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The Promise of a Cooperative and Proportional Discovery Process in North Carolina: House Bill 380 and the New State Electronic Discovery Rules

BRIAN C. VICK* AND NEIL C. MAGNUSON**

INTRODUCTION

With the passage of House Bill 380 (H.B. 380) in 2011,¹ the North Carolina General Assembly not only adopted a basic set of rules to govern the discovery of electronically-stored information (ESI) in the State courts, but also created a procedural framework that set the State on a path towards a more reasonable and efficient discovery process. North Carolina has long adhered to the policy of allowing parties to conduct the liberal discovery² pioneered by the federal courts under the Federal Rules of Civil Procedure.³ Although originally designed to promote the

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1. An Act to Clarify the Procedure for Discovery of Electronically Stored Information and to Make Conforming Changes to the North Carolina Rules of Civil Procedure, 2011 N.C. Sess. Laws 199 (codified at N.C. GEN. STAT. § 1A-1 (2011)).

2. See *Analog Devices, Inc. v. Michalski*, 01 CVS 10614, 2006 NCBC LEXIS 16, at *33 (N.C. Super. Ct. Nov. 1, 2006) ("Rule 26(b)(1) [of the North Carolina Rules of Civil Procedure] makes clear that liberal discovery is permitted.").

3. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 585 (2007) ("[T]he 'simplified notice pleading standard' of the Federal Rules 'relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.'" (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002))); see also *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) ("[B]road discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure." (quoting *Jones v. Goord*, No. 95 Civ. 8026 (GEL), 2002 U.S. Dist.

swift and inexpensive resolution of civil disputes by providing parties broad access to relevant facts,⁴ this policy has increasingly strained the litigation process as its ideal of the liberal flow of information has clashed with the practicalities of technological innovation in the field of electronic discovery (e-discovery).⁵

Since the mid-1970s when a consumer market for personal computers first began developing,⁶ the use of computers and other electronic devices has become a staple of modern life in the United States. As a result, the volume of data that we as a society create and store electronically has increased—and continues to increase—exponentially over even relatively short periods of time.⁷ During one recent seven-year span, the amount of data maintained on computers increased nearly two hundred

LEXIS 8707, at *1 (S.D.N.Y. May 16, 2002)); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004) (“The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court.”).

4. See FED. R. CIV. P. 1; O’Meara-Sterling v. Mitchell, 299 F.2d 401, 404 (5th Cir. 1962) (“The spirit and purpose of the Federal Rules is to secure just, speedy and inexpensive determination of actions and they look to the admission of matters about which there is no dispute.”).

5. W.E. Aubuchon Co. v. Benefirst, LLC, 245 F.R.D. 38, 41 (D. Mass. 2007) (“This principle of liberal discovery is sorely tested when the object of the discovery is electronic data.”). See also Network Computing Servs. Corp. v. Cisco Sys., Inc., 223 F.R.D. 392, 395 (D.S.C. 2004) (“[O]ne attorney [had] suggested to [the court] at a discovery hearing that, including the request for electronic mail communications, a production request was ‘likely to exceed one million pages.’” (quoting Crane v. Int’l Paper Co., C/A No. 3:02-3352 (D.S.C. Apr. 25, 2003))).

6. See A History of IBM: 1975, IBM, http://www-03.ibm.com/ibm/history/history/year_1975.html (last visited January 2, 2012) (noting the introduction of the “IBM 5100 Portable Computer, a 50 lb. desktop machine that put computer capabilities at the fingertips of engineers, analysts, statisticians, and other problem-solvers”); A History of Windows: Highlights from the First 25 Years, WINDOWS, <http://windows.microsoft.com/en-US/windows/history> (last visited January 2, 2012) (noting that Microsoft was founded in 1975 with the vision of placing “a computer on every desktop and in every home”).

7. Data, Data Everywhere: A Special Report on Managing Information, THE ECONOMIST, Feb. 27, 2010, at 1, 2 [hereinafter Data, Data Everywhere], available at <http://bistro.northwestern.edu/mmueller/datadeluge.pdf> (indicating that “[t]he amount of digital information increases tenfold every five years”).

fold—from approximately 5 exabytes (or 5 million terabytes) of data in 2002 to 988 exabytes (or nearly 1 billion terabytes) of data in 2009.⁸

Although the shift towards storage of information in electronic form represents nothing more than a change in the medium of storage, the intrinsic advantages of ESI⁹ *outside* of litigation often represent enormous and costly disadvantages once the discovery of ESI *in* litigation begins.¹⁰ Indeed, given that the average desktop computer used by a company today is capable of storing in excess of 100 million pages of documents, any company that becomes involved in litigation faces the possibility of having to collect, process, search, and review many times that volume of data in discovery.¹¹ As the discovery of ESI has become a more prevalent feature of civil litigation, parties have begun facing exorbitant litigation expenses related *solely* to e-discovery.¹²

Responding to the burdens associated with e-discovery, the Rules Committee of the Federal Judicial Conference (Federal Rules Commit-

8. Bennett B. Borden, *The Demise of Linear Review*, E-DISCOVERY ALERT, (Williams Mullen, Richmond, VA.), Oct. 2010, at 1 [hereinafter *The Demise of Linear Review*], available at http://www.clearwellsystems.com/e-discovery-blog/wp-content/uploads/2010/12/E-Discovery_10-05-2010_Linear-Review_1.pdf; see also Jason R. Baron & Ralph C. Losey, *E-Discovery: Did You Know?*, YOUTUBE (Feb. 11, 2010), http://www.youtube.com/watch?v=bWbJWcsPp1M&feature=player_embedded.

9. See George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, ¶¶ 8-10 (2007) (explaining that today information can be exchanged, and edited faster, plus more information can be stored than in the past).

10. See *Network Computing Servs.*, 223 F.R.D. at 395 (noting that a “request for electronic mail communications” could result in production in excess of “one million pages”).

11. See George Paul, *The Discovery Revolution*, THE PRACTICAL LITIGATOR, May 2007, at 13, 15, available at http://www.lrlaw.com/files/Uploads/Documents/Paul_Practical_Litigator_May07.pdf (estimating that an average corporate employee in 2005 had computer technology capable of storing between 20 million and 100 million pages of information).

12. See *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2011 U.S. Dist. LEXIS 118226, at *26–27 (E.D. Pa. Oct. 5, 2011) (awarding aggregate e-discovery-related costs in excess of \$500,000); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, No. 2:07-CV-1294, 2011 U.S. Dist. LEXIS 48847, at *8–9 (W.D. Pa. May 6, 2011) (noting that parties sought to recover e-discovery-related costs of nearly \$400,000); *Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 U.S. Dist. LEXIS 50108, at *3 (E.D. Wis. Apr. 20, 2011) (indicating that a party could incur nearly \$2.5 million in expenses for first round of e-discovery); CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION, at vi (Richard Van Duizend, Reporter) (2006) [hereinafter CONF. OF CHIEF JUSTICES], available at <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>. (noting two prominent cases in which the e-discovery costs were estimated to be \$6.2 million and \$9.75 million).

tee) proposed amendments to the Federal Rules of Civil Procedure in 2006 (2006 Amendments) specifically designed to address the discovery of ESI.¹³ The basic approach of these amendments was to create “a framework for the parties and the court to give early attention to issues relating to electronic discovery,”¹⁴ and to place the burden of managing e-discovery squarely on the litigants.¹⁵ By expanding the scope and importance of the initial pre-trial conference under Federal Rule of Civil Procedure 16 and the discovery scheduling conference under Federal Rule of Civil Procedure 26(f), the Rules Committee sought to foster greater levels of engagement and cooperation between parties on issues related to e-discovery.¹⁶ Combined with an expansion of principles of proportionality in Rule 26(b), this new focus on collaboration in discovery has worked exceedingly well and has increased the efficiency of the discovery process in the federal courts.¹⁷

While a number of states followed the federal judiciary in adopting rules specifically designed to manage e-discovery,¹⁸ North Carolina eschewed immediate action in favor of a more deliberative rule-making process that sought to benefit from the experience of other jurisdictions.¹⁹ During this interim period, the State’s federal courts had access to the 2006 Amendments,²⁰ but the State trial courts had to grapple with

13. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at 22–23 (2005) [hereinafter 2005 COMM. REPORT], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2005.pdf>.

14. *Id.* at 26.

15. *See id.* at 27–32.

16. *Id.* at 26–28.

17. Emery G. Lee III & Kenneth J. Withers, *Survey of United States Magistrate Judges on the Effectiveness of the 2006 Amendments to the Federal Rules of Civil Procedure*, 11 SEDONA CONF. J. 201, 207 (2010) (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “improving the conduct of Rule 16(b) pretrial conferences,” and that 70.5% reported it “as at least somewhat effective in encouraging the parties to cooperate,” and finally that 61.1% of magistrate judges reported it as at least somewhat effective in “reduc[ing] the number of e-discovery disputes” the survey participants were asked to decide).

18. *See* THOMAS Y. ALLMAN, STATE AND FEDERAL E-DISCOVERY TODAY: AN UPDATE AFTER THE 2006 FEDERAL AMENDMENTS, at 1–2, 56–69 (Nov. 28, 2011), available at <http://www.fiosinc.com/lp/whitepaper/state-rulemaking/state-rulemaking.pdf> (detailing the current status of state e-discovery rulemaking).

19. NORTH CAROLINA BAR ASSOCIATION LITIGATION SECTION E-DISCOVERY COMMITTEE, PROPOSED AMENDED NORTH CAROLINA RULES OF CIVIL PROCEDURE: RULES 16, 26, 33, 34, 37 AND 45, EXPLANATORY STATEMENT AND GENERAL COMMENTS: INTRODUCTION, at 1 (2010) [hereinafter E-DISCOVERY COMM. REPORT], available at <http://www.ncbar.org/media/11074033/NCROCPAmenEDiscovery.pdf>.

20. *See* FED. R. CIV. P. 16, 26, 33, 34, 37, 45.

e-discovery using rules that either pre-dated the proliferation of ESI or only provided informal guidance.²¹ This deliberative rule-making approach eventually resulted in passage of H.B. 380, which amended and modernized the North Carolina Rules of Civil Procedure to create a generally-applicable framework for e-discovery for the State courts.²² Patterned after the 2006 Amendments, H.B. 380 reflects the same approach to e-discovery and similarly attempts to reduce the associated burdens by promoting greater levels of cooperation and proportionality in the discovery process.²³ Although the rule changes in H.B. 380 may seem modest when compared to other recent reform efforts in the State,²⁴ these amendments set the stage for a significant shift in how both courts and litigants approach discovery in the State.

Using the experience of the federal courts under the 2006 Amendments as a guide, this Article examines H.B. 380 and the effect it will have on the discovery process in the state courts. Part I of this Article describes the litigation challenges created by the proliferation of ESI. Part II describes the history, structure and substance of the 2006 Amendments, and discusses their impact in the areas of cooperation and the use of proportionality principles in the federal courts. Part III describes the substance and structure of the rules changes encompassed by H.B. 380, and analyzes the effect that they will have on the discovery process in the State. Part IV discusses specific procedural tools that practitioners and courts can use under the new e-discovery rules in North Carolina to manage the exchange of ESI more efficiently.

I. THE CHALLENGES OF ELECTRONIC DISCOVERY

The advent and rapid spread of ESI²⁵ has profoundly affected the civil litigation process due, in large part, to the simple truth that, in civil

21. See CONF. OF CHIEF JUSTICES, *supra* note 12, at vi–vii; see also *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at *9–10 (N.C. Super. Ct. Nov. 1, 2006) (denying the electronic discovery request of a non-party as unduly burdensome after considering, among other things, the guidelines set forth in the CONF. OF CHIEF JUSTICES, *supra* note 12, at 1–11).

22. An Act to Clarify the Procedure for Discovery of Electronically Stored Information and to Make Conforming Changes to the North Carolina Rules of Civil Procedure, 2011 N.C. Sess. Laws 199 (codified at N.C. GEN. STAT. § 1A-1 (2011)).

23. See E-DISCOVERY COMM. REPORT, *supra* note 19, at 1–2.

24. See, e.g., An Act to Reform the Laws Relating to Money Judgment Appeal Bonds, Bifurcation of Trials in Civil Cases, and Medical Liability, 2011 N.C. Sess. Laws 400 (enacted from 2011 Senate Bill 33).

25. See PETER LYMAN & HAL R. VARIAN, HOW MUCH INFORMATION 2003? 1 (Univ. of Cal. at Berkeley 2003), available at <http://www2.sims.berkeley.edu/research/projects/how->

discovery, volume drives cost.²⁶ The more documents that a party must collect, process, search, review, and produce in response to discovery, the more that party will spend on the litigation and the more the opposing party will have to spend to organize, review, and manage the information.²⁷ Although not directly proportional, discovery costs will generally rise (or fall) in relation to the volume of information at issue. As ESI has become more ubiquitous in our daily lives, the volume of such information at issue in civil discovery has rapidly increased, as have the associated costs of managing such information.²⁸

Prior to this proliferation of ESI, the physical aspects of storing information in paper form indirectly limited the volume of information at issue in any given piece of litigation and, thus, the potential costs associated with discovery of that information.²⁹ Much like the relationship between volume and cost in discovery, the cost for a company to store information on paper relates directly to the volume of paper required to store the information, although, again, the two variables do not necessarily rise or fall in direct proportion to one another. For example, a company seeking to store 500 pages of paper documents would have to allo-

much-info-2003/printable_report.pdf (estimating that of the 5 exabytes of new information created by print, media, magnetic and optical storage media in 2002, up to 92% of this information was stored in a magnetic format, mostly in hard disk).

26. See Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FED. DISCOVERY NEWS, Feb. 2001, at 3; see also 2005 COMM. REPORT, *supra* note 13, at 22 (“The discovery of electronically stored information raises markedly different issues from conventional discovery of paper records. Electronically stored information is characterized by exponentially greater volume than hard-copy documents.”).

27. See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 558 (W.D. Tenn. 2003) (“[T]he cost of restoring, de-duplicating, and designing and conducting a search of all 996 backup tapes reasonably could be in the range of several million [dollars] . . . not includ[ing] the costs of privilege review and actual production . . .”); JAMES N. DERTOUZOS, ET AL., *THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY: OPTIONS FOR FUTURE RESEARCH ix–xi* (RAND Inst. for Civil Justice 2008), available at http://www.rand.org/pubs/occasional_papers/OP183.html; Jocelyn Allison, *Temp Attorneys Boon for Some, Liability for Others*, LAW 360 (May 14, 2009, 12:00 AM), <http://www.law360.com/web/articles/101669> (noting that electronic discovery has raised demand for lower-cost temporary attorneys due to an increase in the volume of documents and information that must be reviewed).

28. Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67–68 (2007) (“[E]-discovery is more time-consuming, more burdensome, and more costly than conventional discovery.”); see also *Medtronic*, 229 F.R.D. at 557–58 (estimating that privilege review of the ESI at issue would have cost between \$16.5 million and \$70 million).

29. See 2005 COMM. REPORT, *supra* note 13, at 22–23; Noyes, *supra* note 28, at 67–68.

cate the physical volume of space that one ream of printer paper occupies, whereas a company seeking to store 500,000 pages of paper documents would have to allocate, at the very least, 1000 times as much physical space and ensure that such space could handle the approximate two-and-a-half tons that the paper would weigh.³⁰ Put simply, the more documents a company seeks to store in paper form, the more resources it must allocate to the physical infrastructure necessary to house and manage the documents. Although some companies stored large quantities of information prior to the advent of ESI,³¹ most did not allocate their resources in this way and thus did not have to grapple with enormous repositories of potentially discoverable information when civil litigation arose.

With the advent of the electronic storage of information, the relationship between volume and cost in the storage of information—as well as the cost of creating such information—fundamentally changed, leading to the rapid accretion of ESI throughout our society.³² The difference between the cost of storing 500 pages of information on a computer hard drive and 500,000 or 5 million or 50 million pages is, at best, negligible in an environment where ordinary consumer hard drives that can hold as much as two terabytes of data cost less than 150 dollars.³³ If used solely for storage purposes, a hard drive of this size could hold well over 100 million pages of documents in a physical space smaller than a single 500-sheet ream of paper.³⁴ Accompanying this decrease in the cost of storing information was the rapid spread of technologies, such as

30. See *How Much Does 20-Pound Bond Paper Weigh?*, HOW STUFF WORKS, <http://home.howstuffworks.com/question329.htm> (last visited Jan. 3, 2012) (“[A] 500-sheet ream of 20-pound bond paper weighs 5 pounds.”).

31. See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 546 n.103 (2003) (describing the production of millions of pages of paper documents in Castano tobacco litigation); see also *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1073 (3d Cir. 1980) (antitrust case involving millions of documents and over 100,000 pages of depositions); *In re Boise Cascade Sec. Litig.*, 420 F. Supp. 99, 101 (W.D. Wash. 1976) (securities fraud case involving more than 900,000 documents).

32. See *Data, Data Everywhere*, *supra* note 7, at 1.

33. See, e.g., BEST BUY, <http://www.bestbuy.com> (last visited Jan. 3, 2012) (follow “Products: Computers & Tablets: Hard Drives & Storage” hyperlink; then follow “Hard Drives” hyperlink; then follow “2TB and Up” hyperlink) (listing nine 2 terabyte hard drives for sale for less than \$150).

