Procedure, the Supreme Court and the Advisory Committee have shifted into reverse and are restricting the scope of discovery.

IV. THE HISTORY OF COST RECOVERY IN THE U.S.

A. Congress Sets the Rules for Recovery

Under British and U.S. *common law*, the courts are not permitted to award costs to the prevailing party.⁶⁹ British courts, however, have long been authorized by *statute* to award attorney’s fees and costs to successful litigants. As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation.⁷⁰ It remains customary in England to award both costs and fees to a prevailing party, and the parties regularly conduct separate hearings before special

practice leaves the propounding party uncertain as to whether the objections raise hypothetical concerns about the phrasing of the request or are the basis for withholding otherwise responsive documents. The amendment would remove this ambiguity.

⁶⁴ Again, this amendment addresses an existing practice in which the responding party simply indicates that it will produce responsive documents “at a mutually convenient time,” leaving the parties to wrangle over that time and leading to further delay. *See* ADVISORY COMM. ON CIVIL RULES 16 (May 2013).

⁶⁵ FED. R. CIV. P. 37(e).

⁶⁶ Goldich, Cohen & Dimond, *supra* note 58.

⁶⁷ *Id.* (“While historically most amendments to the rules have broadened discovery obligations, there now appears to be wide support for proposals aimed at getting discovery back under control.”).

⁶⁸ *See, e.g.,* Hickman v. Taylor, 329 U.S. 495, 512 (1947); Dart Indus. Co., Inc. v. Westwood Chem. Co., Inc., 649 F.2d 646, 649 (9th Cir. 1980); Justiano v. G4S Secure Solutions, Inc., 291 F.R.D. 80, 83 (D.N.J. 2013).

⁶⁹ *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247 (1975).

⁷⁰ Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967).

“Taxing Masters” in order to determine the appropriateness and the size of an award of counsel fees.⁷¹

The United States rejected the British approach to the shifting of attorney’s fees. In 1796, the Supreme Court recognized that “[t]he general practice of the United States is in opposition to” the awarding of counsel fees to the prevailing party.⁷² Although many commentators recommend the “loser pays” English Rule,⁷³ the American Rule remains firmly in place.⁷⁴

The U.S. departure from the British system is not quite so absolute with regard to the taxation of costs. Rule 54(d) of the Federal Rules of Civil Procedure provides that, unless federal statute, the Federal Rules of Civil Procedure, or a court order provide otherwise, “costs—other than attorney’s fees—should be allowed to the prevailing party.”⁷⁵ Although that language would seem on its face plainly to encompass all costs of litigation “other than attorney’s fees,” the courts have interpreted Rule 54(d) to allow only the recovery of costs described in 28 U.S.C. § 1920.⁷⁶

Congress enacted Section 1920 in 1948, but the history of cost recovery in the U.S. predates the enactment of Section 1920 by 155 years. In 1793, Congress enacted a statute that authorized courts to award certain costs to prevailing parties when so authorized under state law.⁷⁷ Under this statute, federal courts awarded both

⁷¹ *Id.* Note, however, that the English system is not strictly a loser pays approach, but rather occupies a middle ground in which the prevailing party typically recovers some, but not all, of its fees as allocated by a taxing Master. See Arthur Goodhart, *Costs*, 38 YALE L.J. 849, 856 (1929).

⁷² *Arcambel v. Wiseman*, 3 U.S. 306, 306 (1796).

⁷³ See, e.g., Marie Gryphon, *Assessing The Effects of a “Loser Pays” Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, 8 RUTGERS J.L. & PUB. POL’Y 567 (2011); Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract With America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317 (1988); Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125 (1995); Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

⁷⁴ See, e.g., John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

⁷⁵ The full text of Rule 54(d)(1) states,

Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days’ notice. On motion served within the next 7 days, the court may review the clerk’s action.

FED. R. CIV. P. 54 (d)(1).

⁷⁶ See, e.g., *Taniguchi v. Kan. Pac. Saipan, LTD.*, 132 S. Ct. 1997, 2005 (2012); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 86 (1991) (Section 1920 “define[s] the full extent of a federal court’s power to shift litigation costs absent express statutory authority.”).

⁷⁷ Judiciary Act of 1793, § 4, 1 Stat. 333 (1793); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247–48 (1975).

attorney's fees and other costs to the prevailing party if the forum state's high court provided for such recovery. Although the statute expired after six years, the practice continued until Congress enacted another act in 1853 to address the taxation of costs and fees.⁷⁸

Congress had at least two purposes in enacting the 1853 act. First, there was no consistency in the manner in which different federal courts awarded costs and fees, and second, losing litigants were bearing attorney's fees that "have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed."⁷⁹ Thus, the purpose of the 1853 act was to mandate a consistent approach to costs and fees that prevented an unreasonable burden on the losing party. The language of the 1853 act was carried forward with little or no change in the Revised Statutes of 1874 and by the Judicial Code of 1911.⁸⁰ Its substance was then included in the Revised Code of 1948 as 28 U.S.C. § 1920, where it currently resides.⁸¹

In 1948 when Congress enacted Section 1920, the discovery world was a much simpler place. Secretaries took dictation by shorthand, typed correspondence and other documents on typewriters—using carbon paper if they needed duplicates—and stored them in metal filing cabinets. Discovery primarily meant rifling through a couple of drawers in those filing cabinets looking for responsive documents.

The 1948 version of Section 1920 provided that:

⁷⁸ See *Taniguchi*, 132 S. Ct. at 2001.

⁷⁹ See the remarks of Senator Bradbury, CONG. GLOBE, 32d Cong., 2d Sess., 207 (1853):

There is now no uniform rule either for compensating the ministerial officers of the courts, or for the regulation of the costs in actions between private suitors. One system prevails in one district, and a totally different one in another; and in some cases it would be difficult to ascertain that any attention had been paid to any law whatever designed to regulate such proceedings It will hence be seen that the compensation of the officers, and the costs taxed in civil suits, is made to depend in a great degree on that allowed in the State courts. There are no two States where the allowance is the same. When this system was adopted, it had the semblance of equality, which does not now exist. There were then but sixteen States, in all of which the laws prescribed certain taxable costs to attorneys for the prosecution and defense of suits. In several of the States which have since been added to the Union, no such cost is allowed; and in others the amount is inconsiderable. As the State fee bills are made so far the rule of compensation in the Federal courts, the Senate will perceive that totally different systems of taxation prevail in the different districts It is not only the officers of the courts, but the suitors also, that are affected by the present unequal, extravagant, and often oppressive system.

The abuses that have grown up in the taxation of attorneys' fees which the losing party has been compelled to pay in civil suits, have been a matter of serious complaint. The papers before the committee show that in some cases those costs have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed.

Id.

⁸⁰ See *Alyeska Pipeline Serv. Co.*, 421 U.S. at 256.

⁸¹ *Id.*

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; and
- (5) Docket fees under section 1923 of this title.

In terms of the recovery of ESI costs, the key language resides in Section 1920(4)—“Fees for exemplification and copies of papers necessarily obtained for use in the case.”

