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The Shifting Sands of Cost Shifting

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ABSTRACT

The cost-shifting analysis employed by the federal courts in ruling on discovery disputes is flawed. There is tremendous variability in how courts interpret the factors guiding the analysis. There is tremendous variability in the information courts rely on in deciding whether to preclude the discovery or shift its costs. The result is waste for the litigants, courts, and society as a whole. This Article argues that there is a better way: mandate cooperation before cost shifting. The courts should condition proportionality and cost-shifting rulings on cooperation. The cooperation should be substantive: require disclosure of objective information about the disputed discovery and, if costs are shared, share control over the process. Cooperation will not come about by exhortation or proclamation; it will come if the cost of discovery, or the discovery itself, hangs in the balance. With that comes the possibility of reducing costs. Asking "is the discovery unduly burdensome" results in a different answer than asking "can it be done more efficiently"? This Article argues that the courts should ask the latter question first and require cooperation in answering it. Federal Rule of Civil Procedure 1, with its mandate to construe the rules to seek the "just, speedy, and inexpensive determination of every action," demands it.

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I. INTRODUCTION

"Equity is a Rogish thing." Or at least legal historian John Selden thought so.[1] He went on to describe it, in now famous terms:

> Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower soe is equity. Tis all one as if they should make the Standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be."[2]

John Selden could be describing the pretrial cost-shifting analysis used by the courts today. There is remarkable variability in how courts decide when to shift the costs of discovery, particularly electronic discovery.[3] Some courts consider cost shifting only if the electronically stored information ("ESI") is inaccessible;[4] other courts consider cost shifting if it is fair.[5] Some courts find $35,000 too much to spend on discovery of ESI in an employment discrimination case; other courts authorize discovery costing ten times that in the same type of case.[6] Some courts include the cost of attorney review in their cost-shifting analysis; some courts do not.[7] Some courts include the resources available to the requesting party's attorney in their analysis; some do not. There is a need for clarity as to what the courts are doing, and there is a need for increased uniformity and objectivity in the norms the courts apply.

There is also a need for renewed scholarship on this issue. Scholarly writing on the subject reflects an outdated reality. Widely cited scholarship starts with the premise that "the presumption in favor of imposing on the producing party the costs necessary to respond to its opponent's requests remains largely intact, if not virtually sacrosanct."[8] Other work suggests cost shifting is decreasing.[9] Articles after the 2015 amendments to the Federal Rules of Civil Procedure suggest cost shifting remains rare.[10]

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1 H. Jefferson Powell, *"Cardozo's Foot": The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. (1993) (citing Edward Fry, *Life of John Selden*, *in* TABLE TALK OF JOHN SELDEN 177 (Frederick Pollock ed., 1927)).

2 *Id.*

3 Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, 4–5 (2007).

4 *See infra* Part III.

5 *See infra* Part III.

6 *See infra* Part IV.

7 *See infra* Part IV.

8 Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011).

9 Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1529 (2010).

10 Charles S. Fax, *Cost-Shifting in Discovery after the 2015 Amendments to Rule 26*, AM. BAR ASS'N (Oct. 12, 2017),

Research for this Article, however, suggests that the Supreme Court's presumption "that the responding party must bear the expense of complying with discovery requests,"[11] while often invoked is now routinely ignored. "Shifting the cost burdens of discovery, both for ESI and paper discovery, is no longer rare."[12] Research for this Article suggests that courts routinely order some form of cost shifting. In the 178 judicial decisions analyzed for this research, they do so thirty-nine percent of the time.

Influential scholarship argues that the current rules externalize the cost of discovery. Cost shifting, according to some, is necessary because the disparity between the cost of requesting discovery and the cost of responding to discovery creates incentives to ask for too much.[13] Others argue that cross-party agency in the discovery process allows the responding party to create and externalize unnecessary costs.[14] This scholarship proposes use of predictive coding and allocating the task of searching for responsive information to the requesting party.[15]

But not every case warrants the use of predictive coding, either because of its cost or because the information cannot be found with a text-based search algorithm, and few litigants are willing to provide the unfettered access necessary for the requesting party to complete the search.[16] The scholarship on cost shifting remains incomplete.

Understanding better how courts decide when to shift costs, what incentives those legal norms create, and whether there is a better way is also important because new cost-shifting proposals followed the landmark 2015 revisions to the federal rules. The

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https://www.americanbar.org/groups/litigation/publications/litigation-news/civil-procedure/costshifting-discovery-after-2015-amendments-rule-26/.

11 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

12 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 336 (E.D. Pa. 2012).

13 *See, e.g.*, Redish & McNamara, *supra* note 8, at 773; Paul W. Grimm & David S. Yellin, *A Pragmatic Approach to Discovery Reform: How Small Changes Can Make a Big Difference in Civil Discovery*, 64 S.C. L. REV. 495, 521 (2013); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547 (2010); Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining* Zubulake *and 28 U.S.C. S 1920*, 56 WAYNE L. REV. 1825, 1830 (2010); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001); Marnie H. Pulver, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1401–05 (2000); Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 455–56 (1994); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989).

14 Bruce H. Kobayashi, *Law's Information Revolution as Procedural Reform: Predictive Search as a Solution to the In Terrorem Effect of Externalized Discovery Costs*, 2014 U. ILL. L. REV. 1473, 1498 (2014).

15 *Id.* at 1516.

16 *See, e.g.*, Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *2–3 (E.D. La. Feb. 19, 2002) (reciting objections to producing backup tapes to requesting party "it would be highly prejudicial for [the requesting party] to receive e-mail . . . that is unrelated" and "which may contain privileged or confidential information."); William C. Dimm, Predictive Coding: Theory & Practice 5–6 (Dec. 8, 2015) (unpublished manuscript), http://www.predictivecodingbook.com/sample.php (noting that files containing few words, e.g., spreadsheets, images, audio, video, are difficult to analyze using predictive coding).

Advisory Committee to the Rules of Civil Procedure has continued to receive requests to examine "a more radical form of cost-sharing where people requesting discovery would have to pay for some or all of the expenses."[17] While that inquiry was tabled, the debate continues, with the labels evolving from "cost shifting" to "cost sharing."[18]

This Article suggests that there is a need to look beyond labels and to ask different questions. In 2010, the Advisory Committee sponsored "the Duke Conference" to look at ways to reduce cost and delay in civil litigation.[19] Those at the conference concluded that "[w]hat is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management."[20]

Following the 2015 revisions to the federal rules, proportionality now defines the scope of discovery in Rule 26(b)(1), and changes to Rule 16 make explicit the inherent authority of the courts to guide conversations regarding preservation and privilege.[21] But the rules still make no mention of cooperation.[22]

This Article argues that the courts should predicate both proportionality and cost-shifting analyses on cooperation, defined here to include: first, disclosure of information necessary to narrowly tailor discovery and objectively evaluate its cost, and, second, if the parties share the costs of discovery, share control over the process

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17 Tera Brostoff, *Cooperation, Case Management at Forefront of New Rules; Cost-Sharing on Horizon?*, Feb. 5, 2015, BLOOMBERG BNA EDISCOVERY RESOURCE CENTER ("Cost-Sharing as The Committee's Next Hot Topic").

18 DISCOVERY SUBCOMMITTEE: REQUESTER PAYS, *in* ADVISORY COMMITTEE ON CIVIL RULES 327–29 (Nov. 5–6, 2015), http://www.uscourts.gov/sites/default/files/2015-11-civil-agenda_book.pdf [https://perma.cc/A2FV-YPPR].

19 JUDICIAL CONF. ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1–2 (2010) [hereinafter 2010 CONFERENCE ON CIVIL LITIGATION REPORT], https://www.uscourts.gov/sites/default/files/report_to_the_chief_justice.pdf; Grimm & Yellin, *supra* note 13, at 496–97; *2010 Civil Litigation Conference*, U.S. CTS., https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil (last visited Jan. 10, 2021).

20 2010 CONFERENCE ON CIVIL LITIGATION REPORT, *supra* note 19, at 4.

21 Memorandum from David G. Campbell, Chair, Advisory Comm. on Fed. Rules of Civ. Proc., to Jeffrey Sutton, Chair, Standing Comm. on Rules of Prac. & Proc., *in* SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, at rules app. B-7–B-8 (Sept. 2014) [hereinafter 2014 Judicial Conference Summary Report], http://www.uscourts.gov/sites/default/files/fr_import/ST09-2014.pdf [https://perma.cc/537S-B3LH].

22 The 2015 Advisory Committee Notes reference cooperation, and even state that it is necessary, but a failure to cooperate will not lead to sanctions. *Id.* at rules app. B-13. Some courts have interpreted the revised language of Rule 1, now referencing party responsibility, to implicitly impose "a heightened duty of cooperation in procedural matters such as discovery." Solo v. United Parcel Serv. Co., No. 15–1426, 2017 WL 85832, at *2 (E.D. Mich. Jan. 10, 2017).

or limit the cost shared. Cooperation will not happen by proclamation or exhortation.[23] Cooperation will happen if it is required as a condition for the requesting party to obtain the disputed discovery or the responding party to shift its costs.[24]

While this Article argues for mandating cooperation in cost-shifting analyses, it also references proportionality, for two reasons: First, the cost-shifting analysis is based, in part, on the proportionality standard set out in the federal rules, so there is significant overlap in the analysis.[25] Second, cost-shifting motions go hand-in-hand with motions to preclude the discovery outright based on proportionality principles.[26] Shifting the cost of discovery is often a fallback to precluding it altogether.[27]

As a result, Part II of this Article starts with the rule-based framework employed by the federal courts in their proportionality and cost-shifting analysis. Part III then addresses the courts' application of these standards, and its evolution from viewing discovery costs as "the cost of doing business," to the marginal-utility analysis in *McPeek*, the multi-factor tests in *Rowe* and *Zubulake*, and the proportionality and more generalized fairness inquiries found in more recent cases. The discussion here focuses on cases involving discovery of ESI, because that is where the costs are.[28]

Readers familiar with the legal framework and principal cases addressing cost shifting may choose to skip to Part IV, which discusses the problems with these judicial standards. Even well-accepted tests like the *Zubulake* seven-factor test have become a Rorschach test applied by the parties and courts in a way that demonstrates advocacy rather than principles and objective standards. Finally, Part V asks whether it is possible to do better and argues that it is. It offers a series of proposals, partial

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23 Hundreds of judges have endorsed the Sedona Conference Cooperation Proclamation. Yet, courts continue to find litigants view discovery as a "legal variety of hand-to-hand combat." *Compare Judicial Endorsements*, SEDONA CONFERENCE, https://thesedonaconference.org/cooperation_proclamation?destination=node/51 (last visited Nov. 12, 2020), *with* UnitedHealthCare of Fla., Inc. v. Am. Renal Assocs., No. 16-CV-81180, 2017 WL 4785457, at *3 (S.D. Fla. Oct. 20, 2017).

24 The *UnitedHealthCare of Florida, Inc.* court ordered the parties collaborate and threated to, inter alia, "strictly utilize cost-shifting" against any party or attorney who "fails to cooperate in good faith." *UnitedHealthCare of Fla., Inc.*, 2017 WL 4785457, at *3.

25 Some courts now directly apply Rule 26(b)(1) proportionality factors to the cost-shifting analysis. *See, e.g.*, Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *10 (D. Kan. June 18, 2020) ("Courts evaluate the Rule 26(b)(1) proportionality factors to determine whether discovery imposes undue burden or expense such that allocating expenses under Rule 26(c)(1)(B) is warranted."); Williams v. Angie's List, Inc., No. 1:16-CV-00878, 2017 WL 1318419, at *5 (S.D. Ind. Apr. 10, 2017) (explaining that courts in the Seventh Circuit "have transmuted the rest for whether the discovery is proportional under Rule 26(b)(1) to guide the courts discretion in whether to shift discovery costs").

26 *See, e.g.*, Martin v. Hapo Cmty. Credit Union, No. CV-04-5109, 2005 WL 8158778, at *3 (E.D. Wash. Sept. 6, 2005); Mazza et al., *supra* note 3, at 170–72.

27 Mazza et. al., *supra* note 3, at 170–72.

28 *See, e.g.*, NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at xiii–xv (2012).

solutions, tied to each factor in the cost-shifting analysis. While varied, they strike a common theme: mandating cooperation before cost shifting will improve the process, and predicating cost-shifting decisions on objective factors will improve the result.

In 1930, Justice Cardozo wrote "[i]n equity, as at law, there are signposts for the traveler" and "discretion . . . must be regulated upon grounds that will make it judicial."[29] The same holds true for proportionality and cost-shifting analyses today. This Article is about improving the signposts courts use in determining when to shift the costs of discovery.

II. THE LEGAL FRAMEWORK

In 1939, Professor Sunderland described the newly adopted Federal Rules of Civil Procedure as marking "the highest point so far reached" in eliminating secrecy in civil litigation.[30] "Each party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game."[31]

In 1947, the Supreme Court in *Hickman v. Taylor* stated that the discovery rules "are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts of his opponent's case."[32] The Court emphasized that "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[33]

Courts today continue to cite *Hickman v. Taylor* for the proposition that "[m]utual knowledge of all the relevant facts . . . is essential to proper litigation."[34] Even after the 2015 amendments, courts state that "[t]he rules of discovery, including Rule 26, are to be given broad and liberal construction."[35] They continue to define relevancy

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29 Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem, 172 N.E. 455, 457 (N.Y. 1930).

30 Edson Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939).

31 *Id.*

32 Hickman v. Taylor, 329 U.S. 495, 500–01 (1947).

33 *Id.*

34 *Id.* at 507; *see also* Begay v. United States, No. CV-04-5109-, 2018 WL 557853, at *4 (D.N.M. Jan. 23, 2018); SEC v. McCabe, No. 2:13–CV–00161, 2015 WL 2452937, at *2 (D. Utah May 22, 2015); Hill v. Auto Owners Ins., Civ. No. 14–5037, 2015 WL 2092680, at *11 (D.S.D. May 5, 2015); United States v. 2121 Celeste Rd. SW, No. CIV 13–0708, 2015 WL 3540182, at *11 (D.N.M. May 13, 2015).

35 *See, e.g.*, Black Love Resists in the Rust v. City of Buffalo, 334 F.R.D. 23, 28 (W.D.N.Y. 2019); Artis v. Murphy-Brown LLC, No. 7:14-CV-237, 2018 WL 3352639, at *2 (E.D.N.C. July 9, 2018); State Farm Mutual Auto. Ins. Co. v. Fayda, No. 14 Civ. 9792, 2015 WL 7871037, at *2 (S.D.N.Y. Dec. 3, 2015).

broadly "'to encompass any matter that bears on or that reasonably could lead to other matter that could bear on' any party's claim or defense."[36]

At the same time, both the courts and the federal rules have articulated limits. In *Hickman v. Taylor*, the Supreme Court recognized that discovery has "ultimate and necessary boundaries,"[37] and modern courts re-affirm the time-honored cry that discovery "is not intended to be a fishing expedition."[38]

They do so in their application of three federal rules, which provide separate bases for limiting discovery of otherwise relevant, non-privileged information: First, there is the proportionality standard, formerly in Rule 26(b)(2)(C) now in Rule 26(b)(1), applicable to all discovery.[39] Second, Rule 26(b)(2)(B) specifically limits discovery of inaccessible ESI.[40] Finally, Rule 26(c) codifies the limitations set out in *Hickman v. Taylor*, providing the court with authority to enter protective orders limiting discovery and shifting its costs.[41] This Part provides context for each of these rules.

A. Rule 26(b)(1) Discovery Scope in General

In 1983, the Advisory Committee sought to discourage "disproportionate" discovery, by encouraging courts to consider discovery in light of the "nature and complexity" of the case; the importance of the issues at stake; limitations on financially weak litigants to withstand discovery, and the significance of the substantive issues as measured in philosophic, social, or institutional terms."[42]

To do so, the committee added Rule 26(b)(2)(C) enabling the courts to limit discovery when (i) it is cumulative or the information requested could be obtained more readily from an alternative source; (ii) the requesting party had already had "ample opportunity" to obtain the information; or (iii) the burden of the discovery outweighed the 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.[43]

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36 Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty., No. 2:16-CV-00154, 2016 WL 3079740, at *3 (D. Utah May 31, 2016) (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978)); *see also Begay*, 2018 WL 557853, at *9; United Healthcare Servs., Inc. v. Consumer Class Plaintiffs (*In re* Epipen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.), MDL No. 2785, 2018 WL 2445100, at *2 (D. Kan. May 31, 2018).

37 Hickman, *supra* note 32, at 507–08.

38 *E.g.*, FTC v. Liberty Supply Co., No. 4:15-CV-829, 2016 WL 4272706, at *5 (E.D. Tex. Aug. 15, 2016); Tottenham v. Trans World Gaming Corp., No. 00 Civ. 7697, 2002 WL 1967023, at *2 (S.D.N.Y. June 21, 2002).

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

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

41 FED. R. CIV. P. 26(c).

42 FED. R. CIV. P. 26(b)(1)(iii) advisory committee's note to 1983 amendments.

43 FED. R. CIV. P. 26(b)(2)(C)(i)–(iii).

On December 1, 2015 the analysis changed. The word "proportional" was added to the rule,[44] and the concepts of relevancy and proportionality conjoined.[45] The drafters of the rules incorporated the proportionality factors into the definition of the scope of discovery, rather than articulating them as a limit placed on otherwise permissible discovery.[46]

Rule 26(b)(1) now provides that parties may obtain discovery relevant to claims or defenses and proportional to the needs of the case:

> considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[47]

The drafters removed the language permitting "the discovery of sources of information" because it was "unnecessary."[48] They eliminated the distinction between information relevant to "claims and defenses" and "subject matter," as well as the language allowing the discovery of information "reasonably calculated to lead to the discovery of admissible evidence."[49]

Arguably the most significant, and controversial, change was the incorporation of the proportionality analysis into Rule 26's definition of the scope of discovery. At the 2010 Duke Conference, when there was "no demand . . . for a change to the rule language," the Advisory Committee's report to Chief Justice Roberts stated:

> [T]here is no clear case for present reform. . . . There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed.[50]

Nonetheless, concerns remained that attorneys were not fully cognizant of the proportionality requirements found in the rules:

> [I]f you talk to trial judges who are routinely called upon to resolve acrimonious discovery disputes, they overwhelmingly will tell you that

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44 Lee H. Rosenthal & Steven S. Gensler, *From Rule Text to Reality: Achieving Proportionality in Practice*, 99 JUDICATURE 44, 44 (2015).

45 Jonathan M. Redgrave & Hon. Elizabeth D. LaPorte, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure 26*, 9 FED. CTS. L. REV. 20, 51, 53 (2015).

46 Rosenthal & Gensler, *supra* note 44, at 44.

47 2014 Judicial Conference Summary Report, *supra* note 21, at rules app. B-30–B-31.

48 *Id.* at rules app. B-4.

49 *Id.*

50 2010 CONFERENCE ON CIVIL LITIGATION REPORT, *supra* note 19, at 8.

> lawyers seem to be comprehensively ignorant of the significant limitations that Rule 26(b)(2)(C) imposes on the scope of discovery.[51]

The Advisory Committee sought to correct this. Those favoring the revision asserted that discovery costs are often disproportionate to the issues at stake, and those costs bar access to the courts.[52]

Opponents saw the proposal as uniformly favoring defendants in litigation and the factors identified as so "subjective and so flexible as to defy uniform application."[53] They voiced concerns that "proportionality" will become a new blanket objection to all discovery requests and impose a new burden on the requesting party to justify each and every request.[54]

The Committee sought to address both concerns by modifying the order of the proportionality factors to consider first "the importance of the issues at stake" and then "the amount in controversy."[55] According to the Report of the Judicial Conference:

> This rearrangement adds prominence to the importance of the issues and avoids any implication that the amount in controversy is the most important concern. The Committee Note was also expanded to emphasize that courts should consider the private and public values at issue in the litigation – values that cannot be addressed by a monetary award. [56]

The Committee also added a factor, "the parties' relative access to relevant information," in order to acknowledge "the reality that some cases involve an asymmetric distribution of information" and "recognize that proportionality in asymmetric cases will often mean that one party must bear greater burdens in responding to discovery."[57] Chief Justice Roberts describes these changes as "crystaliz[ing] the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."[58]

B. Rule 26(b)(2)(B)—Specific Limitations on Electronically Stored Information

Since 2006, the Federal Rules have stated in Rule 26(b)(2)(B) that a party need not produce ESI from sources that the responding party shows are not "reasonably

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51 Grimm & Yellin, *supra* note 13, at 516.