34. See *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732, 2011 U.S. Dist. LEXIS 118226, at *8–9 (E.D. Pa. Oct. 5, 2011) (noting that a party collected 1.05 terabytes of data, which amounted to 75 million pages of information, and indicating that 2 terabytes of data would amount to well over 100 million pages of information).

personal computers and e-mail, that make creating, copying, and distributing ESI easier than ever, resulting in an exponential increase in the amount of ESI that we, as a society, create and store.³⁵

Not surprisingly, as the ubiquity of electronic data increased, ESI began to appear more frequently as an issue in civil litigation.³⁶ Although ESI represented nothing more than a new storage medium, its appearance in civil litigation caused a broad range of problems and challenges, the most enduring and intractable of which relate directly to the sheer volume of information that can come into play during discovery.³⁷ For example, parties have long struggled with the issue of how to effectively preserve large quantities of ESI once litigation begins or is reasonably anticipated.³⁸ However, from a financial and logistical perspective, few issues have proven as difficult to surmount as how to manage discovery in an environment in which even a legitimate request for production can require a party to collect, process, search, review, and produce ESI that is spread across thousands of potential repositories,³⁹ and encompasses millions of pages of documents.⁴⁰

35. See Paul & Baron, *supra* note 9, ¶ 9 (noting that “recently there has been an evolutionary burst in writing technology” that includes “digitization; real time computing; the microprocessor; the personal computer, e-mail; local and wide-area networks leading to the Internet; [and] . . . the World Wide Web”) (citations omitted); *The Demise of Linear Review*, *supra* note 8, at 1. See generally Baron & Losey, *supra* note 8.

36. See Dan H. Willoughby, Jr. et al., *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 794–95 (documenting the rise of e-discovery sanction cases between 1996 and 2009).

37. See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003) (estimating that privilege review of ESI at issue would have cost between \$16.5 million and \$70 million); 2005 COMM. REPORT, *supra* note 13, at 22–23 (“Electronically stored information is characterized by exponentially greater volume than hard-copy documents.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) (“[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.”).

38. See *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218–19 (S.D.N.Y. 2003) (describing the loss of data resulting from failure to preserve records despite the existence of a corporate data retention policy).

39. *Bank of Am. Corp. v. SR Int’l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at *7–8 (N.C. Super. Ct. Nov. 1, 2006) (noting that a party’s original discovery request would have required recipient to identify, restore, extract, convert and process approximately 2500 backup tapes at a cost of over \$1.5 million).

40. See *In re Aspartame Antitrust Litig.*, No. 2:06-CV-1732-LDD, 2011 U.S. Dist. LEXIS 118226, at *8–9 (E.D. Pa. Oct. 5, 2011) (noting that a party collected ESI amounting to 75 million pages of information); *Thermal Design, Inc. v. Guardian Bldg. Prods.*, No. 08-C-828, 2011 U.S. Dist. LEXIS 50108, at *2 (E.D. Wis. Apr. 20, 2011) (noting that party produced 1.46 million pages of documents under ESI protocol); John

Litigants have exacerbated the volume-cost challenges of ESI through the increased use of discovery as an adversarial tool in civil litigation.⁴¹ Although originally intended to “secure the just, speedy, and inexpensive determination of every action and proceeding,”⁴² the liberal discovery rules that are now commonplace throughout the United States have struggled to live up to this ideal.⁴³ Over time, and for reasons that are beyond the scope of this article, litigants have used discovery as a strategic opportunity to gain some type of advantage over their adversaries, rather than as a tool to ensure that disputes are resolved based on a fair and complete understanding of the relevant facts.⁴⁴ The result of this adversarial approach is that, when parties engage in full-blown discovery, the associated costs amount to as much as 90% of the overall expenses incurred in the litigation.⁴⁵

When combined with the volume of potentially discoverable ESI, this adversarial approach to discovery has—in many instances—driven the scope and cost of discovery beyond any reasonable bounds.⁴⁶ For example, in a case before the North Carolina Business Court, a party served a Rule 45 subpoena on a third party that, if strictly enforced, would have required the recipient to search for ESI across 2500 backup

B. v. Goetz, No. 3:98-0168, 2010 U.S. Dist. LEXIS 8821, at *249 (M.D. Tenn. Mar. 1, 2011) (discovery requests were estimated to require production of 15 million pages of ESI at a cost of up to \$10 million).

41. John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 551–52, 557–58, 571–72 (2010) (discussing abuse of the discovery process); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1, 17–19 (1984) (discussing abuse of the discovery process).

42. FED. R. CIV. P. 1.

43. See Beisner, *supra* note 41, at 584–97 (advocating for reform of the discovery process in light of abuse of system).

44. *Network Computing Servs. Corp. v. Cisco Sys., Inc.*, 223 F.R.D. 392, 395 (D.S.C. 2004) (reflecting on what the court termed “[h]ardball discovery,” and noting that in order to gain an advantage “parties often overreach in their discovery requests and stone-wall interrogatories from their opponents,” concluding that this state of affairs “is costly to our system and consumes an inordinate amount of judicial resources” (citations omitted)).

45. *Judicial Conference Adopts Rules Changes, Confronts Projected Budget Shortfalls*, THE THIRD BRANCH (U.S. Courts Office of Pub. Affairs, Washington, D.C.), October 1999, available at http://www.uscourts.gov/News/TheThirdBranch/99-10-01/Judicial_Conference_Adopts_Rules_Changes_Confronts_Projected_Budget_Shortfall.aspx (“Discovery represents 50 percent of the litigation costs in the average case and up to 90 percent of the litigation costs in cases in which it is actively used.”).

46. *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003) (estimating that a review of ESI requested in discovery would cost between \$16.5 million and \$70 million).

tapes at a cost of over \$1.5 million, even though it had no formal role in the litigation and, instead, was simply a repository of information of potential relevance to the dispute.⁴⁷ In another case also involving a third-party subpoena, a government agency spent over \$6 million (or approximately 9% of its annual budget) on e-discovery after the parties who served the subpoena took advantage of the wording of a stipulated ESI protocol to submit a list of 400 search terms that yielded 660,000 responsive documents.⁴⁸ As these types of challenges first began emerging in the mid-1990s, the federal judiciary took note and the Federal Rules Committee launched an effort, discussed in the next section of this article, to examine and address the challenges of e-discovery.

II. ELECTRONIC DISCOVERY IN THE FEDERAL COURTS

A. *The Introduction of Electronic Records into Federal Discovery*

In 1970, the Federal Rules Committee revised Rule 34 of the Federal Rules of Civil Procedure (the “1970 Amendment”) to expand the definition of “documents” to “accord with changing technology,”⁴⁹ and accommodate what turned out to be the extraordinarily understated view “that the use of computerized information would increase.”⁵⁰ Whereas Rule 34 originally “focused on discovery of ‘documents’ and ‘things,’”⁵¹ the 1970 Amendment introduced “electronic data compilations from which information can be obtained only with the use of detection devices” into the definition of “documents.”⁵² The effect of such amendment

47. *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at *7–8, *14–16 (N.C. Super. Ct. Nov. 1, 2006); *see also* Response to Motion to Compel, Exhibit 2, Affidavit of Dennis Richter, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>; Response to Motion to Compel, Exhibit 3, Affidavit of Carl Hardel, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>.

48. *In Re Fannie Mae Sec. Litig.*, 552 F.3d 814, 817 (D.C. Cir. 2009).

49. FED. R. CIV. P. 34 (Subdivision (a) of Advisory Committee’s notes on 1970 amendments).

50. FED. R. CIV. P. 34 (Subdivision (a) of Advisory Committee’s notes on 2006 amendments).

51. *Id.*

52. FED. R. CIV. P. 34 (Subdivision (a) of Advisory Committee’s notes on 1970 amendments).

was to require a party to produce in “reasonably usable form”⁵³ electronic data that otherwise was “usable by the discovering party only through [the producing party’s] devices.”⁵⁴ Although this often meant supplying a printout of computer data based on the technology available at the time,⁵⁵ the revised rule “did not preclude production of the information in an electronic medium.”⁵⁶ The fundamental effect of the 1970 Amendment was to expand discovery to include documents in electronic or computerized form.⁵⁷

The 1970 Amendment, however, did not provide adequate guidance with respect to “when ‘data compilations’ or other types of electronic documents have to be produced and in what form they should be produced.”⁵⁸ In other words, while amended Rule 34 rendered certain electronic data the equivalent of “traditional paper documents,”⁵⁹ doubt remained as to the precise reach of the rule.⁶⁰ Courts, thus, had little choice but to interpret and apply the Rules with respect to various forms

53. FED. R. CIV. P. 34(a)(1)(A).

54. FED. R. CIV. P. 34 (Subdivision (a) of Advisory Committee’s notes on 1970 amendments).

55. *Id.*

56. *Nat’l Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (citing 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2218 (2d ed. 1970)).

57. *See, e.g., Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM) (AJP), 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (stating “today it is black letter law that computerized data is discoverable if relevant”); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382–83 (7th Cir. 1993) (stating “the Advisory Committee notes to the 1970 amendment of Federal Rule of Civil Procedure 34 make clear that computer data is included in Rule 34’s description of documents”); *Nat’l Union Elec. Corp.*, 494 F. Supp. at 1261–62 (indicating that computerized records are subject to requests for production based on the 1970 amendment to FED. R. CIV. P. 34).

58. *Williams v. Sprint/United Mgmt. Co.*, 230 F.R.D. 640, 649 (D. Kan. 2005).

59. *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery*, THE SEDONA CONFERENCE WORKING GROUP SERIES, (Sedona Conference, Sedona, Ariz.) at iii (2005), http://www.thesedonaconference.org/content/miscFiles/7_05TSP.pdf [hereinafter *The Sedona Principles*].

60. *Williams*, 230 F.R.D. at 650 (“[A]lthough Rule 34 was amended in 1970 to add ‘data compilations’ to the list of discoverable documents, there was no suggestion that ‘data compilations’ was intended to turn all forms of ‘data’ into a Rule 34 ‘document.’” (citing *The Sedona Principles*, *supra* note 59, at 37 cmt. 9.a)). In *Williams*, the District of Kansas was faced with the question of whether “a court order directing a party to produce electronic documents as they are maintained in the ordinary course of business requires the producing party to produce those documents with the metadata intact.” *Id.* at 648. The court found that “neither Rule 34” as amended in 1970, “nor its advisory committee notes” provided a definitive answer to this question. *Id.* at 648–49.

of electronic documents and data on an *ad hoc* basis.⁶¹ However, given the vast categories of electronic documents and data that would soon emerge (some very different in nature to traditional paper documents, and many not contemplated or conceived of in 1970), such an *ad hoc* approach was perhaps destined to cause uncertainty regarding the discovery of electronic records.

However, the uncertainty regarding the scope of Rule 34 after the 1970 Amendment was not the lone complicating factor for e-discovery. As discussed above, volume is a transcendent issue with respect to the discovery of ESI, particularly relative to paper records. As the Federal Rules Committee observed, ESI “is characterized by exponentially greater volume than hard-copy documents,” in part due to the “capacity of large organizations’ computer networks.”⁶² Moreover, unlike paper records, electronically stored information is not static; rather, such information is susceptible to proliferation, modification, or deletion, even “without the operator’s specific direction or knowledge,” or by virtue of seemingly innocuous actions, such as “merely turning a computer on or off.”⁶³ Finally, whereas paper records are by their nature self-revealing, the substance or significance of ESI, in some cases, may not be learned or understood apart from software or other electronic files on which the information is dependent.⁶⁴

Recognizing these idiosyncrasies and the issues that they create in discovery, the Federal Rules Committee began in 1996 to review “the experiences of the bar and bench” in order to determine whether the changes in technology called for further rule making.⁶⁵ The Committee found not only a lack of uniformity in the courts’ treatment of ESI, but also that the discovery of ESI was “becoming more time-consuming, burdensome, and costly.”⁶⁶ The Committee also found that the existing

61. See *The Sedona Principles*, *supra* note 59, at 37 cmt. 9.a (considering what data should be treated as discoverable “documents” and noting that “the evaluation of the need for and relevance of such discovery should be separately analyzed on a case-by-case basis” (citing *Mcpeek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001))).

62. 2005 COMM. REPORT, *supra* note 13, at 22–23 (noting that, at the time, such networks “store[d] information in terabytes, each of which represents the equivalent of 500 million typewritten pages of plain text, and [received] 250 to 300 million e-mail messages monthly”).

63. *Id.* at 23.

64. *Id.* at 23; see also *Byers v. Ill. State Police*, No. 99 C 8105, 2002 U.S. Dist. LEXIS 9861, at *31–33 (N.D. Ill. May 31, 2002) (discussing differences between paper-based discovery and discovery of e-mail); *The Sedona Principles*, *supra* note 59, at 3–6 (discussing the differences between electronic documents and paper documents).

65. 2005 COMM. REPORT, *supra* note 13, at 23.

66. *Id.*

discovery rules provided “inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases.”⁶⁷ The Committee wrote:

Developing case law on discovery into electronically stored information under the current rules is not consistent and is necessarily limited by the specific facts involved. Disparate local rules have enlarged to fill this gap between the existing discovery rules and practice, and more courts are considering local rules. Without national rules adequate to address the issues raised by electronic discovery, a patchwork of rules and requirements is likely to develop.⁶⁸

As a result of this review process, the Federal Rules Committee concluded that new rules were necessary to address the discovery of ESI and that any such rules must be tailored to address concerns beyond parties’ mere access to various forms and volumes of information.⁶⁹ Indeed, the Federal Rules Committee instructed that, ideally, any new rules should seek “to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management where appropriate.”⁷⁰ After recognizing that “timely action” had to be taken “to make the federal discovery rules better able to accommodate the distinctive features of

67. *Id.*

68. *Id.*; see also *id.* at 24 (indicating that “[t]he costs of complying with unclear and at times vague discovery obligations, which vary from district to district in ways unwarranted by local variations in practice, are becoming increasingly problematic”); Niemeyer Memorandum, *infra* note 69, at 4 (noting that “the cost of discovery represents approximately 50% of the litigation costs in all cases, and as much as 90% of the litigation costs in the cases where discovery is actively employed”). Compare *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (adopting a test designed to determine whether to shift the costs of electronic discovery), with *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320–22 (S.D.N.Y. 2003) (modifying and replacing the test announced in *Rowe* one year later with new multi-factor test).

69. See, e.g., Memorandum from Paul V. Niemeyer, Chair, Advisory Comm. on Civil Rules, to Anthony J. Scirica, Chair, Comm. on Rules of Practice and Procedure 3 (May 11, 1999), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/repcivil.pdf> [hereinafter “Niemeyer Memorandum”] (noting that “for many years before [the commencement of the Committee’s discovery project in 1996], the Committee had received complaints from the bar and the public that discovery costs too much”); see also FED. R. CIV. P. 26. (Subdivision (f) of Advisory Committee’s notes on the 2006 Amendments) (noting that inadvertent production of privileged information is a further concern due to the fact that the sheer volume of data “may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming,” while at the same time reducing the likelihood that parties will correctly identify privileged information).

70. 2005 COMM. REPORT, *supra* note 13, at 24.

electronic discovery,” the Committee further revised the Federal Rules of Civil Procedure in 1999 to address the discovery of ESI.⁷¹

B. The 2006 Amendments

In September 2005, the Federal Rules Committee delivered its *Report of the Judicial Conference*⁷²—comprising its recommendations and proposed amendments to the Federal Rules—to the Supreme Court for consideration. On April 12, 2006, the United States Supreme Court approved the Committee’s proposed amendments,⁷³ and with the tacit approval of Congress, the amendments went into effect on November 1, 2006.

The 2006 Amendments included revisions to Federal Rules of Civil Procedure 16, 26, 33, 34, 37, and 45, in large part addressing issues related to the discovery of electronically stored information.⁷⁴ Specifically, the Amendments were as follows:

Rule 16(b) was amended “to invite the court to address the disclosure or discovery of electronically stored information in the Rule 16 scheduling order.”⁷⁵ This amendment was one of several designed to encourage “the handling of discovery of electronically stored information early in the litigation, if such discovery is expected to occur.”⁷⁶ Rule 16(b) was further amended to allow for judicial orders adopting any agreements by the parties to protect as privileged any inadvertently produced trial-preparation material.⁷⁷

71. *Id.*

72. *Id.* at 22 (noting that the report was a product of significant “time and energy” contributed to by “bar organizations, attorneys, computer specialists, and members of the public,” and further noting that “the committee’s study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints”).

73. Letter from John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., to Dick Cheney, President, U.S. Senate (Apr. 12, 2006), <http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf>; Letter from John G. Roberts, Jr., Chief Justice, Supreme Court of the U.S., to J. Dennis Hastert, Speaker, House of Representatives (Apr. 12, 2006), <http://www.supremecourt.gov/orders/courtorders/frcv06p.pdf>.

74. 2005 COMM. REPORT, *supra* note 13, at 22.

75. *Id.* at 26. See generally FED. R. CIV. P. 16(b).

76. 2005 COMM. REPORT, *supra* note 13, at 26. The Committee noted that the “amendments to Rule 16, Rule 26(a) and (f), and Form 35 present[ed] a framework for the parties and the court to give early attention to issues relating to electronic discovery, including the frequently-recurring problems of the preservation of evidence and the assertion of privilege and work-product protection.” *Id.*

77. *Id.*; see also FED. R. CIV. P. 16(b)(3)(B)(iv).

Rule 26(a)(1)(A)(ii) (formerly Rule 26(a)(1)(B)) was amended to replace “data compilations” with “electronically stored information” as information that a party must include in its initial disclosures.⁷⁸

Rule 26(b)(2)(B) was amended to clarify that a party “need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost,” provided that the party must, on motion to compel such information, show that the information is not reasonably accessible for these reasons.⁷⁹

Rule 26(b)(5)(B) was amended to provide a procedure whereby a party that inadvertently produces work-product material may assert a claim of privilege as to such material, thereby protecting it from further disclosure.⁸⁰ The Committee noted that this amendment was designed to parallel those to Rules 16 and 26(f).⁸¹ The amended Rule further puts a burden on the receiving party to “take reasonable steps to retrieve the information,” even where the information was disclosed prior to its having been notified as to the claim of privilege.⁸²

Rule 26(f) was amended to provide for discussion of “any issues relating to disclosure or discovery of electronically stored information” during the parties’ conference.⁸³ As the Committee notes, the “topics to be discussed include the form of producing electronically stored information, . . . preservation, . . . [and] whether they can agree on approaches to asserting claims of privilege or work-product protection after inadvertent production in discovery.”⁸⁴

Rule 33(d) was amended to clarify that a party “may answer an interrogatory . . . by providing access to the [electronically stored] informa-

78. 2005 COMM. REPORT, *supra* note 13, at 26 (noting that this amendment “makes the rule consistent with disclosure practices in the courts and with the proposed electronic discovery amendment”); *see also* FED. R. CIV. P. 26(a)(1)(A)(ii).