In 1978, Congress amended Section 1920 to add a sixth category of taxable costs, costs for interpreters. The statute remained unchanged until 2008, when Congress made modest changes to subsections (2) and (4) to address certain electronic costs. Congress revised subsection (2) to cover fees for “printed or electronically recorded transcripts” and revised subsection (4) to substitute “copies of *materials*” for “copies of *papers*.”⁸²

In the House, Representative Zoe Lofgren described the bill as a collection of “noncontroversial measures proposed by the Judicial Conference to improve efficiency in the Federal courts.”⁸³ She also noted that the legislation would “mak[e] electronically produced information coverable in court costs.”⁸⁴

This simple change from “papers” to “materials” belies the complex differences between making paper copies and making electronic copies. As discussed above, the process of gathering, processing, and producing ESI is a multi-step process, some or all of which might be considered part and parcel of the “fees for . . . copies of materials necessarily obtained for use in the case.” The next section describes the courts’ grappling with this issue.

B. The Courts Interpret the Rules

Before facing issues regarding e-discovery costs, the courts considered a number of issues related to the award of copying costs under Section 1920(4). When Section 1920 was enacted, “copying” meant hand transcribing a proceeding or document.⁸⁵ Since the advent of photocopying technology, however, prevailing parties have routinely relied on Section 1920(4) to recover photocopying costs.⁸⁶ Courts also addressed whether Section 1920(4) requires that documents must have been offered at trial or as an exhibit to a motion for their copying costs to be eligible for award to

⁸² Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat. 4291, 4292 (2008) (codified at 28 U.S.C. § 1920(2) & (4)).

⁸³ 154 Cong. Rec. H10271 (Sept. 27, 2008) (statement of Rep. Lofgren).

⁸⁴ *Id.*

⁸⁵ *See Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249, 258 (4th Cir. 2013).

⁸⁶ *See, e.g., Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 643 (7th Cir. 1991); *Tokyo Electron Ariz., Inc. v. Discreet Indus. Corp.*, 215 F.R.D. 60, 65 (E.D.N.Y. 2003); *Gen. Cas. Co. of Am. v. Stanchfield*, 23 F.R.D. 58, 60 (D. Mont. 1959).

the prevailing party.⁸⁷ Courts concluded that Section 1920(4) applies to documents obtained during discovery, even if not introduced at trial or in a motion based on the contrast between the language in earlier cost statutes (allowing costs of copies of papers necessarily obtained for use *on trial*) and Section 1920(4) (allowing costs of making copies necessarily obtained for use *in the case*).⁸⁸

Courts also considered whether to interpret Section 1920 narrowly or broadly. The Supreme Court has observed that taxable costs under the statute are “modest in scope” and “limited to relatively minor, incidental expenses”:

[Section] 1920 . . . lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts. Indeed, the assessment of costs most often is merely a clerical matter that can be done by the court clerk. Taxable costs are a fraction of the nontaxable expenses borne by litigants for attorneys, experts, consultants, and investigators. It comes as little surprise, therefore, that *costs almost always amount to less than the successful litigant’s total expenses in connection with a lawsuit*.⁸⁹

When the courts turned to the issue of how Section 1920(4) applies to the costs of e-discovery, there was significant disagreement. A number of district courts took a broad view of revised Section 1920(4) and construed it to include most of the services an e-discovery consultant would provide.

Perhaps the most frequently cited case for this interpretation is Judge Thomas W. Thrash, Jr.’s opinion in *CBT Flint Partners, LLC v. Return Path, Inc.*⁹⁰ In this patent case, the prevailing defendant sought \$243,453.02 charged by an e-discovery vendor to “collect, search, identify and help produce electronic documents from [the defendant’s] network files and hard drives in response to [the plaintiff’s] discovery requests.”⁹¹ Judge Thrash noted that the services that the vendor provided are “highly technical,” and “not the type of services that attorneys or paralegals are trained for or are capable of providing.”⁹² He also noted the defendant’s undisputed contention that

⁸⁷ See *Country Vintner*, 718 F.3d at 257.

⁸⁸ See *In re Ricoh Co., Ltd. Patent Litig.*, 661 F.3d 1361, 1365 (Fed. Cir. 2011) (applying Ninth Circuit law) (“Under section 1920(4), exemplification and copying costs for producing documents in discovery are recoverable.”); *Rundus v. City of Dallas, Tex.*, 634 F.3d 309, 316 (5th Cir. 2011) (“[C]osts incurred merely for discovery. . . . [a]re recoverable if the party making the copies has a reasonable belief that the documents will be used during trial or for trial preparation.”) (internal quotation marks omitted); *U.S. E.E.O.C. v. W & O, Inc.*, 213 F.3d 600, 623 (11th Cir. 2000) (“Copies attributable to discovery are a category of copies recoverable under § 1920(4).”) (internal quotation marks omitted); *Illinois v. Sangamo Constr. Co.*, 657 F.2d 855, 867 (7th Cir. 1981) (affirming taxation of costs of copying discovery documents because the “expense of copying materials reasonably necessary for use in the case are recoverable costs under 28 U.S.C. § 1920(4),” and “[t]he underlying documents need not be introduced at trial in order for the cost of copying them to be recoverable”).

⁸⁹ *Taniguchi v. Kan. Pac. Saipan, LTD.*, 132 S. Ct. 1997, 2006 (2012) (emphasis added).

⁹⁰ *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376 (N.D. Ga. 2009).

⁹¹ *Id.* at 1381.

⁹² *Id.*

making paper copies of the more than 1.4 million documents and the source code involved would actually have cost more than the amount that the vendor charged.⁹³ He reasoned that broad taxation of e-discovery costs would promote caution in making overly burdensome ESI demands: “Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery.”⁹⁴ Based upon these considerations, he denied the plaintiff’s objections to the e-discovery costs.⁹⁵

Other early district court decisions allowing the recovery of various e-discovery costs include: *Tibble v. Edison Int’l*⁹⁶ (more than \$500,000 in electronic discovery costs “necessarily incurred” to respond to plaintiff’s discovery requests were taxable); *Parrish v. Manatt, Phelps, & Phillips, LLP*⁹⁷ (“The tasks of collecting client documents, reviewing those documents, and determining which documents are relevant are essential—and often costly—parts of investigation and discovery.”); *In re Aspartame Antitrust Litig.*⁹⁸ (“The court is persuaded that in cases of this complexity, e-discovery saves costs overall by allowing discovery to be conducted in an efficient and cost-effective manner.”).

Other district court judges took the opposite view, interpreting Section 1920 narrowly. These courts generally reasoned that costs for paper copies are limited to the charges for pushing the “copy” button on the copying machine, and costs for electronic copying should be similarly limited to the scanning or duplicating of the electronic files, and should not include the costs of locating or processing the files.

Thus, in *Fells v. Virginia Department of Transportation*,⁹⁹ the prevailing party sought costs associated with “electronic records initial processing, Metadata extraction, [and] file conversion.” While the party’s ESI project manager testified that these activities were “much like photocopying or scanning of paper records,” the court denied recovery of costs because the project manager “did not testify that these techniques are photocopying or scanning.”¹⁰⁰ Likewise, in *Kellogg Brown & Root Int’l, Inc. v. Altanmia Commercial Mktg. Co., W.L.L.*,¹⁰¹ the court reasoned that extracting and storing electronic data was more like the work of an attorney in finding and sorting documents for discovery than copying documents. In *Mann v.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ As discussed *infra* p. 23, the Court of Appeals for the Federal Circuit recently reversed Judge Thrash in *CBT Flint Partners, LLC v. Return Path, Inc.*, 654 F.3d 1353 (Fed. Cir. 2013), which is in line with the other circuit courts to address this issue.