52 2014 Judicial Conference Summary Report, *supra* note 21, at rules app. B-5.

53 *Id.*

54 *Id.*

55 *Id.* at rules app. B-8.

56 *Id.*

57 *Id.*

58 JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2015), https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

accessible because of undue burden or cost," unless the requesting party shows "good cause."[59]

The 2006 Advisory Committee defined accessibility in terms of "sources" and "electronic information systems," not the cost of review.[60] The focus in the notes is on the burden of discovering ESI from machines and media: While ESI is often easier to locate and retrieve than paper documents, some "sources" of ESI can only be "accessed" with substantial burden and cost.[61] "It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing [ESI]."[62] The systems may be "designed to provide ready access to information," or a "system" may "retain information on sources that are accessible only by incurring substantial burdens or costs."[63]

According to the notes, the parties are expected to turn to technologically accessible sources first.[64] If discovery is then sought from inaccessible sources and disputed, the responding party has the burden of proof. The responding party "must show the identified sources of information are not reasonably accessible because of undue burden or cost," and sampling, inspection, or depositions may be necessary to test the assertion.[65]

The rules do not define "good cause" for the requesting party to obtain inaccessible information, but the Advisory Committee Notes consider the following factors:

> (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[66]

This good cause inquiry is coupled with the court's "authority to set conditions for discovery," including shifting the reasonable costs of obtaining information from sources that are not reasonably accessible to the requesting party.[67]

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

60 FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendments.

61 FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments; *see also* Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 301–03 (S.D.N.Y. 2012).

62 FED. R. CIV. P. 26(b)(2)(B) advisory committee's note to 2006 amendments.

63 *Id.*

64 FED. R. CIV. P. 26(b)(2)(C) advisory committee's note to 2006 amendments.

65 *Id.*

66 *Id.*

67 *Id.*

C. Rule 26(c)—Protective Orders

The above proportionality and good cause factors provide guidance for an inquiry that has long been conducted under Rule 26(c), the oldest of the general limitations on discovery.[68] Rule 26(c) provides that a court may "for good cause" protect a party from "annoyance, embarrassment, oppression, or undue burden or expense" by, *inter alia*, forbidding the discovery; specifying its terms; prescribing another method; or limiting its scope.[69]

Part-in-parcel of the court's authority to protect a party from "undue burden or expense" is its discretion to condition discovery on the requesting party's payment of the costs of that discovery.[70] In determining whether to do so, the courts have long considered the proportionality factors now set out in Rule 26(b)(2).[71] After the 2015 amendments, Rule 26(c) now expressly provides that a court may also protect a party from "undue burden or expense" by "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery."[72]

Scholars suggest the initial drafters of the federal rules "widely—if only implicitly—assumed that the discovery costs were to remain where they fell."[73] The current federal rules retain that presumption: while there is no express statement in the rules that the responding party pays, the rules describe exceptions when costs are shifted to the requesting party.[74]

According to Judge David Campbell, former chair of the Advisory Committee, the 2015 revisions were not intended to "work . . . any sort of significant change" to this presumption. [75] The Rule 26(c) amendment was not intended to signal a change to requestor pays: "In virtually all cases, if discovery is relevant and proportional to the

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68 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2035 (3d ed. 2020).

69 FED. R. CIV. P. 26(c)(1).

70 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978); Bills v. Kennecott Corp., 108 F.R.D. 459, 462 (D. Utah 1985).

71 *See, e.g.*, Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, No. 07–2388, 2008 WL 3822773, at *6–7 (D. Kan. Aug. 13, 2008); Semsroth v. City of Wichita, 239 F.R.D. 630, 633 (D. Kan. 2006).

72 2014 Judicial Conference Summary Report, *supra* note 21, at rules app. B-33–B-34.

73 Redish & McNamara, *supra* note 8, at 774. The drafters expressly rejected language requiring the requesting party to pay for discovery at least once. Professor Sunderland's first draft of the rule permitting interrogatories required the requesting party tender to the witness "a fee of two dollars plus one dollar for every question in excess of twenty." That language was deleted before adoption. Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 723 (1998).

74 Grimm & Yellin, *supra* note 13, at 520 ("Implicitly . . . the rules establish a presumption that this burden and expense falls upon the responding or producing party.").

75 Judicial Roundtable, *The Nuts and Bolts*, 99 JUDICATURE 26, 30 (2015).

needs of the case, the party producing the information will pay for the cost of production . . . . Cost shifting is now and should be in the future a rare occurrence."[76]

At the same time, the rules have evolved to provide the courts with clear authority to limit discovery and guidelines for doing so. Regardless of the rule, the guidelines, over thirty years of rule-making, have been remarkably consistent: examine the importance of the issues at stake; the importance of the discovery in question, its specificity and cost, and whether the information is readily available elsewhere; the amount in controversy and the parties' resources; and the parties' relative access to information and role in preserving it in accessible form.

In sum, litigants and the courts are instructed to examine whether the burden of discovery outweighs its likely benefit. The problem is that, despite the consistency in the rules, there is tremendous variability in how the courts have applied these factors.

III. COURT APPLICATION

A. The Basic Presumption

In 1978, the Supreme Court in *Oppenheimer Fund, Inc. v. Sanders* gave voice to the implicit presumption that the responding party bears its own expenses: "The presumption is that the responding party must bear the expense of complying with discovery requests."[77] Courts have accepted this as the starting point since.[78] But it is just that, a starting point for an analysis determining if and when to shift costs.

The analytical framework used by the courts in determining whether to rebut the presumption has evolved. Early on, courts adopted norms that rarely resulted in cost shifting, apart from copying costs. More recently, courts have expanded the scope and frequency of cost shifting.[79] Courts asked to engage in a proportionality analysis to preclude discovery or shift its costs now routinely shift a portion of the costs to the requesting party.[80] They do so regardless of the rule applied: Rule 26(b)(1), Rule 26(b)(2)(B), or Rule 26(c). They do so regardless of the factors considered. They do so where the information is relevant but inaccessible, and, more recently, where the information is relevant and accessible but costly to produce. The following Part contains a discussion of the principal cases articulating these norms.

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76 *Id.* at 31.

77 Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

78 *See, e.g.*, Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *8 (D. Kan. June 18, 2020); United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 236 (S.D. Cal. 2015); Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427, at *3 (S.D.N.Y. Sept. 24, 2013); Rundus v. City of Dallas, 634 F.3d 309, 315–16 (5th Cir. 2011); Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 97 (D. Md. 2003).

79 *See infra* Part IV.

80 *See infra* Part IV.

B. Rebutting the Presumption – Early Standards

Early decisions from the 1970s and 1980s addressed copying ESI, i.e. copying computer tapes or creating digital copies of previously produced computer printouts.[81] With the exception of one court refusing to shift the cost of duplicating computer tapes, finding it "a reasonable cost of doing business,"[82] courts regularly compelled production and assessed the costs of creating copies of computer tapes or digital copies of earlier paper productions.[83]

The first decision to set out a legal framework for analyzing cost shifting for electronic discovery beyond copying costs came in 1985, in *Bills v. Kennecott Corp.*[84] In *Bills*, and the cases that followed, the courts routinely rejected cost shifting. Plaintiffs in *Bills* alleged age discrimination and requested information regarding defendant's reduction in force.[85] Pursuant to Rule 26(c), defendant sought an order requiring plaintiffs to pay its costs to produce a "computer printout."[86] The court denied the motion, holding it "axiomatic that electronically stored information is discoverable" if relevant.[87] And if relevant, "the expense and burden to the responding party should not only be balanced against the relative expense and burden to the requesting party, but also should be scrutinized for possible excessiveness."[88]

The court rejected "ironclad formulas" for determining "undue burden,"[89] and analyzed factors including (1) the cost of the request; (2) the relative expense and burden in obtaining the data; (3) the burden on the requesting party to obtain the information otherwise; and (4) the benefit to the responding party from producing the data in question.[90] In *Bills*, the court put ESI on equal footing with paper, and conducted a cost-benefit analysis, acknowledging that the responding party is

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81 *See, e.g.*, *In re* Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987, 130 F.R.D. 634, 636 (E.D. Mich. 1989) [hereinafter *In re Detroit Air Crash Disaster*].

82 United States v. Davey, 543 F.2d 996, 1001 (2d Cir. 1976).

83 *In re Detroit Air Crash Disaster*, *supra* note 81, at 636; Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987); Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980).

84 Bills v. Kennecott Corp., 108 F.R.D. 459, 460 (D. Utah 1985).

85 *Id.*

86 *Id.*

87 *Id.* at 461.

88 *Id*. at 463.

89 *Id.*

90 *Id.* at 464.

generally in the best position to evaluate how to produce their own ESI, but courts must assess allegations of burden for excessiveness.[91]

Subsequent courts acknowledged both the "ordinary and foreseeable" burden associated with producing ESI and the need to cooperate. In 1986, a court held in *Daewoo Electronics Co. v. United States*:

> The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent . . . Similarly, a normal and reasonable degree of direct communication and assistance to the discovering party is the unavoidable burden of the respondent, in the absence of a showing of extraordinary hardship.[92]

Even in this early decision, the court sought to require the producing party to transmit the data "in a reasonably usable way with a modicum of cooperation."[93]

In 1995, in *In re Brand Name Prescription Drugs Antitrust Litigation*, a federal court again rejected cost shifting, finding the expense inevitable; best controlled by the producing party; and best mitigated through cooperation.[94] Here, the court declined to shift the costs of producing email from backup tapes, holding "the mere fact that the production of computerized data will result in a substantial expense is not a sufficient justification for imposing the costs of production on the requesting party."[95] As in *Daewoo*, the court held that "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk."[96]

Equally important, the court found that the burden of searching the email system resulted from the limitations of the software defendant chose to use—a burden that other defendants in the litigation did not have or claim.[97] Where "the costliness of the discovery procedure involved is . . . a product of the defendant's record-keeping scheme over which the [plaintiffs have] no control,"[98] it would be unreasonable to

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91 *See* Sedona Conference, *The Sedona Conference Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 118 (2018).

92 Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986); *see also* Kaufman v. Kinko's, Inc., No. Civ.A. 18894, 2002 WL 32123851, at *2 (Del. Ch. Apr. 16, 2002); Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. June 16, 1999); Hurt v. Dime Sav. Bank, 151 F.R.D. 30, 31–32 (E.D.N.Y. 1993).

93 *Daewoo Elecs. Co.*, 650 F. Supp. at 1006.

94 *In re* Brand Name Prescription Drugs Antitrust Litigation, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* (citing Kozlowski v. Sears Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976)); *see also Kozlowski*, 73 F.R.D. at 75–76 ("[D]efendant may not excuse itself from compliance . . . by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents

shift costs of searching the records to plaintiff. The court, instead, required the parties to cooperate, "to consult with each other and agree upon meaningful limitations on the scope of any e-mail search."[99]

These early cost-shifting cases involving ESI drew upon well-established law. The "mere fact" that producing documents was "burdensome and expensive" and "would interfere with a party's normal operations was not inherently a reason to refuse an otherwise legitimate discovery request."[100] Size did not matter; organization did: "The fact that defendant's size requires it to keep a great amount of records cannot give it immunity . . . Nor can the lack of an adequate filing system insulate a party from discovery."[101] What mattered were the choices that the responding party made prior to the litigation regarding storing the information. Courts "will not shift the burden of discovery onto the discovering party where the costliness of the discovery procedure involved is entirely a product of the defendant's record-keeping scheme."[102]

Filing systems and the information filed, however, change. As the volume of potential discovery "once thought of in terms of numbers of pages" grew to terabytes, this "explosion of information has brought along with it an explosion of costs."[103] This increase in costs brought cost-shifting motions, and with it a change in the legal norms.

C. Rebutting the Presumption – The Marginal Utility Test

Subsequent case law criticized *In re Brandname Prescription Drugs*, often omitting discussion of its emphasis on cooperation and disclosure and focusing instead on the language suggesting that the cost of producing ESI is a foreseeable cost of using computers.[104] Subsequent cases labeled the test applied in *In re Brandname Prescription Drugs* the "cost of doing business" test, and they rejected it.[105]

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an excessively burdensome and costly expedition."*)*; Kaufman v. Kinko's Inc., No. Civ.A. 18894, 2002 WL 32123851, at *2 (Del. Ch. Apr. 16, 2002); Delozier v. First Nat'l Bank of Gatlinburg, 109 F.R.D. 161, 164 (E.D. Tenn. 1986).

99 *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 WL 360526, at *3.

100 Baine v. Gen. Motors Corp., 141 F.R.D. 328, 331 (M.D. Ala. 1991); *see also* Keco Indus., Inc. v. Stearns Elec. Corp., 285 F. Supp. 912, 914 (E.D. Wis. 1968); Speedrack, Inc. v. Baybarz, 45 F.R.D. 254, 257 (E.D. Cal. 1968); Technograph, Inc. v. Tex. Instruments, Inc., 43 F.R.D. 416, 419 (S.D.N.Y. 1967); Rockaway Pix Theatre, Inc. v. Metro–Goldwyn–Mayer, Inc., 36 F.R.D. 15, 17 (E.D.N.Y. 1964).

101 *Baine*, 141 F.R.D. at 331; *see also* Delozier v. First Nat'l Bank, 109 F.R.D. 161, 164 (E.D. Tenn. 1986); Baxter v. Travenol Lab'ys, Inc. v. LeMay, 93 F.R.D. 379 (S.D. Ohio 1981); All. to End Repression v. Rochford, 75 F.R.D. 441, 447 (N.D. Ill. 1977); *Kozlowski*, 73 F.R.D. at 76.

102 *Delozier*, 109 F.R.D. at 164.

103 Grimm & Yellin, *supra* note 13, at 511.

104 *See, e.g.*, Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D.D.C. 2001); Kemper Mortg., Inc. v. Russell, No. 3:06-CV-042, 2006 WL 2319858, at *2 (S.D. Ohio Apr. 18, 2006).

105 *See* cases cited *supra* note 104.

In 2001, Judge Facciola, in *McPeek v. Ashcroft*, proposed an alternative, now applied expressly or impliedly in most cases.[106] In *McPeek*, plaintiff alleged retaliation following a sexual harassment claim and sought production of email from defendant's backup systems.[107] Judge Facciola flatly rejected arguments that the producing party pay the costs of restoration as a cost of its "choice" to use computers: "It is impossible to walk ten feet into [an office] without seeing a network computer . . . What alternative is there? Quill pens?"[108]

While Judge Facciola rejected "the cost of doing business argument," he also rejected the converse, simply making the requesting party pay.[109] He articulated an alternative, a marginal utility test, for determining whether to shift the costs of restoring and searching inaccessible ESI.[110]

> A fairer approach borrows, by analogy, from the economic principle of "marginal utility." The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is "at the margin."[111]

In other words, Judge Facciola focused on the importance of the discovery in resolving the issues. More importantly, he required objective proof to decide this, i.e., sampling and a sworn certification of the costs and results of the search.[112]

D. Rebutting the Presumption – The Rowe Eight-Factor Test

In the year following *McPeek*, Judge Francis sought to define marginal utility more precisely.[113] In *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, plaintiffs alleged racial discrimination and sought email from both active servers and backup

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106 *McPeek*, 202 F.R.D. at 31–33; *see also* Sophia & Chloe, Inc. v. Brighton Collectibles, Inc., No. 12CV2472, 2014 WL 12642170, at *5 (S.D. Cal. May 28, 2014); Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 602 (E.D. Wis. 2004); Certain Network Interface Cards & Access Points, USITC Inv. No. 337-TA-455, 2001 WL 1217233, at *1–2 (U.S.I.T.C. Oct. 12, 2001) (admin. law judge order).

107 *McPeek*, 202 F.R.D. at 31–32.

108 *Id.* at 33; *see also Certain Network Interface Cards & Access Points*, 2001 WL 1217233.

109 *McPeek*, 202 F.R.D. at 33–34.

110 *Id.* at 34.

111 *Id.*

112 *Id*. at 34–35.

113 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428–29 (S.D.N.Y. 2002).

tapes.[114] Defendants sought a protective order precluding discovery or shifting costs.[115]

Judge Francis rejected plaintiff's "cost of doing business" argument "because the costs of storage are virtually nil."[116] He also rejected defendants' "requestor-pays" arguments, finding that "it flies in the face of well-established legal principle . . . [and] it places a price on justice that will not always be acceptable: it would result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery."[117]

In lieu of both, *Rowe* articulated a balancing approach considering eight factors: (1) "the specificity of the discovery requests;" (2) "the likelihood of discovering critical information" or "the likelihood of a successful search;" (3) "the availability of such information from other sources;" (4) "the purposes for which the responding party maintains the requested data;" (5) "the relative benefit to the parties of obtaining the information;" (6) "the total cost associated with production;" (7) "the relative ability of each party to control costs and its incentive to do so;" and (8) "the resources available to each party."[118]

Many courts adopted the *Rowe* standard,[119] and, in contrast to early cost-shifting decisions, almost always ordered cost shifting.[120]

E. Rebutting the Presumption – The Zubulake "Gold" Standard

Recognizing this bias towards cost shifting, Judge Scheindlin modified the *Rowe* test in her seminal opinions in *Zubulake v. UBS Warburg LLC*.[121] In response to defendant's request to shift the cost of email discovery from backup tapes, Judge

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114 *Id.* at 424–28.

115 *Id.* at 423.

116 *Id.* at 429.

117 *Id.*; *see also* U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc., 94 A.D.3d 58, 64–65 (N.Y. App. Div. 2012).

118 *Rowe*, 205 F.R.D. at 429–30.

119 *See* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 316 (S.D.N.Y. 2003); *see also* Comput. Assocs. Int'l, Inc. v. Quest Software, Inc., No. 02 C 4721, 2003 WL 21277129, at *1–2 (N.D. Ill. June 3, 2003); *In re* Livent, Inc. Noteholders Sec. Litig., No. 98 Civ. 7161, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *10–12 (N.D. Ill. June 3, 2002); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99–3564, 2002 WL 246439, at *3–8 (E.D. La. Feb. 19, 2002).

120 *See Zubulake I*, 217 F.R.D. at 320; Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 284 (S.D.N.Y. 2003); *Murphy Oil USA, Inc.*, 2002 WL 246439, at *7–9; Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *12 (N.D. Ill. June 3, 2002); *In re* Bristol-Myers Squibb Sec. Litig., 205 F.R.D. 437, 444 (D.N.J. 2002).

121 *Zubulake I*, 217 F.R.D. at 317–20; *see* Sedona Conference, *Cooperation Proclamation: Resources For The Judiciary, Third Edition* 39 (2020) [hereinafter Sedona Conference, *Resources for the Judiciary*] ("Cost-shifting came to eDiscovery with the iconic *Zubulake* decision.").

Scheindlin articulated a three-step, seven-factor test that has become, according to some, the "gold standard."[122]

The first step examines whether cost shifting must be considered in every case involving ESI.[123] According to *Zubulake*, given that ESI is no less discoverable than paper, the answer is "no."[124] Instead, "whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format."[125]

ESI is inaccessible if the data "must be restored or otherwise manipulated to be usable."[126] If the ESI is inaccessible, the second step examines whether cost shifting is warranted.[127] Just as in *McPeek*, reliable information based on sampling is necessary: "When based on an actual sample, the marginal utility test will not be an exercise in speculation—there will be tangible evidence of what the backup tapes may have to offer."[128]

Finally, based on this objective evidence, *Zubulake* suggests the following analysis: First, in order to maintain the presumption that the responding party pays, "the cost-shifting analysis must be neutral; close calls should be resolved in favor of the presumption."[129] In order to ensure neutrality, *Zubulake* modified the *Rowe* standard to address "the amount in controversy" and "the importance of the issues at stake in the litigation."[130] It then omitted, as irrelevant, an inquiry into the purpose for which the data is maintained.[131] The result is a seven-factor test examining:

> 1. The extent to which the request is specifically tailored to discover relevant information;

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122 *Zubulake I*, 217 F.R.D. at 317–20, 323; *see also* Price v. Synapse Group, No. 16CV1524-BAS(BLM), 2018 WL 9517276, at *10 (S.D. Cal. Sept. 12, 2019); Tierno v. Rite Aid Corp., No. C 05-02520 TEH, 2008 WL 3287035, at *4 (N.D. Cal. July 31, 2008); Maria Perez Crist, *Preserving the Duty to Preserve: The Increasing Vulnerability of Electronic Information*, 58 S.C. L. REV. 7, 15 (2006); Redish & McNamara, *supra* note 8, at 781; Mast, *supra* note 13, at 1827; James M. Evangelista, *Polishing the "Gold Standard" on the E-discovery Cost-Shifting Analysis*: Zubulake v. UBS Warburg, LLC, 9 J. TECH. L. & POL'Y 1 (2004).