79. FED. R. CIV. P. 26(b)(2)(B).

80. *Id.*; 2005 COMM. REPORT, *supra* note 13, at 29.

81. 2005 COMM. REPORT, *supra* note 13, at 29. The Committee further noted that: Under the proposed amendments to Rules 26(f) and 16, if the parties are able to reach an agreement to adopt protocols for asserting privilege and work-product protection claims that will facilitate discovery that is faster and at a lower cost, they may ask the court to include such arrangements in a case-management or other order.

Id. at 27.

82. *Id.* at 29.

83. 2005 COMM. REPORT, *supra* note 13, at 26–27; *see also* FED. R. CIV. P. 26(f).

84. 2005 COMM. REPORT, *supra* note 13, at 26–27.

tion if [the requesting] party can find the answer as readily as the responding party can.”⁸⁵

Rule 34(a) was amended to “explicitly recognize [electronically stored information] as a category subject to discovery . . . distinct from ‘documents’ and ‘things.’”⁸⁶ In addition to addressing the uncertainty surrounding the previously utilized term “data compilations,” the Committee noted that this amendment served to further distinguish “between documents and electronically stored information, mak[ing] it clear that there are differences between them important to managing discovery.”⁸⁷

Rule 34(b) was amended to “authorize a requesting party to specify the form of production, such as in paper or electronic form,” and to allow for “the responding party to object.”⁸⁸

Rule 37(f) was amended to provide “limited protection against sanctions . . . for a party’s failure to provide electronically stored information in discovery.”⁸⁹ Specifically, “sanctions may not be imposed . . . if electronically stored information sought in discovery has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.”⁹⁰

Rule 45 was amended to conform “the provisions for subpoenas to changes in other discovery rules related to discovery of electronically stored information.”⁹¹

Collectively, the 2006 Amendments were designed to recognize and respond to the conclusion reached by the Sedona Conference Working Group that “dialogue between litigants is a prerequisite to resolving (or avoiding) potentially costly and disruptive electronic discovery disputes.”⁹² Under the 2006 Amendments, parties are encouraged to communicate, and to get out in front of e-discovery issues, nearly at the onset of litigation. This may be achieved by: (1) collaborating to “identify

85. 2005 COMM. REPORT, *supra* note 13, at 27; *see also* FED. R. CIV. P. 33(d).

86. 2005 COMM. REPORT, *supra* note 13, at 28; *see also* FED. R. CIV. P. 34(a).

87. 2005 COMM. REPORT, *supra* note 13, at 28.

88. *Id.* (noting that this amended rule “provides an electronic discovery analogue to existing language that prevents massive ‘dumps’ of disorganized documents by requiring production of documents as they are ordinarily maintained or labeled to correspond with the categories in the request”); *see also* FED. R. CIV. P. 34(b).

89. 2005 COMM. REPORT, *supra* note 13, at 33; *see also* FED. R. CIV. P. 37(f).

90. FED. R. CIV. P. 37(f).

91. 2005 COMM. REPORT, *supra* note 13, at 28; *see also* FED. R. CIV. P. 45.

92. *The Sedona Principles*, *supra* note 59, at iv (noting further that “parties are well-served by an early discussion about the issues in dispute, the types of information sought, the likely sources and locations of such information, and the realistic costs of identifying, locating, retrieving, reviewing, and producing such data”).

the various sources of . . . information within [their] control that should be searched for electronically stored information”;⁹³ (2) discussing “whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information”;⁹⁴ and (3) discussing the “form or forms in which electronically stored information might be produced,”⁹⁵ along with “any issues regarding preservation of discoverable information.”⁹⁶ This approach to promoting communication and cooperation has proven extremely effective at addressing the challenges of e-discovery.⁹⁷

C. *The Impact of the 2006 Amendments*

The 2006 Amendments have significantly impacted the management of e-discovery in the federal courts as a result of two central principles that the new rules emphasize: cooperation and proportionality. In the years since their adoption, courts have actively embraced and promoted the idea that e-discovery should be a collaborative process that strives to reach the information most relevant to any given dispute in as efficient a manner as possible.⁹⁸ Through application of the aspects of the 2006 Amendments that promote cooperation between counsel and proportional limitations on the scope of discovery, the federal courts have made great strides in addressing the challenges of e-discovery, reducing the associated burdens on the parties, and decreasing the number of discovery disputes presented to the courts for resolution.

i. *Cooperation under the 2006 Amendments*

One of the central goals of the 2006 Amendments is to foster greater levels of cooperation between litigants in the discovery process and, in

93. FED. R. CIV. P. 26(b)(2)(B) (Subdivision (b)(2) of Advisory Committee’s notes on 2006 Amendments).

94. *Id.*

95. FED. R. CIV. P. 26(f) (Subdivision (f) of Advisory Committee’s notes on 2006 Amendments).

96. *Id.*

97. See Lee & Withers, *supra* note 17, at 207 (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “improving the conduct of Rule 16(b) pretrial conferences,” and that 70.5% reported it “as at least somewhat effective in encouraging the parties to cooperate,” and finally that 61.1% of magistrate judges reported it as at least somewhat effective in “reduc[ing] the number of e-discovery disputes” the survey participants were asked to decide).

98. See *id.*

particular, with respect to e-discovery.⁹⁹ The new rules do not go so far as to *require* parties to compromise or impose explicit penalties on parties who fail to do so, but they do emphasize the importance of early identification of e-discovery issues and the need for concerted efforts to address such issues in discovery plans and scheduling orders.¹⁰⁰ The goal of this collaborative approach is to promote engagement between the parties on issues where cooperative agreements can reduce the scope of discovery and the likelihood of disputes erupting over ESI-related issues.¹⁰¹ This approach also facilitates early communication between the parties so that, once discovery begins, the parties can proceed with a better sense of what lays ahead with respect to electronic discovery and with a more unified understanding of what each party's rights and obligations are in this regard.¹⁰²

Recognizing the clear advantages of having parties take greater responsibility for the scope and contours of the discovery process, the federal judiciary has whole-heartedly embraced this collaborative approach, with certain judges noting that "communication among counsel is *crucial* to a successful electronic discovery process"¹⁰³ and that "parties should cooperate as much as possible[,] . . . for this collaboration helps . . . to focus [discovery] on matters reasonably calculated to produce evidence admissible at trial."¹⁰⁴ Indeed, as the 2006 Amendments have matured, courts have increasingly framed cooperation as less of an aspirational goal and more of a mandatory requirement,¹⁰⁵ with at least one district court adopting a local rule that explicitly requires counsel to cooperate with one another in discovery.¹⁰⁶

Parties have, in general, responded positively to this shift away from a more adversarial paradigm in discovery. As a result, the federal courts

99. See FED. R. CIV. P. 26(f) (Advisory Committee's notes on 2006 Amendments).

100. See *id.*

101. See *id.*

102. See *id.*

103. *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109 (E.D. Pa. 2010) (emphasis added).

104. *Dahl v. Bain Capital Partners, LLC*, 655 F. Supp. 2d 146, 149 (D. Mass. 2009) (citation omitted).

105. See *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644-REB-CBS, 2010 U.S. Dist. LEXIS 17857, at *41 (D. Colo. Feb. 8, 2010) (mandating that counsel cooperate in all aspects of discovery).

106. M.D.N.C. RULES OF PRAC. & PROC., R. 26.1(b)(1) (2011), available at http://www.ncmd.uscourts.gov/CIV_LR.pdf ("The Court expects counsel to conduct discovery in good faith and to cooperate and be courteous with each other in all phases of the discovery process.").

have seen an increase in collaborative agreements reached on a wide variety of electronic discovery-related issues. For example, in one matter, the parties agreed to limit the scope of email production for the explicit purpose of “streamlin[ing] the discovery process and reduc[ing] expenses.”¹⁰⁷ In another matter, the parties limited the scope and burdens of e-discovery by agreeing that “the only relevant documents containing electronically stored information” were emails, which “would be produced in PDF format.”¹⁰⁸ Agreements such as these—addressing scope and format—have become common in the wake of the 2006 Amendments and are designed specifically to reduce the cost of discovering ESI.¹⁰⁹ Even when parties have failed to reach agreement, the cooperative discussions in which they engaged have provided the court a solid foundation on which to craft an ultimate resolution of the dispute.¹¹⁰

In order to reinforce the importance and significance of collaboration, courts have—by and large—held parties to ESI-related agreements, even where doing so resulted in one party experiencing the very burdens such agreements aim to reduce. For instance, courts have required parties to abide by agreements regarding the format in which they will produce ESI,¹¹¹ and the search protocols that they will employ.¹¹² In one

107. *Widevine Techs., Inc. v. Verimatrix, Inc.*, No. 2-07-cv-321, 2009 U.S. Dist. LEXIS 115264, at *3 (E.D. Tex. Dec. 10, 2009).

108. *Palm Bay Int’l, Inc. v. Marchesi Di Barolo S.P.A.*, No. CV 09-601 (ADS) (AKT), 2009 U.S. Dist. LEXIS 104020, at *21 n.6 (E.D.N.Y. Nov. 9, 2009) (citations omitted) (internal quotation marks omitted).

109. *See, e.g., Kay Beer Distrib. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 U.S. Dist. LEXIS 130595, at *17 (E.D. Wis. June 10, 2009) (noting that “the parties had agreed at their Rule 26 conference that either a hard copy or electronic copy [of responsive documents] would be produced depending on what was most cost-effective”); *Hassaine v. Home Depot U.S.A., Inc.*, No. 09CV2215-MMA (BGS), 2011 U.S. Dist. LEXIS 34117, at *12 (S.D. Cal. Mar. 30, 2011) (noting that “the parties agreed to produce any electronic information in written format”); *White v. Honda of Am. Mfg.*, 2:07-CV-216, 2008 U.S. Dist. LEXIS 112102, at *11 (S.D. Ohio Dec. 31, 2008) (noting that “the parties agreed in the Rule 26(f) Report to produce all documents on paper”).

110. *See, e.g., Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *8–12 (D. Conn. Sept. 30, 2010) (crafting a phased ESI protocol that incorporated elements from the proposals that each party made when they were unable to reach agreement on the scope of electronic discovery).

111. *See, e.g., Nissan N. Am., Inc. v. Johnson Elec. N. Am., Inc.*, No. 09-CV-11783, 2010 U.S. Dist. LEXIS 43753, at *12–13 (E.D. Mich. May 5, 2010) (ordering production “in accordance with Rule 34(b)(2)(E)(i),” which provides for production “in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms”).

112. *See, e.g., Oracle USA, Inc. v. SAP AG*, 264 F.R.D. 541, 556–57 (N.D. Cal. 2009) (declining to permit discovery of expanded damages claims, given that the parties had, at

notable example, a court enforced a stipulated ESI protocol that could be read to allow one party to the agreement the unilateral discretion to designate the search terms that the other party would have to use when searching for documents responsive to a Rule 45 subpoena.¹¹³ Even though the agreement contained language suggesting that this discretion was somewhat limited, the party who held the discretion exercised it in an extraordinarily broad fashion to designate over 400 search terms.¹¹⁴ The court enforced the agreement as written, which resulted in the subpoena recipient incurring costs of over \$6 million responding to the subpoena.¹¹⁵ Courts have even shown the willingness to enforce informal agreements related to e-discovery where justified by the surrounding circumstances.¹¹⁶

Consistent with the new focus on collaboration, courts are increasingly willing to step in and demand cooperation when parties submit discovery disputes to the court for resolution.¹¹⁷ For example, in *Mancia v. Mayflower Textile Services Co.*,¹¹⁸ Magistrate Judge Paul Grimm ordered the parties to meet and confer based on concerns about the breadth of requested discovery in light of the modest amount at stake in the litigation.¹¹⁹ In so doing, Judge Grimm noted that, had the parties cooperated and communicated at the start of discovery, “most, if not all, of [their discovery] disputes could have been resolved without involving

the outset of the case, agreed to direct search terms to a narrower set of damage theories).

113. *In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 817 (D.C. Cir. 2009).

114. *Id.*

115. *Id.*

116. *In re Classicstar Mare Lease Litig.*, No. 5:07-cv-353-JMH, 2009 U.S. Dist. LEXIS 9750, at *26 (E.D. Ky. Feb. 2, 2009) (enforcing an agreement to produce ESI in native format based on an informal exchange between the parties); *see also Oracle USA, Inc.*, 264 F.R.D. at 556–57 (declining to permit discovery of expanded damages claims, given that the parties had, at the outset of the case, agreed to direct search terms to a narrower set of damage theories). *But see Susquehanna Commer. Fin. v. Vascular Res., Inc.*, No. 1:09-CV-2012, 2010 U.S. Dist. LEXIS 127125, at *5–6 (M.D. Pa., Dec. 1, 2010) (refusing plaintiff’s request to enforce agreement reached with the defendants’ prior counsel, “particularly as some of the current defendants were not even named in the case when such an agreement was reached, and particularly because plaintiff has failed to persuade the Court that producing ESI and other data in native format will be unduly burdensome”).

117. *See, e.g., Dunkin’ Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc.*, No. CV 2007-4027(ENV)(MDG), 2009 U.S. Dist. LEXIS 52261, at *14–15 (E.D.N.Y. June 19, 2009) (directing parties to “meet and confer on developing a workable search protocol” and noting that Rule 26(f) requires the parties to formulate a discovery plan addressing such issues).

118. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

119. *Id.* at 364–65.

the court.”¹²⁰ Other courts have adopted a similar approach,¹²¹ with some courts even citing the failure of the parties to cooperate early in the litigation as the basis for denying discovery sought later in the same proceeding.¹²² Indeed, courts have shown no reticence in openly and vocally expressing their displeasure with parties who fail to communicate and cooperate with one another on e-discovery issues.¹²³

In a clear sign of the degree to which the federal judiciary has embraced cooperation as a means of streamlining the discovery process, courts have increasingly looked to and relied on *The Sedona Conference*

120. *Id.* at 365.

121. *See, e.g.,* Ross v. Abercrombie & Fitch Co., Nos. 2:05-CV-0819,2:05-cv-0848,2:05-CV-0879,2:05-CV-0893,2:05-CV-0913,2:05-CV-0959, 2010 U.S. Dist. LEXIS 47620 (S.D. Ohio May 14, 2010) (instructing the parties to meet and confer regarding search protocols as part of effort to locate certain of defendants' documents); Burt Hill, Inc. v. Hassan, No. 09-1285, 2010 U.S. Dist. LEXIS 7492, at *34 (W.D. Pa. Jan. 29, 2010) (ordering the parties to “promptly meet and confer to determine whether the scope of Defendants’ [overbroad discovery requests] can be narrowed, [and] whether they can agree upon . . . ‘search terms’” to use in attempting to identify responsive documents); Marion v. State Farm Fire & Cas. Co., No. 1:06cv969-LTS-RHW, 2008 U.S. Dist. LEXIS 27082, at *12 (S.D. Miss. March 17, 2008) (chastising parties for having “done little to resolve their perceived differences on document production,” and demanding the “mutual cooperation of the parties” prospectively, and also threatening sanctions on “any one—party or counsel or both—who engages in any conduct that causes unnecessary delay or needless increase in the cost of litigation”).

122. *See, e.g.,* Sentis Group, Inc. v. Shell Oil Co., 559 F.3d 888, 891 (8th Cir. 2009) (noting the court’s belief that “neither party behaved in a manner consistent with the spirit of cooperation, openness, and candor owed to fellow litigants and the court and called for in modern discovery”); Wells Fargo Bank, N.A. v. LaSalle Bank Nat’l Ass’n, No. 3:07-cv-449, 2009 U.S. Dist. LEXIS 70514, at *8 (S.D. Ohio July 24, 2009) (refusing to grant a motion compelling additional discovery where the parties “could have avoided the expenses of [the] Motion by conferring appropriately early in the case about ESI”).

123. *See, e.g.,* Seven Seas Cruises v. V. Ships Leisure, No. 09-23411-CIV-UNGARO/SIMONTON, 2011 U.S. Dist. LEXIS 7063, at *18 (S.D. Fla. Jan. 19, 2011) (concluding that “the ESI dispute in [the] case was primarily caused by the parties’ mutual failure to communicate and work together in a good faith effort to resolve the areas of dispute”); Accounting Prin., Inc. v. Solomon Edwards Grp., LLC, No. 09-2085-CM, 2010 U.S. Dist. LEXIS 82071, at *4 (D. Kan. Aug. 12, 2010) (decrying the lack of “meaningful discussion about the specific discovery requests at issue” and calling the dispute “the litigation equivalent of the cafeteria food fight scene in the infamous movie *Animal House*” before ordering a conference to discuss salient issues); Capitol Records, Inc. v. Mp3tunes, LLC, 261 F.R.D. 44, 50 (S.D.N.Y. 2009) (criticizing the parties for having drafted “dueling epistles for submission to the court” rather than focusing “their attention on discussing their differences”).