⁹⁶ *Tibble v. Edison Intern.*, No. CV 07-5359 SVW (AGRx), 2011 WL 3759927, at *7 (C.D. Cal. Aug. 22, 2011).

⁹⁷ *Parrish v. Manatt, Phelps, & Phillips, LLP.*, No. C10-03200WHA, 2011 WL 1362112, at *2 (N.D. Cal. Apr. 11, 2011).

⁹⁸ *In re Aspartame Antitrust Litig.*, 817 F. Supp. 2d 608, 615 (E.D. Pa. 2011).

⁹⁹ *Fells v. Va. Dep’t of Transp.*, 605 F. Supp. 2d 740 (E.D. Va. 2009).

¹⁰⁰ *Id.* at 743.

¹⁰¹ *Kellogg Brown & Root Int’l, Inc. v. Altanmia Commercial Mktg. Co., W.L.L.*, No. H-07-2684, 2009 WL 1457632, at *6 (S.D. Tex. 2009).

Heckler & Koch Defense, Inc.,¹⁰² the court observed that “such tasks as ‘Searching and Deduping,’ and ‘Creation of Native File Database with Full Text and Metadata Extraction’” do not qualify as “copying.” In *In re Scientific–Atlanta, Inc. Securities Litigation*,¹⁰³ the court analogized keyword searching to reviewers physically reviewing paper documents; just as the cost of reviewers examining documents is not taxable, so too the task of keyword searching is not taxable. And in *In re Fast Memory Erase v. Spansion, Inc.*,¹⁰⁴ the court found that data collection and extraction of relevant discoverable ESI was more like non-taxable attorney and paralegal review than copying.

Three recent opinions from the federal courts of appeals seem to have resolved this disagreement among the district courts. The first was the decision from the Court of Appeals for the Third Circuit in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*¹⁰⁵ After granting Hoosier Racing Tire Corp.’s motion for summary judgment in this antitrust case, the trial court awarded Hoosier approximately \$365,000 in costs under Rule 54(d) of the Federal Rules of Civil Procedure. The vast majority of these costs represented charges from e-discovery vendors for activities like hard drive imaging, data processing, keyword searching, and file format conversion.

Moreover, many of these activities were actually required by the court. The Case Management Order (“CMO”) directed the parties to attempt to agree upon a list of keyword search terms, with a party’s use of such terms carrying a presumption that it had fulfilled its “obligation to conduct a reasonable search.”¹⁰⁶ The CMO further required the parties to produce ESI documents in Tagged Image File Format,” accompanied by “[a] cross reference or unitization file, in standard format (e.g. Opticon, Summation DII, or the like)¹⁰⁷ showing the Bates number of each page and the appropriate unitization of the documents.”¹⁰⁸ The CMO identified specific metadata fields that the parties had to produce if reasonably available.¹⁰⁹ Finally, the CMO directed the parties to produce an extracted text file or searchable version for each electronic document.¹¹⁰ Thus, the CMO expressly required significant technical processing of an electronic document as part of the process of producing a copy to the opposing party.

¹⁰² *Mann v. Heckler & Koch Defense, Inc.*, No. 1:08cv611 (JCC), 2011 WL 1599580, at *9 (E.D. Va. 2011).

¹⁰³ *In re Scientific–Atl., Inc. Sec. Litig.*, No. 1:01-CV-1950-RWS, 2011 WL 2671296, at *1 (N.D. Ga. 2011).

¹⁰⁴ *In re Fast Memory Erase v. Spansion, Inc.*, No. 3-10-CV-0481-M-BD, 2010 WL 5093945, at *4 (N.D. Tex. 2010).

¹⁰⁵ *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158 (3d Cir. 2012).

¹⁰⁶ *Id.* at 161.

¹⁰⁷ These are different software programs that lawyers use to access ESI. They typically provide such functionality as searching, issue tagging, appending notes, etc.

¹⁰⁸ *Race Tires Am. Inc.*, 674 F.3d at 161.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

The district court clerk's office issued a Taxation of Costs which awarded all of the claimed e-discovery charges.¹¹¹ On appeal, the Court of Appeals for the Third Circuit considered which of these costs should be recoverable as "copies of papers necessarily obtained for use in the case."¹¹² Relying primarily on the definition of the word "copy," the court held that the only e-discovery activities that were the equivalent of copying a paper document were the scanning and conversion to TIFF files.¹¹³

The court also considered the other basis for recovery that parties often assert for e-discovery costs: the language in Section 1920(4) allowing recovery of "fees for exemplification."¹¹⁴ Parties who rely on this language in Section 1920(4) argue that the manipulation of the electronic data is exemplifying the data. The court held that the "electronic discovery vendors' work in this case did not produce illustrative evidence or the authentication of public records. Their charges accordingly would not qualify as fees for 'exemplification' under either construction of the term."¹¹⁵ Accordingly, the court ruled that Hoosier could not recover its e-discovery costs as costs of exemplification or costs of copies.

About a year later, the Fourth Circuit weighed in, in *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*¹¹⁶ Country Vintner of North Carolina sued E. and J. Gallo Winery, Inc., for breach of contract. Gallo won the case on motions, and then sought its costs under Rule 54(d). Gallo sought approximately \$110,000 in costs associated with the production of the discovery material, including costs for converting the original documents into non-editable files, initial processing of the ESI, extracting metadata, electronic Bates numbering, and copying the images onto CDs.¹¹⁷

Like the Third Circuit in *Race Tires*, the Fourth Circuit court determined that "making copies" should be construed as "producing imitations or reproductions of original works."¹¹⁸ This interpretation, the court concluded, was in league with the Supreme Court's observation that taxable costs under Section 1920 were "modest in scope" and limited to "relatively minor incidental expenses."¹¹⁹ This led the court to conclude that the conversion of native files to non-editable formats and transferring the documents onto CDs were the only costs that Gallo submitted that qualified as "making copies."¹²⁰

¹¹¹ *Id.* at 162.

¹¹² *Id.* at 167.

¹¹³ *Id.*

¹¹⁴ *Id.* at 165.

¹¹⁵ *Id.* at 166.

¹¹⁶ *Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc.*, 718 F.3d 249 (4th Cir. 2013).

¹¹⁷ *Id.* at 253.

¹¹⁸ *Id.* at 259.

¹¹⁹ *Id.* (quoting *Taniguchi v. Kan. Pac. Saipan, LTD.*, 132 S. Ct. 1997, 2006 (2012)).

¹²⁰ *Id.* at 260.

The court likewise rejected Gallo's argument that its ESI processing charges were taxable as "fees for exemplification."¹²¹ The court decided that the modern interpretation of "exemplification" was the "act or process of showing or illustrating by example" or an "official transcript of a public record, authenticated as a true copy for use as evidence."¹²² Gallo's e-discovery costs did not qualify under this definition of "fees for exemplification," so the court allowed Gallo to recover only the costs associated with "making copies."¹²³ Those costs amounted to only \$218 of the \$110,000 that Gallo incurred.

Then, in December 2013, the United States Court of Appeals for the Federal Circuit, applying Eleventh Circuit law, reversed Judge Thrash's ruling in *CBT Flint Partners, LLC v. Return Path, Inc.*¹²⁴ The Federal Circuit's approach was similar to that adopted by the Third and Fourth Circuits, with a few minor twists.