123 *Zubulake I*, 217 F.R.D. at 317.

124 *Id.*

125 *Id.* at 318. *Zubulake* identifies five types of data: (1) active, online; (2) near-line; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data, and determines that the first three categories are typically accessible, while the latter two are not." *Id.* at 319–20.

126 *Id.* at 320.

127 *Id.* at 323.

128 *Id.* at 324.

129 *Id.* at 320.

130 *Id.* at 321.

131 *Id.*

2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[132]

According to *Zubulake*, these factors are not a checklist. The focus must be: "does the request impose an 'undue burden or expense' on the responding party" and "how important is the sought-after evidence in comparison to the cost of production?"[133] In answering these questions, the first two factors—the marginal utility factors—are most important and the last two factors least. [134] "[T]he importance of the litigation" will "only rarely come into play" and "the relative benefits of the production" will generally benefit the requesting party, but "in the unusual case" may also benefit the responding party and that fact "may weigh against shifting costs."[135]

The *Zubulake* decisions provided the basis for the 2006 revisions to the federal rules.[136] As discussed *supra*, Rule 26(b)(2)(B) now distinguishes between accessible and inaccessible ESI, as defined by whether the ESI requires restoration. If inaccessible information is sought and restoration required, the 2006 Advisory Committee Notes consider the factors discussed in both *Rowe* and *Zubulake*.

In the years since, courts have tweaked the standard. The Seventh Circuit modified the *Zubulake* factors to expressly include an eighth factor, one identified in Rule 26(b)(2)(C), "the importance of the requested discovery in resolving the issues of the litigation."[137] But, whether in whole or part, federal courts have adopted the *Zubulake* standard widely, referring to *Zubulake* as the "leading opinion" on the subject.[138]

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132 *Id.* at 322.

133 *Id.* at 322–23.

134 Id. at 323.

135 *Id.*

136 Jacob Smith, *Electronic Discovery: The Challenges of Reaching into the Cloud*, 52 SANTA CLARA L. REV. 1561, 1567 (2012).

137 Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09-CV-3789, 2011 WL 1897213, at *2 (N.D. Ill. May 17, 2011); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 572–73 (N.D. Ill. 2004).

138 *See* Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 336 (E.D. Pa. 2012) (describing *Zubulake* as "undoubtably" the "leading opinion" on the subject). Courts adopting *Zubulake* include Zeller v South Central Emergency Med. Servs., Inc., No. 1:13–CV–2584, 2014 WL 2094340 (M.D. Pa. May 20, 2014); Cochran v. Caldera Med., Inc., No. 12–5109, 2014 WL 1608664 (E.D. Pa. Apr. 22, 2014); W Holding Co., Inc. v. Chartis Ins. Co. of P.R., 293 F.R.D. 68 (D.P.R. 2013); Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427 (S.D.N.Y. Sept. 24, 2013); Juster Acq. Co. v. N. Hudson Sewerage Auth., No. 12–3427, 2013 WL 541972 (D.N.J. Feb. 11, 2013); Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905 (S.D.N.Y. Dec. 27, 2012); Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09-CV-3789, 2011 WL 1897213, at *2 (N.D. Ill. May 17, 2011); Couch v. Wan, No. CV08–1621, 2011 WL 2971118 (E.D. Cal. July 20, 2011); Couch v. Wan, No. CV08–1621, 2011 WL

F. Rebutting the Presumption – Beyond Accessibility

Zubulake and its progeny make clear that "cost-shifting does not even become a possibility unless there is first a showing of inaccessibility."[139] The "obvious negative corollary" to this is that "accessible data must be produced at the cost of the producing party."[140]

But this limitation is ignored by a growing number of courts.[141] In these decisions, definitions of "undue burden or expense" based on the technical accessibility of the

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2551546 (E.D. Cal. June 24, 2011); Johnson v. Neiman, No. 09-CV-00689, 2010 WL 4065368 (E.D. Mo. Oct. 18, 2010); Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of N.M., No. 09CV00689, 2010 WL 4928866 (D.N.M. Oct. 22, 2010); Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010); Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761 (D.N.J. Oct. 20, 2009); Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532, 2008 WL 1805727 (W.D. Wash. 2008); Haka v. Lincoln Cnty., 246 F.R.D. 577 (W.D. Wis. 2007); PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 05-CV-657, 2007 WL 2687670 (N.D.N.Y. 2007); Semsroth v. City of Wichita, 239 F.R.D. 630, 633 (D. Kan. 2006); Hagemeyer N.A., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 572–73 (N.D. Ill. 2004); Multitechnology Servs., L.P. v. Verizon Sw., No. 02–CV–702, 2004 WL 1553480 (N.D. Tex. July 12, 2004); OpenTV v. Liberate Techs., 219 F.R.D. 474, 476–79 (N.D. Cal. 2003); Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459 (S.D.N.Y. 2003).

139 Peskoff v. Faber, 240 F.R.D. 26, 30–31 (D.D.C. 2007); *see also* Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc, No. CV 14-03053, 2018 WL 5816108, at *6–7 (C.D. Cal. Apr. 25, 2018); Nehad v. Browder, No. 15-CV-1386, 2016 WL 3769807, at *3 (S.D. Cal. July 15, 2016); United States *ex rel.* Guardiola v. Renown Health, No. 12–CV–00295, 2015 WL 5056726, at *9 (D. Nev. Aug. 25, 2015); Hausman v. Holland Am. Line-USA, No. 13cv00937, 2015 WL 11234152, at *1 (W.D. Wash. Mar. 17, 2015); Cochran v. Caldera Med., Inc., No. 12–5109, 2014 WL 1608664, at *2–3 (E.D. Pa. Apr. 22, 2014); Lindsay v. Clear Wireless, LLC, No. 13–834, 2014 WL 813875, at *2 (D. Minn. Mar. 3, 2014); Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 145 (E.D. Mich. 2009); Juster Acq. Co. v. N. Hudson Sewerage Auth., No. 12–3427, 2013 WL 541972, at *3–6 (D.N.J. Feb. 11, 2013); Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427, at *4 (S.D.N.Y. Sept. 24, 2013); Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 301–03 (S.D.N.Y. 2012); Nogle v. Beech St. Corp., No. 10–CV–01092, 2012 WL 3687570, at *8 (D. Nev. Aug. 27, 2012); Adair v. EQT Prod. Co., No. 10cv00037, 2012 WL 1965880, at *3–5 (W.D. Va. May 31, 2012); Helmert v. Butterball, LLC, No. 08CV00342, 2010 WL 2179180, at *10 (E.D. Ark. May 27, 2010); Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 WL 2714239, at *3 (E.D. Mich. July 7, 2008); Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532, 2008 WL 1805727, at *1–2 (W.D. Wash. Apr. 21, 2008); Io Grp. v. Veoh Networks, Inc., No. C06-03926, 2007 WL 1113800, at *7 (N.D. Cal. Apr. 13, 2007); Wachtel v. Health Net, Inc., 239 F.R.D. 81, 91 n.23 (D.N.J. 2006); OpenTV v. Liberate Techs., 219 F.R.D. 474, 476 (N.D. Cal. 2003).

140 Peskoff v. Faber, 244 F.R.D. 54, 62 (D.D.C. 2007); *see also* Hawa v. Coatesville, No. 15-4828, 2017 WL 1021026, at *1 (E.D. Pa. Mar. 16, 2017); Zeller v. S. Cent. Emergency Med. Servs., Inc., No. 13–CV–2584, 2014 WL 2094340, at *9 (M.D. Pa. May 20, 2014).

141 *See, e.g.*, Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *9 (D. Kan. June 18, 2020) ("Although the court in *Zubulake* stated that '[a] court should consider cost-shifting only when electronic data is relatively inaccessible,'… that approach is no longer accepted."); N. Shore–Long Island Jewish Health Sys., Inc. v. Multiplan, Inc., 325 F.R.D. 36, 51–53 (E.D.N.Y. 2018) (inviting briefing on shifting the costs of production

storage media give way to general inquiries into burden, ESI volume and cost, and whether it is fair to shift the costs.[142] There are two types of these cases: in the first, courts conduct a broad-based proportionality analysis applying either the *Zubulake* factors or the proportionality standard now set out in Rule 26(b)(1).[143] In the second, courts more generally seek to do what is fair.[144] In these latter cases, "[a]ccessibility turns largely on the expense of production."[145]

United States ex rel. Carter v. Bridgepoint Education, Inc. provides an often-cited example of the first. [146] Plaintiffs, in a *qui tam* action, sought documents relating to recruiter compensation found on defendant's active servers and backup tapes.[147] The court ordered production, without cost shifting, from a tape providing access to email between key players.[148]

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for accessible database reports); United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 240 (S.D. Cal. 2015) ("[C]ost-shifting has been extended beyond merely inaccessible ESI."); United States *ex rel.* Garbe v. Kmart Corp., 12-CV-881, 2014 WL 12787823, at *3–4 (S.D. Ill. May 2, 2014) (noting the split); FDIC v. Bowden, No. CV413–245, 2014 WL 2548137, at *6 (S.D. Ga. June 6, 2014) ("'inaccessible' . . . can mean prohibitively expensive").

142 *See, e.g.*, United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 239 (S.D. Cal. 2015); Remy Inc. v. Tecnomatic, S.P.A., 11–CV–00991, 2013 WL 1310216, at *5 (S.D. Ind. Mar. 27, 2013); Lubber, Inc. v. Optari LLC, No. 11-0042, 2012 WL 899631 (M.D. Tenn. Mar. 15, 2012); Pippins v. KPMG LLP, 279 F.R.D. 245 (S.D.N.Y. Feb. 23, 2012); Ameriwood Indus., Inc. v. Liberman, No. 06CV524, 2007 WL 496716, at *2 (E.D. Mo. Feb. 13, 2007); Best Buy Stores, L.P. v. Devs. Diversified Realty Corp., No. 05-2310, 2007 WL 333987, at *1 (D. Minn. Feb. 1, 2007); Martin v. HAPO Cmty. Credit Union, No. CV-04-5109, 2005 WL 8158778, at *2–3 (E.D. Wash. Sept. 6, 2005).

143 *See, e.g.*, Sung Gon Kang v. Credit Bureau Connection, Inc., No. 18-CV-01359, 2020 WL 1689708, at *4 (E.D. Cal. Apr. 7, 2020); Duhigg v. Indus., No. 15CV91, 2016 WL 4991480, at *2–4 (D. Neb. Sept. 16, 2016); Elkharwily v. Franciscan Health Sys., No. 15-CV-05579, 2016 WL 4061575 at *2–4 (W.D. Wash. July 29, 2016); Wagoner v. Lewis Gale Med. Ctr., LLC, No. 15cv570, 2016 WL 3893135, at *3–4 (W.D. Va. July 14, 2016); *United States ex rel. Carter*, 305 F.R.D. at 240; Martin v. HAPO Cmty. Credit Union, No. CV-04-5109, 2005 WL 8158778, at *3 (E.D. Wash. Sept. 6, 2005).

144 *See, e.g.*, Conn. Gen. Life Ins. Co. v. Earl Scheib, Inc., No. 11–CV–0788, 2013 WL 485846, at *3–4 (S.D. Cal. Feb. 6, 2013); Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *3–4 (E.D. Cal. June 24, 2011); OpenTV v. Liberate Technologies, 219 F.R.D. 474, 476–79 (N.D. Cal. 2003).

145 *See, e.g.*, *Couch*, 2011 WL 2551546, at *3–4; E & J Gallo Winery v. Encana Energy Serv. Inc., No. CV-F-03-5412, 2004 WL 7342781, at *3 (E.D. Cal. Dec. 16, 2004) ("Taking into account defendant's privilege claims, the requested material is not readily accessible.").

146 *United States ex rel. Carter*, 305 F.R.D. at 227; *see also* 3 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION FEDERAL COURTS § 26:28 (4th ed. Supp. 2019); CAROLE BASRI & MARY MACK, EDISCOVERY FOR CORPORATE COUNSEL § 25:2 (2020); ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 5.05 (2020).

147 *United States ex rel. Carter*, 305 F.R.D. at 232.

148 *Id.* at 242.

In addressing the remaining requests, it noted that the proliferation of ESI has prompted the courts to "reconsider their disinclination to authorize cost shifting."[149] The court analyzed the rules discussed above and concluded that a balancing test weighing the benefits and burdens of the discovery applies "regardless of the documents' original medium, whether it be code or pulp."[150] It analyzed *Rowe*, *Zubulake*, and their progeny and concluded that even as the distinction between accessible and inaccessible ESI has gained prominence, "this preference for cost-shifting has been extended beyond merely inaccessible ESI."[151]

Citing the remaining discovery's marginal relevance, the court applied the *Zubulake* factors to deny plaintiffs' motion to compel restoration of additional backup tapes unless they paid for it.[152] In defining price, the court held: "As to all ESI, whether accessible or inaccessible . . . Plaintiffs will bear the cost of searching and recovery. Defendants, however, will bear the cost of production."[153] In shifting the costs of restoration, as well as the costs to search for relevant information, it rejected earlier norms and articulated a "preference for cost-shifting . . . beyond merely inaccessible ESI."[154]

Shortly before publication of this Article, in a decision that may become the new "gold standard," the court in *Lawson v. Spirit Aerosystems, Inc.* applied Rule 26(b)(1)'s proportionality standard to cost shifting.[155] In contesting an alleged breach of a non-compete, plaintiff sought discovery of accessible information relating to business overlap between defendant and a non-party.[156] Plaintiff engaged in a "scattershot" approach, requesting defendant search over a hundred custodians' ESI,[157] using as many as 803 terms, including common terms like "paint".[158] When sampling showed few responsive documents, most "technically responsive" but "largely irrelevant,"[159] plaintiffs demanded use of predictive coding.[160] Defendant explained the issue of "business overlap" was so broad that traditional eDiscovery

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149 *Id.* at 237–38.

150 *Id.* at 237.

151 *Id.* at 240.

152 *Id.* at 242–44, 247.

153 *Id.* at 247.

154 *Id.* at 240.

155 Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *1 (D. Kan. June 18, 2020), *aff'd*, No. 18-1100-EFM, 2020 WL 6939752 (D. Kan. Nov. 24, 2020).

156 *Id.*

157 *Id*. at *3 (plaintiff demanded defendant search 69 custodians, plus each custodians' assistant's ESI).

158 *Id*. at *3, *5, *17-18.

159 *Id*. at *5.

160 *Id*. at *6.

processes were ineffective and began more targeted collections based on custodian interviews. The court warned plaintiff, repeatedly, of the risk of cost shifting if they pursued their original eDiscovery requests, but plaintiff persisted.[161] After a search of its original collection using predictive coding yielded few relevant documents, defendant filed its motion to shift costs, pursuant to Rule 26(c).[162]

In ruling on the motion, the court applied Rule 26(b)(1)'s proportionality factors.[163] Each factor pointed to cost shifting, but the court, in two separate decisions, emphasized the final two factors: When the court examined whether the discovery sought information "at the very heart of the litigation,"[164] the court found the predictive coding that plaintiff demanded, as predicted by three earlier sampling efforts, added nothing of value.[165] At the same time, plaintiff exacerbated the problem by demanding a "bloated ESI collection" from custodians unlikely to have relevant information, resulting in large volumes and low responsiveness rates, which plaintiff sought to remedy by demanding a high recall rate.[166] The result is not surprising: After warning plaintiff three times about shifting costs, the court shifted costs, $754,029.46 for the predictive coding review.[167] The court's analysis is, however, remarkable for its careful application of the proportionality factors, and its adherence to the default

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161 *Id*. at *22.

162 *Id*. at *8.

163 It found the parties' breach of contract claim did not implicate any broad societal issues, and the amount in controversy large but less relevant because the defendant had already borne significant discovery expenses and produced significant discovery. In examining the parties' relative access to information, the court noted defendant had produced relevant information regarding contended areas of business overlap, while plaintiff had not pursued any necessary third-party discovery. Regarding resources, it found defendant a Fortune 500 company enduring massive layoffs, while an investment company, pursuant to an indemnification agreement, had a subrogated interest in plaintiffs claim and funded plaintiff's litigation costs. *Id*. at *3, *11-14.

164 *Id.* at *15 (citing Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 8 (D.D.C. 2017)).

165 *Id.* at * 7; Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 6343292, at *1 (D. Kan. Oct. 29, 2020), *aff'd*, No. 18-1100-EFM, 2020 WL 6939752 (D. Kan. Nov. 24, 2020).

166 *Lawson*, 2020 WL 3288058, at *20. Recall is defined as: "The fraction of Relevant Documents that are identified as Relevant by a search or review effort." Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology Assisted Review*, 7 FED. CT. L. REV. 1, 27 (2013).

167 The court "mindful of the default rule that the producing party should ordinarily bear the costs of production [found] good cause to require both parties to bear some portion of the expenses for the overall ESI/TAR process." It went on to find defendant had already borne approximately $150,000 through the ESI sampling exercises and imposed the remainder, approximately $750,000 in costs associated with plaintiff's request defendant utilize predictive coding on plaintiff. *Lawson*, 2020 WL 3288058, at *1, *22; *Lawson*, 2020 WL 6343292, at *1; *Lawson*, 2020 WL 6939752, at *1.

rule for core discovery: the requesting party bore the costs of sampling and the more targeted collections that produced relevant documents.[168]

The courts' increased willingness to shift costs is also embodied in decisions that spend little time applying proportionality factors and focus instead on fairness. In *Boeynaems v. L.A. Fitness, Int'l, LLC*, putative class plaintiffs sought accessible ESI, including email from seven custodians, and "member notes" from a customer database, which the defendant estimated would cost almost $600,000 to produce.[169] In ruling on the requests, the court focused on fairness: "Discovery need not be perfect, but discovery must be fair."[170] The court noted discovery in this case was asymmetrical, with the defendants producing many more documents than plaintiffs, and allowing the requested discovery would "dramatically increase the economic pressure on the defendant."[171]

The court held that "where the cost of producing documents is very significant, the Court has the power to allocate the cost of discovery, and doing so is fair."[172] The court mandated "fair and appropriate" cost allocation concluding that "where (1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek."[173]

This general fairness inquiry extends beyond discovery related to class certification. One sees the same analysis in breach of contract and breach of warranty actions; gender discrimination and retaliation cases, whether brought by individuals or commercial entities.[174]

Courts have split the costs of producing email from two hard drives because "fairness and efficiency" require it.[175] Without any legal analysis, courts will "share equally" the cost of a forensic examination or the costs to obtain documents because

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168 *Lawson*, 2020 WL 3288058, at *22.

169 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 340 (E.D. Pa. 2012); *see also* Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55, 90–91 n.97 (2015).

170 *Boeynaems*, 285 F.R.D. at 333.

171 *Id.* at 334.

172 *Id.* at 335.

173 *Id*. at 341. *Compare* Schweinfurth v. Motorola, Inc., No. 1:05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008) ("Because the sheer size of the discovery already produced . . . and the immense size of the discovery now ordered to be produced . . . the Court finds cost shifting is reasonable and fair."), *with* Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *3–5 (S.D.N.Y. Dec. 27, 2012) ("The presumption created by *Boeynaems* has never been adopted in this circuit.").

174 *See, e.g.*, Juster Acquisition Co. v. N. Hudson Sewage Auth., No. 12-3427, 2013 WL 541972, at *3–6 (D.N.J. Feb. 11, 2013); Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *3–4 (E.D. Cal. June 24, 2011).

175 Haka v. Lincoln Cnty., 246 F.R.D. 577, 579 (W.D. Wis. 2007).

"it seems fair to assume [they] will entail some cost."[176] Courts will split the costs of producing ESI because the parties didn't cooperate and the disputed discovery would cost "at least $10,000 and produce gigabytes of ESI."[177] Courts will shift costs of future discovery because previous discovery was unproductive.[178] Courts will reject cost shifting because of the "extravagance" of the litigation.[179] Courts will reject cost shifting after finding the discovery to date was "reasonable."[180] Courts will also deny discovery outright because it is just too expensive: $35,000 is "too high of a cost for the production of the requested ESI in this type of action," i.e. a gender discrimination claim.[181] Accessibility is no longer the touchstone in many cases. "Fairness" is.