*Cooperation Proclamation*¹²⁴ (*Cooperation Proclamation*), which carries no precedential or persuasive authority, to define the obligations of counsel in discovery. Issued after adoption of the 2006 Amendments and motivated by both “economy and logic,”¹²⁵ the *Cooperation Proclamation* was drafted as part of an effort “to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”¹²⁶ The *Cooperation Proclamation* identified specific methods that litigants can use to facilitate cooperation and outlined a broad three-step process to integrate this new approach to discovery into the litigation process by (1) promoting greater awareness of the need for cooperation, (2) developing a full understanding of the changes needed to promote greater cooperation, and (3) developing practical “toolkits” to support what the authors described as a “paradigm shift for the discovery process.”¹²⁷

Although only three pages in length, courts have repeatedly invoked the *Cooperation Proclamation* when reminding parties of their obligations to cooperate and communicate, and—in some cases—when requiring such cooperation and communication. For example, the Eastern District of Pennsylvania cited the *Cooperation Proclamation* when directing counsel “to work in a cooperative, rather than an adversarial manner, to resolve discovery issues,” and stating its expectation that the parties will “reach practical agreement” on e-discovery-related issues.¹²⁸ Similarly, the Southern District of New York explicitly endorsed the *Cooperation Proclamation* when stating that “the best solution in the entire area of electronic discovery is cooperation among counsel.”¹²⁹ When confronted with parties who had a “strained” relationship, the District of Kansas “directed [the parties] to read” the *Cooperation Proclamation* in

124. *Sedona Conference Cooperation Proclamation*, THE SEDONA CONFERENCE WORKING GROUP SERIES: DIALOGUE DESIGNED TO MOVE THE LAW FORWARD IN A REASONED AND JUST WAY, (Sedona Conference, Sedona, Ariz. 2008), http://www.thosedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf [hereinafter *Cooperation Proclamation*].

125. *Id.* at 1.

126. *Id.*

127. *Id.* at 3.

128. *Romero v. Allstate Ins. Co.*, 271 F.R.D. 96, 109 (E.D. Pa. 2010) (citing *Cooperation Proclamation*, *supra* note 124, at 1–3; *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009)).

129. *William A. Gross Constr. Assocs. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

order to “help [them] understand their obligations.”¹³⁰ Numerous other courts have similarly relied on the *Cooperation Proclamation*,¹³¹ indicating the level of importance that the federal judiciary has assigned to cooperative discovery in the wake of the 2006 Amendments.

This new focus on communication, cooperation, and collaboration has been effective in addressing some of the challenges of e-discovery and reducing the associated burdens. In a recent survey of federal magistrate judges, respondents reported that the 2006 Amendments had “encouraged more cooperation” and “reduced the number of e-discovery disputes.”¹³² In large part, the willingness of the courts to enforce and litigants to embrace this break from the traditional adversarial model of discovery has driven these results.

While effective at addressing certain challenges of e-discovery, cooperation alone cannot eliminate every ESI-related issue from the discovery process. Even when parties succeed in reaching cooperative agreements, disputes can still erupt over the very issues on which the parties previously agreed.¹³³ Thus, cooperation succeeds only to the ex-

130. Bldg. Erection Servs. Co. v. Am. Bldgs. Co., No. 09-2104-CM-DJW, 2010 U.S. Dist. LEXIS 2625, at *4–5 (D. Kan. Jan. 13, 2010).

131. See, e.g., Susquehanna Commer. Fin., Inc. v. Vascular Res., Inc., No. 1:09-CV-2012, 2010 U.S. Dist. LEXIS 127125, at *40 (M.D. Pa., Dec. 1, 2010) (declaring that courts generally refer to *The Sedona Principles* and other Sedona Conference publications as “the leading authorities on electronic document retrieval and production”); DeGeer v. Gillis, 755 F. Supp. 2d 909, 918 (N.D. Ill. 2010) (endorsing the *Cooperation Proclamation* and its “call for ‘cooperative, collaborative, [and] transparent discovery’”); Dunkin’ Donuts Franchised Rests. LLC v. Grand Cent. Donuts, Inc., No. CV 2007-4027(ENV)(MDG), 2009 U.S. Dist. LEXIS 52261, at *14–15 (E.D.N.Y. June 19, 2009) (noting that the *Cooperation Proclamation* “recommends that parties cooperate to resolve discovery disputes in order to reduce the rising costs associated with such disputes”); Ford Motor Co. v. Edgewood Props. Inc., 257 F.R.D. 418, 424–26 (D.N.J. 2009) (denying a motion to compel re-production of documents in native format, and citing numerous cases declaring the Sedona Conference publications to be “the leading authorities on electronic document retrieval and production” while also admonishing the defendant to address such issues early in litigation, through an “explicit agreement between the parties as to production”).

132. See Lee & Withers, *supra* note 17, at 207 (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “making the conduct of Rule 16(b) pretrial conferences more effective,” 70.5% reported it as at least somewhat effective in “encourage[ing] more cooperation,” and 61.1% reported it as at least somewhat effective in “reduc[ing] the number of e-discovery disputes” decided by survey participants).

133. See *In re Classicstar Mare Lease Litig.*, No. 5:07-cv-353-JMH, 2009 U.S. Dist. LEXIS 9750, at *26 (E.D. Ky. Feb. 2, 2009) (enforcing parties’ agreement to produce ESI in native format); Oracle USA, Inc. v. SAP AG, 264 F.R.D. 541, 556–57 (N.D. Cal. 2009) (declining to permit discovery of expanded damages claims, given that the parties had, at

tent that parties are able to find and maintain common grounds on discovery issues. Once parties lose such footing, the benefits of cooperation fall away and the burdens of e-discovery return.¹³⁴ However, principles of proportionality in discovery—which the 2006 Amendments both incorporated and emphasized—help to fill in the gap left when cooperation fails,¹³⁵ and more importantly, help prevent such gaps from forming in the first instance.

ii. *Proportionality under the 2006 Amendments*

As hard as it may be for younger lawyers to believe, the scope of discovery allowed under the Federal Rules of Civil Procedure was substantially broader in the past than it is today. Prior to 1983, Federal Rule of Civil Procedure 26 placed no significant limitations on the scope of discovery absent a protective order.¹³⁶ In 1983, however, the Federal Rules Committee substantially revised the rule “to deal with the problem of over-discovery” and to “guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”¹³⁷ The rule was expanded in 1993 out of recognition that—even then—“[t]he information explosion of recent decades ha[d] greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”¹³⁸

Today, Federal Rule of Civil Procedure 26(b)(1) presumptively allows a litigant to obtain discovery on “*any* nonprivileged matter that is

the outset of the case, agreed to direct search terms to a narrower set of damage theories).

134. See, e.g., *McNulty v. Reddy Ice Holdings, Inc.*, 271 F.R.D. 569, 571 (noting that while both parties “claim[ed] the high ground on willingness to cooperate in electronic discovery, . . . apparently no cooperation [had] occurred,” and the court was therefore forced to order parties to meet and confer).

135. See, e.g., *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *8–12 (D. Conn. Sept. 30, 2010) (ordering discovery of the electronically stored documents of three custodians from a proposed list of forty).

136. See FED. R. CIV. P. 26 (Subdivision (a) of the Advisory Committee’s notes on 1983 amendments) (“The deletion of the last sentence of Rule 26(a)(1), which provided that unless the court ordered otherwise under Rule 26(c) ‘the frequency of use’ of the various discovery methods was not to be limited, is an attempt to address the problem of duplicative, redundant, and excessive discovery and to reduce it.”).

137. See FED. R. CIV. P. 26 (Subdivision (b) of the Advisory Committee’s note on 1983 amendments).

138. FED. R. CIV. P. 26 (Subdivision (b) of the Advisory Committee’s note on 1993 amendments).

relevant to any party’s claim or defense.”¹³⁹ However, as a result of the 1983 and 1993 amendments, Rule 26(b)(2) tempers the breadth of discovery through proportionality principles that allow a court to limit discovery to include *only* that information that is truly necessary and relevant to the resolution of a given dispute.¹⁴⁰ Specifically, Federal Rule of Civil Procedure 26(b)(2)(C) requires a court to

[L]imit the frequency or extent of discovery otherwise allowed . . . if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.¹⁴¹

The significance of this rule—particularly since the advent of electronic discovery—cannot be understated because it allows a court to limit or prevent discovery based on its own *subjective* analysis of various exigent circumstances surrounding the case.¹⁴² For example, a court can preclude a party from requesting any further documents on a given subject if it determines that the party has—or should have—already obtained sufficient information on the subject in discovery.¹⁴³ Similarly, a court can limit a party’s document requests to a specific period of time or specific individuals if it determines that a broader scope of discovery would not serve “the needs of the case,”¹⁴⁴ is not justified based on “the amount in controversy,”¹⁴⁵ or would not be appropriate given “the par-

139. FED. R. CIV. P. 26(b)(1) (emphasis added).

140. *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 107 (D.N.J. 1990) (recognizing that Rule 26(b)(2) “allow[s] the court to proportion discovery, even though it may be relevant”).

141. FED. R. CIV. P. 26(b)(2)(C).

142. FED. R. CIV. P. 26(b)(2).

143. FED. R. CIV. P. 26(b)(2)(C)(ii) (requiring the court to limit discovery where “the party seeking discovery has had ample opportunity to obtain the information”).

144. FED. R. CIV. P. 26(b)(2)(C)(iii); *see also* *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *8–12 (D. Conn. Sept. 30, 2010) (limiting the time and scope of an initial ESI search).

145. FED. R. CIV. P. 26(b)(2)(C)(iii).

ties' resources."¹⁴⁶ The fundamental power of Rule 26(b)(2)(C) lies in the fact that it "allow[s] the court to proportion discovery, *even though it may be relevant*" and *would be discoverable* notwithstanding the court's subjective analysis.¹⁴⁷

Perhaps the only flaw in this proportionality framework is the fact that Rule 26(b)(2)(C) places the onus of enforcement on the court without creating any new rights or obligations for litigants.¹⁴⁸ This creates a structural dynamic where discovery *can* be limited under this rule, but where parties need not alter their discovery conduct until the court has actively inserted itself into the process and imposed limitations. Historically, this fact limited the effectiveness of this rule because courts were reluctant to exercise the full scope of their discretion under Rule 26(b)(2)(C).¹⁴⁹ One likely explanation for this is that, in the prior age of pure paper discovery, proportionality had less salience than today because the differing burdens associated with broad and narrow discovery requests were generally not of a sufficient magnitude to spur action by courts or litigants. A party may have grumbled over the expenses associated with searching for and producing marginally relevant paper documents, but the volume of such documents rarely escalated to the point where discovery threatened to become "the sideshow which eclipse[d]

146. *Id.*

147. *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 135 F.R.D. 101, 107 (D.N.J. 1990) (emphasis added); *see also Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, No. 88-9752, 1991 U.S. Dist. LEXIS 12959, at *13 (E.D. Pa. Sept. 16, 1991) ("Even were I to find some remote relevance in the . . . [discovery] requests, the 1983 amendments to Rule 26(b)(1) of the Federal Rules emphasized that discovery must be proportional, as well as relevant to the lawsuit and must be tailored to the case at hand.").

148. *See* FED. R. CIV. P. 26 (Subdivision (b) of Advisory Committee's notes on 1983 amendments) ("The new sentence is intended to encourage *judges* to be more aggressive in identifying and discouraging discovery overuse." (emphasis added)).

149. FED. R. CIV. P. 26 (Subdivision (b)(1) of Advisory Committee's notes on 2000 amendments) ("The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated."). *But see* *Leksi, Inc. v. Fed. Ins. Co.*, 129 F.R.D. 99, 106 (D.N.J. 1989). A federal district court in New Jersey cited Rule 26(b) to support a holding that:

The information which [the plaintiff] seeks . . . is disproportionate to the declaratory judgment action it has filed. To compel the production of the [information would] . . . not only involve[] enormous inconvenience and management difficulties, but [would] also entail[] a frightening potential for spawning unbearable side litigation which, in [the court's] view, [would] defeat[] the purpose and spirit of the discovery rules themselves.

Id.

the circus.”¹⁵⁰ With the advent of e-discovery, this calculus fundamentally changed,¹⁵¹ and as a result, the concept of proportionality in discovery has taken on much greater importance.¹⁵²

In 2006, the Federal Rules Committee amended Rule 26 to add subsection (b)(2)(B), which states that a party “need not provide discovery of electronically stored information [that is] not reasonably accessible because of undue burden or cost” provided, however, that such party has the burden of demonstrating that the ESI is, in fact, not reasonably accessible for these reasons.¹⁵³ The new rule is specifically “designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information,”¹⁵⁴ and for the first time, allows a party responding to discovery to proportion the scope of its responses, at least in the first instance. This new rule rests on the recognition that the burdens caused by the volume¹⁵⁵ or geographic dispersion¹⁵⁶ of ESI may, in many instances, be disproportionate to the value of that ESI to the litigation,¹⁵⁷ and that, often, “information contained on easily accessed sources . . . may be all that is reasonably useful or necessary for the litigation.”¹⁵⁸

Although the Federal Rules Committee recognized the need to give parties the ability to proportion the discovery of ESI, it also recognized that granting such power carried a significant risk of abuse and, there-

150. *Tech. Sales Assocs. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 U.S. Dist. LEXIS 53711, at *4 (E.D. Mich. May 1, 2009).

151. 2005 COMM. REPORT, *supra* note 13, at 22–24.

152. *See, e.g., Adams v. United States*, No. 4:CV 03-49-BLW, 2010 U.S. Dist. LEXIS 135726, at *14–15 (D. Idaho Dec. 22, 2010) (illustrating a court that weighed the burden of proposed discovery against its likely benefit, and exercising discretion under Rule 26(b)(2)(C)(iii) to deny a party’s motion to compel); *Araiza v. Mecham*, No. CV10-0188 PHX DGC, 2010 U.S. Dist. LEXIS 127420, at *3–4 (D. Ariz. Dec. 1, 2010) (noting that the court limited discovery as required by Rule 26(b)(2)(C)(iii) “to ensure that it was proportional to the modest amount at issue in [the] case”).

153. FED. R. CIV. P. 26(b)(2)(B) (limiting Rule 26(b)(1)). Rule 26(b)(1) is further limited by subsection (b)(2)(C), which, for instance, permits a court to limit discovery where the burden of such discovery would outweigh its likely benefit. *See* FED. R. CIV. P. 26(b)(2)(C)(iii).

154. FED. R. CIV. P. 26(b)(2)(B) (Subdivision (b)(2) of the advisory committee’s notes on 2006 amendments).

155. *See The Sedona Principles*, *supra* note 59, at 4 (sharing statistics concerning the proliferation of electronically stored information).

156. *Id.* at 6, 17.

157. *Id.* at 17.

158. 2005 COMM. REPORT, *supra* note 13, at 31 (noting that a “two-tier practice,” whereby the parties first examine easily-accessed sources before moving on to more difficult-to-access sources, may be appropriate in some cases).

fore, took steps to mitigate this danger through the commentary to Rule 26(b)(2)(B).¹⁵⁹ Prior to the 2006 Amendments, many litigants adopted the practice of responding to electronic discovery requests simply by declining to produce ESI that was characterized as “difficult to access.”¹⁶⁰ When expanding the role of proportionality under Rule 26(b)(2) in 2006, the Federal Rules Committee clarified that this new ability to limit the scope of discovery on accessibility grounds only applied when ESI is “difficult to access . . . for all purposes.”¹⁶¹ In other words, Rule 26(b)(2)(B) allows a party to proportion its production of ESI only when the burden or cost of retrieval truly outweighs the value of the information to the litigation,¹⁶² and, even then, allows the opposing party to obtain the ESI when necessary.¹⁶³

Regarding the 2006 amendments, the Federal Rules Committee suggested:

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

FED. R. CIV. P. 26(b)(2)(B) (Subdivision (b)(2) of Advisory Committee’s notes on 2006 amendments).

160. 2005 COMM. REPORT, *supra* note 13, at 31.

161. *Id.* at 32 (emphasis added).

162. Daniel B. Garrie, et al., *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 118–19, 125, 126 (2006) (noting that Rule 26(b)(2)(B) does not allow litigants simply to “re-characterize their data by saving it in inaccessible forms to eliminate discovery production obligations while maintaining access to their data”); *see also* Rebecca Rockwood, Comment, *Shifting Burdens and Concealing Electronic Evidence: Discovery in the Digital Era*, 12 RICH. J.L. & TECH. 16, ¶ 34 (2006) (considering how Rule 26(b)(2)(B) and Rule 37(f) work together). Rockwood observes that:

The combined effect of proposed Rules 26(b)(2)(B) and 37(f) is that companies can get the ‘benefits of a data deletion policy’ without actually deleting anything. Although these new rules will help corporate defendants get through the litigation process without incurring a great deal of expense, it will also allow them more room to conceal important files and electronic documents. In the future, technically savvy defendants will have a distinct advantage in evading discovery of potentially damaging documents. In many cases, this could change the entire outcome of the litigation.

Id.

163. FED. R. CIV. P. 26(b)(2) (Subdivision (b)(2) of Advisory Committee’s notes on 2006 amendments) (indicating that inaccessibility can be overcome by a showing of good cause). The committee explained that:

When analyzing accessibility objections under the 2006 Amendments, courts apply proportionality principles in a variety of ways to ensure that discovery “is reasonable and appropriate to the dispute at hand while not imposing excessive burdens and costs on litigation and the court.”¹⁶⁴ In some cases, courts have denied a party’s request for ESI outright where the circumstances of the case did not justify the burden of production or the party failed to show good cause.¹⁶⁵ In other instances, courts have substantially narrowed the scope of e-discovery to ensure that the associated burdens corresponded to the facts of the case,¹⁶⁶ in some instances carefully distinguishing between accessible and inaccessible ESI sources.¹⁶⁷ In still other matters, courts have used proportionality principles to limit the scope of proposed ESI protocols to specific cus-

[o]nce it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case.

Id.