The Federal Circuit first adopted a narrow interpretation of the scope of copying costs that a prevailing party may recover, similar to that employed by the Third and Fourth Circuits.¹²⁵ The court found that Section 1920(4) "allows recovery only for the reasonable costs of actually duplicating documents, not for the cost of gathering those documents as a prelude to duplication."¹²⁶

The court then divided the process of producing ESI into three stages. In the first stage, "an electronic-discovery vendor copied (or 'imaged') computer hard drives or other 'source media' that contain the requested documents, replicating each source as a whole in its existing state."¹²⁷ In the second stage, the extracted documents were organized into a database. They were then indexed, decrypted, de-duplicated, filtered, analyzed, searched, and reviewed to determine which were responsive to discovery requests and which contained privileged information.¹²⁸ In the final stage, the responsive ESI was copied onto media to be provided to the opposing party.¹²⁹

First, the court clarified that the district court may not award the ESI vendor's charges for planning the production process, even if some or all of the planning relates to recoverable copying.¹³⁰ With respect to the first stage—making a copy of the potentially relevant ESI to preserve it, the court noted that such a step was often necessary to producing a copy of the ESI without altering the metadata during the review process.¹³¹ Therefore, the court held, the prevailing party could recover those

¹²¹ *Id.* at 262.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *CBT Flint Partners, LLC v. Return Path, Inc.*, 737 F.3d 1320, 1333 (Fed. Cir. 2013).

¹²⁵ *Id.*

¹²⁶ *Id.* at 1334 (quoting *Allen v. U.S. Steel Corp.*, 665 F.2d 689, 697 n. 5 (5th Cir. 1982)).

¹²⁷ *Id.* at 1328 (citing *Sedona Conference Glossary* at 23).

¹²⁸ *Id.* at 1328-29.

¹²⁹ *Id.* at 1329.

¹³⁰ *Id.* at 1330 ("[C]osts incurred in *preparing* to copy are not recoverable.").

¹³¹ *Id.* at 1329 ("[I]t is often necessary—in order to produce a single production copy of the document's visible content and of the metadata (where both are requested)—to create an image of the original source first and then to apply special techniques to extract documents while preserving all associated metadata.").

preservation costs relating to the documents actually copied and produced, but not as to documents not copied and produced.¹³² However, the court further held that, if the parties were not producing metadata or if their process did not otherwise require imaging of data at the outset of the process, then the stage one costs might not be recoverable.¹³³

As to the second stage, the court found those costs categorically not recoverable, likening those activities to attorneys reviewing paper documents for discoverability.¹³⁴ Finally, as to the third stage—converting the documents into the format for production and transferring copies onto the media for production—the court found the costs to be squarely within the contemplation of Section 1920(4) (and in fact the losing party had not contested costs for the third stage).¹³⁵

Although time will tell, it appears that *Race Tires*, *Country Vintner*, and *CBT Flint Partners* have settled the disagreement about which e-discovery costs are recoverable under Rule 54(d) and Section 1920(4). District courts have cited *Race Tires* close to forty times, with only one case declining to follow it.¹³⁶ *Country Vintner*, a more recent and less groundbreaking decision, has only been cited eleven times, with no district courts declining to follow it.¹³⁷

Accordingly, unless a split in the circuits develops, it is likely that the majority of the courts will construe Section 1920(4) to include only a small fraction of the e-discovery costs that a party necessarily incurs in the litigation process. Therefore, the next logical question is whether Rule 54(d) and/or Section 1920(4) should be revised to provide for the recovery of additional categories of cost.¹³⁸ The next section of this article examines that question.

V. THE LEGAL AND SOCIAL IMPLICATIONS OF ALLOWING GREATER TRANSFER OF DISCOVERY COSTS

The decision as to which party should bear which litigation costs and fees has a variety of implications and consequences, some societal and some practical. As discussed above, one of the noted features of the American jurisprudence system is the “American Rule,” pursuant to which, as a default matter, the parties bear their own legal fees regardless of who prevails in the litigation.¹³⁹ Although the American Rule developed in part as a reaction to statutes setting rates for legal services, one of

¹³² *Id.* at 1330.

¹³³ *Id.*

¹³⁴ *Id.* at 1330-31.

¹³⁵ *Id.* at 1332-33.

¹³⁶ See *In re Online DVD Rental Antitrust Litigation*, No. M 09-2029 PJH, 2012 WL 1414111, at ¶ 3 (N.D. Cal. Apr. 20, 2012) (describing *Race Tires* as “well reasoned,” but declining to follow it and instead awarding the majority of the prevailing party’s e-discovery costs as recoverable under Section 1920).

¹³⁷ *CBT Flint Partners, LLC*, 737 F.3d at 1333.

¹³⁸ Given the courts’ holdings that Section 1920 limits the types of costs recoverable under Rule 54(d), the safest method of implementing the proposal set forth in this article would be to amend both Section 1920 to specify that costs beyond copying costs are recoverable in civil litigation, and Rule 54(d) to set forth the discretion and factors for awarding such costs.

¹³⁹ See, e.g., Vargo, *supra* note 74, at 1569.

the policy concerns behind the American Rule is the notion that we are better off with easier access to the courts for plaintiffs with limited resources.¹⁴⁰ The Supreme Court expressed this policy as follows:

[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.¹⁴¹

Thus, the reasoning goes, requiring each party to bear its own attorney's fees allows individuals believing they have been harmed by the conduct of a large corporate entity to bring lawsuits without the specter of bearing the attorney's fees of the corporate defendant hanging over their heads should the individuals lose their lawsuits.

While the benefits and costs of the American Rule have been debated for many years,¹⁴² and while the policies underlying the American Rule are relevant to a discussion of cost-shifting, we do not need to overturn the American Rule to allow the prevailing party to recover a larger portion of the discovery costs incurred during the litigation. The American Rule is philosophically opposed to shifting attorney's fees to the losing party, but the Federal Rules of Civil Procedure expressly distinguish between attorney's fees and costs in this regard, and explicitly authorize the prevailing party to recover its costs.¹⁴³

Therefore, the question that this section will address is whether the American litigation system and the justice that it seeks to uphold would be enhanced or weakened by allowing the recovery of a greater portion of the costs incurred in the discovery process. I argue that the system would be improved by amending Rule 54(d) and/or 28 U.S.C. § 1920(4) to accord the trial judge the discretion to award some or all of a broad range of discovery costs to the prevailing party.

The current system virtually guarantees in the vast majority of cases that neither side is made whole. Plaintiffs who persuade the jury or judge to rule in their favor may achieve moral vindication, but their ultimate recovery is typically drastically smaller than the amount by which they are found to have been harmed, reduced not only by the 33 or 40% contingency fee, but further reduced by the substantial e-discovery costs not presently awarded. Likewise, a defendant who obtains a defense verdict on all counts has a comparably Pyrrhic victory. While e-discovery costs are only one component of this "justice gap," closing that component of the justice gap in appropriate circumstances only promotes justice.

There are two primary arguments advanced against imposing discovery costs on the prevailing party. The first tracks one of the rationales for the American Rule—that the prospect of being saddled with enormous discovery costs would discourage

¹⁴⁰ *Id.* at 1634-35.

¹⁴¹ *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

¹⁴² *See Vargo, supra* note 74, at § 2; *see also* FED. R. CIV. P. 54(d)(1).