District courts confront cost-shifting issues in the context of either a motion for protective order or a motion to compel discovery.[182] In either context, the courts exercise broad discretion, with appellate review limited to abuse of that discretion, or, in some cases, a "gross abuse of discretion."[183] An analysis of the courts' application of that broad discretion shows an evolution. First, for decades, cost-shifting motions came rarely and fell on deaf ears. The presumption that the responding party pay the cost of the response, apart from copying charges, was enforced. Now, cost shifting is "no longer rare."[184] Research for this Article suggests that it is routine. Second, the standard applied by the courts to evaluate cost shifting has evolved. It has shifted from consideration of the "cost of doing business"; to marginal utility; to multi-factor cost-shifting analyses; and now inquiries into proportionality and whether cost shifting just

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176 URS Corp. v. Isham, No. 09–2955, 2010 WL 2428841, at *3 (D.S.C. June 11, 2010); Verigy US, Inc. v. Mayder, No. C07-04330 RMW, 2008 WL 4786621, at *3 (N.D. Cal. Oct. 30, 2008).

177 Lubber, Inc. v. Optari LLC, No. 11–0042, 2012 WL 899631, at *3 (M.D. Tenn. Mar. 15, 2012); Covad Commc'ns Co. v. Revonet, Inc., 254 F.R.D. 147, 151 (D.D.C. 2008) (splitting costs of review "[s]ince both parties went through the same stop sign" in failing to collaborate regarding ESI productions).

178 Self v. Equilon Enters. LLC, No. 00CV1903, 2007 WL 427964, at *3 (E.D. Mo. Feb. 2, 2007).

179 E & J Gallo Winery v. Encana Energy Servs. Inc., No. CV-F-03-5412, 2004 WL 7342781, at *3 (E.D. Cal. 2004).

180 Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., No. 08–2150, 2009 WL 1362530, at *1 (D. Kan. May 14, 2009).

181 Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) (rejecting production of ESI in employment discrimination claim); *accord* Complaint at 19, *Rodriguez-Torres*, 265 F.R.D. 40 (No. 09–1151) (seeking reinstatement and damages in excess of $1 million).

182 *See, e.g.*, Semsroth v. City of Wichita, 239 F.R.D. 630, 634 (D. Kan. 2006); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 309 (S.D.N.Y. 2003).

183 Kilpatrick v. King, 499 F.3d 759, 766 (8th Cir.2007); *see, e.g.*, Seattle Times, Co. v. Rhinehart, 467 U.S. 20, 36 (1984); Dove v. Atl. Cap. Corp., 963 F.2d 15, 19 (2d Cir. 1992); FTC v. Shaffner, 626 F.2d 32, 38 (7th Cir. 1980).

184 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 336 (E.D. Pa. 2012).

seems "fair." The majority of decisions reviewed for this Article offer more than a generalized fairness inquiry: they consider the factors identified in *McPeek*, *Rowe*, and *Zubulake*, and the proportionality factors now found in Rule 26(b)(1). And those factors form the basis of a reasoned inquiry, but they remain problematic.

IV. PROBLEMS WITH THE APPLICATION

This Part describes the remarkable variability in the courts' application of the factors outlined in *Rowe*, *Zubulake*, and the revised proportionality standard in Rule 26(b)(1). Scholars examining these factors in the context of Rule 26(b)(1) have concluded that "implementing the proportionality standard will in many cases require quantifying benefits implicated by intrinsically nonquantifiable factors."[185] The factors provide judges with explicit "equitable discretion to consider normative issues" subject to the same advantages and disadvantages of other balancing tests: it allows judges to consider case-specific issues; it also involves "subjectivity and a reduction of predictability."[186] As set out below, that puts it mildly. These factors have come to serve as little more than a Rorschach test for litigants and the courts.[187]

A. The Importance of the Issues

Zubulake described the "importance of the issues at stake in the litigation" as a "critical consideration" albeit "one that will rarely be invoked."[188] After widespread debate, the 2015 revisions to the proportionality factors now suggest that the courts should consider this factor first and foremost.[189]

Examining the importance of the issues at stake in the litigation makes sense. The Sedona Conference Principles on Proportionality recognize that "nonmonetary factors should be considered."[190] Common sense suggests that resolving a contract dispute between two parties,[191] while important to the parties, is less important to society than

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185 Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1117 (2016).

186 *Id.* at 1118.

187 This Part follows the language and order of the factors set out in revised Rule 26(b)(1), with the remaining *Zubulake* factors addressed as part of the cost-benefit analysis.

188 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

189 FED. R. CIV. P. 26(g) advisory committee's note to 2015 amendment.

190 Sedona Conference, *Commentary on Proportionality in Electronic Discovery*, 18 SEDONA CONF. J. 141, 168 (2017) [hereinafter Sedona Conference, *Commentary on Proportionality*].

191 *See, e.g.*, Xpedior Creditor Tr. v. Credit Suisse First Bost. (USA), Inc., 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) ("This litigation involves a contract dispute between sophisticated commercial entities, and therefore does not raise the kind of public policy issues that might affect cost-shifting."); OpenTV v. Liberate Techs., 219 F.R.D. 474, 479 (N.D. Cal. 2003) ("This is an infringement action. While parties certainly have an interest in protecting their intellectual property rights, there is no indication that this case presents novel issues. As such, this factor is neutral.")

litigation over civil rights, health care, the environment, and other instances where the civil justice system immediately shapes the world in which we live.[192]

The problem is that there is no consensus on what should be considered public interest litigation. Judge Scheindlin suggests that some cases have the potential for broad public impact: "Cases of this ilk might include toxic tort class actions, environmental actions, so-called 'impact' or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions."[193] Judge Scheindlin does *not* include discrimination in the workplace: "Claims of discrimination are common, and while discrimination is an important problem, this litigation does not present a particularly novel issue. If I were to consider the issues in this discrimination case sufficiently important to weigh in the cost-shifting analysis, then this factor would be virtually meaningless."[194] Some courts agree with this.[195]

Some do not. In *Chen-Oster v. Goldman Sachs & Co*., a putative class action alleging gender discrimination in the workplace, Judge Francis applied the proportionality factors in Rule 26(b)(2)(C) and concluded "the importance of this litigation is not measured in dollars alone; the plaintiffs seek to vindicate the civil rights of the class members, and thus further an important public interest."[196] Judge Francis cited to the 1983 Advisory Committee Notes discussing adoption of the proportionality standard: The rule "recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved."[197] As Judge Francis notes, the very first example given by the Advisory Committee is employment litigation.[198]

So, is discrimination in the workplace an important issue for which broad discovery should be permitted? Should it depend on whether the litigants appeared before Judge Francis in the Southern District of New York or Judge Scheindlin in the Southern District of New York? Should it depend on whether the responding party invokes the proportionality standard under Rule 26(b)(1), the accessibility standard in Rule 26(b)(2)(B), or undue burden under Rule 26(c)?

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192 *See* Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *11 (D. Kan. June 18, 2020); Adam Liptak & Alicia Parlapiano, *Major Supreme Court Cases in 2015*, N.Y TIMES (June 29, 2015), http://www.nytimes.com/interactive/2015/us/major-supreme-court-cases-in-2015.html?_r=0.

193 *Zubulake I*, 217 F.R.D. at 321.

194 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 289 (S.D.N.Y. 2003).

195 Quinby v. WestLB AG, 245 F.R.D. 94, 110 (S.D.N.Y. 2006); Semsroth v. City of Wichita, 239 F.R.D. 630, 638–41 (D. Kan. 2006); OpenTV v. Liberate Techs., 219 F.R.D. 474, 479 (N.D. Cal. 2003).

196 Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 306 (S.D.N.Y. 2012); *see also* Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *4, *6 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010) ("This case involves allegations of racial discrimination by public employees. In such an instance, it is not unreasonable to permit broad discovery. . . . [P]laintiffs are pursuing issues of paramount public importance.").

197 *Chen-Oster*, 285 F.R.D. at 306.

198 FED. R. CIV. P. 26(b)(1) advisory committee's notes to 1983 & 2015 amendments.

Recent *qui tam* cases offer another example of disparate outcomes. In *United States ex rel. Carter v. Bridgepoint Education, Inc.*, discussed above, the court summarily rejected plaintiff's suggestion that a potential $2 billion recovery going to the federal treasury warranted broad discovery.[199] The court ordered plaintiff to forgo discovery of disputed backup tapes or bear its costs, and it split the costs for all future discovery whether accessible or not.[200]

In contrast, in *United States ex rel. Guardiola v. Renown Health*, the court rejected defendant's cost-shifting request related to production of email from backup tapes. "Because liability and corresponding recovery will recompense the public, this factor weighs against cost shifting."[201] The court rejected notions "that this case is simply about a transfer of wealth from one party to another. Instead, *qui tam* actions are an important means of addressing fraud claims on behalf of taxpayers and the United States. That fact imbues this case with heightened importance."[202]

One finds the same variability elsewhere. In *Hawa v. Coatesville Area School*, a federal judge sitting in Pennsylvania found a retaliation claim against a local government involved important issues that weighed against cost shifting.[203] In *Haka v. Lincoln Co.,* a federal judge sitting in Wisconsin attached no significance to plaintiff's retaliation claim against a local government, finding neither plaintiff nor the local government had a lot of money so cost-sharing was warranted.[204] In *Couch v. California*, the court omitted all reference to the importance of the issues in a retaliation claim involving allegations of prison management-condoned drug trafficking and assault. [205]

Are retaliation claims important in Pennsylvania but not Wisconsin or California? Is *qui tam* litigation important in Nevada but not California? Do employment cases or *qui tam* litigation or retaliation claims have greater "significance . . . as measured in philosophic, social, or institutional terms"[206] than anti-trust or environmental or products liability litigation? Is there any way to determine the importance of the issues at stake during the litigation? This factor, as currently stated, defies uniform

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199 United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 235 (S.D. Cal. 2015).

200 *Id.* at 242, 244, 247; s*ee also* United States *ex rel.* Garbe v. Kmart Corp., No. 12-CV-881, 2014 WL 12787823, at *4 (S.D. Ill. May 2, 2014).

201 United States *ex rel.* Guardiola v. Renown Health, No. 3:12–cv–00295, 2015 WL 5056726, at *11 (D. Nev. Aug. 25, 2015).

202 *Id.* at *8.

203 Hawa v. Coatesville Area Sch. Dist., No. 15-4828, 2017 WL 1021026, at *2 (E.D. Pa. Mar. 16, 2017).

204 Haka v. Lincoln Cnty., 246 F.R.D. 577, 578–79 (W.D. Wis. 2007).

205 Couch v Wan, No. CV08–1621, 2011 WL 2971118, at *3 (E.D. Cal. July 20, 2011); Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *4 (E.D. Cal. June 24, 2011); Second Amended Complaint at 2, Couch v. California, No. CV08–1621, 2010 WL 3708821, at ¶ 1 (E.D. Cal. July 8, 2010).

206 FED. R. CIV. P. 26(b)(1) advisory committee's note to 1983 amendment.

application. Yet, with the 2015 revisions elevating the importance of this factor, its importance has grown, and along with it the need to develop more objective measures.

B. The Amount in Controversy

What is the "amount in controversy"? This seemingly easy question begets more difficult ones. How do you objectively measure the amount in controversy early in a case? How do you meaningfully compare that amount to the total cost of production? This factor has been characterized as the most objective of the factors in the cost-shifting analysis,[207] but the courts' discussion of this factor is dominated by conclusory statements.

In some cases, there is a clear, objective measure of the amount in controversy, i.e. a dispute over a $100 million insurance policy or a settlement agreement.[208] In most other cases, estimates have become tools of advocacy and a poor measure of proportionality.

Courts routinely confront high-ball, low-ball estimates and paint broad-brush strokes from them. In *Zubulake*, the court asked the parties to estimate damages assuming a verdict for plaintiff: defendant estimated a high of $1.3 million; plaintiff estimated $19.2 million.[209] The court found it impossible to assess the accuracy of either assessment, but concluded that the case had the potential for a multi-million dollar recovery and "[w]hatever else might be said, this is not a nuisance value case, a small case or a frivolous case."[210]

Other courts end up in a similar place. In *United States ex rel. Guardiola*, plaintiffs suggested a "multimillion dollar recovery;" defendants suggested it is "impossible to analyze this factor because the amount in controversy is not certain."[211] The court was left to conclude: "this is not a nuisance value case, a small case, or a frivolous case," and "assuming this to be a multi-million-dollar case" the cost of the discovery is not disproportionate.[212]

Many litigants simply ignore the issue, leaving the court to guess. In *OpenTV v. Liberate Technologies*, the court concluded:

> While the parties failed to provide the Court with any of the necessary figures to analyze the total cost of production compared with the amount in controversy . . . the Court has no doubt that this infringement action has the

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207 Gelbach & Kobayashi, *supra* note 185, at 1096.

208 Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *3–6 (N.D. Ill. May 17, 2011); Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc., 240 F.R.D. 401, 412 (N.D. Ill. 2007).

209 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 287–88 (S.D.N.Y. 2003).

210 *Id.* at 288; *see also* United States *ex rel.* Guardiola v. Renown Health, No. 3:12–cv–00295, 2015 WL 5056726, at *10 (D. Nev. Aug. 25, 2015).

211 *United States ex rel. Guardiola*, 2015 WL 5056726, at *10.

212 *Id.*; *see also* Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 575 (N.D. Ill. 2004).

> potential for recovery in the hundreds of thousands of dollars" and "the cost of production is likely to pale in comparison.[213]

In *Semsroth v. City of Wichita*, neither party addressed plaintiffs' possible recovery, leaving the court to examine the record, and conclude "the costs of restoring and searching the e-mail back-up tape does not *seem* excessive when compared to the possible amount in controversy."[214]

Some courts just ignore the issue, discuss the cost of production without reference to the amount in controversy, and conclude that cost shifting is appropriate.[215] Other courts hold the parties' inability to determine the amount in controversy weighs in favor of cost shifting, "unknown damages cannot justify exorbitant discovery requests."[216]

In other cases, courts adopt without analysis one party's estimate of compensatory damages, without reference to other requested relief. In *Haka,* discussed *supra*, the court cited only defendant's briefs suggesting the potential recovery was less than six figures and concluded "the potential damages are low, so that the cost of engaging in the ESI search . . . is disproportionate."[217] The court omitted any reference to plaintiff's claim for injunctive relief, reinstatement to his former position, or his claim for statutory damages and attorney's fees.[218] In *Rodriquez-Torres v. Government Development Bank of Puerto Rico*, another retaliation claim, the court found $35,000 to produce ESI from active email accounts would create an undue burden.[219] In doing so, the court omitted reference to plaintiff's complaint seeking $1.4 million in damages and her request for injunctive relief, reinstatement to her former position, as well as

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213 OpenTV v. Liberate Techs., 219 F.R.D. 474, 478 (N.D. Cal. 2003).

214 Semsroth v. City of Wichita, 239 F.R.D. 630, 638 (D. Kan. 2006) (emphasis added); *see also* Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *4 (S.D.N.Y. Dec. 27, 2012) ("[Defendant] has not discussed either the amount in controversy or its own resources."); Hawa v. Coatesville Area Sch. Dist., No. 15-4828, 2017 WL 1021026, at *2 (E.D. Pa. Mar. 16, 2017); Black Love Resists in the Rust *ex rel.* Soto v. City of Buffalo, 334 F.R.D. 23, 31 (W.D.N.Y. 2019); Zeller v. S. Cent. Emergency Med. Servs., Inc., No. 13–CV–2584, 2014 WL 2094340, at *10 (M.D. Pa. May 20, 2014).

215 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341 (E.D. Pa. 2012) (citing estimated total cost of production of $579,000 without discussion of the amount in controversy other than "if, as Plaintiffs anticipate, their class action motion is granted, this case will suddenly turn from a routine case to a major financial exposure for Defendant"); Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) (citing $35,000 estimated cost of production without reference to $1.4 million demand set out in plaintiff's complaint).

216 First Niagara Risk Mgmt., Inc. v. Folino, 317 F.R.D. 23, 28 (E.D. Pa. 2016).

217 Haka v. Lincoln Cnty., 246 F.R.D. 577, 579 (W.D. Wis. 2007); *see also* Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427, at *1 (S.D.N.Y. Sept. 24, 2013) (simply concluding that "the amount in controversy is small").

218 Complaint at 12, *Haka*, 246 F.R.D. 577 (No. 06—594–c).

219 *Rodriguez-Torres*, 265 F.R.D. at 44.

attorney's fees.[220] In *Couch v. Wan*, the court concluded that the estimated cost of $54,000 to produce relevant ESI imposed a sufficient burden to warrant cost shifting, again without reference to plaintiff's request for declaratory and injunctive relief.[221] Courts will determine the value of a request for injunctive relief to decide if there is subject matter jurisdiction based on diversity, but they will ignore it when deciding cost shifting.[222]

The question remains: are these broad-brush conclusions sufficient? Should the proportionality and cost-shifting analysis depend on whether *Zubulake* was a $1.3 million case or ten times that much? Is it sufficient for the courts to find the cost of production likely to "pale in comparison?"[223] Can a court, in the midst of discovery, reasonably adopt one party's estimate or consider only one of the remedies sought? In analyzing this factor, courts end up offering cursory assessments based on litigants' highball-lowball estimates and incomplete information.

C. The Parties' Relative Access to Information

In response to public comments, the Advisory Committee added a new factor to the proportionality standard in the 2015 revisions: the analysis now considers "the parties' relative access to relevant information."[224] The Advisory Committee Notes suggest the factor is intended to address the "asymmetric distribution of information" found in some cases, which "often mean[s] that the burden of responding to discovery lies heavier on the party who has more information, and properly so."[225]

There is little case law specifically analyzing this factor, and the courts that do analyze it, do not struggle with it. In *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.*, the court that found neither party disputed that plaintiff's CEO possessed "relevant, unique information, and there appears to be no other way for Defendants to obtain this information."[226] The factor favored granting defendant's motion to compel and denying plaintiffs attempts to shift costs.[227] The court in *First Niagara Risk Management, Inc. v. Folino* adopted similar reasoning: Defendant "has

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220 Civil Cover Sheet, *Rodriguez-Torres*, 265 F.R.D. 40 (No. 09–1151). *Cf.* Disability Rts. Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 139, 148 (D.D.C. 2007) (ordering production of ESI based on importance of the issues and requested injunctive relief.).

221 Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *4 (E.D. Cal. June 24, 2011); Second Amended Complaint at 1, Couch v. California, No. CV08–1621, 2010 WL 3708821, at ¶ 8 (E.D. Cal. July 8, 2010).

222 *Compare* McCarty v. Amoco Pipeline Co., 595 F.2d 389, 3890–95 (7th Cir. 1979); Rodriguez-Torres v. Gov't Dev. Bank of Puerto Rico, 265 F.R.D. 40, 44 (D.P.R. 2010).

223 OpenTV v. Liberate Techs., 219 F.R.D. 474, 476–79 (N.D. Cal. 2003); Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *4 (S.D.N.Y. Dec. 27, 2012).

224 2014 Judicial Conference Summary Report, *supra* note 21, at Rules App. B-8.

225 *Id.* at B-40–B-41. This means recognizing that in such cases "one party must bear greater burdens in responding to discovery than the other party bears." *Id.* at B-8.

226 Oxbow Carbon & Mins. LLC v. Union P.R.R., 322 F.R.D. 1, 8 (D.D.C. 2017).

227 *Id.*

access to the information on his emails and text messages while First Niagara does not, so the third factor weights in favor of First Niagara."[228]

At the same time, this factor raises more difficult issues. Courts regularly consider the availability of the information from other sources.[229] In *Wiginton v. CB Richard Ellis, Inc.*, for example, the court held "there is reason to believe that the requested discovery would assist in resolving the issues . . . but because there is also other evidence to support Plaintiffs' claims, we find that this factor weighs slightly in favor of cost-shifting."[230]

In many respects this is a commonsense inquiry into whether the disputed cost is necessary in the first place and whether the information can be obtained more efficiently from other sources. The Sedona Conference Proportionality Principles suggest that discovery should be "obtained from the most convenient, least burdensome, and least expensive source."[231] The 2006 Advisory Committee Notes addressing inaccessible sources suggest examining "the quantity of information available from other and more easily accessed sources."[232]

This commonsense approach falters because courts interpret "availability from other resources" in very different ways. *Rowe* and *Zubulake* state the question narrowly: they ask about "availability of *such* information from other sources."[233] The discussion makes clear that they are looking for the *same document* from a more accessible source.