164. *The Sedona Principles*, *supra* note 59, at iii. The Sedona Conference Working Group has stated that, in “drafting the [Sedona] principles and commentary, [they] tried to keep in mind the ‘rule of reasonableness,’” which is “embodied in [Federal] Rules 1 (courts should secure the just, speedy and inexpensive determination of all matters) and 26(b)(2) (proportionality test of burden, cost, and need).” *Id.*

165. *See, e.g., Rodriguez-Torres v. Gov’t Dev. Bank of P.R.*, 265 F.R.D. 40, 44 (D.P.R. 2010) (denying a party’s request for three years’ worth of e-mails on the grounds that ESI was “not reasonably accessible because of the undue burden and cost”); *BBVA Compass Ins. Agency, Inc. v. Olson*, No. 10-cv-00528-WYD-KLM, 2010 U.S. Dist. LEXIS 111633, at *10 (D. Colo. Oct. 12, 2010) (finding that Plaintiff’s affidavit, which “attests that Plaintiff [would] expend between 200 and 400 hours to compile the requested files” sufficiently demonstrated Plaintiff’s claim of undue burden, and finding Defendant’s need insufficient to overcome such burden); *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644-REB-CBS, 2010 U.S. Dist. LEXIS 17857, at *45–46 (D. Colo. Feb. 8, 2010) (calling the defendants’ argument the “e-discovery equivalent of an unsubstantiated claim that the ‘sky is falling’”).

166. *See, e.g., Calixto v. Watson Bowman Acme Corp.*, No. 07-60077, 2009 U.S. Dist. LEXIS 111659, at *30–35 (S.D. Fla. Nov. 16, 2009) (ordering defendant to restore and search one backup tape, rather than all of its backup tapes as plaintiff requested).

167. *Johnson v. Neiman*, No. 4:09CV00689 AGF, 2010 U.S. Dist. LEXIS 110496, at *4–5 (E.D. Mo. Oct. 18, 2010) (holding that information stored on 5,880 backup tapes was inaccessible based on estimated time and cost of restoring information); *Helmert v. Butterball, LLC*, No. 4:08CV00342 JLH, 2010 U.S. Dist. LEXIS 60777, at *26 (E.D. Ark. May 27, 2010) (allowing discovery of ESI housed on laptops and hard drives, but not ESI located on backup tapes).

todians,¹⁶⁸ date ranges,¹⁶⁹ and search terms most likely to yield relevant information.¹⁷⁰ More recently, courts have begun to show an increased willingness to proportion e-discovery through iterative search and sampling techniques in which a small quantity of ESI is searched in order to determine whether further and broader searches are justified.¹⁷¹

Similar to its reliance on the *Cooperation Proclamation* when addressing issues of cooperation under the 2006 Amendments, the federal judiciary has begun to rely on The Sedona Conference's *Commentary on Proportionality in Electronic Discovery*¹⁷² (*Commentary on Proportionality*) when addressing issues of proportionality. Issued in late 2010, the *Commentary on Proportionality* sets forth and discusses six principles "to guide courts, attorneys, and parties" when confronting questions regarding the proportionality of discovery.¹⁷³ The six principles are:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

168. *Willnerd v. Sybase, Inc.*, No. 1:09-cv-500-BLW, 2010 U.S. Dist. LEXIS 121658, at *8–9 (D. Idaho Nov. 16, 2010) (characterizing a request for search of thirty custodians' e-mails as "the proverbial fishing expedition" and, applying proportionality standards, to limit the search to a single custodian).

169. *United Cent. Bank v. Kanan Fashions, Inc.*, No. 10 C 331, 2010 U.S. Dist. LEXIS 83700, at *3–4 (N.D. Ill. Aug. 12, 2010) (adopting date ranges proposed by Plaintiff for ESI search "given the cost of ESI and minimal relevance of any documents outside of [the] date range").

170. *See, e.g., Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *12–13 (D. Conn. Sept. 30, 2010) (rejecting a party's proposed protocol that sought search of ESI from forty custodians over six-year period in favor of limited protocol involving search of three custodians over three-year period); *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 684–85 (N.D. Ga. 2009) (rejecting protocol proposed by a requesting party that would have searched fifty-five custodians over a three-year period using fifty search terms in favor of a narrower protocol proposed by the party responding to discovery).

171. *See, e.g., Barrera*, 2010 U.S. Dist. LEXIS 103491, at *12; *Phillip M. Adams & Assoc., LLC v. Fujitsu Ltd.*, No. 1:05-CV-64, 2010 U.S. Dist. LEXIS 45576, at *24–25 (D. Utah May 10, 2010) (permitting a limited search of a sampling of Plaintiff's old computers, with the possibility of "further discovery"); *see also Makrakis v. DeMelis*, No. 09-706-C, 2010 Mass. Super. LEXIS 223, at *6–7 (Mass. Super. Ct. July 13, 2010) (utilizing iterative searching under state procedural rules).

172. The Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289 (2010), available at <http://www.thesedonaconference.org/content/miscFiles/Proportionality2010.pdf> [hereinafter *Commentary on Proportionality*].

173. *Id.* at 291.

2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.
3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.
4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.
5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.
6. Technologies to reduce cost and burden should be considered in the proportionality analysis.¹⁷⁴

Within months of its initial publication, the Northern District of Illinois had cited the *Commentary on Proportionality*, informing parties—who had been involved in litigation for six years, but were just reaching the point of discovery—of its authority to limit discovery based on principles of proportionality in what appeared to be a clear attempt to steer the parties away from misuse of the discovery process.¹⁷⁵ More recently, the District of Minnesota relied on the *Commentary on Proportionality* when rejecting a party's assertion that ESI was inaccessible and compelling that party to produce the ESI, in part, because “the burden and expense of this discovery was self-inflicted.”¹⁷⁶ As with its frequent reliance on the *Cooperation Proclamation*, the federal judiciary's growing embrace of the *Commentary on Proportionality* reflects the extent to which courts have come to recognize how they can use the proportionality principles in Rule 26(b) to shape and focus the process of electronic discovery.

The power of these principles to reduce the burdens of electronic discovery is manifest from the cases in which courts have actively ap-

174. *Id.*

175. *Tamburo v. Dworkin*, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *7 (N.D. Ill. Nov. 17, 2010) (“The ‘metrics’ set forth in Rule 26(b)(2)(C)(iii) provide courts significant flexibility and discretion to assess the circumstances of the case and limit discovery accordingly to ensure that the scope and duration of discovery is reasonably proportional to the value of the requested information, the needs of the case, and the parties’ resources.” (quoting *Commentary on Proportionality*, *supra* note 172, at 294) (internal quotation marks omitted)).

176. *Escamilla v. SMS Holdings Corp.*, No. 09-2120 ADM/JSM, 2011 U.S. Dist. LEXIS 122165, at *16–17 (D. Minn. Oct. 21, 2011) (“In assessing whether a particular discovery request or requirement is unduly burdensome or expensive, a court should consider the extent to which the claimed burden expense grow[s] out of the responding party’s action or inaction.” (citing the *Commentary on Proportionality*, *supra* note 172, at 294)).

plied them. For example, in one recent case, the plaintiff sought production of ESI from forty custodians over a six year period using eighty search terms.¹⁷⁷ After considering the defendants' objection that the cost of such production would greatly outweigh its benefit to the case, the court approved a limited initial sampling of ESI that only covered three custodians over a three year period, but did employ the eighty search terms proposed by the plaintiff.¹⁷⁸ Although the defendant faced the possibility of further e-discovery depending on the results of the initial phase, the court's willingness and ability to proportion discovery in this manner reduced by 75% the defendants' estimated costs associated with the production.¹⁷⁹

III. ELECTRONIC DISCOVERY IN NORTH CAROLINA

A. *H.B. 380 and the Advent of Formal Electronic Discovery Rules in North Carolina*

Although state courts in North Carolina have confronted the same e-discovery-related issues that prompted the Federal Rules Committee to propose the 2006 Amendments,¹⁸⁰ until passage of H.B. 380 in 2011, the State lacked a set of generally-applicable procedural rules¹⁸¹ to govern the discovery of ESI.¹⁸² As a result, state court litigants and judges have had to grapple with the complexities of e-discovery under prior versions

177. *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *8–12 (D. Conn. Sept. 30, 2010).

178. *Id.*

179. *See id.* (noting that the estimated cost of full search was \$60,000, while estimated cost of limited search was between \$13,000 and \$15,000).

180. *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at *7–10 (N.C. Super. Ct. Nov. 1, 2006).

181. *See id.* The North Carolina Business Court had adopted a limited set of rules related to e-discovery, but the Honorable Ben F. Tennille, Chief Special Superior Court Judge for Complex Business Cases, recognized that development of a more comprehensive set of e-discovery rules would require legislative action. *Id.* at *9–10.

182. *Id.* (“Were it necessary to adopt a separate test specifically for electronic discovery, it would not be the province of this Court to do so. It is for the appellate courts and the Legislature to set forth such a test.”); Kara A. Millonzi, *E-Discovery In North Carolina: A Review of the 2006 Amendments to the Federal Rules of Civil Procedure and the 2008 Proposed Amendments to the North Carolina Rules of Civil Procedure 2* (draft) (March 26, 2009) available at <http://www.sog.unc.edu/programs/attorneyconferences/docs/2009-city%20winter-millonzi-ediscovery%20memo.pdf>.

of the North Carolina Rules of Civil Procedure¹⁸³ and informal guidelines promulgated by the Conference of Chief Justices.¹⁸⁴ During this time, e-discovery issues arose,¹⁸⁵ but the State courts did not experience any ESI-related scenarios of a magnitude similar to those confronted by the federal courts prior to the adoption of the 2006 Amendments.¹⁸⁶

Regardless, based on the changes that had taken place on the federal level, the North Carolina Bar Association’s Litigation Section formed an E-Discovery Committee during its 2007–2008 term to study the issue and examine possible changes to the North Carolina Rules of Civil Procedure.¹⁸⁷ The E-Discovery Committee was specifically tasked with proposing “a mechanism for discovery of ESI during litigation in our state courts” and a “means to alleviate, to the extent possible, the difficulties demonstrated in the early interpretations of the [2006 Amendments].”¹⁸⁸ Accordingly, the committee eventually proposed a discrete set of amendments to North Carolina Rules of Civil Procedure 16, 26, 33, 34, 37, and 45.¹⁸⁹ Eschewing a more complicated or novel scheme, the E-Discovery Committee followed the federal approach and largely patterned the rule changes in H.B. 380 after the 2006 Amendments with only a handful of state-specific alterations.¹⁹⁰

Perhaps most significantly, the E-Discovery Committee emphasized the fact that “practical application of the federal rules amendments [had shown] the great value of pre-discovery dialogue among the parties or

183. *Analog Devices, Inc. v. Michalski*, 01 CVS 10614, 2006 NCBC LEXIS 16, at *39–41 (N.C. Super. Ct. Nov. 1, 2006) (analyzing a claim that production of electronic information poses an undue burden on a party under Rule 26(b)(2) proportionality factors).

184. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *9–10 (denying electronic discovery request of a non-party as unduly burdensome after considering, among other things, the factors set forth in the Conference of Chief Justices, Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information); see also CONF. OF CHIEF JUSTICES, *supra* note 12.

185. See generally *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *9–10; *Analog Devices, Inc.*, 2006 NCBC LEXIS 16.

186. See generally *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).

187. NORTH CAROLINA BAR ASSOCIATION LITIGATION SECTION E-DISCOVERY COMMITTEE, PROPOSED AMENDED NORTH CAROLINA RULES OF CIVIL PROCEDURE: RULES 16, 26, 33, 34, 37 AND 45: OVERVIEW 1 (2010), [hereinafter “E-DISCOVERY COMM. OVERVIEW”] available at <http://www.ncbar.org/media/11074033/NCROCPAmendEDiscovery.pdf>.

188. E-DISCOVERY COMM. REPORT, *supra* note 19, at 1–2.

189. E-DISCOVERY COMM. OVERVIEW, *supra* note 187, at 1–2.

190. See E-DISCOVERY COMM. REPORT, *supra* note 19, at 1 (noting that the proposed rules “follow[] the concepts of the federal rules”).

their attorneys, particularly with regard to discovery of ESI.”¹⁹¹ As a result, the committee specifically designed the new rules to “encourage and facilitate that dialogue[] to the greatest extent possible short of mandating a conference in every civil matter,” and to “create a framework for the court and the litigants to [use in] address[ing] the methods, mechanisms, and potential costs of discovery of ESI.”¹⁹² The specific rule changes that make up this framework are described below.¹⁹³

- Rule 16—Court-Ordered Discovery Scheduling Conference

As part of an overall scheme to bring greater control to the discovery process, H.B. 380 amended Rule 16 to increase the effectiveness of court-ordered pre-trial scheduling conferences. While the amended rule does not require a court to conduct a discovery scheduling conference in every case, if a court exercises its discretion to hold such a conference, Rule 16(a) now requires it to enter an order memorializing what took place, including any agreements reached by the parties that relate to discovery issues.¹⁹⁴

- Rule 26(b)(1)—Scope of Discovery/Metadata

As part of the “core of the e-discovery framework,”¹⁹⁵ H.B. 380 amended Rule 26(b)(1) to add ESI as a category of discoverable information.¹⁹⁶ In recognition of the fact that ESI often contains relevant information that is buried or hidden in digital code (otherwise known as “metadata”), H.B. 380 expanded the definition of ESI “to include not only the information contained on the screen view of [a] file[,] but also reasonably accessible metadata that reflect such key information as date sent, date received, author, and recipients.”¹⁹⁷ However, the E-Discovery Committee drafted the amended rule “to focus electronic discovery on

191. *Id.* at 2.

192. *Id.*

193. The E-Discovery Committee also made various technical changes to the rules at issue, such as to incorporate gender neutrality. *Id.* at 1. This article does not review or address these technical changes.

194. H.B. 380, Gen. Assem., 2011–2012 Sess. (N.C. 2011); E-DISCOVERY COMM. REPORT, *supra* note 19, at 2.

195. E-DISCOVERY COMM. REPORT, *supra* note 19, at 2.

196. H.B. 380, Gen. Assem., 2011–2012 Sess. (N.C. 2011); E-DISCOVERY COMM. REPORT, *supra* note 19, at 2.

197. N.C. GEN. STAT. § 1A-1, Rule 26(b)(1) cmt. to amendment (2011).

the kinds of metadata that will be relevant in most cases” by specifically excluding other types of metadata from the definition of ESI and “making that metadata not subject to discovery unless the parties agree . . . or the court orders disclosure.”¹⁹⁸

- Rule 26(b)(2)—Proportionality of Discovery

Although H.B. 380 did not alter Rule 26(b)(2) in any meaningful way,¹⁹⁹ the fact that the legislation retained the proportionality provision contained in this rule is, as discussed in more detail below, significant to the overall effectiveness of the legislation in addressing the burdens of e-discovery. As is relevant here, Rule 26(b)(2) continues to *require* a court to limit the “frequency or extent” of discovery when it “is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties’ resources, and the importance of the issues at stake in the litigation.”²⁰⁰ Put differently, Rule 26(b)(2) mandates that a court ensure that a party’s use of discovery is proportional to the needs of the case.²⁰¹

- Rules 26(b)(3) and 34(b)—Accessibility Limitations on Discovery of ESI

Amended Rules 26(b)(3) and 34(b) allow a party to resist discovery of ESI by interposing an objection that the ESI sought is “not reasonably accessible because of undue burden or cost,” or that the format of the requested ESI production is objectionable.²⁰² Where such an objection is raised, Rules 26(c) and 37(a)(2) clarify that the burden rests with the objecting party to prove that the information is, in fact, not reasonably accessible, and that, upon a showing of good cause, a court can order production even where the objecting party carries this burden.²⁰³

198. *Id.*

199. *Id.* § 1A-1, Rule 26(b)(2) cmt. to amendment (2011).

200. *Id.* § 1A-1, Rule 26(b)(2).

201. *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 600 (E.D. Wis. 2004) (discussing the comparable proportionality mandate contained in FED. R. CIV. P. 26(b)); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003).

202. N.C. GEN. STAT. § 1A-1, Rules 26(b)(3), 34(b).

203. *Id.* § 1A-1, Rule 26(c) cmt. to amendment (2011), Rule 37(a)(2) cmt. to amendment (2011).

- Rule 26(b)(3)—Allocation of E-Discovery Costs

Under Rule 26(b)(3), a court now has the express authority to allocate the costs of e-discovery between the parties.²⁰⁴ Significantly, the amended rule does not condition the court's authority to make such an allocation on a party first moving for or otherwise requesting an allocation of costs.²⁰⁵

- Rule 26(b)(7)—The Discovery of Privileged Documents

H.B. 380 added a new Rule 26(b)(7) to incorporate two significant privilege-related protections.²⁰⁶ Under Rule 26(b)(7)(a), a party withholding documents on the basis of privilege must now expressly make the claim of privilege and must provide sufficient information about the withheld documents to allow the receiving party to assess fully the claim.²⁰⁷ Under Rule 26(b)(7)(b), a party can mitigate the inadvertent production of privileged information by providing notice to the receiving party, who then is obligated to return, sequester, or destroy the information in question, though the party can submit the information to the court to review the claim of privilege.²⁰⁸

- Rule 26(f)—Discovery Scheduling Conferences

One of the most significant and important changes incorporated in H.B. 380 was the creation of a new discovery scheduling conference, or “meet and confer” process. Under amended Rule 26(f), any party involved in civil litigation can request a discovery scheduling conference and, after such a request is made, the opposing party is required to attend.²⁰⁹ During the “meet and confer,” parties are required to “consider the nature and basis of the parties’ claims and defenses and the possibilities for promptly settling or resolving the case and . . . discuss the prepa-

204. *Id.* § 1A-1, Rule 26(b)(3) cmt. to amendment (2011) (noting that Rule 26(b)(3) “specifically recognizes the authority of the court to specify conditions for electronic discovery, including allocation of the costs of that discovery”).

205. *See id.* § 1A-1, Rule 26(b)(3).

206. *Id.* § 1A-1, Rule 26(b)(7) cmt. to amendment (2011).

207. *Id.* § 1A-1, Rule 26(b)(7)(a).

208. *Id.* § 1A-1, Rule 26(b)(7)(b).