¹⁴³ FED. R. CIV. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."). *But see* Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235, 238 (2012) ("In this Article, I argue that neither Rule 54(d) nor 28 U.S.C.A. § 1920 allow the taxation of discovery costs as a matter of law.").

individuals having meritorious claims against corporations from pursuing those claims.¹⁴⁴ The second is that after-the-fact shifting of these costs will not create the proper incentives to be cost conscious and efficient during the discovery process.¹⁴⁵ This article examines each rationale in turn.

*A. Shifting of Discovery Costs Does Not Create a New,
Undesirable Barrier to the Courts*

As a starting point, if any shifting of discovery costs—or related attorney’s fees—violates a “bright line” standard and undesirably discourages plaintiffs from bringing meritorious claims, then the American system needs a wide-ranging overhaul. There are numerous situations in which a variety of costs and fees are shifted.

For certain statutory claims, Congress has decided that society is better served by allowing the prevailing party to recover its attorney’s fees. For example, under the Clean Water Act, citizens are authorized to bring citizen suits in which they act as “private attorneys general” to seek enforcement of the Clean Water Act’s provisions.¹⁴⁶ Section 1365(d) of the Clean Water Act authorizes the court to award costs of litigation, including attorney’s fees, to “any prevailing or substantially prevailing party”—plaintiff or defendant—when the court deems it appropriate.¹⁴⁷ The purpose of this two-way cost and fee shifting provision is twofold: to encourage citizens to bring meritorious actions and to discourage frivolous or harassing actions.¹⁴⁸

The civil rights statutes have a similar dual-purpose fee shifting provision, but with a twist. The section titled “Proceedings in vindication of civil rights” provides that, in any civil rights action, the court may, in its discretion, award “the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”¹⁴⁹ Thus, the statute authorizes an award of fees to a prevailing plaintiff or defendant (other than the United States). However, the courts have developed different standards for plaintiffs and defendants. Courts will award fees to plaintiffs if they obtain even a small benefit, but courts will only award fees to defendants if the claim was frivolous, vexatious, unreasonable, or without foundation.¹⁵⁰ Thus, in the civil rights context, Congress and the courts still want to encourage meritorious litigation and discourage frivolous litigation, but with the balance shifted towards encouraging meritorious litigation.

¹⁴⁴ See, e.g., Mast, *supra* note 11, at 1844.

¹⁴⁵ See, e.g., Gillen, *supra* note 143, at 271-77.

¹⁴⁶ 33 U.S.C. § 1365 (2012).

¹⁴⁷ 33 U.S.C. § 1365(d) (2012).

¹⁴⁸ See *Natural Resources Defense Council, Inc. v. E.P.A.*, 484 F.2d 1331, 1337-38 (1st Cir. 1973) (discussing S. REP. No. 91-1196, at 38-39 (1970)).

¹⁴⁹ 42 U.S.C. § 1988(b) (2012).

¹⁵⁰ See, e.g., *Dangler v. Yorktown Cent. Schools*, 777 F. Supp. 1175, 1177 (S.D.N.Y. 1991); *Tufaro v. Willie*, 756 F. Supp. 556, 560 (S.D. Fla. 1991).

Other statutes provide for “one way” fee shifting, allowing a successful plaintiff to recover its fees but not a successful defendant.¹⁵¹ An example of a “one way” fee shifting statute is the Fair Credit Reporting Act, which allows a successful plaintiff consumer to recover attorney’s fees incurred in an action against a credit reporting agency that violates the procedures for credit ratings, but does not provide a comparable right to a successful defendant.¹⁵²

Overall, there are more than 200 federal statutes¹⁵³ and almost 2,000 state statutes¹⁵⁴ that provide for the shifting of attorney’s fees. Thus, both state and federal legislators have repeatedly found sufficiently compelling interests to override the American Rule.

There are also common law exceptions to the American Rule. For example, the “common fund” doctrine is an equitable exception to the American Rule, allowing parties who create or preserve a common fund for the benefits of others to recover their attorney’s fees from the fund before it is distributed to the other beneficiaries.¹⁵⁵

Similarly, a number of federal courts, including the Supreme Court, have awarded attorney’s fees against a plaintiff for bringing an “unwarranted,” “baseless,” or “vexatious” action.¹⁵⁶ Likewise, many states have frivolous litigation statutes that allow a party to recoup the fees and costs incurred in defending a frivolous claim.¹⁵⁷

¹⁵¹ See Vargo, *supra* note 74, at 1589-90; MARY F. DERFNER & ARTHUR D. WOLF, COURT AWARDED ATTORNEY FEES, ¶ 5.02[5] at 5-8 (1992).

¹⁵² See 15 U.S.C. § 1681n (2008).

¹⁵³ See Vargo, *supra* note 74, at 1588; DERFNER & WOLF, *supra* note 151, ¶ 1.02[1], at 109 (1992), Table of Statutes, TS1-TS36 (providing an alphabetical list of statutes and cross references to appropriate sections that provide for an award of attorney’s fees); see also E. Richard Larson, *Current Proposals in Congress to Limit and to Bar Court-Awarded Attorneys’ Fees in Public Interest Litigation*, 14 N.Y.U. REV. L. & SOC. CHANGE 523, 523-24 (1986) (stating that the majority of court awards for attorney’s fees are presently based on express statutory provision rather than doctrinal theories such as common fund).

¹⁵⁴ See *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS. 321, 336 (Winter 1984) (listing 1974 state fee-shifting statutes).

¹⁵⁵ See Vargo, *supra* note 74, at 1579; *Trustees v. Greenough*, 105 U.S. 527, 528 (1882).

¹⁵⁶ See Vargo, *supra* note 74, at 1584; *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129-30 (1974) (discussing various fee-shifting doctrines recognized by Court, including bad faith); *Guardian Trust Co. v. Kansas City S. R.R.*, 28 F.2d 233, 241 (8th Cir. 1928) (describing bad faith classes of English Chancery Court cases allowing fee awards and acceptance of such cases in U.S. courts, especially where courts of equity remained distinct from courts of law).

¹⁵⁷ See, e.g., GA. CODE ANN., § 9-15-14 (West 2001) (Attorney’s fees and expenses of litigation where attorney brings or defends action lacking substantial justification); MICH. COMP. LAWS ANN. § 600.2591 (West 1992) (Frivolous action; costs and fees); N.J. STAT. ANN. § 2A: 15-59.1 (West 1995 & Supp. 2014) (Frivolous complaint, counterclaim, cross-claim or defense of non-prevailing party; award of costs and attorney fees to prevailing party); OHIO REV. CODE ANN. § 2323.51 (West 2004) (Definitions; award of attorney’s fees as sanction for frivolous conduct); UTAH CODE ANN. § 78B-5-825 (West 1953) (Attorney fees—Award where action or defense in bad faith—Exceptions).

We also allow parties to shift attorney's fees by contract, often specifying that the loser pays the winner's attorney's fees and other expenses.¹⁵⁸ Thus, shifting fees and costs to the prevailing party is not anathema to the American judicial system; the system does not promote the ability of parties without resources to access the courts to advance baseless filings, only those with at least a threshold level of merit.