According to *Rowe*, courts have shifted costs "because *equivalent information* either has already been made available or is accessible in a different format."[234] *Rowe* cites to cases where the information was originally produced in hard copy and the requesting party sought the same information again in electronic form. Courts following *Rowe* and *Zubulake* do the same.[235]

Other courts ask a different question. Is the same *type* of information available from a less expensive source? In *Byers v. Illinois State Police*, the court agreed with defendants that "depositions would be a more practical method" for obtaining the

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228 First Niagara Risk Mgmt., Inc. v. Folino, 317 F.R.D. 23, 28 (E.D. Pa. 2016).

229 Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 574–75 (N.D. Ill. 2004).

230 *Id.* at 577.

231 Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 154.

232 FED. R. CIV. P. 26(b)(2)(C) advisory committee's note to the 2006 amendment.

233 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 286 (S.D.N.Y. 2003) (emphasis added); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (emphasis added); Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (emphasis added).

234 *Rowe*, 205 F.R.D. at 430 (emphasis added).

235 Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) ("The documents sought are unavailable from any other source. Although hard copies may exist of some requested information . . . the critical pricing, valuation, and customer correspondence that Xpedior has requested . . . is only available from the DLJ servers. This factor does not favor cost-shifting.").

information.[236] In *Connecticut General Life Insurance Co. v. Earl Scheib, Inc.*, the court found the costs of email discovery disproportionate, because plaintiff would receive "a significant amount of relevant financial data" from other sources and have "the opportunity to depose Defendant's employees."[237] In patent litigation, courts direct the parties elsewhere by restricting email discovery in order "to address the imbalance of benefit and burden resulting from email production."[238]

Other courts reject the idea that the requesting party should look to other documents or take depositions because they are cheaper. They find that "efficiency" comes at too high a price:

> Defendant argues that plaintiffs can more efficiently secure pertinent information concerning defendant's "practices" or "policies" through interrogatories and Rule 30(b)(6) depositions. However, defendant fails to explain how it can prepare complete interrogatory answers or Rule 30(b)(6) deposition answers without reviewing defendant's email correspondence. Moreover, documents and correspondence are powerful evidence and a party is generally entitled to review relevant documents rather than "take an opposing party's word."[239]

In rejecting claims that the same information can be obtained from cheaper sources, some courts acknowledge that "email has become the principal form of workplace communication"[240] and because it "contains the precise words used by the author" it is "a particularly powerful form of proof at trial when offered as an admission of a party opponent."[241] Litigants suggest the same for social media—

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236 Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *3 (N.D. Ill. June 3, 2002).

237 Conn. Gen. Life Ins. Co. v. Earl Scheib, Inc., No. 11–CV–0788, 2013 WL 485846, at *4 (S.D. Cal. Feb. 6, 2013); *see also* Martin v. HAPO Cmty. Credit Union, No. CV-04-5109, 2005 WL 8158778, at *3 (E.D. Wash. Sept. 6, 2005); Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *3 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010); Navajo Nation Hum. Rts. Comm'n v. San Juan Cnty., No. 16-cv-00154, 2016 WL 3079740, at *2, *4 (D. Utah May 31, 2016); Wood v. Cap. One Servs., LLC, No. 09–CV–1445, 2011 WL 2154279, at *9 (N.D.N.Y. Apr. 15, 2011).

238 *See, e.g.*, Hoist Fitness Sys. Inc. v. TuffStuff Fitness Int'l, No. EDCV 17-1388, 2019 WL 121195, at *3, *5–6 (C.D. Cal. Jan. 7, 2019) (requiring defendant to pay for the cost of production of the first 5,000 emails and shifting the remainder to plaintiff).

239 Spieker v. Quest Cherokee, LLC, No. 07–1225, 2009 WL 2168892, at *4 (D. Kan. July 21, 2009); *see also* Kipperman v. Onex Corp., 260 F.R.D. 682, 691 (N.D. Ga. May 27, 2009) ("The court believes that some of the most interesting evidence in this matter has come from e-mail production."); Hawa v. Coatesville Area Sch. Dist., No. 15-4828, 2017 WL 1021026, at *2 (E.D. Pa. Mar. 16, 2017) (rejecting responding party's argument that an investigative grand jury report provided an adequate substitute for plaintiff's conducting their own investigation).

240 United States *ex rel.* Guardiola v. Renown Health, No. 12–cv–00295, 2015 WL 5056726, at *7 (D. Nev. Aug. 25, 2015).

241 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 287 (S.D.N.Y. 2003).

deposition testimony does not replace social media discovery.[242] And courts have reached the same conclusion with regard to tangible evidence, finding that photographs don't replace inspections, even if they cost more.[243]

In cases involving information asymmetry, litigants routinely argue about a related point—the responding party has already produced a lot of information; it shouldn't have to produce more. [244] Some courts accept that argument: "In the Court's view the most important considerations are the fact that defendants have already produced tens of thousands of relevant documents"[245] or defendant "has already produced many documents in response to plaintiffs' request" and further production would be "unduly burdensome."[246] Some courts reject that logic.[247] In *Juster Acquisition Co., LLC v. North Hudson Sewerage Auth.*, for example, the court held that if the information is relevant and the request proportional, it is "irrelevant" that the responding party has already turned over 8,000 pages.[248]

This again raises the question: have they produced the "equivalent information"? Is this a question of seeking the same document from a more accessible location or the same type of information? Does production of some relevant information, excuse production of other relevant information?

D. The Parties' Resources

Analysis of the parties' resources compared to the cost of production presents similar challenges. *Rowe* notes that "the ability of each party to bear the costs of discovery may be an appropriate consideration."[249] *Zubulake* examines "the total cost

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242 *See, e.g.*, Charles W. Cohen & Ignatius A. Grande, *The New Constant–Death, Taxes, and … Social Media?*, BLOOMBERG LAW (Apr. 3, 2013), https://news.bloomberglaw.com/tech-and-telecom-law/the-new-constantsdeath-taxes-andsocial-media.

243 Guadet v. GE Indus. Servs., No. 15-795, 2016 WL 2594812, at *4 (E.D. La. May 5, 2016).

244 Linnen v. A.H. Robins Co., No. 97–2307, 1999 WL 462015, at *6 (Mass. Super. June 16, 1999); Juster Acquisition Co., LLC v. N. Hudson Sewerage Auth., LLC, No. 12–3427, 2013 WL 541972, at *2, *5 (D.N.J. Feb. 11, 2013); Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 340 (E.D. Pa. 2012); Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *1 (S.D.N.Y. Dec. 27, 2012); *In re* XPRT Ventures, LLC v. eBay, Inc., No. 10–cv–00595, 2011 WL 13142141, at *14 (D. Del. June 15, 2011).

245 Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *4 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010).

246 *Linnen*, 1999 WL 462015, at *6; *see also Fleisher*, 2012 WL 6732905, at *1; *Juster Acquisition Co., LLC*, 2013 WL 541972, at *3–6; *Boeynaems*, 285 F.R.D. at 334; Cognex Corp. v. Electro Sci. Indus., Inc., No. Civ.A. 01CV10287, 2002 WL 32309413, at *5 (D. Mass. July 2, 2002).

247 *See, e.g.*, *Linnen*, 1999 WL 462015, at *6.

248 *Juster Acquisition Co.*, 2013 WL 541972, at *3–6.

249 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 433 (S.D.N.Y. 2002).

of production, compared to the resources available to each party."[250] The accessibility factors discussed in the Advisory Committee Notes to Rule 26(b)(2)(B), and the proportionality factors now in Rule 26(b)(1) each examine "the parties' resources."[251] There is uniform agreement that the relative resources of the parties is a relevant consideration. There is no uniformity in how the courts apply this factor.

How do you define the scope of the parties' resources? The 1983 Advisory Committee Notes make clear that examination of "the parties' resources" was intended to protect the "financially weak litigant" from excessive discovery.[252] Some courts have expressly cited this factor to do so: courts have declined to shift the costs of depositions where "the financial burden on the individual plaintiff . . . were he to be required to pay defendants' expenses, could seriously thwart his ability to pursue his case."[253] Similarly, courts have shifted copying costs to the requesting party where the respondent was indigent.[254]

Rowe incorporates this focus examining "the ability of each party to *bear the costs* of discovery" noting that in some cases, the cost even if modest in absolute terms might outstrip the resources of one of the parties, justifying an allocation of those expenses to the other.[255] *Rowe* went on to examine the parties' individual resources, without reference to those of counsel, insurance companies, or other interested parties.[256]

The language in *Zubulake* is more expansive. In contrast to *Rowe*'s inquiry into the parties' ability to bear the costs, *Zubulake* examines the resources "available to each party."[257] Doing so allows consideration of the resources of the parties' law firms, insurance companies, and third-party financing:

> While Zubulake is an accomplished equities trader, she has now been unemployed for close to two years. . . . On the other hand, she asserts . . . a $19 million claim against UBS. So while UBS's resources clearly dwarf Zubulake's, she may have the financial wherewithal to cover at least some of the cost of restoration. In addition, it is not unheard of for plaintiff's firms to front huge expenses when multi-million dollar recoveries are in sight.[258]

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250 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

251 FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26(b)(2)(B) advisory committee note to 2006 amendment.

252 FED. R. CIV. P. 26(b)(2)(B) advisory committee note to 1983 amendment.

253 Stillman v. Nickel Odeon, S.A., 102 F.R.D. 286, 287 (S.D.N.Y. 1984).

254 Simms v. Ctr. for Corr. Health & Pol'y Stud., 272 F.R.D. 36, 40 (D.D.C. 2011).

255 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002) (emphasis added).

256 *Id.*

257 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 288 (S.D.N.Y. 2003).

258 *Id*. at 287–89.

Judge Scheindlin speculates as to plaintiff's ability to finance the litigation, as well as the resources of plaintiff's counsel, but gives this information limited weight finding "this factor weighs against cost shifting, it does not rule it out."[259]

Some courts follow this example by considering the resources of the requesting party's counsel but assigning it limited weight.[260] Some have considered the resources of the requesting party's counsel and declined to shift costs.[261] Others, however, assign this factor great weight. In *Boeynaems*, the court found:

> Plaintiffs are represented by [a] very successful and well regarded Philadelphia firm . . . which has had outstanding successes for many years in prosecuting class actions, winning hundreds of millions of dollars for their clients, and undoubtedly and deservedly, substantial fees for themselves. If the . . . firm believes that this case is meritorious, it has the financial ability to make the investment in discovery, to the extent the Court finds that cost sharing is otherwise appropriate.[262]

Others refuse to consider the resources of counsel altogether. In *Fleisher v. Phoenix Life Insurance Co.*, the court noted:

> [The defendant] alluded in general terms to the resources of the plaintiffs or, more precisely, the resources of their counsel. However, it is far from clear why the resources of counsel should be taken into consideration. Certainly, Phoenix has not suggested that the wherewithal of the law firms that it has engaged should be weighed in the balance. More importantly, if the assets of counsel were to be taken into consideration, the ability of clients to engage an attorney of their choice would likely be hampered. [263]

On the whole, there is asymmetrical application of this factor. Courts either consider the resources of the plaintiff's law firm or those of the parties alone. None have considered the resources of the responding parties' counsel or an interested third party.

Regardless of whose resources the courts consider, valuation remains a problem. Conclusory statements are again common, and courts vary in deciding how much further to go. What sort of objective financial data should the courts require? Should the analysis require more than generalities?

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259 *Id.*

260 *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 574–77 (N.D. Ill. 2004); Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459, 465–67 (S.D.N.Y. 2003).

261 Hallmark v. Cohen & Slamowitz, LLP, No. 11-CV-842, 2016 WL 1128494, at *15–18 (W.D.N.Y. Mar. 23, 2016).

262 Boeynaems v. LA Fitness Int'l , LLC, 285 F.R.D. 331, 335 (E.D. Pa. 2012).

263 Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *4 (S.D.N.Y. Dec. 27, 2012) (internal citations omitted).

Litigants commonly argue about resources in generalities, and some courts reject them.[264] Many do not: In *Open TV v. Liberate Technologies*, plaintiffs made "conclusory statements" that the cost of production is small compared to the resources of the parties, and the court simply found "no reason . . . to believe that either party has a lack of resources in the case."[265] In *Medtronic Sofamor Danek, Inc. v. Michelson*, the defendant simply argued plaintiff was "a large profitable company," without providing any comparison of his own worth or income. The court was left to surmise "[b]ased on the voluminous pleadings in the court" that both parties have spent a lot on legal services and must be able to bear the cost.[266] In *Semsroth v. City of Wichita*, the court observed:

> The parties . . . failed to present any evidence as to the relative financial position of the parties, but the court can properly assume that the four Plaintiffs have significantly less financial capability to pay these costs than does the City. However . . . the City's ability to shoulder significant discovery costs is not comparable to the investment banking organizations in both *Zubulake* and *Quinby*[.][267]

Other courts go into greater detail. In cases involving individual litigants and small businesses, courts have considered affidavits describing the litigants' living circumstances and expenses and the businesses' profits, losses, and debt loads.[268] With publicly traded companies, they examine annual reports, financial statements, and SEC filings to determine assets and net revenue.[269] In *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, the court reviewed the requesting party's annual reports, annual sales, loss, and equity information and compared that with evidence suggesting the responding party had "few, if any, liquid assets," with "this factor favoring cost-shifting."[270] In *Xpedior Creditor Trust v. Credit Suisse First Boston*, the court examined SEC filings to review defendant's *net* revenues with those of plaintiffs,

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264 *See, e.g.*, Almont Ambulatory Surgery Ctr. LLC., v. UnitedHealth Grp., Inc., No. CV 14-03053, 2018 WL 5816108, at *6 (C.D. Cal. Apr. 25, 2018); Escamilla v. SMS Holdings Corp., No. 09-2120, 2011 WL 5025254, at *5 (D. Minn. Oct. 21, 2011).

265 OpenTV v. Liberate Techs., 219 F.R.D. 474, 478 (N.D. Cal. 2003).

266 Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 558 (W.D. Tenn. 2003).

267 Semsroth v. City of Wichita, 239 F.R.D. 630, 639 (D. Kan. 2006).

268 *See, e.g.*, Bailey v. Brookdale Univ. Hosp. Med. Ctr., No. CV 16-2195, 2017 WL 2616957, at *2 (E.D.N.Y. June 16, 2017); Symons Int'l Grp., Inc. v. Cont'l Cas. Co., No. 01cv-00799, 2015 WL 4392933, at *6 (S.D. Ind. July 15, 2015).

269 Quinby v. WestLB AG, 245 F.R.D. 94, 110 (S.D.N.Y. 2006); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 575–76 (N.D. Ill. 2004); Decision and Order at 7, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004) (No. 97-C-635); Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003).

270 Decision and Order at 7, *Hagemeyer N. Am., Inc.*, 222 F.R.D. 594 (No. 97-C-635).

to find defendant's assets "clearly dwarf" plaintiff's, which weighed against cost shifting.[271]

In each of these cases, the question remains: what do you do with the numbers? Courts look for a large disparity in resources, and, absent that, decline to utilize this factor to shift the presumption that the responding party pays. In cases where business entities' resources are more evenly matched, there is little discussion of those resources and the courts hold this factor neutral.[272]

The more difficult question arises where both parties have limited resources. Is that neutral or does that favor cost shifting? In *Haka*, discussed above, plaintiff was unemployed after the defendant county government terminated him and argued that he did not have the resources to search the defendant's ESI. The court found that the local county government had limited resources as well and split the costs 50/50.[273]

Examining the parties' resources, like other factors, presents judgment calls. Whose resources do you consider, how do you value them, and what do you do with that information? This factor, like others, raises more questions than it answers.

E. The Importance of the Discovery

The next factor, the importance of the discovery, raises additional questions. As discussed above, courts inquire whether the information sought is available from other sources. They reasonably ask, will the discovery uncover relevant information? Does it go to the heart of the matter? Courts, however, answer these questions applying very different standards.

In evaluating the importance of the discovery in dispute, litigants and the courts usually don't know if the information contained in the disputed source is important. In *Kipperman v. Onex Corporation*, the responding party sought to preclude discovery of backup tapes or shift its costs because "we don't know whether there is . . . a single e-mail in any way related to this case . . . what we have is a pig in a poke."[274]

Some courts take this uncertainty as a reason to shift costs—there is no proof the discovery will produce important information; some courts take this as a reason not to shift costs—there is no proof it will not. In *Johnson v. Neiman*, the court found "it most significant that the plaintiff has no idea what, if any, discoverable information may be obtained by cataloging, restoring, and searching the . . . e-mails that are stored on the backup tapes."[275] In *Major Tours, Inc. v. Colorel*, the court found: "Plaintiffs

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271 *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 466; *see also Wiginton*, 229 F.R.D. at 576.

272 Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *4 (N.D. Ill. May 17, 2011); PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 05-CV-657, 2007 WL 2687670, at *11 (N.D.N.Y. Sept. 7, 2007).

273 Haka v. Lincoln Cnty., 246 F.R.D. 577, 579 (W.D. Wis. 2007).

274 Kipperman v. Onex Corp., 260 F.R.D. 682, 689–90 (N.D. Ga. 2009) (requiring the responding party search a sample of two tapes, resulting in production of thousands of relevant documents); *see also* Cargill Meat Sols. Corp. v. Premium Beef Feeders, LLC, No. 13-CV-1168, 2015 WL 3937410, at *4 (D. Kan. June 26, 2015) (asserting, without offering proof, that the importance of the discovery was minimal and would "add nothing").

275 Johnson v. Neiman, No. 09CV00689, 2010 WL 4065368, at *2 (E.D. Mo. Oct. 18, 2010); *see also* Elkharwily v. Franciscan Health Sys., No. 15-cv-05579, 2016 WL 4061575, at *3 (W.D. Wash. July 29, 2016); Gen. Elec. Co. v. Wilkins, No. 10-cv-00674, 2012 WL 570048, at

have not produced evidence that the backup or archived e-mails contain relevant information that is not otherwise available or cumulative of other evidence. There is, of course, a possibility that some of the requested e-mails contain 'smoking gun' information. However, this is pure conjecture."[276] This supported cost shifting.

Compare these findings with the decision in *Juster Acquisition Co. v. North Hudson Sewerage Authority*:

> [U]ntil NHSA actually runs the requested searches, neither NHSA nor anybody else can know whether the ESI word searches will turn up information that would have been available from any other source. . . . NHSA fails to show how it would be unreasonably cumulative or duplicative to perform the requested ESI discovery. As such, the Court is not compelled to impose such a limitation on plaintiff's requested ESI discovery.[277]

The court in *Semsroth* similarly noted that Defendant had not attempted to view any the email on the back-up tapes, despite having restored them, such that "Defendants, like Plaintiffs, are merely speculating about the results of any e-mail search."[278] Courts deal with uncertainty about unsearched sources very differently.

In analyzing the importance of the discovery, courts are consistent in asking, do the requests go to the heart of the matter? The standard for determining the substantive relevancy of the requests, however, varies. Should it matter if the discovery relates to class certification as opposed to merits discovery? In *Boeynaems* it did: the court held that "[w]here the burden of discovery expense is almost entirely on the defendant, *principally because the plaintiffs seek class certification*, then the plaintiffs should share the costs."[279] Other courts handling putative class actions have made no distinction between cost shifting for discovery relating to certification as opposed to merits discovery.[280]

Some courts addressing individual claims have rejected *Boeynaems* because it addressed discovery related to class certification.[281] In these cases, a more general

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*6 (E.D. Cal. Feb. 21, 2012); *Haka*, 246 F.R.D. at 578–79; Helmert v. Butterball, LLC, No. 08CV00342, 2010 WL 2179180, at *9 (E.D. Ark. May 27, 2010).

276 Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *3 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010).

277 Juster Acquisition Co. v. N. Hudson Sewerage Auth, No. 12-3427, 2013 WL 541972, at *5 (D.N.J. Feb. 11, 2013).

278 Semsroth v. City of Wichita, 239 F.R.D. 630, 638–41 (D. Kan. 2006).

279 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341 (E.D. Pa. 2012); *see also* Wood v. Cap. One Servs., LLC, No. 09-CV-1445, 2011 WL 2154279 at *1 (N.D.N.Y. Apr. 15, 2011); Schweinfurth v. Motorola, Inc., No. 05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008).