209. *Id.* § 1A-1, Rule 26(f).

ration of a discovery plan²¹⁰ that includes “a statement of the issues as they then appear.”²¹¹

The new rule specifically encourages the parties to consider, where appropriate, (a) the preservation of ESI;²¹² (b) “the media form, format, or procedures by which [ESI] will be produced;”²¹³ (c) “the allocation of the costs of preservation, production, and, if necessary, restoration, of [ESI];”²¹⁴ (d) “the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials if different from that provided in [Rule 26(b)(7)];”²¹⁵ (e) “the method for asserting or preserving confidentiality and proprietary status” of documents or ESI;²¹⁶ (f) “any limitations proposed to be placed on discovery, including, if appropriate under the circumstances of the case, that discovery be conducted in phases or be limited to or focused on particular issues;”²¹⁷ and (g) any agreements between the parties to limit discovery through the use of a protective order under Rule 26(c).²¹⁸ After the conference is held, the parties must either submit a joint discovery plan to the court if they reach agreement on all issues or separate plans if they cannot.²¹⁹ Thereafter, Rule 26(f) requires the court to enter a discovery scheduling order upon motion of either party.²²⁰

The commentary to Rule 26(f) explicitly encourages parties to delay the discovery scheduling conference “until all parties can become sufficiently familiar with the issues arising in the action and the potential sources of discovery information” to ensure that the “discovery meeting will be meaningful, beneficial, and productive.”²²¹ Additionally, the commentary incorporates by reference the commentary to the 2006 amendment to Federal Rule of Civil Procedure 26(f), and advises that it “can provide guidance regarding discovery of electronically stored information where applicable.”²²² This decision on the part of the E-Discovery Committee is particularly significant because of the emphasis

210. *Id.* § 1A-1, Rule 26(f)(2)(i)–(ii).

211. *Id.* § 1A-1, Rule 26(f)(3)(i).

212. *Id.* § 1A-1, Rule 26(f)(3)(iii).

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* § 1A-1, Rule 26(f)(3)(iv).

218. *Id.* § 1A-1, Rule 26(f)(3)(vi).

219. *Id.* § 1A-1, Rule 26(f)(2).

220. *Id.* § 1A-1, Rule 26(f)(4).

221. *Id.* § 1A-1, Rule 26(f) cmt. to amendment (2011).

222. *Id.*

that the commentary to Federal Rule 26(f) places on engagement between the parties on the issue of e-discovery and the benefits that can be achieved through cooperative agreements regarding issues, such as preservation and privilege, that have proved so problematic in e-discovery practice.²²³

- Rule 33(c)—Responding to Interrogatories Using Business Records

H.B. 380 made a slight change to Rule 33(c) to clarify that a party can now respond to an interrogatory by producing and referring to ESI where “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.”²²⁴ However, Rule 33(c) now requires a party who relies on business records or ESI in this manner to provide “sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained,”²²⁵ and the commentary to the amendments warn that a party invoking this provision “may be required to provide direct access to its electronic information system . . . if . . . necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory.”²²⁶

- Rule 34(a)—Requests for Production of ESI

H.B. 380 revised Rule 34(a) to include ESI within the scope of information of which a party can request production in discovery.²²⁷ It is significant to note that H.B. 380 retained the language that allows a party to request an opportunity to “test or sample” information that falls within the scope of Rule 34(a).²²⁸ By expanding the scope of this rule to encompass ESI while simultaneously retaining the “test and sample” provision, H.B. 380 expressly allows a party to conduct a forensic examination of an ESI repository (i.e., hard drive, thumb drive, etc.) where appropriate.

223. FED. R. CIV. P. 26(f) (Advisory Committee’s note on 2006 amendments).

224. N.C. GEN. STAT. § 1A-1, Rule 33(c).

225. *Id.*

226. *Id.* § 1A-1, Rule 33(c) cmt. to amendment (2011).

227. *Id.* § 1A-1, Rule 34(a) cmt. to amendment (2011).

228. *Id.* § 1A-1, Rule 34(a)(i).

- Rule 34(b)—Form of Production of ESI

H.B. 380 also amended Rule 34(b) in two significant ways. First, a party must produce ESI “as [it is] kept in the usual course of business or must organize and label [it] to correspond to the categories in the discovery request.”²²⁹ By incorporating this mandate, Rule 34(b) seeks “to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party.”²³⁰ Put differently, this “provision prohibits ‘simply dumping large quantities of unrequested material[] onto [a] discover[y] party along with the items actually sought.’”²³¹ Second, the amended rule allows the party requesting discovery to specify the form in which the responding party should produce ESI and, in the absence of such a specification, allows the responding party to produce ESI in any “reasonably usable form,” but does not require production in more than one form.²³² The commentary to the amendments further clarifies that it is inappropriate for a party to withhold production based on an objection to the requested form of production of ESI and that, in such situation, the objecting party “must propose an alternative form or forms” of production.²³³

- Rule 37(c)—Safe Harbor for the Loss of ESI under Certain Circumstances

Amended Rule 37(c) incorporates a safe harbor protection that relates to a litigant’s common law duty to preserve relevant information when litigation arises or is reasonably anticipated to arise.²³⁴ Under Rule 37(c), a party is protected from spoliation sanctions—except in exceptional circumstances—where ESI that is subject to the preservation duty is “lost as a result of routine, good-faith operation of an electronic infor-

229. *Id.* § 1A-1, Rule 34(b)(1).

230. *Id.* § 1A-1, Rule 34(b) cmt. to amendment (2011).

231. *S.E.C. v. Colins & Aikman Corp.*, 256 F.R.D. 403, 410 (S.D.N.Y. 2009) (construing the federal counterpart to North Carolina Rule of Civil Procedure 34(b) (quoting 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2213 (2008))).

232. N.C. GEN. STAT. § 1A-1, Rule 34(b).

233. *Id.* § 1A-1, Rule 34(b) cmt. to amendment (2011).

234. *See Inventory Locator Serv., LLC v. PartsBase, Inc.*, No. 02-2695-MaV, 2005 U.S. Dist. LEXIS 46252, at *37 n.8 (W.D. Tenn. Oct. 19, 2005) (noting relationship between duty to preserve and safe-harbor provision in what was then-proposed FED. R. CIV. P. 37(f)).

mation system.”²³⁵ This safe harbor does not vitiate a party’s obligation to institute preservation measures when a triggering event occurs, but recognizes the sometime-mercurial nature of electronic information governance and provides a modicum of protection where ESI is inadvertently lost.²³⁶

- Rule 45—Subpoenas Seeking Production of ESI

H.B. 380 made a number of changes to Rule 45 that incorporate ESI into the subpoena process.²³⁷ These changes largely mirror those to the rules that govern discovery between the parties to a lawsuit, and create similar substantive rights and obligations for those involved in discovery under Rule 45 subpoenas.²³⁸ For example, a party can specifically subpoena ESI from a non-party²³⁹ who can object to the subpoena on grounds that the requested ESI is not reasonably accessible.²⁴⁰

Through these various amendments, the E-Discovery Committee designed a general framework to govern the discovery of ESI in state court litigation. When read in isolation or analyzed from a technical perspective, these rule changes may seem somewhat modest and largely uneventful. With few exceptions, H.B. 380 does not dramatically change the rights and duties of parties engaged in discovery. However, the seeming simplicity of the legislation’s design does not reflect the true depth of its impact, as discussed in the following section.

B. *The Impact of H.B. 380 on the Discovery Process in North Carolina*

When summarizing its work, the E-Discovery Committee stated that the proposed rules reflected “significant differences” from the 2006 Amendments and, thus, the prevailing e-discovery rules in the federal

235. N.C. GEN. STAT. § 1A-1, Rule 37(c); *see also id.* cmt. to amendment (2011) (clarifying that the safe harbor only applies “to information lost due to . . . the ways in which [electronic information systems] generally are designed, programmed, and implemented to meet the party’s technical and business needs”).

236. *Id.* § 1A-1, Rule 37(c) cmt. to amendment (2011) (“Section (c) is an effort to recognize a necessary balance between normal computer system operations and the needs of litigation.”).

237. *Id.* § 1A-1, Rule 45 cmt. to amendment (2011) (“Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information.”).

238. *Id.*

239. *Id.* § 1A-1, Rule 45(a)(1)(b).

240. *Id.* § 1A-1, Rule 45(d)(4).

courts.²⁴¹ Although the committee did not specifically delineate these perceived differences, the procedural framework that it created and the basic approach that it adopted incorporated perhaps the two most important principles embodied in the 2006 Amendments: cooperation and proportionality. If actively promoted by the courts and embraced by litigants, these two principles have the potential to shift the discovery process in the North Carolina state courts from the current adversarial paradigm towards a more efficient and less contentious future.

i. H.B. 380 Will Promote Greater Communication and Cooperation in Discovery

Prior to H.B. 380, the North Carolina Rules of Civil Procedure created a structurally adversarial paradigm in discovery that did little to promote cooperation between the parties. The rules allowed parties to request various types of discovery from one another and imposed various penalties on parties who failed to respond to discovery,²⁴² but, except in limited circumstances,²⁴³ did not require parties ever to engage with one another directly on any issue related to discovery unless and until a dispute had already developed.²⁴⁴ This lack of structured engagement between the parties created a vacuum in which adversarial approaches to discovery blossomed. For example, in one case, a court defaulted a defendant who flatly refused to produce certain information requested in discovery—even after the court compelled it to do so—on grounds that the information did not relate to a claim or defense at issue in the case.²⁴⁵ Although one cannot say for certain that engagement between the parties in that particular matter would have made a difference, the disputed issue there is precisely the type that parties can clarify—if not resolve entirely—through constructive pre-discovery dialogue.²⁴⁶

241. E-DISCOVERY COMM. REPORT, *supra* note 19, at 1.

242. *See generally* N.C. GEN. STAT. § 1A-1, Rules 26, 33, 34, and 37 (2009).

243. *See id.* § 1A-1, Rule 26(f1) (requiring discovery scheduling conference in medical malpractice action).

244. *Id.* § 1A-1, Rule 37(a)(2) (requiring party to certify that, prior to filing motion to compel, it “has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action”).

245. *Kewaunee Scientific Corp. v. E. Scientific Prods., Inc.*, 471 S.E.2d 451, 451–52 (N.C. Ct. App. 1996).

246. *See* N.C. GEN. STAT. § 1A-1, Rule 26(f)(1)–(3) (2009) (requiring parties to include a statement of the issues involved in a matter and any limitations on discovery in a proposed discovery scheduling submitted to the court following a discovery scheduling conference); N.C. GEN. STAT. § 1A-1, Rule 26(f) cmt. to amendment (2011) (encouraging

H.B. 380 sets the stage for parties to engage in just such a dialogue by creating a new “meet and confer” process under Rule 26(f) that will foster constructive engagement between the parties early in a case.²⁴⁷ Although not mandatory in every civil matter, this new process will likely occur in a significant percentage of cases—particularly those likely to involve substantial e-discovery—given that Rule 26(f) now allows *any* party to obtain the certainty of a discovery scheduling order, but conditions entry of such an order on the parties’ first conducting a “meet and confer.”²⁴⁸ This new rule does not—and, indeed, could not—force the parties to agree on an overall discovery plan or even a single provision of such a plan, but it does require them to talk and, as the federal courts have demonstrated, it is this mechanism of engagement that has proven so effective at promoting the type of cooperation that prevents certain e-discovery disputes from developing.²⁴⁹

Prior to adoption of the 2006 Amendments, the Federal Rules of Civil Procedure had long incorporated a “meet and confer” process under Rule 16 that required the parties to discuss case management and discovery scheduling in civil matters,²⁵⁰ but primarily focused on administrative and ministerial topics, such as how many interrogatories a party could serve and the deadline for disclosing experts, rather than more substantive issues.²⁵¹ As a result, initial pre-trial conferences conducted under this prior iteration of Rule 16 did not result in parties collectively engaging in constructive dialog about their case or individually spending time before the conference exploring the full contours of the discovery necessitated by the claims and defenses at issue in the case.²⁵² Although a diligent party would certainly approach the Rule 16 conference with some understanding of these issues, there was generally little need to conduct a more thorough investigation at that stage of the proceeding.

parties to delay discovery scheduling conference “until all parties can become sufficiently familiar with the issues arising in the action”).

247. N.C. GEN. STAT. § 1A-1, Rule 26(f) cmt. to amendment (2011).

248. *Id.* § 1A-1, Rule 26(f)(4) (2011).

249. Lee & Withers, *supra* note 17, at 207 (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “improving the conduct of Rule 16(b) pretrial conferences,” 80.5% reported it as at least somewhat effective in “encourag[ing] more cooperation,” and 61.1% reported it as at least somewhat effective in “reduc[ing] the number of e-discovery disputes” decided by survey participants).

250. FED. R. CIV. P. 16 (2000).

251. *Id.*

252. See Lee & Withers, *supra* note 17, at 207 (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “improving the conduct of Rule 16(b) pretrial conferences”).

The demands of e-discovery, however, led the Federal Rules Committee to place a new emphasis on the “meet and confer” process with the goal of having the parties think about e-discovery issues early in a case, engage with one another on those issues, and, optimally, reach agreement on basic parameters for the discovery of ESI.²⁵³ This approach of promoting cooperation as a means of addressing the burdens of e-discovery has worked exceedingly well,²⁵⁴ in large part because every party involved in litigation in which a large volume of ESI may come into play has a strong incentive to narrow the scope of discovery as much as possible.²⁵⁵ Even in asymmetric litigation, parties with fewer resources benefit when the wheat is separated from the chaff in e-discovery, thereby eliminating—or at least reducing—the need to manage large quantities of documents that, though responsive to discovery, do nothing to move their cases forward.²⁵⁶

Since the 2006 Amendments took effect, the federal courts have seen a significant increase in the number of litigants reaching cooperative agreements on such e-discovery related issues as the scope of the

253. 2005 COMM. REPORT, *supra* note 13, at 26–27; *see also* FED. R. CIV. P. 26(f) (Advisory Committee’s note on the 2006 amendments).

254. *See* Lee & Withers, *supra* note 17, at 207.

255. *See* Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 10, 17 (2011) [hereinafter *Four Years Later*]. The authors stated that

Much of the consternation surrounding electronic discovery has resulted from the fact that parties adopting bareknuckled approaches to discovery in the age of ESI have driven the cost of litigation beyond all reasonable bounds. Parties who approach electronic discovery in this fashion often find themselves facing legal discovery bills that exceed the underlying amount in controversy and come to dominate the litigation.

Id. *See also* Lisa M. Arent, Robert D. Brownstone & William A. Fenwick, *EDiscovery: Preserving, Requesting & Producing Electronic Information*, 19 SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 178 (2002) (“Reciprocity can act as a check on unreasonable and premature requests for intensive electronic discovery. When the parties are both businesses and/or the electronic discovery burdens weigh similarly on each side, there is an element of mutually assured destruction.”).

256. *See* *Chevron Corp. v. E-Tech Int’l*, No. 10cv1146-IEG (WMc), 2011 U.S. Dist. LEXIS 53812, at *2–3 (S.D. Cal. May 19, 2011) (discussing court’s use of an e-discovery protocol to narrow scope of forensic examination); *D’Onofrio v. SFX Sports Grp., Inc.*, 256 F.R.D. 277, 280 (D.D.C. 2009) (limiting scope of forensic search and noting that sometimes “[a] judge must simply draw a reasonable line between the likely and the unlikely, the discoverable and the prohibited, the wheat and the chaff”).

duty to preserve ESI,²⁵⁷ the protocol that the parties will use to search for relevant ESI,²⁵⁸ and the format in which the parties will produce ESI.²⁵⁹ The benefits of such cooperation are manifest: by reaching agreement on these issues, litigants are able to reduce—or eliminate—the likelihood of disputes that were far more prevalent a decade ago when such issues often went unaddressed.²⁶⁰ When surveyed about the effectiveness of this new process, a clear majority of United States Magistrate Judges reported that the revisions to Rule 26(f) had increased the effectiveness of the pre-trial “meet and confer,” promoted greater cooperation between the parties, and reduced the number of discovery disputes in their courts.²⁶¹

To a significant extent, the federal judiciary has driven this shift toward cooperation. Even as litigants clung tightly to discovery norms or attempted to use the new rules as an adversarial tool,²⁶² the federal courts whole-heartedly embraced the view that adversarial conduct is not compatible with the realities of e-discovery, and that litigants have a paramount responsibility to cooperate in discovery. For example, Magistrate Judge Paul Grimm of the District of Maryland recently declined to rule directly on a motion to compel production of ESI and, instead, or-

257. See, e.g., *United States v. La. Generating, LLC*, No. 09-100-RET-CN, 2010 U.S. Dist. LEXIS 20207, at *2–11 (M.D. La. Mar. 5, 2010).

258. See, e.g., *Northington v. H&M Int’l*, No. 08-CV-6297, 2011 U.S. Dist. LEXIS 14366, at *10–11 (N.D. Ill. Jan. 12, 2011).

259. See, e.g., *Premier Int’l Assocs., LLC v. Apple Computer, Inc.*, No. 2-05CV-506TJW, 2007 U.S. Dist. LEXIS 97541, at *15 (E.D. Tex. Sept. 11, 2007).

260. See *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (considering motion to compel production of database in case in which “the parties . . . never agreed that electronic documents would be produced in any particular format”). *But see* *Diesel Mach., Inc. v. Manitowoc Crane Grp.*, No. CIV 09-4087-RAL, 2011 U.S. Dist. LEXIS 15780, at *2–11 (D.S.D. Feb. 16, 2011) (denying motion to compel party to produce ESI in native format in accordance with agreement between parties where party had already produced ESI in PDF format).

261. *Lee & Withers*, *supra* note 17, at 207 (finding that 71.4% of surveyed magistrate judges reported that the 2006 amendment to Rule 26(f) was at least somewhat effective in “improving the conduct of Rule 16(b) pretrial conferences,” 80.5% reported it as at least somewhat effective in “encourage[ing] more cooperation,” and 61.1% reported it as at least somewhat effective in “reduc[ing] the number of e-discovery disputes” decided by survey participants).