The Federal Rules of Civil Procedure are also replete with cost and fee shifting. Rule 11 is perhaps the most well known. Rule 11 allows a court to shift both costs and attorney's fees to a party taking a frivolous position, either in the case as a whole or on an issue-specific basis.¹⁵⁹ The simple act of signing and filing a pleading, motion, brief, or other court paper certifies that the submission has a good faith legal and factual basis and is not submitted for an improper purpose like harassing or driving up the costs of an opposing party. Breach of this certification subjects both party and attorney to potential sanctions, and Rule 11(c)(4) explicitly includes imposition of the opposing party's attorney's fees and other expenses as a proper sanction.¹⁶⁰ Thus, the American Rule yields when the plaintiff has filed a claim or taken a position, or a defendant has asserted a defense or taken a position, that the court deems to be insufficiently supported by the law or the facts or to be filed for an improper purpose.

Rule 26(g) contains a provision for discovery papers that is analogous to Rule 11. It provides that the attorney signing discovery papers certifies that the disclosures are complete and accurate, and that the discovery requests, responses, and objections are consistent with the Rules and with existing law or by a non-frivolous argument for extending the law, are not interposed for any improper purpose such as harassment or delay, and are neither unreasonable nor unduly burdensome or expensive.¹⁶¹ As with Rule 11, breach of this certification subjects party and the attorney to sanctions including reasonable expenses and attorney's fees.¹⁶² The certification under Rule 26(g), therefore, is another context in which the American Rule yields to other concerns—the American system does not protect the rights of a plaintiff with limited resources to participate in the discovery process with no risk of bearing the defendant's attorney's fees or costs if the plaintiff does not conduct discovery appropriately.

Rule 68 of the Federal Rules of Civil Procedure, addressing offers of judgment, does not shift attorney's fees,¹⁶³ but it does shift costs. Normally, as this article discusses, the prevailing party is entitled under Rule 54(d) to recover those costs specified in 28 U.S.C. § 1920. If the defendant makes a qualifying settlement

¹⁵⁸ See Vargo, *supra* note 74, at 1578-79; *United States v. Carter*, 217 U.S. 286, 322 (1910).

¹⁵⁹ FED. R. CIV. P. 11; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (the purpose of Rule 11 is to deter baseless filings and “streamline the administration and procedure of the federal courts.”).

¹⁶⁰ FED. R. CIV. P. 11(c)(4).

¹⁶¹ FED. R. CIV. P. 26(g)(1).

¹⁶² FED. R. CIV. P. 26(G)(3).

¹⁶³ Although Rule 68 is silent as to attorney's fees, it is now settled law that it does not shift attorney's fees. See, e.g., *McCain v. Detroit II Auto Finance Center*, 378 F.3d 561, 564 (6th Cir. 2004).

proposal in an offer of judgment under Rule 68 and the plaintiff does not accept the offer, then the plaintiff must bear the defendant's costs incurred thereafter even if the plaintiff prevails, so long as the plaintiff does not recover more than the offered amount.¹⁶⁴ Thus, Rule 68 subjects a plaintiff to the risk of paying the defendant's costs even if the plaintiff succeeds, if the plaintiff improvidently declines the defendant's settlement offer.

The discovery rules also contain a variety of cost shifting provisions specifically oriented towards discovery costs. For example, Rule 26(c) authorizes courts to issue protective orders related to discovery. The rule specifically lists eight types of protective orders, and Rule 26(c)(1)(B) allows the court to specify the terms under which challenged discovery would be allowed.¹⁶⁵ Courts use this provision to issue orders providing that if the requesting party wants to take the discovery in question, it must bear the responding party's costs.¹⁶⁶ Thus, under Rule 26(c), a court may issue a ruling that requires the plaintiff to pay the defendant's discovery costs (potentially including some component of attorney's fees) in order to obtain discovery in the case. Such an order may limit access to the judicial process for a plaintiff with limited means, but the rules balance this limitation against the burdens of gathering and producing information with marginal value—the concept of proportionality is deemed more important in this context than the principles underlying the American Rule.

Rule 26 also contains a separate provision specifically authorizing shifting of discovery costs related to ESI. Rule 26(b)(2)(B) authorizes a party to decline to produce ESI that is “not reasonably accessible because of undue burden or cost.”¹⁶⁷ In such circumstances, the court may order production of the ESI despite the undue burden or cost, but may shift the cost to the requesting party.¹⁶⁸ Again, like Rule 26(c), this provision authorizes the court to condition the plaintiff's access to discovery of electronic media on the plaintiff's paying the costs, and potentially some portion of attorney's fees, of the defendant. And again, proportionality trumps the American Rule.

Rule 37 contains a whole host of cost and fee shifting provisions as sanctions for various discovery conduct. One recurring theme in these sanctions is that the losing party pays the attorney's fees and expenses of the prevailing party. Thus, under the provisions of Rule 37(a) authorizing parties to bring motions to compel opposing parties to comply with their discovery obligations, the court “must” require the losing party to reimburse the prevailing party's expenses, including attorney's fees, unless the court affirmatively finds that the party's conduct was substantially justified or other circumstances render the sanction “unjust.”¹⁶⁹

Similarly, the sanctions provisions in Rule 37(b) for failure to comply with a Rule 37(a) order compelling discovery shift the prevailing party's expenses and attorney's fees to the losing party. This award of fees is also a mandatory component

¹⁶⁴ FED. R. CIV. P. 68(d); *Marek v. Chesny*, 473 U.S. 1, 4 (1985).

¹⁶⁵ FED. R. CIV. P. 26(c)(1)(B).

¹⁶⁶ *See, e.g., Kirschenman v. Auto-Owners Ins.*, 280 F.R.D. 474, 487 (D.S.D. 2012).

¹⁶⁷ FED. R. CIV. P. 26(b)(2)(B).

¹⁶⁸ *See, e.g., Semsroth v. City of Wichita*, 239 F.R.D. 630 (D. Kan. 2006).

¹⁶⁹ FED. R. CIV. P. 37(a)(5).

of every sanctions award unless the court finds that the party's conduct was substantially justified or other circumstances render the sanction unjust.¹⁷⁰

These discovery rules provide multiple examples of the American Rule yielding to the goal of promoting good faith participation in the discovery process. In short, while the American Rule may prohibit wholesale shifting of attorney's fees at the end of every case, there are numerous exceptions where we shift some or all of the prevailing party's expenses to the losing party. In fact, expense shifting is the default condition in the discovery arena.¹⁷¹ Therefore, shifting e-discovery costs at the end of the litigation is not inconsistent with the balance that the federal court system already draws with respect to awarding discovery costs at each other stage of the process.

It is further important to note that the discovery rules do not *mandate* which party ultimately bears the discovery expenses; throughout the discovery process, the rules vest the court with extremely broad discretion as to whether to shift the expenses of discovery.¹⁷² Even in situations where the rules nominally require the court to shift costs and fees, the rules grant the court the discretion to decline to shift these expenses if it deems such an award "unjust."¹⁷³ Thus, at every stage of the discovery process, except at the end, the U.S. federal court system gives the judge discretion to shift discovery costs according to the equities of the specific situation. There is no reason to believe that vesting the courts with the discretion to reallocate discovery costs at the end of the case—the same discretion they already have at multiple intermediate stages—will create a new barrier to the courts.

B. After-the-Fact Cost Shifting Will Not Incentivize Wasteful Behavior

The second rationale in opposition to allowing the shifting of e-discovery costs is that it does not incentivize parties to be efficient in their e-discovery activities. The reasoning runs that parties will be most efficient in incurring costs that they know they will ultimately bear. If a party is sufficiently confident that it will succeed on the merits and be awarded its discovery costs under Rule 54(d), under this reasoning, it will either run up its discovery costs, or at least not try very hard to minimize its discovery costs because it will believe that the opposing party will ultimately bear those costs. Conversely, the party who will ultimately bear the costs has no ability to control or reduce them.