280 *See, e.g.*, Sung Gon Kang v. Credit Bureau Connection, Inc., No. 18-cv-01359, 2020 WL 1689708 (E.D. Cal. Apr. 7, 2020); Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459 (S.D.N.Y. 2003).

281 Cochran v. Caldera Med., Inc., No. 12-5109, 2014 WL 1608664, at *3 n.3 (E.D. Pa. Apr. 22, 2014).

question remains: do the requests seek core or marginally relevant information? It is not uncommon for parties to seek cost shifting right out of the starting gate. Litigants routinely seek to shift the cost of responding to first requests for production of information directly relevant to the action. *Rowe* dealt with a first request for production of documents seeking, e.g., internal communications relating to selection of concert promoters where plaintiffs claimed discrimination on the basis of race.[282] The *Zubulake* opinions dealt with plaintiff's first request for production of documents relating to "communication by or between UBS employees concerning Plaintiff," where plaintiff alleged gender-based discrimination.[283] Both courts shifted costs associated with these requests.[284] Other courts have rejected cost shifting for first requests, specifically noting that "defendant has produced *no* discovery to date."[285]

In some instances, courts analyze specific categories of documents and label them "critical," of "grave importance," or "very important" and this weighs against cost shifting.[286] In *United States ex rel. Carter v. Bridgepoint Education, Inc.*, the court distinguished between "important" discovery and marginally relevant discovery.[287] In adjudicating an alleged violation of the ban on compensating university recruiters based on enrollment, the court ordered production, without cost shifting, of the restoration of the tape that provided access to email between recruiters and their supervisors and managers.[288] It declined to order production of email *between* recruiters.[289]

Yet, other courts shift the cost of discovery going to the heart of the dispute. The class in *Boeynaems* alleged deceptive practices regarding termination of a health club membership, and the court held that Plaintiffs must pay 100% of the cost of producing "[c]orporate documents stating Defendant's practices and policies applicable to . . . cancellation of memberships."[290] In *Multitechnology Services, L.P. v. Verizon Southwest*, the dispute centered on defendant's refusal to pay access fees for customers utilizing plaintiff's phone network. Plaintiff propounded discovery that required searching defendant's database to confirm who those customers were, in order to determine the scope of the dispute and the amount of damages, yet the court shifted

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282 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 424 (S.D.N.Y. 2002).

283 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 312 (S.D.N.Y. 2003).

284 *Id.*; *see also Cochran*, 2014 WL 1608664, at *1; Quinby v. WestLB AG, 245 F.R.D. 94, 111 (S.D.N.Y. 2006); *Rowe*, 205 F.R.D. at 433.

285 *Cochran*, 2014 WL 1608664, at *3 n.3 (emphasis added).

286 *Id.*; First Niagara Risk Mgmt., Inc. v. Folino, 317 F.R.D. 23, 28 (E.D. Pa. 2016); Unknown Parties v. Johnson, No. CV-15-00250, 2017 WL 7520603, at *7 (D. Ariz. Dec. 19, 2017).

287 United States *ex. rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 246–47 (S.D. Cal. 2015).

288 *Id.* at 242.

289 *Id.*

290 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 342 (E.D. Pa. 2012).

half of the costs of the production.[291] In these cases, courts identify discovery of specific categories of highly relevant information, yet order cost shifting.

There is, once again, tremendous variability among the courts. In analyzing the importance of the discovery in the dispute, some courts penalize litigants for not knowing what is on unsearched sources of ESI; some do not. Some courts apply cost shifting to requests for production seeking core discovery; some do not. Some courts examine whether there is equivalent information more readily accessible; some require only the same type of information from cheaper forms of discovery such as depositions.

F. Whether the Burden Outweighs the Benefit

Most cases ultimately engage in a cost-benefit analysis. Yet, measuring costs remains problematic. Courts vary widely in their analysis of the "total cost of production." Some courts consider the cost of the initial request; other courts consider the cost of the request as modified after the parties meet and confer. Some courts consider only the cost of producing the disputed discovery. Other courts consider the total cost of the production to date. When examining the disputed discovery, some courts consider only the cost of restoring and searching the data; others consider all costs, including the cost of attorney review for responsiveness and privilege. In all cases, there are valuation problems: the estimates are tools of advocacy.

1. Cost of Production – Estimates as Advocacy

Whether one includes the total cost of discovery or only the cost of the disputed discovery, whether one includes the cost of restoration and searching or the total cost of production, courts are confronted with responding parties who have an incentive to inflate costs to show burden and requesting parties with an incentive to do the opposite. And both do so with abandon.

In *Rowe*, one defendant estimated the cost of cataloguing, restoring, and processing eight backup tapes at $400,000; plaintiffs estimated the same defendant could produce responsive information for as little as $24,000.[292] Another *Rowe* defendant estimated a cost of $403,000 to produce ESI responsive to plaintiffs' first request for production.[293] Plaintiffs' expert estimated they could produce the same ESI for approximately $64,000.[294]

In *Wiginton v. CB Richard Ellis, Inc.*, defendants estimated a cost of production in the "millions of dollars." Plaintiffs estimated as low as $183,500.[295] In *PSEG Power New York, Inc. v. Alberici Constructors, Inc.*, defendant estimated a cost of $206,000

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291 Multitechnology Servs., L.P. v. Verizon Sw., No. Civ.A. 4:02-CV-702, 2004 WL 1553480, at *1–2 (N.D. Tex. July 12, 2004); Multitechnology Servs., L.P. v. Verizon Sw., No. 4:02-CV-702, 2004 WL 594112, at *1 (N.D. Tex. Mar. 8, 2004).

292 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 425, 427 (S.D.N.Y. 2002).

293 *Id.* at 426.

294 *Id.* at 427–28.

295 Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 575 (N.D. Ill. 2004).

to reproduce its emails. Plaintiff estimated $37,500.[296] In *Escamilla v. SMS Holdings Co.*, defendant estimated that restoration and searching of relevant backup tapes would cost $36 million.[297] Plaintiff's expert estimated one to two percent of that total.[298]

Litigants estimate costs based on unrealistic assumptions like assuming "every document on the existing database comes up with search terms,"[299] or estimating costs for "all of its offices nationwide . . . ignoring the fact that discovery has been limited to only a small fraction of the 125 offices,"[300] or estimating $1.2 – $3.6 million to search all of defendant's servers rather than searching the email of a few key custodians,[301] or assuming it will take six times longer to complete quality assurance than it takes to complete the underlying task.[302]

In *Boeynaems*, when defendant objected to production of records from a database containing records of member inquiries and complaints, it estimated a cost to produce of $360,000.[303] The court found, without analysis, that this represented "a very elaborate and expensive undertaking."[304] The briefs showed that it required querying a Microsoft SQL database.[305] In a more recent example, the responding party estimated as much as 300 employee hours to pull individual wage statements for employees from a commercial payroll software. [306] The requesting party estimated three hours if one used the software's administrative functions to batch export the

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296 PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 05-CV-657, 2007 WL 2687670, at *3 (N.D.N.Y. Sept. 7, 2007).

297 Escamilla v. SMS Holdings Corp., No. 09-2120, 2011 WL 5025254, at *8 (D. Minn. Oct. 21, 2011).

298 *Id.* at *9; *see also* Haka v. Lincoln Cnty., 246 F.R.D. 577, 578–79 (W.D. Wis. 2007) (defendant estimated a cost of $49,000 to produce email contained on two hard drives; Plaintiff estimated $27,000).

299 Universal Del., Inc. v. Comdata Corp., No. 07-1078, 2010 WL 1381225, at *7 (E.D. Pa. Mar. 31, 2010).

300 Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 575 (N.D. Ill. 2004).

301 Hock Foods, Inc. v. William Blair & Co., No. 09-2588, 2011 WL 884446, at *9 (D. Kan. Mar. 11, 2011).

302 Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 306–07 (S.D.N.Y. Sept. 10, 2012).

303 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 340 (E.D. Pa. 2012).

304 *Id.*

305 Defendant's Estimate of the Cost to Comply with the Discovery Plaintiffs Propose at 3, Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331 (E.D. Pa. 2012) (No. 10-CV-2326), ECF No. 58; Transcript of Ben Deposition at 18, *Boeynaems*, 285 F.R.D. 331 (No. 10-CV-2326), ECF No. 58-1.

306 Brum v. MarketSource, Inc., No. 17-CV-241, 2018 WL 3861558, at *5 (E.D. Cal. Aug. 14, 2018); Further Joint Statement Re Discovery Disagreement in Support of Plaintiffs' Motion to Compel Defendant to Serve Responses to Plaintiffs' Special Interrogatories and Requests for Production, Set One at 16, *Brum*, 2018 WL 3861558 (No. 17-CV-241), ECF No. 46 [hereinafter Joint Statement on Discovery Disagreement].

statements.[307] In another recent case, defendant estimated a cost of $3.125 million to produce relevant information from a database of consumer credit files.[308] It assumed eight hours to review each file.[309] The court noted the record contained an alternative estimate of two minutes per file, which would reduce the cost of review to $12,500.25.[310]

For decades, courts have stated that "the expense and burden to the responding party should not only be balanced against the relative expense and burden to the requesting party, but such should be scrutinized for possible excessiveness."[311] At this point, if the courts inquire, they routinely find cost estimates are "greatly exaggerated"[312] or "overblown."[313] The problem is that courts often do not make the inquiry.[314]

2. Cost of Production – Who Does What Work?

Some courts recognize that the cost of the discovery is, in large part, driven by the choice of vendor. *Zubulake* was one of the first, finding that UBS had complete control over selection of the vendor and noting the possibility that a less-expensive vendor could have been found.[315] In *Wiginton* and *Clean Harbors*, the courts again found that the ability to control costs "pivots around the selection of the vendor."[316]

Nowhere is the significance of that choice more apparent than in the small value cases where litigants choose high-dollar vendors and then claim undue burden. In *Haka*, discussed above, the defendant argued it would cost $60,000 to search and produce email and other routine ESI from two hard drives. [317] Defendant valued the case at less than six figures, and the court found "fairness and efficiency" required the parties to split the cost. In shifting costs, the court noted defendant's estimates, but not

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307 Joint Statement on Discovery Disagreement *supra* note 306, at 8, 10.

308 Sung Gon Kang v. Credit Bureau Connection, Inc., No. 18-CV-01359, 2020 WL 1689708, at *3 (E.D. Cal. Apr. 7, 2020).

309 *Id.*

310 *Id.* at *6 n.7.

311 Bills v. Kennecott Corp., 108 F.R.D. 459, 463 (D. Utah 1985).

312 Spieker v. Quest Cherokee, LLC, No. 07-1225, 2009 WL 2168892, at *3–4 (D. Kan. July 21, 2009).

313 Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 307 (S.D.N.Y. 2012).

314 *See supra* notes 296–98 and accompanying text.

315 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 288 (S.D.N.Y. 2003).

316 Clean Harbors Env't Servs. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *5; Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 576 (N.D. Ill. 2004).

317 Affidavit of Saul C. Glazer in Support of Defendants' Motion for Protective Order and in Opposition to Plaintiff's Motion to Compel at 4, Haka v. Lincoln Cnty., 246 F.R.D. 577 (W.D. Wis. 2007) (No. 06-CV-0594-C), ECF No. 42 [hereinafter Glazer Affidavit]; *see also Haka*, 246 F.R.D. at 578.

the specifics.[318] The county government defendant proposed outsourcing the search to a multi-national vendor, with the largest portion of the costs relating to creating TIFF images and a load file for all documents returned in the keyword search.[319] Plaintiff estimated half the cost, $27,000.[320]

In *Connecticut General Life Insurance Co. v. Earl Scheib, Inc.*, plaintiffs sought $120,000 in damages.[321] Defendant estimated the cost of production at around $121,000.[322] Defendant argued that discovery from nineteen email PST files for nineteen custodians was unduly burdensome and should be precluded or the costs shifted.[323] The court agreed and precluded discovery unless plaintiff agreed to "absorb the incredible expense" associated with the requests.[324] Defendant's estimate came from a multi-national eDiscovery vendor, with separate charges for collection, processing, hosting, and other fees, including creating TIFF images of all documents to be reviewed.[325]

In *Couch v. Wan*, the California Attorney General's Office found it did not have the resources available to search 140 gigabytes of active data previously collected from sixteen hard drives.[326] It would need to hire a vendor, at an estimated cost of

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318 *Haka*, 246 F.R.D. at 578–79.

319 *Id.* at 578.

320 *Id.* at 579; Defendants' Brief in Opposition to Plaintiff's Motion to Compel Production of Documents and to Compel Search of Backup Tape Drive at 11, *Haka*, 246 F.R.D. 577 (No. 06-CV-00594), ECF No. 41 [hereinafter *Haka* Protective Order]. The Sedona Conference Glossary defines TIFF images as: "A widely used and supported graphic file format for storing bit-mapped images, with many different compression formats and resolutions." A load file "relates to a set of scanned images or electronically processed files, and that indicates where individual pages or files belong together as documents, to include attachments, and where each document begins and ends. A load file may also contain data relevant to the individual documents, such as selected metadata, coded data, and extracted text. *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Ed.,* 21 SEDONA CONF. J. 263, 332, 377–78 (2020).

321 Conn. Gen. Life Ins. Co. v. Earl Scheib, Inc., No. 11-CV-0788, 2013 WL 485846, at *1 (S.D. Cal. Feb. 6, 2013); Complaint for Breach of Contract; Quantum Meruit; Unjust Enrichment at 8, *Conn. Gen. Life Ins. Co.*, 2013 WL 485846 (No. 11-CV-0788).

322 *Conn. Gen. Life Ins. Co.*, 2013 WL 485846, at *1; Declaration of Saeid Ahmadian in Support of Supplemental Brief Regarding Cost of E-Mail Production at 8, *Conn. Gen. Life Ins. Co.*, 2013 WL 485846 (No. ll-CV-0788), ECF No. 41-1 [hereinafter Ahmadian Declaration].

323 *Conn. Gen. Life Ins. Co.*, 2013 WL 485846, at *1. The Sedona Conference Glossary defines a PST file as "[a] Microsoft Outlook email storage file containing archived email messages in a compressed format. *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Ed.,* 21 SEDONA CONF. J. 263, 357 (2020).

324 *Conn. Gen. Life Ins. Co.*, 2013 WL 485846, at *4.

325 Ahmadian Declaration, *supra* note 322, at 6.

326 Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *4 (E.D. Cal. June 24, 2011).

$54,000,[327] based on an estimated "industry rate of $275 per hour."[328] The court concluded, as a result, that Plaintiffs' discovery requests warranted cost shifting.[329] Compare these responses with *Semsroth v. City of Wichita*, where plaintiffs sought production of email from 117 email accounts from a back-up tape.[330] Defendant proposed to restore the tape in-house using its Exchange server and sought to shift the costs of keyword searching the 117 restored PST files either manually or by purchasing an off-the-shelf product to search them.[331] Defendant estimated the cost of the former at $1,950 and the latter at $2,624.95, and the costs associated with restoring and searching the email in-house at $50 an hour.[332]

So, the cost is either $275 an hour or $50 an hour, depending. Email can be searched in-house for $2,000 or with a vendor for $121,000, depending. Should proportionality and cost-shifting determinations depend on which government agency plaintiff sues, and how technologically savvy its attorneys are? Does it pay to just throw up your hands and hire the most expensive vendor you can find if you are filing a proportionality or cost-shifting motion? The standard for discovery is reasonableness, not perfection.[333] The exception comes when parties are choosing a means to produce ESI in the context of a cost-shifting or proportionality motion.

3. Cost of Production – Choice of Process

Principle 6 of the Sedona Conference's *Best Practices Commentary on the Use of Search and Information Retrieval Methods in E–Discovery* states unequivocally that the "[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information."[334] And the courts generally find that the party in possession of the data is best able to control the costs of discovery.[335] But if a responding party seeks

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327 *Id.* at *3–4.

328 Declaration of Sean Cotulla in Support of Motion to Modify Subpoenas at 2, *Couch*, 2011 WL 2551546 (No. 08-CV-1621).

329 *Couch*, 2011 WL 2551546, at *4.

330 Semsroth v. City of Wichita, 239 F.R.D. 630, 632 (D. Kan. 2006).

331 *Id.* at 632–33.

332 *Id.* at 633.

333 Agerbrink v. Model Serv. LLC, No. 14 Civ. 7841, 2017 WL 933095, at *5 (S.D.N.Y. Mar. 8, 2017) ("The standard for evaluating discovery is reasonableness, not perfection."); Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012) ("[T]he Federal Rules of Civil Procedure do not require perfection.").

334 *See* Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E–Discovery*, 8 SEDONA CONF. J. 189, 193 (2007).

335 *See, e.g.*, OpenTV v. Liberate Techs., 219 F.R.D. 474, 478–79 (N.D. Cal. 2003); Illiana Surgery & Med. Ctr. LLC v. Hartford Fire Ins. Co., No. 07 CV 3, 2014 WL 1094455, at *14 (N.D. Ind. Mar. 19, 2014).

to have the court preclude or shift the costs of discovery, should that presumption change?

The issue shows up repeatedly in the case law with courts rubber-stamping the producing party's form of production. In many cases, where litigants oppose discovery on the grounds of undue burden, significant costs arise from protocols that require production of static images of each electronic file produced.

Producing parties commonly prefer to produce ESI as static images, usually TIFF or PDF images, instead of in their native format because static images facilitate control over the information.[336] Static images readily permit bates stamping, redaction, and marking documents confidential.[337] But that control comes at a cost. According to some, converting ESI from its native form "injects needless expense."[338]

One defendant in *Rowe* estimated it would cost $403,000 to produce ESI responsive to plaintiffs' request.[339] Of that amount, $126,000 was attributable to the cost of creating TIFF images.[340] Of the $121,183.65 that defendant estimated in *Connecticut General Life Insurance Co.*, $54,120 of "the incredible expense" that the court shifted to plaintiff was attributable to TIFF conversion and "image endorsing."[341] In *Haka*, of the defendant's $60,000 estimated cost, the largest portion of the costs, $27,000, related to creating the TIFF images and a load file for all documents returned in the keyword search. [342] In *Spieker v. Quest Cherokee, LLC*, creating TIFF images added $38,000 to the $82,500 charged by defendant's vendor to process the requested email.[343] In *United States ex rel. Carter v. Bridgepoint Education, Inc.*, creating TIFF

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336 The Sedona Conference defines "native format" as an electronic document with its "associated file structure defined by the original creating application. *The Sedona Conference Glossary: eDiscovery & Digital Information Management, Fifth Ed.,* 21 SEDONA CONF. J. 263, 340 (2020). *See supra* note 320 defining TIFF images.

337 United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 246–47 (S.D. Cal. 2015); *see also* CRAIG BALL, LAWYER'S GUIDE TO PRODUCTION 21 (2014), http://www.craigball.com/Lawyers%20Guide%20to%20Forms%20of%20Production_Ver.20140512_TX.pdf.

338 BALL, *supra* note 337, at 28 (explaining that converting native files to static images requires (1) retaining a vendor to convert and emboss Bates stamps (2) generating load files containing extracted text and metadata from the native ESI; (3) producing multiple copies of spreadsheets and other file types that are difficult to image; (4) paying vendors more to ingest and host the images and load files because they are larger in size than the native files); *see also, e.g.*, Thorton v. Morgan Stanley, LLC, No. 12-CV-298, 2013 WL 1890706, at *1 (N.D. Okla. May 3, 2013) ("Defendants estimated $91,337 to produce ESI, $37,399 less if it produced native files.").

339 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 426 (S.D.N.Y. 2002).

340 *Id.*

341 Conn. Gen. Life Ins. Co. v. Earl Scheib, Inc., No. 11-CV-0788, 2013 WL 485846, at *4 (S.D. Cal. Feb. 6, 2013); Ahmadian Declaration, *supra* note 322, at 6.