262. Steven S. Gensler, *Some Thoughts on the Lawyer’s E-volving Duties in Discovery*, 36 N. KY. L. REV. 521, 553 (2009) (discussing the view of one lawyer-commentator that “the time and expense needed to prepare for the post-2006 Rule 26(f) conference [are justified] on the grounds that doing so will provide ‘ammunition to constrain demands made by the other side’”).

dered the parties to seek a cooperative solution to the dispute.²⁶³ In a similar vein, Magistrate Judge Craig Shaffer of the District of Colorado ordered parties to seek cooperative resolutions to their disagreements “consistent with well-established case law and the principles underlying *The Cooperation Proclamation*.”²⁶⁴ The Middle District of North Carolina has gone so far as to adopt a local rule specifically requiring counsel “to cooperate and be courteous with each other in all phases of the discovery process.”²⁶⁵

This judicial embrace of cooperation is not surprising given the judiciary’s general disdain of discovery disputes²⁶⁶ and the efficiencies realized from avoiding disputes as trivial as whether information should be produced in one electronic format over another.²⁶⁷ However, parties also benefit by embracing cooperative behavior. In recent years, courts have shown increasing favor towards parties who—when confronted with a discovery dispute—offer cooperative, constructive, and reasonable solutions. For example, a party who offered a phased ESI protocol that would initially cover three custodians over a three year period prevailed in a dispute over the opposing party who sought a protocol that would cover forty custodians over a six year period.²⁶⁸ Another court granted the defendant’s motion to compel the opposing parties to use an outside vendor to assist with their collection, review, and production of ESI in part because the defendant offered to split the cost of the vendor in order to accelerate the pace of discovery even though it was under no duty to do so.²⁶⁹

These cases represent a growing trend of parties obtaining a narrower overall scope of e-discovery simply by adopting a cooperative ap-

263. *Anderson v. Reliance Standard. Life Ins. Co.*, No. WDQ-11-1188, 2011 U.S. Dist. LEXIS 117058, at *2 (D. Md. Oct. 11, 2011).

264. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01-cv-01644-REB-CBS, 2010 U.S. Dist. LEXIS 17857, at *41 (D. Colo. Feb. 8, 2010).

265. M.D.N.C. LR 26.1(b)(1); *see also* *EEOC v. Dolgencorp, LLC*, No. 1:09CV700, 2011 U.S. Dist. LEXIS 35195, at *32 (M.D.N.C. Mar. 31, 2011) (“[T]his Court’s Local Rule 26.1(b)(1) . . . require[s] attorneys to conduct discovery in a cooperative fashion.”).

266. *See, e.g., Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 50 (S.D.N.Y. 2009) (criticizing the parties for having drafted “dueling epistles for submission to the Court” rather than “focus[ing] their attention on discussing their differences”).

267. *See, e.g., Silicon Labs Integration, Inc. v. Melman*, No. C08-04030 RMW (HRL), 2010 U.S. Dist. LEXIS 122871, at *5 (N.D. Cal. Nov. 3, 2010) (“Plaintiff represents to this court that defendant’s documents have been produced in PDF format, not TIFF.”).

268. *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491 at *8–12 (D. Conn. Sept. 30, 2010).

269. *Multiven, Inc. v. Cisco Sys., Inc.*, No. 5:08-cv-05391 JW (HRL), 2010 U.S. Dist. LEXIS 71221, at *5–6 (N.D. Cal. July. 9, 2010).

proach. When such parties opt for a more adversarial stance, the court confronts a much starker dispute in which it must decide between allowing the requesting party everything it requests, nothing it requests, or something in between that the court is left to craft on its own.²⁷⁰ By approaching discovery in a more cooperative fashion, parties are able to gain greater control over disputes that arise and, thereby, narrow the scope of ESI that they must collect, process, search, review, and produce.²⁷¹ The end result of this cooperative approach is lower costs and a more efficient discovery process.²⁷²

As the federal court experience has shown, promoting cooperation is a powerful method of mitigating the burdens of e-discovery. Through the combination of the 2006 Amendments, the support of the judiciary, and the recognition by counsel of the associated benefits, this paradigmatic shift has already substantially impacted many notions long-held by attorneys of how discovery should be conducted.²⁷³ This shift, however, remains a work in progress given the number of ESI-related disputes that continue to come before the federal courts as a result of adversarial conduct on the part of one or both parties.²⁷⁴

With the advent of the new “meet and confer” process, H.B. 380 sets North Carolina on a similar path as the federal courts. By promoting engagement between the parties with the goal of crafting a cooperative plan for discovery, Rule 26(f) now fosters the same type of collaborative

270. *DeGeer v. Gillis*, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010) (noting that neither party had “approached production of . . . ESI with a spirit of cooperation and efficiency,” but conditionally granting defendants’ motion to compel, and admonishing the parties to cooperate prospectively).

271. The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 342 (2009), available at http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/caseforcooperation.pdf (suggesting that a cooperative approach “allows the parties to save money, maintain greater control over the dispersal of information, maintain goodwill with courts, and address the litigation’s merits at the earliest practicable time”).

272. *Id.*

273. See, e.g., Hausfeld LLP and Milberg LLP, *E-Discovery Today: The Fault Lies Not In Our Rules* . . . , 2011 FED. CTS. L. REV. 1, 35 (2011) (stating that “enhanced cooperation among parties . . . is the most powerful tool available to reduce the costs and burdens of e-discovery” and that “[t]hose who hold fast to the outdated notion that adversarial discovery is the only way to litigate are clinging to the railing of a sinking ship”).

274. See, e.g., *Accounting Principals, Inc. v. Solomon Edwards Grp., LLC*, No. 09-2085-CM, 2010 U.S. Dist. LEXIS 82071, at *4 (D. Kan. Aug. 12, 2010) (characterizing the discovery dispute at issue as “the litigation equivalent of the cafeteria food fight scene in the infamous movie *Animal House*” before ordering a conference to discuss salient issues).

environment in state court discovery that the 2006 Amendments fostered in the federal courts, although arguably to a slightly lesser degree given that the “meet and confer” is not mandatory in all state court cases.²⁷⁵ Nevertheless, by setting the stage for engagement and cooperation, there is every reason to believe that North Carolina will experience the same type of cooperative shift as the federal courts, particularly given the strong incentive that parties have to collaborate in order to obtain the benefits that flow from a discovery scheduling order.²⁷⁶

It is significant to note that this new procedure and the cooperative possibilities that it creates could not have come at a better time for the state court system in North Carolina. Between state-level budget cuts,²⁷⁷ and significant caseloads,²⁷⁸ the resources of the State courts have been stretched increasingly thin in recent years. By aggressively promoting a more cooperative approach to discovery, State court judges can—as the federal judiciary has done—reduce the number and intensity of the discovery disputes that they confront and thereby conserve the resources that they would otherwise have to allocate to the management of such disputes. Indeed, litigants in federal court now routinely reach cooperative agreements on basic discovery-related issues that, as recently as a decade ago, generated full-blown discovery disputes²⁷⁹ and have begun

275. E-DISCOVERY COMM. REPORT, *supra* note 19, at 1.

276. See N.C. GEN. STAT. § 1A-1, Rule 26(f) (2011) (providing that the court may “enter an order tentatively . . . establishing a plan and schedule for discovery” following a discovery conference wherein the parties are expected to cooperate and to establish a discovery plan).

277. See N.C. Judicial Department Voluntary Reduction-in-Force Plan, THE NORTH CAROLINA COURT SYSTEM, <http://www.nccourts.org/News/NewsDetail.asp?id=1383&type=1&archive=False> (last visited Jan. 15, 2012) (detailing voluntary reduction-in-force plan to address anticipated budget cuts).

278. See Phillip Bantz, *State Business Court Straining Under Caseload*, NORTH CAROLINA LAWYERS WEEKLY, July 29, 2011, available at <http://nclawyersweekly.com/2011/07/29/state-business-courts-straining-under-caseload>.

279. Compare *Kay Beer Distrib. v. Energy Brands, Inc.*, No. 07-C-1068, 2009 U.S. Dist. LEXIS 130595, at *17 (E.D. Wis. June 10, 2009) (noting that “the parties had agreed at their Rule 26 conference that either a hard copy or electronic copy [of responsive documents] would be produced depending on what was most cost-effective”), *White v. Honda of Am. Mfg., Inc.*, No. 2:07-CV-216, 2008 U.S. Dist. LEXIS 112102, at *11 (S.D. Ohio Dec. 31, 2008) (noting that “the parties agreed in the Rule 26(f) Report to produce all documents on paper”), and *Hassaine v. Home Depot, U.S.A., Inc.*, No. 09CV2215-MMA (BGS), 2011 U.S. Dist. LEXIS 34117, at *12 (S.D. Cal. Mar. 30, 2011) (noting that “the parties agreed to produce any electronic information in written format”), with *Wyeth v. Impax Labs., Inc.*, 248 F.R.D. 169, 171 (D. Del. 2006) (considering motion to compel production of database in case in which “the parties . . . never agreed that electronic documents would be produced in any particular format”).

to use collaborative agreements to address issues of preservation that are not currently governed by the federal rules.²⁸⁰

ii. *H.B. 380 Will Promote Greater Proportionality in Discovery*

North Carolina Rule of Civil Procedure 26(b) has long incorporated the same proportionality principles as the Federal Rules of Civil Procedure,²⁸¹ with the text of the State rule closely tracking the federal rule.²⁸² The North Carolina rule reads:

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).²⁸³

Regardless, North Carolina State courts have adhered to a liberal discovery paradigm, rarely invoking Rule 26(b)(1) to vary a party's discovery

280. Compare *United States v. La. Generating, LLC*, No. 09-100-RET-CN, 2010 U.S. Dist. LEXIS 20207, at *2–11 (M.D. La. Mar. 5, 2010) (noting stipulated preservation order freeing parties of duty to preserve certain categories of information), and *In re Yamin and Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2010 U.S. Dist. LEXIS 14092, at *1–11 (S.D. Ill. Feb. 10, 2010) (entering agreed-upon preservation order limiting information that plaintiffs had duty to preserve in class action lawsuit), with *Mini-Conference on Preservation and Sanctions*, Sept. 9, 2011, at 7, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Materials/Notes%20from%20the%20Mini-Conference%20on%20Preservation%20and%20Sanctions.pdf [hereinafter *Mini-Conference*] (detailing discussions regarding need for rule changes to govern preservation).

281. Compare N.C. GEN. STAT. § 1A-1, Rule 26(b)(1) (2009), with FED. R. CIV. P. 26(b)(2). See also *Analog Devices, Inc. v. Michalski*, 01 CVS 10614, 2006 NCBC LEXIS 16, at *41–42 (N.C. Super. Ct. Nov. 1, 2006) (conducting a proportionality analysis under North Carolina Rule of Civil Procedure 26(b)(1)).

282. Compare N.C. GEN. STAT. § 1A-1, Rule 26(b)(1) (2009), with FED. R. CIV. P. 26(b)(2).

283. N.C. GEN. STAT. § 1A-1, Rule 26(b)(1) (2009).

obligation.²⁸⁴ H.B. 380, however, breathes new life into this underutilized rule by emphasizing the need for a greater balance in the discovery of ESI.

The principle of proportional discovery, reflected in both the federal and state versions of Rule 26(b), rests on the concept that discovery should be only as broad as necessary to advance the merits of a civil action or, put differently, that no party should face discovery unless the associated burdens are justified by the value of the information to the litigation.²⁸⁵ With the advent of ESI, the potential gulf between a discovery request for “all documents” on a given subject and one more narrowly tailored became enormous. For example, in one North Carolina case, a party reduced the scope of an ESI search from 2500 to 400 backup tapes simply by focusing its document requests.²⁸⁶ The new focus on cooperation in H.B. 380 will go a long way in achieving these efficiencies, but principles of proportional discovery serve as an important adjunct to limit the scope of discovery when its utility does not outweigh the burdens associated with its production.

284. See, e.g., *Bank of Am. Corp. v. SR Int'l Bus. Ins. Co.*, 2006 NCBC LEXIS 17, at *17–18 (N.C. Super. Ct. Nov. 1, 2006) (quashing subpoena based on proportionality analysis); *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *41–42 (declining to limit electronic discovery based on undue burden, but requiring parties to share the costs of e-discovery); *Phelps-Dickson Builders, LLC v. Amerimann Partners*, 617 S.E.2d 664, 668 (N.C. Ct. App. 2005) (citing Rule 26(b)(1) as part of general reference to scope of discovery); *Joyce v. Joyce*, COA03-1314, 2004 N.C. App. LEXIS 2119, at *6 (N.C. Ct. App. Dec. 7, 2004) (citing Rule 26(b)(1) as part of general reference to scope of discovery); *Lindsey v. Boddie-Noell Enters., Inc.*, 555 S.E.2d 369, 373 (N.C. Ct. App. 2001), *rev'd on other grounds*, 562 S.E.2d 420 (N.C. 2002) (limiting discovery because “plaintiff had ample opportunity by discovery in the action to obtain the information sought” (internal quotations omitted)).

285. See, e.g., *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *36 (“Electronic discovery burdens must be proportional to the amount in controversy and nature of the case. Otherwise transaction costs due to electronic discovery will overwhelm the ability to resolve disputes fairly in litigation.” (quoting The Sedona Conference, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Document Production* 17 (2005))); *Azalea Garden Bd. & Care, Inc. v. Vanhoy*, 2009 NCBC LEXIS 7, at *13 (N.C. Super. Ct. 2009) (stating that “discovery must be . . . proportional to what is at issue in the litigation”) (quoting *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 357–63 (D. Md. 2008)).

286. See Response to Motion to Compel, Exhibit 2, Affidavit of Dennis Richter, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>; Response to Motion to Compel, Exhibit 3, Affidavit of Carl Hardel, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>.

As an initial matter, it is important to note that H.B. 380 does not alter, change or amend the existing proportionality principles in Rule 26(b)(1). The new rules, however, augment a court's power to proportion discovery by authorizing parties to modulate the scope of electronic discovery on the same grounds.²⁸⁷ Under Rules 26(b)(3) and 34(b), a party can resist the discovery of ESI that is "not reasonably accessible because of undue burden or cost."²⁸⁸ Unlike Rule 26(b)(1), the decision of whether to invoke these accessibility limitations rests—at least in the first instance—with the party from which discovery is sought and on which the burden would fall. A party can invoke these rules to object and narrow the scope of its discovery responses to only those documents or data sources that are "reasonably accessible."²⁸⁹ Under Rule 26(c), a party can take a more proactive approach and seek a protective order to impose similar limits on the scope of discovery.²⁹⁰

In either instance, the party's ability to resist discovery on accessibility grounds ultimately turns on the same factors that govern the court's power under Rule 26(b)(1)(iii): undue burden and cost. By tying the accessibility limitations to these factors, H.B. 380 functionally expands the role of proportionality when ESI is at issue. Indeed, because the court is the ultimate arbiter of whether any given discovery request is unduly burdensome or costly, the proportionality factors in Rule 26(b)(1)(iii) now serve as the basic guide that parties can use when crafting ESI requests and analyzing the proper scope of an ESI production, given that they are the same factors that a court would use if a dispute later arose.

287. N.C. GEN. STAT. § 1A-1, Rules 26(c), 34(b) (2011). Unlike Rule 26(b)(1), which only authorizes a court to proportion any form of discovery, the new authority created under H.B. 380 *only* applies to discovery involving ESI. See N.C. GEN. STAT. § 1A-1, Rule 26(c) ("A party seeking a protective order on the basis that *electronically stored information* sought is from a source identified as not reasonably accessible . . ." (emphasis added)); N.C. GEN. STAT. § 1A-1 Rule 34(b) ("In addition to other bases for objection, the response [to a request for production of electronically stored information] may state an objection to production of *electronically stored information* from sources that the party identified as not reasonably accessible because of undue burden or cost." (emphasis added)).

288. N.C. GEN. STAT. § 1A-1, Rules 26(b)(3), 34(b).

289. See *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *42 (quoting CONF. OF CHIEF JUSTICES, *supra* note 12).

290. See N.C. GEN. STAT. § 1A-1, Rule 26(c) ("Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from . . . undue burden or expense . . .").

In two decisions that pre-date H.B. 380, the North Carolina Business Court demonstrated the power and flexibility of these proportionality principles.²⁹¹ Significantly, but perhaps not surprisingly, in both *Bank of America Corp. v. SR International Business Insurance Co.* and *Analog Devices, Inc. v. Michalski*, Judge Ben Tennille used a proportionality analysis to resolve disputes over the scope of e-discovery.²⁹² In *Bank of America Corp.*, Judge Tennille considered a defendant's motion to compel compliance with a Rule 45 subpoena that would have required a non-party to search for and produce ESI that was spread across up to 2500 backup tapes located in Charlotte, New York, London, and Bermuda at an estimated cost of over \$1.5 million.²⁹³ In *Analog Devices, Inc.*, the court considered a motion to compel production of ESI that was contained on approximately 400 backup tapes and was estimated to cost at least \$54,000.²⁹⁴ In each case, Judge Tennille resolved the dispute by conducting a subjective analysis of whether the value of the information sought outweighed the circumstances surrounding the claims of undue burden.²⁹⁵

In *Bank of America Corp.*, Judge Tennille found that the exigencies involved were paramount based on:

- (1) the size of the expense and the burden of production placed upon a nonparty, (2) the breadth of the information sought, (3) the availability of information from other sources, (4) the fact that the information sought was on inaccessible backup tapes, (5) the absence of any unwarranted or suspicious destruction of information, and (6) the low level of marginal utility shown at this stage of the proceedings.²⁹⁶

In *Analog Devices, Inc.*, Judge Tennille conducted a similar analysis before narrowing the dispositive issues down to cost and relevance, and ultimately concluding that “[t]he uncertainty of the cost combined with

291. See generally *Bank of Am. Corp.*, 2006 NCBC LEXIS 17; *Analog Devices, Inc.*, 2006 NCBC LEXIS 16.

292. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *32; *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *39–45.