There are at least two compelling fallacies with this argument. First, the percentage of cases that are resolved on the merits after discovery is quite small. Under two percent of cases filed in the federal courts go to trial.¹⁷⁴ Approximately five percent of the cases that are filed are completely resolved by summary judgment

¹⁷⁰ FED. R. CIV. P. 37(b)(2)(C) (providing that expenses and fees are to be awarded "instead of or in addition to," the other listed sanctions).

¹⁷¹ See FED. R. CIV. P. 26(c), 37(a), 37(b).

¹⁷² See, e.g., *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488 (5th Cir. 2012).

¹⁷³ FED. R. CIV. P. 37(b)(2)(C); *Novak v. Wolpoff & Abramson LLP*, 536 F.3d 175, 177 n.1 (2d Cir. 2008).

¹⁷⁴ See Judge Stanley Marcus, J., "*Wither the Jury Trial*", 21 ST. THOMAS L. REV. 27, 28 (2008) (finding in 2008, less than 1.3% of the cases filed resulted in a jury trial).

motion.¹⁷⁵ Thus, in fewer than seven percent of the cases does the court make an adjudication on the merits resulting in a right to recover costs under Rule 54(d). In the other 93–95 percent of the cases, either the case resolves on an early motion without the incurrance of significant discovery costs or the case settles. Even a very confident party would be foolish to incur discovery costs wantonly with only a seven percent likelihood of reaching a result on the merits entitling the successful party to recover its costs.

Second, with the unpredictable nature of judges and juries, no seasoned litigator should guarantee a winning result. Even in an extremely strong case where the litigator is willing to forecast an 80% chance of winning, that leaves a 20% chance of losing.¹⁷⁶ So, if the litigator chooses to spend \$200,000 of avoidable costs based on the hopes of shifting those costs to the opposing party if successful, in 20% of the cases the litigator's own client will bear the costs. Or, on a weighted average basis, the decision to spend \$200,000 of avoidable costs on average costs the client \$40,000, with no benefit.

Combining these two considerations, a party or litigator deciding whether to manage e-discovery costs prudently or wantonly should recognize that it will only have the potential to recover the costs in the approximately 7% of the cases that are adjudicated on the merits, and thus have a prevailing party. Of those 7% that are adjudicated on the merits after discovery, if the litigator estimates an 80% chance of winning, it will recover its costs 5.6% of the time, and not recover its costs 94.4% of the time. Returning to our example where the party has the choice of incurring \$200,000 of avoidable e-discovery costs, that decision would cost the party \$188,800 on a weighted average basis. Very few practical businesspersons would recklessly incur unnecessary costs with those odds.¹⁷⁷ Therefore, it seems quite unlikely that altering Rule 54(d) and/or Section 1920(4) to allow awarding of additional e-discovery costs would drive up the costs of discovery.

¹⁷⁵ It is extremely difficult to determine the precise percentage of cases that are resolved on summary judgment motion. Joe S. Cecil, et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL L. STUD. (Issue 4) (2007). For a discussion of the difficulties in gathering accurate data. The Federal Judicial Center conducted an analysis from 1975 to 1980. CECIL, ET AL., *supra* note 1. This study estimated that in 2000, summary judgment motions were filed in approximately 20% of the cases, were granted in part in approximately 12% of the cases, and granted in full in approximately 7.7%, up from 3.7% at the early end of the study period. Studies since that time have not demonstrated any clear picture of percentages that are meaningfully different for purposes of this analysis, and therefore this article will use 5% as its estimate, recognizing that the concepts do not change with even a 100% change in the percentages.

¹⁷⁶ And these figures do not even account for the possibility that the judge might not award some or all of the costs even if the party wins.

¹⁷⁷ It cannot be doubted that many parties in litigation do not always act rationally. For a discussion of the issue see Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 67 (2002). However, that irrational behavior rarely if ever results in the party instructing its attorneys to run up the legal fees and expenses wantonly, with no strategic or punitive objective. *Id.*

An analogous argument was advanced against the cost shifting that occurs in the context of offers of judgment under Rule 68.¹⁷⁸ The argument was that, having made an offer of judgment, a defendant would no longer be incentivized to contain its costs, believing that it would eventually recover the costs from the plaintiff. This seems to have been empirically unsubstantiated in the context of Rule 68,¹⁷⁹ and should likewise be rejected in the context of Rule 54(d).¹⁸⁰

C. Proposal: Allow Courts the Discretion to Award E-Discovery Expenses as Costs

Appropriate access to the court system is certainly an important policy objective but perhaps easier to articulate than to achieve. The system should facilitate access to the courts for those with meritorious claims, even if they have limited resources, by insulating them from ruinous consequences if they pursue meritorious claims that simply happen not to succeed. Conversely, the system should not encourage those with frivolous claims to file them, buoyed by the hope of extracting a settlement with little to no downside.

As applied to the award of discovery costs to the prevailing party, the choice is not binary. In addition to categorically precluding recovery or routinely allowing the recovery of discovery costs at the end of the litigation, the system could vest in the trial judge the discretion to award such costs as she deems appropriate.

This article proposes that the American judicial system would function more fairly and more efficiently if the rules authorized the court to award a much wider range of discovery costs to the prevailing party. As long as the courts continue to construe the current language of Rule 54(d), as limited by Section 1920(4), as narrowly allowing recovery of only a small slice of e-discovery costs, any expansion of the recoverable costs must come by amendment, ideally of both Section 1920(4) and Rule 54(d).

This article does not propose that the award of the full range of e-discovery costs becomes mandatory. Rather, the courts should have discretion to award any discovery costs it deems equitable and appropriate following a final adjudication on the merits. In this manner, the courts can balance the competing policy objectives of fostering access to the courts for those plaintiffs with limited resources and of protecting defendants from financial pressure to settle spurious claims to avoid high e-discovery costs.

There are multiple factors that the courts might consider in this analysis, and these could be enumerated in a non-exclusive list in the rule, described in the comments, or left to the judges' discretion. These factors could include:

¹⁷⁸ See Kevin F. Amatuzio & Joyce L. Jenkins, *Application of the "Offer of Settlement" Statute: Less Than Legislative Intent?*, 24 COLO. LAW. 2557, 2557 (Nov. 1995).

¹⁷⁹ *Id.* (“[U]nlikely that any significant proportion of litigants will generate exorbitant or unnecessary litigation expenses merely in the hope of ‘punishing’ an opponent who declines an offer of settlement.”).

¹⁸⁰ Indeed, some have argued that *uncertainty* about who will bear the e-discovery costs (as in the model proposed in this article) provides the best incentive for the parties to manage their costs efficiently. See, e.g., Matthew Prewitt, *E-Discovery: An Uncertain Standard for Cost Shifting Can Restore a Level Playing Field*, INSIDE COUNSEL (July 10, 2012), <http://www.insidecounsel.com/2012/07/10/e-discovery-an-uncertain-standard-for-cost-shifting>.