342 Haka v. Lincoln Cnty., 246 F.R.D. 577, 578 (W.D. Wis. 2007).

343 Spieker v. Quest Cherokee, LLC, No. 07-1225, 2009 WL 2168892, at *2 (D. Kan. July 21, 2009).

images increased the cost of production from $83,700 to $358,209, depending on the number of backup tapes restored. [344]

If creating static images can add $358,209 in *United States ex rel. Carter* and double the cost of production in *Haka* or *Connecticut General Life Insurance Co.*, is there undue burden or undue cost shifting? Courts have found producing TIFF images a "reasonable" form of production,[345] but, for most commonly used productivity software, there are also well-established, alternative protocols for production of ESI in native file format.[346]

There are choices along the way, of which form of production is but one. In one case study on collecting mobile ESI, an expert estimated the cost of collection from the mobile devices used by fifty-three sales representatives ranged from $30,000 to $60,000, depending on whether the party engaged local forensic examiners or not.[347] In the alternative, the parties could utilize free, off-the-shelf tools to collect the most commonly used files from mobile devices in-house and save $30,000 to $60,000.[348] In another case, the court gave the parties a choice: split the $20,000 costs for defendant to purchase forensic software to view forensic images obtained by plaintiff, or plaintiff could set up a work station, with the necessary software, and allow defendant to review the information on-site.[349] There are usually choices to make between collecting the main sources of information and collecting it all; between an expensive process and one that requires more cooperation.

Courts have long held that needless costs should not be part of a proportionality or cost-shifting analysis. In 1986, *Delozier v. First National Bank of Gatlinburg* stated plainly that "[a] court will not shift the burden of discovery . . . where the costliness of the discovery procedure involved is entirely a product of the defendant's record-keeping scheme over which the plaintiff has no control."[350] While the court in *Delozier* addressed the burdens of production from microfilm, the same rationale applies to ESI.

In short, the courts do not consistently evaluate the estimates provided and the work proposed. The question remains, should a party be able to utilize a high-cost process, and then claim "extraordinary cost" and undue burden in responding to the requested discovery?

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344 United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 229, 244 (S.D. Cal. 2015); *see also* Haka v. Lincoln Cnty., 246 F.R.D. 577, 578–79 (W.D. Wis. 2007); *Haka* Protective Order, *supra* note 320, at 11.

345 *Bridgepoint Educ., Inc.*, 305 F.R.D. at 244.

346 BALL, *supra* note 337, at App. 2.

347 Craig Ball, *Custodian-Directed Preservation of iPhone Content*, http://www.craigball.com/mobile_preservation_method_FINAL.pdf 3–4 (last visited Feb. 21, 2019).

348 *Id.*

349 Robotic Parking Sys., Inc. v. City of Hoboken, No. 06-3419, 2010 WL 324524, at *10 (D.N.J. Jan. 19, 2010).

350 Delozier v. First Nat'l Bank of Gatlinburg, 109 F.R.D. 161, 164 (E.D. Tenn. 1986).

4. Cost of Production – The Costs of Review

Nowhere is this inconsistency more evident than in disputes regarding the cost of review. In many cases, burden is defined by review.[351] In *Rowe*, one defendant estimated costs between $40,000–$80,000 to produce the requested email, and an estimated cost of $247,000 to then review for privilege and work-product.[352] In *Zubulake*, the defendant estimated costs of $165,000 to search for and restore responsive information, with an additional expense of $107,000 for attorney and paralegal review costs.[353]

The discrepancy is often greater. In *Shevlin v. Phoenix Life Insurance Co.*, the responding party estimated $3,000 – $4,500 to search for and retrieve ESI, and $250,000 – $300,000 to review it.[354] In *Medtronic Sofamor Danek, Inc. v. Michelson*, the responding party estimated $605,000 to restore ESI, and $16.5 – $70 million to review it.[355] In *General Electric Co. v. Wilkins*, the responding party estimated $2.1 million to restore, and $16 – $24 million to review.[356] More recently, in *United States ex rel. Carter*, defendant estimated the cost of restoration and indexing at $263,000, and the cost of attorney review at $1.4 million.[357] Adding the cost of review can multiply the cost 100 times and increase it by millions of dollars.[358] Should that cost shift?

In *Zubulake*, Judge Scheindlin held that "where cost-shifting is appropriate, only the costs of restoration and searching should be shifted,"[359] but "the responding party should *always* bear the cost of reviewing and producing electronic data once it has

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351 PACE & ZAKARAS, *supra* note 28, at 41.

352 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 425 (S.D.N.Y. 2002).

353 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 283 (S.D.N.Y. 2003).

354 Shevlin v. Phoenix Life Ins. Co., No. 09-6323, 2012 WL 1981793, at *1 (D.N.J. June 1, 2012).

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

356 Gen. Elec. Co. v. Wilkins, No. 10-CV-00674, 2012 WL 570048, at *5 (E.D. Cal. Feb. 21, 2012).

357 Declaration of Michael Marks in Support of Defendant's Supplemental Brief re Production of Documents from Backup Tapes at 9, United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225 (S.D. Cal. 2015) (No. 3:10-cv-01401), ECF No. 68-1[hereinafter Marks Declaration]; *United States ex rel. Carter*, 305 F.R.D. at 229, 244.

358 In *Johnson v. Charps Welding & Fabricating, Inc.*, the court assumed adding the cost of review would add $91.6 million to the cost of producing 6.7 million documents. Johnson v. Charps Welding & Fabricating, Inc., No. 14-cv-2081, 2017 WL 9516243, at *8 n.11 (D. Minn. Mar. 3, 2017).

359 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 290 (S.D.N.Y. 2003). Judge Scheindlin further explained: "Restoration . . . is the act of making inaccessible material accessible. That 'special purpose' or 'extraordinary step' should be the subject of cost-shifting. Search costs should also be shifted because they are so intertwined with the restoration process." *Id*.

been converted to an accessible form."[360] She offered two reasons: the responding party "unilaterally decides on the review protocol," and "has the exclusive ability to control the cost of reviewing the documents" by deciding who does the review.[361] Some courts, including *Rowe*, have implemented protocols eliminating attorney review prior to production, or, in the alternative, if the producing party elects to review in advance requiring the producing party pay the costs of that review.[362]

Other courts include the cost of attorney review, but on a limited basis, shifting the additional costs as "fairness dictates" and as "equitable" if plaintiffs elect to pursue discovery of redundant or marginally relevant sources of information.[363] Others are more expansive, considering the entire cost of attorney review or, in some instances, the entire cost of the production. The court in *Adair v. EQT Production Co.*, citing its authority to limit discovery when the burden outweighs its likely benefit, held:

> [T]he court may consider the cost of review of ESI for privileged or responsive information in deciding whether discovery imposes an undue burden . . . Furthermore, if the court were inclined to limit discovery based on the burden or cost of the review, I hold that the court could shift the costs of that review, either in whole or in part, to the requesting party.[364]

Some courts add to the cost of review all costs attributable to producing the ESI, including the cost of "searches, negotiations, document review, copying, including time devoted by law firm employees and client employees."[365] *United States ex rel. Carter* added filtering, de-duping and hosting costs of $6 million and production costs of $360,000, raising the estimate to a total of $8.3 million.[366]

The result is that, in a case like *United States ex rel. Carter*, if one follows the *Zubulake* standard, one considers whether $263,000 constitutes an undue burden. If one follows the courts considering review costs, the amount jumps to $1.6 million, and if one considers the total cost of production, one considers approximately $8.3

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360 *Id.*

361 *Id.*

362 *In re* Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig., No. 18-MD-2809-KCC, slip op. at 4 (E.D. Ky. May 26, 2020); Hudson v. AIH Receivable Mgmt. Servs., No. 10-2287, 2011 WL 1402224, at *2 (D. Kan. Apr. 13, 2011); Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 433 (S.D.N.Y. 2002).

363 Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *5–6 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010); Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 562 (W.D. Tenn. 2003).

364 Adair v. EQT Prod. Co., No. 10cv00037, 2012 WL 1965880, at *4 (W.D. Va. May 31, 2012); *see also* Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427, at *1–2 (S.D.N.Y. Sept. 24, 2013); Rodriguez–Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010).

365 *See* Cannata v. Wyndham Worldwide Corp., 10-cv-00068, 2012 WL 528224, at *5 (D. Nev. Feb. 17, 2012); Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 342 (E.D. Pa. 2012).

366 United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 229, 244 (S.D. Cal. 2015); Marks Declaration, *supra* note 357, at 9.

million, a sum thirty times larger. As with other factors, there is tremendous variability in how the courts define burden.

G. Relative Ability of Each Party to Control Costs

Finally, both *Rowe* and *Zubulake* specifically examine the parties' "relative ability . . . to control costs and its incentive to do so."[367] The proportionality rule does not expressly consider this factor, but there is a question of control inherent in the consideration of "whether the burden or expense of the proposed discovery outweighs its likely benefit."[368] So, it is worth examining here.

The courts are uniform in finding that if the responding party created the problem and attendant costs, the responding party pays for it. This is so whether the additional expense is caused inadvertently or intentionally. Where a vendor inadvertently separates attachments from emails, basic fairness requires the responding party to pay to re-produce the information.[369] Where defendant collects hard drives, but doesn't index them, it bears the cost of producing user logs.[370] Where a party converts to inaccessible format information that is likely to be requested in reasonably foreseeable litigation, it may not shift the costs of restoring and searching the data.[371] If a party wipes a hard drive during pending litigation, it will bear the cost of the forensic search.[372] In short, when the burden and expense of the discovery is "self-inflicted" the courts have little difficulty with the cost-shifting analysis. [373]

Control over costs and incentives get murky beyond that. A review of the case law, however, highlights one area almost all courts confront. Litigants routinely argue that the requesting party failed to control costs by limiting the scope of its request:[374]

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367 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 322 (S.D.N.Y. 2003); *Rowe*, 205 F.R.D. at 429.

368 FED. R. CIV. P. 26(b)(1).

369 PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 05-cv-657, 2007 WL 2687670, at *3 (N.D.N.Y. Sept. 7, 2007).

370 Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M., No. CIV 09-0885, 2010 WL 4928866, at *5 (D.N.M. Oct. 22, 2010).

371 Quinby v. WestLB AG, 245 F.R.D. 94, 104 (S.D.N.Y. 2006) ("[I]f a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data."); *see also* Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 217 (S.D.N.Y. 2003); Escamilla v. SMS Holdings Corp., No. 09-2120, 2011 WL 5025254, at *10 (D. Minn. Oct. 21, 2011); Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 159 ("Principle 3: Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.").

372 *Escamilla*, 2011 WL 5025254, at *5.

373 *Id.*

374 Novick v. AXA Network, LLC, No. 07 Civ. 7767, 2013 WL 5338427, at *1–2 (S.D.N.Y. Sept. 24, 2013); Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *4 (N.D. Ill. May 17, 2011).

> Medtronic points out that Michelson has nearly unfettered ability to control costs by limiting the scope of his discovery requests. The court agrees and finds that this factor weighs in favor of Michelson bearing part of the production cost.[375]

According to *McPeek*, "American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need."[376] Courts find the requesting party has every incentive to ask for overly broad discovery and little incentive not to. Some scholars agree: "the extent of a party's discovery costs are determined not by the litigant himself but by the scope and content of the request filed by his opponent."[377]

Most courts attempt to sort discovery narrowly tailored to find relevant information from discovery that is not, preserving the presumption that the responding party pays for the former. The first factor that *Zubulake* examines is "the extent to which the request is specifically tailored to discover relevant information."[378] *Rowe* inquires of "the specificity of the discovery requests" and the "the likelihood of discovering critical information."[379] *McPeek* examines the "marginal utility" of the request.[380] The 2006 Advisory Committee factors examine the "specificity of the discovery request" and "predictions as to the importance . . . of the further information."[381] Even those cases focused on "fairness" look to whether the request is narrowly tailored criticizing, for example, the breath of the search terms selected.[382] The inquiry makes sense. If one of the fundamental purposes of civil litigation is a "just" determination of the action,[383] then examining whether the discovery requests are aimed at uncovering evidence directly relating to disputed facts should be a priority. It is the variability in the analysis, however, that limits its utility.

As a starting point, courts uniformly decry overbroad discovery. Some courts preclude outright "[a]ny requests characterized by Plaintiffs as a demand for

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375 Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 558 (W.D. Tenn. 2003); *see also* Multitechnology Servs., L.P. v. Verizon Sw., No. 02-CV-702, 2004 WL 1553480, at *1–2 (N.D. Tex. July 12, 2004).

376 McPeek v. Ashcroft, 202 F.R.D. 31, 33–34 (D.D.C 2001); *see also* Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y 2002); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *5 (E.D. La. Feb. 19, 2002).

377 Redish & McNamara, *supra* note 8, at 779.

378 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

379 *Rowe*, 205 F.R.D. at 429–30 ("Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the expense.").

380 *McPeek*, 202 F.R.D. at 34.

381 FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

382 *See, e.g.*, Haka v. Lincoln Cnty., 246 F.R.D. 577, 578–79 (W.D. Wis. 2007).

383 FED. R. CIV. P. 1.

production of "all" documents of a general category."[384] Other courts state that a claim for any and all documents will "rarely suffice."[385] Commentary to the Sedona Principles routinely discourages use of "[s]o-called 'any and all' discovery requests."[386]

But the courts vary as to what is acceptable. Some courts find requests "appropriately tailored" simply because the email and word processing documents are "the likely source of information."[387] Some courts find requests reasonably specific if they are limited to searching for ESI relating to the plaintiff.[388]

Other courts reject such limitations.[389] Some courts analyze search terms, finding certain search criteria "appropriately fashioned" and, hence, the specificity requirement met.[390] Conversely, they shift the costs of producing ESI where the requesting party goes beyond a reasonable number of search terms and sources or the estimated production is "clearly voluminous."[391]

Other courts find requests narrowly tailored where the parties have agreed to search terms and time frames.[392] Some courts require requesting parties to narrow their search terms unilaterally.[393] Others have required an iterative process and information exchange regarding search terms and sources, and then shifted a portion of the costs for discovery beyond an agreed threshold.[394]

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384 Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 343 (E.D. Pa. 2012).

385 United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 238–39 (S.D. Cal. 2015).

386 SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION, at Comment 3(a) (2d ed. 2007). *See also* The Sedona Conference, *Federal Rule of Civil Procedure 34(b)(2) Primer: Practice Pointers for Responding to Discovery Requests*, 19 SEDONA CONF. J. 447, 464, 467, 469, 484 (2018); Sedona Conference, *Resources for the Judiciary*, *supra* note 121.

387 Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459, 465 (S.D.N.Y. 2003).

388 Johnson v. Neiman, No. 4:09CV00689, 2010 WL 4065368, at *2 (E.D. Mo. Oct. 18, 2010).

389 Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 43 (D.P.R. 2010).

390 Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., No. 97-CV-00635, at *6 (E.D. Wis. Dec. 27, 2004), ECF No. 173.

391 Hoist Fitness Sys., Inc. v. TuffStuff Fitness Int'l, Inc., No. EDCV 17-1388, 2019 WL 121195, at *3–4 (C.D. Cal. Jan. 7, 2019); *see also* Remy Inc. v. Tecnomatic, S.P.A., No. 11-CV-00991, 2013 WL 1310216, at *7 (S.D. Ind. Mar. 27, 2013); Cannata v. Wyndham Worldwide Corp., No. 10-CV-00068, 2012 WL 528224, at *5 (D. Nev. Feb. 17, 2012).

392 Zeller v. S. Cent. Emergency Med. Servs., Inc., No. 13-CV-2584, 2014 WL 2094340, at *10 (M.D. Pa. May 20, 2014); Major Tours, Inc. v. Colorel, No. 05-309, 2009 WL 3446761, at *3 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010).

393 Haka v. Lincoln County, 246 F.R.D. 577, 579 (W.D. Wis. 2007).

394 *Remy*, 2013 WL 1310216, at *7; *Cannata*, 2012 WL 528224, at *4.

The leading cases look for well-defined parameters: lists of custodians, sources, and time frames, following a meaningful meet and confer process. *Zubulake* found plaintiff's request for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff," as subsequently narrowed to five employees during a twenty-nine month period to be "a relatively limited and targeted request."[395] The court in *Cochran v. Caldera Medical, Inc.* found requests seeking specific categories of data that the defendant was required by law to maintain were "narrowly tailored."[396] In *Juster Acquisition Co. v. North Hudson Sewerage Authority*, the court found requests narrowly tailored where they were limited to requests for ESI from identified actors involved in the transaction and "a reasonable and restricted" time period during which the parties were in negotiation.[397]

In contrast, where the defendant in *Medtronic Sofamor Danek, Inc. v. Michelson* had not "specifically limited his requests by date" despite an apparent understanding of the three year period most likely to have relevant information, the court found this factor weighed in favor of cost shifting.[398] Similarly, *Rowe* looked for limitations, such as requesting email from only specific persons or seeking information about specific data sets, and finding none found plaintiffs requests "extremely broad."[399] *Lawson* looked for limited numbers of custodians and terms tailored to the custodians, and found "really broad search terms that end up in ridiculous numbers of unresponsive documents."[400]

Taken individually, the courts vary dramatically in how they define a narrowly tailored request. Taken as whole, one finds best practices. In defining specificity, some courts look for identification of a limited number of key custodians,[401] sources of

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395 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 285 (S.D.N.Y. 2003).

396 Cochran v. Caldera Med., Inc., No. 12-5109, 2014 WL 1608664, at *3 (E.D. Pa. Apr. 22, 2014).

397 Juster Acquisition Co. v. N. Hudson Sewerage Auth., No. 12-3427, 2013 WL 541972, at *4 (D.N.J. Feb. 11, 2013).

398 Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 554–55 (W.D. Tenn. 2003); *see also* Gen. Elec. Co. v. Wilkins, No. 10-cv-00674, 2012 WL 570048, at *5–6 (E.D. Cal. Feb. 21, 2012); Quinby v. WestLB AG, 245 F.R.D. 94, 98 (S.D.N.Y. 2006).

399 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429–30 (S.D.N.Y. 2002).

400 Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *4 (D. Kan. June 18, 2020).

401 *See, e.g.*, Crown Castle USA Inc. v. Fred A. Nudd Corp., No. 05-CV-6163, 2010 WL 4027780 (W.D.N.Y. Oct. 14, 2010); Siani v. State Univ. of N.Y. at Farmingdale, No. CV09-407, 2010 WL 3170664, at *7 (E.D.N.Y. Aug. 10, 2010).

ESI,[402] a defined time period,[403] with reasonably tailored subject matter inquiries or keywords.[404] The problem is that not all courts follow their lead.

V. INCREASING OBJECTIVITY

This Part offers proposals that will reduce, though admittedly not eliminate, the remarkable subjectivity found in the cost-shifting case law. In general terms, it proposes three steps, all of which can be readily implemented through discovery orders: First, interpret the above factors to require verifiable information—make them objective measures. Second, mandate cooperation, in the form of disclosure of information, before cost shifting, and penalize its absence in the cost-shifting analysis. Finally, if the courts shift costs, share control over the process or limit those costs. Aligning abilities and incentives to control costs requires more than a single-minded focus on making sure the requesting party has "skin in the game." It requires creating incentives to reduce costs rather than strategically inflate them.

A. Defining the Importance of the Issues

The courts can readily restore a measure of objectivity to their analysis of the importance of the issues. In examining this factor, one can simply ask, will the case impact more than the named litigants? [405] With employment discrimination, is the alleged discrimination limited to the named plaintiff or is it widespread? Will the proposed injunctive relief affect one person, e.g. reinstatement, or many, e.g., banning a workplace policy that discriminates on the basis of race or gender? Is the civil rights litigation about compensating a named party for a harm, or will it potentially change a law affecting many? In products liability litigation, does the injury arise from a manufacturing defect that affected only the named parties, or a design defect that potentially impacts the safety of many? In a dissolution of marriage, is the discovery about divvying up assets or custody of children?

It is a standard that is easy to apply. It is also a standard that, in many cases, will result in the factor favoring the traditional presumption that the producing party bears the costs. Yet, there is logic to safeguarding that presumption where the discovery will affect the many as opposed to the few.[406]

In analyzing the amount in controversy, courts and scholars have recognized that there "may be substantial external benefits to the general litigation in question; thus,

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402 *See, e.g.*, Cannata v. Wyndham Worldwide Corp., No. 10-CV-0068, 2012 WL 528224, at *4 (D. Nev. Feb. 17, 2012).

403 *See, e.g.*, *Quinby*, 245 F.R.D. at 98.

404 *See, e.g.*, Black Love Resists in the Rust *ex rel* Soto v. City of Buffalo, 334 F.R.D. 23, 31 (W.D.N.Y. 2019).

405 Other commentators have referenced fee-shifting statutes as a means to identify public interest litigation in the course of arguing for a user-pays system with government funding of discovery in litigation of broader societal importance. Redish & McNamara, *supra* note 8 at 815.