293. See Response to Motion to Compel, Exhibit 2, Affidavit of Dennis Richter, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>; Response to Motion to Compel, Exhibit 3, Affidavit of Carl Hardel, *Bank of Am. Corp.*, 2006 NCBC LEXIS 17 (No. 05-CVS-5564), available at <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=05CVS5564>.

294. *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *40–41.

295. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *17–18; *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *39–45.

296. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *17–18.

the potential probative value of the discovery [wa]s too great to deny” production of the ESI.²⁹⁷ Judge Tennille further concluded, however, that the level of uncertainty in his analysis justified cost-shifting and therefore ordered the parties to share the cost of restoring the backup tapes.²⁹⁸

Both of these opinions are less important for the conclusions that Judge Tennille reached than the process that he used to reach them. In each case, Judge Tennille asked whether the exigent circumstances surrounding discovery in the case (i.e., the parties’ resources, the cost of discovery, the value of the information, etc.) outweighed North Carolina’s presumptive policy of liberal discovery.²⁹⁹ Although courts had previously used Rule 26(b)(1) to limit discovery (even if only sparingly),³⁰⁰ *Bank of America Corp.* and *Analog Devices, Inc.* represent some of the first instances—if not the first instance³⁰¹—of a State court fully exercising its authority to determine whether to prevent discovery based on a subjective analysis of factors that, with the exception of potential probative value, were disconnected from the merits of the action.

With its expansion of proportionality in discovery, H.B. 380 again lays the groundwork for a fundamental change in how both litigants and courts in the State approach discovery. The concept that discovery should be only as broad as necessary to advance the merits of an action—and that a party should have the power to make this decision in the first instance—is largely anathema to the liberal discovery tradition

297. *Analog Devices, Inc.*, 2006 NCBC LEXIS 16, at *45.

298. *Id.* Judge Tennille also reserved the issue of whether to order further cost shifting until later in the matter. *Id.* at *11.

299. *Bank of Am. Corp.*, 2006 NCBC LEXIS 17, at *17–18; *Analog Devices, Inc.*, 2006 NCBC 16, at *45.

300. *Lindsey v. Boddie-Noell Enters., Inc.*, 555 S.E.2d 369, 373 (N.C. Ct. App. 2001), *rev’d on other grounds*, 562 S.E.2d 420 (N.C. 2002) (limiting discovery because “plaintiff had ample opportunity by discovery in the action to obtain the information sought”) (internal quotations omitted).

301. North Carolina Superior and District Courts continue overwhelmingly to maintain court records in paper form and do not maintain any type of centralized repository that can be readily searched to identify court orders that address any given issue or topic. Lacking the resources necessary to conduct a thorough search of these paper court files spread across the 100 counties of the State, the authors have been unable to determine whether any trial courts other than the North Carolina Business Court have actively employed a proportionality analysis under Rule 26(b)(1). However, the authors have been unable to identify any such case in which a discovery issue resolved in that manner by the trial court has reached the Court of Appeals, with the possible exception of the perfunctory use of Rule 26(b)(1)(ii) in *Lindsey v. Boddie-Noell Enterprises*. See *id.*

to which North Carolina has long adhered.³⁰² However, in an environment where a traditional request for “all documents” on a given subject can generate expenses as high as \$70 million,³⁰³ the realities of electronic discovery necessitate a change in this tradition. If courts actively promote and parties actively apply these proportionality principles, North Carolina will realize a discovery process that is more streamlined, efficient, and focused on the merits of the dispute, rather than collateral discovery issues.³⁰⁴

IV. PRACTICAL TOOLS TO INCREASE EFFICIENCY OF ELECTRONIC DISCOVERY

As the process of discovering ESI has matured, attorneys, courts and service providers—particularly those engaged in federal litigation—have developed a number of tools and techniques to address and surmount the challenges associated with the discovery of large quantities of ESI. In various ways, these tools and techniques seek either to constrain the volume of ESI that goes fully through discovery or to streamline the process through which that data passes. Although not exhaustive, the following list represents a core group of tools that practitioners and their clients can use—when appropriate—to manage some of the common challenges that arise in this area.

- Phased Discovery Protocols

Phased discovery is a technique that controls the volume of ESI subject to discovery at any one time and creates circumstances under which the e-discovery process may terminate before reaching certain repositories of ESI. Whether implemented by agreement or court order, a phased protocol segments the discovery process into a series of constituent elements in order to search for and reveal the most relevant information early in the discovery process.³⁰⁵ For example, a protocol might divide an undifferentiated mass of ESI into specific groups of custodians,

302. See *In re Estate of Johnson*, 697 S.E.2d 365, 366 (N.C. Ct. App. 2010) (noting that trial court had ordered party to “provide full and complete answers and responses to [opposing party’s] First and Second Discovery, *without objection*” (emphasis added)).

303. See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003) (estimating privilege review costs of “between \$16.5 million and \$70 million” (internal citations omitted)).

304. See generally *Four Years Later*, *supra* note 255.

305. *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 365 (D. Md. 2008).

designated periods of time, certain geographic areas, or any other categorizing principle that will group the ESI at issue into logical groups for recovery and searching.³⁰⁶

Once the grouping is complete, the parties conduct discovery on the constituent ESI elements in accordance with a predetermined set of rules.³⁰⁷ Often, a protocol will set out specific triggers that prevent discovery from proceeding to a subsequent phase unless the information produced in the current phase satisfies a certain threshold.³⁰⁸ One important benefit of conducting discovery in this segmented manner is that parties can deal with ESI in more manageable chunks at a lower marginal cost and avoid the cost of discovery of certain groups of ESI altogether if the information produced in the early phases leads to resolution or demonstrates the futility of proceeding to later phases.

- Computer-Assisted Non-Linear Document Review

The enormous expenses associated with high-volume e-discovery are often a result of a party's pre-production review of the ESI that it has previously identified, collected, processed, and searched. The costs associated with the collection of ESI can be significant, but rarely reach stratospheric levels.³⁰⁹ In comparison, the costs associated with a traditional "eyes-on" linear ESI review in which each page of each document is reviewed by at least one attorney can reach breathtaking heights. For

306. See, e.g., *Barrera v. Boughton*, No. 3:07cv1436(RNC), 2010 U.S. Dist. LEXIS 103491, at *12 (D. Conn. Sept. 30, 2010) (ordering phased search of ESI to begin with three of the forty custodians requested by party seeking discovery); *Makrakis v. DeMelis*, No. 09-706-C, 2010 Mass. Super. LEXIS 223, at *6-7 (Mass. Super. Ct. July 13, 2010) (ordering initial sampling of ESI from thirteen custodians to determine whether broader search was justified).

307. See, e.g., *Tamburo v. Dworkin*, No. 04 C 3317, 2010 U.S. Dist. LEXIS 121510, at *11 (N.D. Ill. Nov. 17, 2010) (ordering parties to prepare phased discovery protocol and directing that "parties should identify which claims are most likely to go forward and concentrate their discovery efforts in that direction before moving on to other claims").

308. *Vondriska v. Gerald Cugno & Paychex Bus. Solutions, Inc.*, No. 8:07-cv-1322-T-24-TGW, 2010 U.S. Dist. LEXIS 92742, at *2-3 (M.D. Fla. Aug. 17, 2010) (describing phased discovery process under which parties were unable to conduct discovery on merits of plaintiff's claim prior to resolution of threshold issue under Fair Labor Standards Act).

309. See *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 425-26 (S.D.N.Y. 2002) (detailing estimates of up to \$84,000 for one party and \$395,000 for another party to collect and produce ESI). *But see id.* at 425 (detailing estimate of nearly \$10 million to select, catalogue, restore, and process all emails sought from one party involved in lawsuit).

example, in one matter, the cost of restoring, de-duping, and searching ESI was approximately \$600,000, which, although not a trivial sum, paled in comparison to the \$16.5 million to \$70 million estimate for the pre-production review of the ESI.³¹⁰

In recent years, new technologies have emerged that dramatically reduce the cost of review by employing advanced search and machine learning technologies to group and code documents in a non-linear fashion.³¹¹ These technologies save costs by obviating the need for an attorney or multiple attorneys to review mechanically every single page of every single document.³¹² Attorneys remain directly involved in this process, but these technologies streamline the review process by using various algorithms to classify documents by analyzing various characteristics of the constituent data.³¹³

Although a full exploration of computer-assisted review is beyond the scope of this Article, the efficiencies that they are capable of delivering are manifest. In one comparison, a computer-assisted non-linear review of over 20,000 documents was completed in *one-tenth* of the time that it took for a traditional “eyes-on” linear review of the same set of documents.³¹⁴ Perhaps more importantly, not only was the computer-assisted review significantly faster, the process was *more* accurate at identifying and coding documents in a consistent manner than the traditional review process.³¹⁵ Similar studies have produced similar results,³¹⁶ demonstrating the power of these emerging technologies to increase substantially the efficiency of e-discovery.

310. See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557–58 (W.D. Tenn. 2003).

311. See generally Bennett B. Borden et al., *Why Document Review Is Broken*, EDIG: E-DISCOVERY & INFORMATION GOVERNANCE, (Williams Mullen, Richmond, VA.), May 2011 [hereinafter *Why Document Review is Broken*], available at <http://www.umiacs.umd.edu/~oard/desi4/papers/borden.pdf> (discussing computer-assisted non-linear review); *The Demise of Linear Review*, *supra* note 8.

312. See generally *Why Document Review Is Broken*, *supra* note 311.

313. *The Demise of Linear Review*, *supra* note 8, at 2–3.

314. *Why Document Review Is Broken*, *supra* note 311, at 2–3.

315. *Id.*

316. Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH J.L. & TECH. 11, 11 (2011) (“[T]echnology-assisted review processes . . . achieve[d] results superior to those that could have been achieved through a manual review of [the same] document collection . . .”).

- Preservation Agreements

The preservation of ESI once litigation begins or is reasonably anticipated remains one of the most challenging aspects of electronic discovery. With the risk of spoliation ever present,³¹⁷ and the potentially catastrophic nature of related sanctions,³¹⁸ parties continue to struggle with the logistics and costs associated with simply ensuring that they do not inadvertently lose or destroy information once the preservation obligation is triggered.³¹⁹ In recent years, judges, practitioners and academics have devoted a substantial amount of time to discussing whether further rules are needed to define more clearly the duty to preserve.³²⁰ While that debate has continued, courts and practitioners have sought to address this issue within the context of the current rules through stipulated preservation agreements and orders that specifically define what parties must and—often more importantly—need not preserve. Such agreements are beneficial because they not only provide parties with clear direction on their preservation obligation, but they create a zone of safety in which parties can free ESI from the burden of a litigation hold without the fear of later facing a spoliation motion.³²¹

- Privilege Agreements

The fear of losing the protections afforded by the attorney-client privilege and work-product doctrine through waiver resulting from an inadvertent disclosure of protected material is one of the primary reasons that review costs can mount so quickly when a large volume of ESI

317. See *Mini-Conference*, *supra* note 280, at 7.

318. See *Philips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1216 (D. Utah 2010) (recommending default sanction against party for failure to preserve ESI).

319. See *Mini-Conference*, *supra* note 280, at 2.

320. See *id.* (detailing discussions regarding the need for rule changes to govern preservation).

321. See, e.g., *United States v. La. Generating, LLC*, No. 09-100-RET-CN, 2010 U.S. Dist. LEXIS 20207, at *2–11 (M.D. La. Mar. 5, 2010) (discussing a stipulated preservation order excluding eleven categories of data, including deleted computer files, from the duty to preserve); *In re: Yasmin and Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-md-02100-DRH-PMF, 2010 U.S. Dist. LEXIS 14092, at *1–11 (S.D. Ill. Feb. 10, 2010) (noting a preservation order limiting the categories of documents and data that plaintiffs in a class action have a duty to preserve).

is subjected to the discovery process.³²² The 2006 Amendments³²³ and H.B. 380³²⁴ provide a base level of protection in an advertent disclosure situation, but the danger of waiver nonetheless remains.³²⁵ Parties can further reduce this risk, however, by entering a non-waiver agreement and/or moving the court to enter a non-waiver order.³²⁶

Under a “non-waiver agreement,” parties agree that, under certain circumstances, the production of privileged ESI during discovery does not waive any privilege that attaches thereto.³²⁷ Such agreements typically set out a specific process that the parties agree to use to manage the production of ESI and strengthen the protection of privilege within the context of this process.³²⁸ For example, under so-called “quick peek”

322. See *Rowe Entm't, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 426 (S.D.N.Y. 2002) (discussing estimated cost of pre-production privilege review of requested ESI).

323. FED. R. CIV. P. 26(a)(5)(B). Additionally, revisions made to Federal Rule of Evidence 502 in 2008 strengthened the protection of privilege in federal court proceedings. See FED. R. EVID. 502.

324. N.C. GEN. STAT. § 1A-1, RULE 26(b)(7)(B) (2011).

325. *Rhoads Indus. v. Bldg. Materials Corp. of Am.*, 254 F.R.D. 216, 226–27 (E.D. Pa. 2008) (analyzing whether inadvertent disclosure of privileged documents resulted in waiver under FED. R. CIV. P. 26 and FED. R. EVID. 502).

326. See *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 234–35 (D. Md. 2005) (discussing “non-waiver agreements”).

327. See, e.g., *Gruss v. Zwirn*, No. 09 Civ. 6441 (PGG) (MHD), 2011 U.S. Dist. LEXIS 79298, at *73–75 (S.D.N.Y. July 14, 2011) (holding that party had not waived privilege status of documents that were produced to government agency pursuant to non-waiver agreement).

328. The notes of the advisory committee regarding the 2006 Amendments to the Federal Rules of Civil Procedure are illuminative on this point:

Parties may attempt to minimize . . . costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection—sometimes known as a ‘quick peek.’ The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called ‘clawback agreements’—that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

agreements, (1) the producing party makes the requested ESI available for review without first conducting a full-fledged privilege review; (2) the requesting party then reviews that ESI and designates the relevant documents that it wants produced; and (3) the producing party then reviews those designated documents for privilege.³²⁹ Under such agreements, the parties explicitly agree that any disclosure of privileged material during the requesting party's first-pass review of the ESI does not waive any privilege that may attach to that ESI.³³⁰ Similarly, so-called "claw back" agreements operate by allowing a party to produce requested ESI without first conducting a full-fledged privilege review and then later recover any privileged documents that it produced with such disclosure triggering waiver.³³¹

By rearranging certain aspects of the traditional discovery timeline or instituting other protections, "non-waiver agreements" allow parties to proceed with discovery without first conducting an exhaustive privilege review and with a significantly reduced fear of any inadvertent disclosure resulting in a privilege waiver. These agreements, however, are not without limitations.³³² Because they are essentially contracts between parties involved in the litigation, "non-waiver agreements" do not bind non-parties to the litigation and, thus, any further disclosure of privileged information to such parties revives the waiver threat.³³³ Parties can mitigate such danger by having the court approve and adopt the non-waiver agreement in a court order.³³⁴ Furthermore, even when a non-

FED. R. CIV. P. 26(f) (Advisory Committee's note on 2006 amendments).

329. *Id.*

330. *Id.*

331. It has been held that:

many parties to document-intensive litigation enter into so-called 'claw-back' agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents. The parties here can still reach such an agreement with respect to the remaining seventy-two tapes and thereby avoid any cost of reviewing these tapes for privilege.

Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).

332. See Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228, 244 (D. Md. 2005) (discussing danger of waiver even where parties enter "non-waiver agreement").

333. See FED. R. EVID 502(e) ("An agreement on the effect of disclosure in a federal proceeding [of a privileged document] is binding only on the parties to the agreement, unless it is incorporated into a court order.").

334. See *id.*

waiver agreement or order is in place, a party should still take reasonable measures to protect the privilege.³³⁵

- Information Governance Review

Each of the foregoing cost-reduction tools only applies after litigation begins. Prior to such point in time, the most powerful tool that a company can use to reduce its exposure to e-discovery costs is effective management of its ESI. Although a party can control cost by limiting the scope of e-discovery or streamlining the production of ESI, the most effective way to reduce costs is to reduce the volume of ESI that *could be* subjected to discovery. Because we can now store enormous quantities of electronic information at low cost with a small physical footprint, we, as a society, have developed a tendency of retaining far more information than we actually need or use.³³⁶ As a result, a substantial portion of e-discovery cost is incurred wading through information that has no functional purpose or value either inside or outside of the litigation.

A company can eliminate the e-discovery risks associated with the accumulation of valueless ESI by conducting a pre-litigation information governance review to identify what ESI it is creating and storing, what the ESI contains, where the ESI is stored, why it is storing the ESI (i.e., for regulatory, business, or other reasons), and what function that ESI serves for its business. By using the results of such a review to craft a comprehensive information governance plan that eliminates existing repositories of ESI that have no functional value, and prevents such repositories from forming in the future, companies can substantially reduce the risk of runaway e-discovery costs once litigation begins. An information governance review of this type also allows companies to craft and implement a litigation response protocol to ensure full compliance with their preservation obligations and, thereby, reduce the threat of spoliation.

335. See, e.g., FED. R. EVID. 502 (Advisory Committee's note) ("[A] party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.").

336. See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, No. 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, at *1 (S.D.N.Y. Jan. 15, 2010) (noting that we live in "an era where vast amounts of electronic information [are] available"); Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 9 (2006) (stating that "improvements in technology make information storage easier and cheaper in an electronic form").

V. CONCLUSION

State court litigation in North Carolina is far too diverse and varied for H.B. 380 to have a uniform effect across every type of case regardless of subject matter. However, as the experience of the federal courts following adoption of the 2006 Amendments demonstrates, the rules-based framework that the E-Discovery Committee proposed and the North Carolina General Assembly passed to govern electronic discovery lays the groundwork for a fundamental shift in the State court discovery process away from the traditional adversarial paradigm and towards a more cooperative and proportional future.