1) The nature of the discovery activities that led to the incurrence of the discovery costs. Considerations under this factor might include the reasonableness and burdensomeness of the requests, whether the activities were driven by procedures to which the parties agreed in advance, the manner of the parties' storage of the ESI, and the extent to which the activities are substitutes for legal fees—so that the court might be more likely to shift costs incurred in response to discovery that was aggressive or overly broad, more likely to shift costs if the requesting party had agreed to the procedures, less likely to shift costs driven by the producing party's chosen manner of storage, and less likely to shift costs that are the equivalent of legal fees;

2) The actual benefits achieved through the expenditure of the discovery costs—the courts might be less likely to shift the costs of discovery that generated meaningful, non-duplicative information;

3) The parties' efforts to minimize costs or lack thereof, and their sophistication and prior experience with e-discovery—such that the court can decline to award costs that the court deems to be unnecessary, inflated, or the result of mismanagement; and

4) The merits of the claims and defenses—not necessarily who won the case, but whether, at the end of the process, the court concludes that the parties' positions were non-frivolous and asserted in good faith.

Further clarity as to which party would ultimately bear which costs could easily be built into the system. At the initial planning phase, the parties could discuss which discovery costs would be taxable at the Rule 26(f) conference and could incorporate issues relating to taxation of discovery costs into their report to the court. The judge could address taxation of discovery costs during the initial Rule 16 conference and could incorporate taxation concepts into the case management order.

As discovery proceeds, there are further opportunities to bring taxation issues to the front. In ruling on a motion for protective order under Rule 26(c) or a motion to compel under Rule 37(a), the court could order that certain discovery could occur but explicitly state that such costs would be taxable at the end of the case.¹⁸¹

Under this approach, the court could protect access to the courts by shielding from these costs unsuccessful plaintiffs with meritorious claims who did not try to use the discovery process to harass or unduly burden the defendants. Furthermore, successful plaintiffs could be made more whole if they are able to recover their e-discovery costs under appropriate circumstances.

Conversely, a more flexible approach gives the courts another tool to try to address some of the problems created by spiraling e-discovery costs. Neither party can drive up the opponent's e-discovery costs with impunity, knowing that those costs cannot be imposed on it at the end of the case.

¹⁸¹ Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 555 (2010); *see also* *Overlap, Inc. v. Alliance Bernstein Inv. Inc.*, No. 07-0161-CV-W-ODS, 2008 WL 5780994, at *2-3 (W.D. Mo. 2008) (ordering the defendant to recover and produce data from backup tapes, and noting that “[T]his expense qualifies as a component of the cost to be awarded to the prevailing party”).

This approach has numerous advantages over the current system where courts have the discretion to shift e-discovery costs during the litigation but not afterwards. While it certainly can make sense to shift e-discovery costs during the discovery process, the courts can make a more effective and informed exercise of that discretion at the end of the litigation.

In the middle of a lawsuit, we have accorded judges the discretion to impose a variety of costs on a plaintiff, even one with minimal resources. The court can rule that a plaintiff cannot have access to a collection of documents unless the plaintiff pays the costs of gathering and producing them.¹⁸² The court makes these determinations based on the information that the parties provide to the court—information that can include the parties' financial wherewithal, the merits of the claims, and the likelihood that the discovery will generate important information affecting the merits.

Thus, the judge is forced to make this determination about who should pay the costs of discovery with incomplete information. The judge is typically balancing the potential benefit of the discovery—the likelihood that it will generate probative, non-duplicative information—against the cost and burden.¹⁸³ The more remote the prospects of important evidence, the more likely the court is to tell the requesting party that it can only have access to the discovery if it bears the cost. Yet, the judge is asked to make this determination with only the parties' representations, largely based on speculation as to what evidence the discovery might generate.

Likewise, the judge makes an evaluation of the merits of the claim with incomplete information. Under the current rules, the court must make determinations about shifting the costs of discovery before the parties have conducted that discovery, and thus without knowing whether the plaintiff has an extremely strong case or a weak or frivolous case and whether the defendant has a meritorious defense or a weak or frivolous defense. Therefore, while a judge may reasonably be more inclined to require a party to bear the costs of trying to develop a wildly speculative claim or defense, the court has only very limited knowledge about the nature of the claims and defenses at the outset of the case.

Thus, at the beginning of the case when the judge is authorized to shift discovery costs, the judge has limited knowledge about the need for the discovery and the merits of the parties' positions. In contrast, at the end of the case, after discovery has concluded and the court has reached an adjudication on the merits, the court has perfect knowledge about the benefits of the discovery and a judicial determination about the merits of the parties' positions. It is difficult to conceive of a persuasive policy reason why it should be appropriate for the judge to shift discovery costs in the middle of the case with imperfect knowledge, but inappropriate for the court to make that same determination at the end of the case with perfect knowledge. Hindsight is twenty-twenty, and it seems beyond doubt that a judge could more fairly allocate discovery costs at the end of the case using that hindsight.¹⁸⁴

¹⁸² FED. R. CIV. P. 26(c)(1)(B).

¹⁸³ See BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN CORR, FEDERAL CIVIL RULES HANDBOOK, Part III (2014 ed.) (Rule 26(c), and the cases cited therein).

¹⁸⁴ One might argue that it is unfair to use hindsight to allocate these costs when the parties are forced to make their discovery requests and responses without the benefit of this hindsight. In other words, if a party seeks discovery with a perceived high likelihood of uncovering important evidence, and instead the discovery yields no fruit, that party should be penalized

Put another way, if shifting discovery costs in the early stages of the discovery process does not unduly chill access to the courts, it is unlikely that the prospect of an award of such costs at the end of the case would. Remember that less than seven percent of the cases are adjudicated on the merits after discovery, and thus eligible for Rule 54(d) cost shifting of discovery expenses. And remember that the plaintiff will win some percentage of those cases, so it is only exposed to the potential of a discovery cost award in some fraction of the seven percent of cases that are adjudicated on the merits.

One counterargument might be that a plaintiff could decide to forgo the discovery if the court indicated that the plaintiff would have to pay the costs before the discovery occurred (such as in the context of a Rule 26(c) motion for a protective order). This would allow a plaintiff to make a more informed cost-benefit decision as to whether to pursue certain discovery. However, the trade-off is that the plaintiff can seek any e-discovery with virtual impunity under the current system. If parties need to consider the possibility that they ultimately may bear the costs of discovery they seek, they will be more measured and thoughtful in their requests—something that can only improve the current system.

Another counterargument might be that this approach would lead to additional motion practice for the courts. This would be a small cost, however, as fewer than twelve percent of the cases are eligible for Rule 54(d) costs following an adjudication on the merits after discovery is conducted. Moreover, courts frequently have some involvement in disputed costs under the current system, so the additional burden on the courts would be minimal.

The principles that already led the Supreme Court and Congress to authorize the courts to shift discovery costs during the discovery process favor extending that authority to cost shifting at the end of the litigation as well. We allow judges to award costs and even attorney's fees in numerous contexts. We allow judges to shift discovery costs at the outset of discovery, with limited information about the facts that are relevant to the court's decision. We should allow courts that same discretion at the end of the litigation when they have more complete information and can make a better decision considering all of the circumstances.

V. CONCLUSION

The problem of spiraling e-discovery costs and their effects on the civil litigation system is complex and not easily resolved—the problem likely will require multiple rule revisions and court action. Certainly, giving courts the discretion to award e-discovery costs to the prevailing party will not solve the problem by itself, but it will provide another tool to try to ensure that these costs are allocated as equitably as possible.

for not being clairvoyant. However, with a flexible test, the court could take the reasonableness of the parties' expectations into account.