406 *Compare* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976), *with* Richard Marcus, *"Looking Backward" to 1938*, 162 U. PA. L. REV. 1691, 1718 (2014).

discovery costs that seem exorbitant when only the instant litigants are considered can, in context, be justifiable."[407] Some private rights of action may deter unsafe or unlawful conduct. Other rights of action simply divide stakes.[408] This distinction applies with equal force to the importance of the issues at stake in the litigation and can be used to objectively define importance.

It is not that gender discrimination was an important issue for Judge Francis in his decision in *Chen Oster* but not for Judge Scheindlin in her decision in *Zubulake*. The real issue is that the discrimination affected one person in *Zubulake* and a workplace in *Chen Oster*.[409] The real question to ask in analyzing this factor is, will the case impact more than the named litigants?

B. Defining the Amount in Controversy

This "most objective" of factors defies objective application because courts are confronted with either estimates as advocacy or silence. The courts are left to paint with broad strokes deciding whether the case is "a nuisance value case," or not, and whether the discovery "seems" excessive, or not. There can be no certainty in the amount in controversy before final judgment, but there are means to value a case early. Attorneys do it all the time. The solution proposed here is to make them do it in the cost-shifting motion and response.

Pursuant to Rule 11, plaintiffs must have a reasonable basis in fact and law for the *ad damnum* they state in their complaint.[410] Courts could require them to provide such basis in their cost-shifting briefs. Defendants must have a reasonable basis for admitting or denying the *ad damnum*. Courts could require them to disclose this in their briefs. For both parties, courts could require substantiated estimates or weigh litigants' silence against them in deciding proportionality or cost-shifting motions.

Providing objective bases for this factor requires reference to other cases. Comparisons, whether in real estate or litigation, offer imperfect information, but better than no information. Litigants reference comparable cases in settlement discussions. The same can be done in a cost-shifting analysis. For some cases, attorneys could substantiate estimates by reference to jury verdict reporters. For complex litigation, there is data. Litigation analytics now estimate jury awards and settlement values in commercial litigation (the largest of all federal practice areas), class actions, antitrust cases, intellectual property, MDL litigation, securities, trade

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407 Gelbach & Kobayashi, *supra* note 185, at 1112; *see also* Stephen B. Burbank**,** *Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?*, 34 REV. LITIG. 647, 654 (2015) (**"**[T]here is danger that case-by-case cost–benefit calculations will give short shrift to those elements of the analysis that. . . are difficult to quantify— in particular, social benefits.").

408 Gelbach & Kobayashi, *supra* note 185, at 1102. Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *11 (D. Kan. June 18, 2020) ("the breach-of-contract claim here does not implicate any broader societal impact. This is a case between private parties seeking money damages.").

409 *Compare* Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 311 (S.D.N.Y. 2003), *with* Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 295 (S.D.N.Y. 2012).

410 FED. R. CIV. P. 11(b).

secrets, ERISA cases, and other areas.[411] There is objective information that the courts could require to substantiate claims regarding compensatory damages.

Equally important, there is objective information that the courts could require to evaluate the other remedies sought. While the "amount in controversy" factor encourages litigants and the courts to focus on claims for compensatory damages,[412] injunctive relief may come closest to making an injured party whole.[413] Courts routinely place a value on requests for injunctive relief to determine subject matter jurisdiction in diversity cases: they do so by assessing the value of the injunction to the plaintiff or the cost to the defendant.[414] Courts could do the same in cost-shifting cases.

In short, courts should require more than unsubstantiated speculation regarding the amount in controversy and silence as to the value of other remedies requested. There is proof, albeit imperfect, that a court could require that would add objectivity. Doing so will not eliminate the subjectivity inherent in weighing this factor against the cost of production, but requiring a substantiated estimate for both compensatory and non-compensatory remedies and, absent that weighing the factor against the litigant, promises better information than the silence commonly offered. Few cases are truly *sui generis*. The question to ask here is, what do comparable cases suggest regarding the amount in controversy *and* the importance of non-monetary remedies?

C. Defining the Parties' Relative Access to Information

In *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.*, the court set out an objective standard to be applied when defining the parties' relative access to information: whether a key player possessed "relevant, unique information."[415] This standard recognizes that the inquiry is, as set out in *Rowe* and *Zubulake*, an inquiry into whether the same information, i.e., the same document or file, is more readily obtained from another source.

If the inquiry is about whether the same ESI exists elsewhere, there is an objective answer, one that can be validated with a hash value. Once the inquiry becomes a

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411 Kirk Jenkins, *Making Sense of the Litigation Analytics Revolution*, CAL. SUP. CT. REV. (Oct. 4, 2017), https://www.californiasupremecourtreview.com/2017/10/making-sense-of-the-litigation-analytics-revolution/; Jay W. Belle Isle, *Lex Machina Expands Award-Winning Legal Analytics Platform to Commercial Litigation*, LEGAL READER (June 21, 2017), https://www.legalreader.com/lex-machina-expands-analytics-platform/.

412 *Compare* Complaints and Judicial Decisions in Haka v. Lincoln Cnty., 246 F.R.D 577 (W.D. Wis. 2007), *and* Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40 (D.P.R. 2010), *with* Couch v. Wan, No. CV08–1621, 2011 WL 2551546 (E.D. Cal. June 24, 2011).

413 *See, e.g.*, Tracy A. Thomas, *The Continued Vitality of Prophylactic Relief*, 27 REV. LITIG. 99 (2007); Tracy A. Thomas, *Switching to Prophylactic Injunctions*, 90 TEX. L. REV. 295, 297 (2012).

414 *See, e.g.*, Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc., 120 F.3d 216, 218 (11th Cir. 1997) ("Because [plaintiff] sought only declaratory and injunctive relief amount in controversy is measured by the value of the object of the litigation."); McCarty v. Amoco Pipeline Co., 595 F.2d 389 (7th Cir. 1979); 14AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE JURISPRUDENCE § 3703 (4th ed. 2020).

415 Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 8 (D.D.C. 2017).

question of whether the same type of information is more readily available, i.e., whether depositions offer a reasonable substitute, the inquiry becomes a subjective one, with some courts saying yes and some saying no.

Attorneys in the Enron litigation stated over a decade ago, "when you've got the emails, people remember lots and lots of things."[416] Attorneys today recognize that discovery of social media precedes, and is not replaced by, plaintiff's deposition in the personal injury case. The better reasoned judicial decisions recognize the unique value of ESI—that parties should not be required to forgo written discovery because the same subject can be addressed in a deposition. These courts interpret both factors relating to relative access and availability from other sources objectively to ask whether the *same* ESI is available elsewhere.

As suggested in the Advisory Committee Notes, this factor is about information asymmetry.[417] As shown in the cases, information asymmetry can be objectively defined at the file level. The question to ask here is, does one party have access to "relevant, unique" ESI?

D. Defining the Parties' Resources

In defining resources, the better reasoned decisions again limit their inquiry to an objective determination of the parties' resources. They do not consider concentric circles of potentially expanding resources.

The standard first articulated in *Rowe* and now the plain language of revised Rule 26(b)(1) supports this limitation. As a starting point, Rule 26 examines "the parties' resources."[418] The rule does not provide for examination of "the resources available to each party" as suggested in *Zubulake*.[419] The rule does use the plural possessive suggesting a comparison of both parties' resources. Applying the plain language of the rule supports the more limited, verifiable interpretation given this factor by courts that decline to consider the resources of plaintiff's counsel.

The Advisory Committee Notes to the 1983 amendments support this interpretation as well. The original language in the rule examined the "limitations on the parties' resources," and the Committee notes explained that this factor sought to address discovery that is disproportionate given "the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests."[420] The Committee's focus is on the "financially weak litigant," not the financially weak litigant, as aided by counsel.

Courts that go beyond this to consider the resources of counsel or other third parties raise intractable issues. What is the basis for examining only the resources of the requesting party, typically the plaintiff, as some courts do and some scholars

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416 Peter Geier, *A Defense Win in the Heart of "Enron Country"; Use of an E-mail Trail Helps a Jury Acquit an Energy Trading Executive.; Houston*, NAT. L.J., Jan. 23, 2006, at 2.

417 FED. R. CIV. P. 26(b) advisory committee's note to 2015 amendments.

418 FED. R. CIV. P. 26(b)(1).

419 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 316 (S.D.N.Y. 2003) (quoting Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002)).

420 FED. R. CIV. P. 26(b) advisory committee's note to 1983 amendment.

advocate?[421] If courts do include as "available resources" those of plaintiffs' counsel or third-party litigation funding, does not fairness (and the plain language of the rule) require consideration of the resources of defense counsel, insurance companies, and related third parties? If so, how many law firms would agree to represent a client if they knew that doing so would require them to consistently reveal their income and net worth? What incentives would this create for those seeking counsel?

The better course, as seen in some of the opinions discussed above,[422] is for the courts to mandate substantive disclosures regarding the parties' own resources.[423] Tying this analysis to a concrete comparison of the parties' individual resources provides an objective, uniform measure. Individuals and small businesses submit affidavits or other proof of income, liabilities, and assets, the same type of information routinely produced in cases ranging from bankruptcy to dissolution of marriage. Publicly traded companies submit audited financial statements and documentation found in SEC filings, again information that is routinely generated and produced. Litigants provide objective information regarding their resources, in cases large and small. Courts could require the same in cost-shifting motions. The question to ask here is, what do the parties' submissions say about their *own* resources?[424]

E. Defining the Importance of the Discovery

1. Sampling and "A Pig in a Poke"[425]

Donald Rumsfield infamously responded to a question about weapons of mass destruction in Iraq by stating: "there are known knowns . . . there are known unknowns . . . But there are also unknown unknowns – the ones we don't know we don't know."[426] Cost-shifting motions need not be based on known unknows or unknown unknowns.

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421 *See* Boeynaems v. LA Fitness Intern., LLC, 285 F.R.D. 331, 335 (E.D. Pa. 2012); Redish & McNamara, *supra* note 8, at 821–22.

422 *See supra* notes 249–62.

423 In this context, party should be defined to include those who have assumed control over the litigation because of a subrogation agreement or otherwise. *See, e.g.*, Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *14 (D. Kan. June 18, 2020).

424 Redish & McNamara, *supra* note 8, at 817, suggests "[p]erhaps the most feasible option would involve a system similar to the Free Application for Federal Student Aid ("FAFSA"), which takes account of all of an applicant's relevant financial data, including income, savings, investments, and property. It then calculates, according to a predetermined formula, an individual contribution representing the amount of money that the applicant can be reasonably expected to contribute toward his education."

425 *See* Kipperman v. Onex Corp., 260 F.R.D. 682, 689–90 (N.D. Ga. 2009) discussed *supra* in text accompanying note 274.

426 News Briefing from U.S. Dep't of Def., Sec'y Rumsfeld and Gen. Myers (Feb. 12, 2002).

Sampling is an established means to assess the importance of the discovery. It does not offer perfect information, but it does offer some objective information.[427] The problem is: some courts require it;[428] others do not.[429]

The leading cases have long recognized the importance of sampling. In *McPeek*, the court "decided to take small steps and perform, as it were, a test run."[430] The court ordered restoration of email from the most important fact witness for a one-year period.[431] *Zubulake* emphasized that "[w]hen based on an actual sample . . . [t]here will also be tangible evidence of the time and cost required."[432] In doing so, "the entire cost-shifting analysis can be grounded in fact rather than guesswork."[433]

The Sedona Conference Commentary on Proportionality encourages sampling. Extrinsic information and sampling may assist in determining whether the requested discovery is sufficiently important to warrant the potential burden or expense of its production.[434] The Sedona Conference Cooperation Proclamation suggests that courts "[r]equire sampling of ESI that a party has been requested to produce from sources it deems not reasonably accessible, thus enabling the judge to ascertain the extent to

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427 *See* Mia Mazza et al., *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, 69–75 (2007); *see also* Davis v. E. Idaho Health Servs., Inc., No. 16-CV-00193, 2017 WL 1737723 (D. Idaho May 3, 2017); Michael Levine et al., *EDRM Statistical Sampling Applied to Electronic Discovery*, EDRM, https://edrm.net/resources/project-guides/edrm-statistical-sampling-applied-to-electronic-discovery/ (last updated Feb. 18, 2015).

428 *See, e.g.*, Brum v. MarketSource, Inc., No. 17-CV-241, 2018 WL 3861558, at *4 (E.D. Cal. Aug. 14, 2018) (ordering sampling); City of Rockford v. Mallinckrodt ARD Inc., 326 F.R.D. 489, 494 (N.D. Ill. 2018); Solo v. United Parcel Serv. Co., No. 14-12719, 2017 WL 85832, at *3 (E.D. Mich. Jan. 10, 2017); Juster Acquisition Co. v. N. Hudson Sewerage Auth., No. Civ.A. 12-3427, 2013 WL 541972, at *3–6 (D.N.J. Feb. 11, 2013); United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 233–34 (S.D. Cal. 2015); Gen. Elec. Co. v. Wilkins, No. 10-cv-00674, 2012 WL 2376940 (E.D. Cal. June 22, 2012); Kipperman v. Onex, 260 F.R.D. 682, 690 (N.D. Ga. 2009); Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 602–03 (E.D. Wis. 2004); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

429 *See, e.g.*, CFPB v. Ocwen Fin. Corp., No. 17-CV-80495, 2018 WL 6843629, at *2 (S.D. Fla. Dec. 21, 2018) (shifting costs after parties failed to reach agreement regarding sampling protocol); Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 44 (D.P.R. 2010) (simply finding the requested discovery "too high of a cost . . . in this type of action.").

430 McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001).

431 *Id.*

432 *Zubulake I*, 217 F.R.D. at 324.

433 *Id.*; *see also* Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *7 (D. Kan. June 18, 2020); Kipperman, 260 F.R.D. at 691; King Pharm., Inc. v. EON Labs, Inc., No. 04-CV-5540, 2008 WL 11427890, at *3 (E.D.N.Y. Nov. 18, 2008); *Hagemeyer*, 222 F.R.D. at 602–03.

434 Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 64–65.

which relevant information resides within the ESI and the cost of retrieval of the entire data set."[435]

But many litigants and courts do not heed the advice. Courts instead criticize the requesting party for offering "pure conjecture" or "no idea" what the disputed ESI may hold.[436] When courts deny discovery or shift its costs because the requesting party has not proven the disputed discovery contains new, relevant information, the courts speculate that the untapped source does not contain new, relevant information and ignore the burden of proof. Assuming a threshold showing of relevancy by the requesting party, well-established law provides that the moving party has the burden of establishing *undue* burden.[437] Courts that find the requesting party offers nothing more than speculation without sampling the data in question flip that burden.

Sampling does not bring certainty: it is biased towards quantity, not quality.[438] And sampling is difficult if there are few responsive documents in the collection, i.e., there is low richness or low prevalence.[439] But those flaws can be addressed, at least in part, with techniques such as stratified and cluster sampling.[440] There may also be

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435 Sedona Conference, *Resources for the Judiciary*, *supra* note 121, at 41.

436 Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *3 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010); Johnson v. Neiman, No. 09CV00689 AGF, 2010 WL 4065368, at *1–3 (E.D. Mo. Oct. 18, 2010); *see supra* text accompanying notes 267–69.

437 *See, e.g.*, Black Love Resists in the Rust *ex rel.* Soto v. City of Buffalo, N.Y., 334 F.R.D. 23, 28 (W.D.N.Y. 2019); Seger v. Ernest-Spencer Metals, Inc., No. 08CV75, 2010 WL 378113, at *3 (D. Neb. Jan. 26, 2010); Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, No. 07–2388, 2008 WL 3822773, at *6 (D. Kan. Aug. 13, 2008).

438 Patricia Groot, *Electronically Stored Information: Balancing Free Discovery with Limits on Abuse*, 2009 DUKE L. & TECH. REV. 2, 30–31 (2009) ("the numerical test is biased toward quantity rather than quality . . . [m]arginal utility cannot measure the possibility of finding one key 'smoking gun'").

439 "Prevalence" or "richness" or "yield" rates are defined as "the fraction of Documents in a Population that are Relevant to the Information Need." Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology Assisted Review*, 7 FED. CT. L. REV. 1, 26 (2013). Regarding the difficulty of sampling with data sets containing low yield rates, *see, e.g.*, Michael Levine et al., *EDRM Statistical Sampling Applied to Electronic Discovery*, EDRM (Feb. 18, 2015), https://edrm.net/resources/project-guides/edrm-statistical-sampling-applied-to-electronic-discovery/; William Webber, *What is the Maximum Recall in re Biomet?*, EVALUATING E-DISCOVERY (Apr. 24, 2013, 10:00 AM), http://blog.codalism.com/index.php/what-is-the-maximum-recall-in-re-biomet/#more-1808.

440 *See* Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 304 (S.D.N.Y. 2012) (stratified sampling "take[s] into account the heterogeneity of the population by dividing it into subgroups that are each homogeneous with respect to the relevant variables, after which a random sample would be drawn from each subgroup"); *see also* Mich. Dep't of Educ. v. U.S. Dep't of Educ., 875 F.2d 1196, 1205 (6th Cir. 1989); Spears v. First Am. eAppraiseIT, No. C–08–00868, 2012 WL 1438709, at *6 (N.D. Cal. Apr. 25, 2012); Feske v. MHC Thousand Trails Ltd. P'ship, No. 11–CV–4124, 2012 WL 1123587, at *2 (N.D. Cal. Apr. 3, 2012); Schafer v. State Farm & Fire Cas. Co., No. 06–8262, 2009 WL 799978, at *5 (E.D. La. Mar. 25, 2009); McReynolds v. Sodexho Marriott Servs., Inc., 349 F. Supp. 2d 1, 23 (D.D.C. 2004); Chavez v. IBP, Inc., No. CV–01–5093, 2004 WL 5520002, at *10–11 (E.D. Wash. Dec. 8, 2004); Levine

instances where sampling is not feasible, for example, where the principal cost of the discovery is licensing the software or building the hardware to search archived ESI. In such cases, the courts could require testimony and other evidence regarding the contents of the data set in question. But in most instances, sampling of some form is possible, and this Article argues that it should be presumptively part of each cost-shifting motion to provide an objective basis for evaluating the importance of the discovery. Would it not make more sense to sample and decide, rather than have the court speculate based on the parties' speculation?

Well-reasoned judicial decisions acknowledge that the "pig in a poke" argument is, to mix metaphors, a red herring. They acknowledge that litigants can estimate the importance of the discovery, and the potential relevancy of an unsearched dataset, through sampling and other discovery. While some courts omit this step, the law is clear that the requesting party must demonstrate relevancy and the objecting party must prove burden. Sampling provides evidence of both.

2. Sampling and Prevalence Rates

Parties that have sampled the disputed ESI routinely argue that there are few responsive documents in the data set and that this supports precluding or shifting the costs of the discovery.[441] The argument raises a second issue regarding the importance of the discovery: prevalence rates and the inherent limitations of sampling with key word search. "Prevalence" or "richness" or "yield" rates are defined as "the fraction of Documents in a Population that are Relevant to an Information Need."[442] While the terminology is clear, the minimum standards are not.

In *Wiginton v. CB Richard Ellis, Inc.*, plaintiffs alleged sexual harassment in the workplace.[443] At the court's urging, plaintiffs selected a sample of three backup tapes for restoration. Following restoration, the court concluded that "the percentage of sexually objectionable e-mails is substantially lower than 4.5%."[444] The court held that "because the search also revealed a significant number of unresponsive documents . . . the marginal utility test weighs slightly in favor of cost-shifting."[445] In *United States ex rel. Garbe v. Kmart Corp*., the court found a two percent responsive rate too low and required the relator to narrow its request and then assume half the costs of defendant's production.[446] Similarly, in *Quinby v. West LB AG*, another gender discrimination case, the court analyzed the number of relevant email obtained from a

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et al., *supra* note 427; MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 257–60 (2d ed. 2001).

441 *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 574 (N.D. Ill. 2004); Quinby v. WestLB AG, 245 F.R.D. 94, 106 (S.D.N.Y. 2006); United States *ex rel.* Garbe v. Kmart Corp., Case No. 12-CV-881, 2014 WL 12787823, at *1 (S.D. Ill. May 2, 2014).

442 Maura R. Grossman & Gordon V. Cormack, *The Grossman-Cormack Glossary of Technology Assisted Review*, 7 FED. CT. L. REV. 1, 26 (2013).

443 *Wiginton*, 229 F.R.D. at 570.

444 *Id.* at 571, 575. Plaintiffs argued it was 21.3%; defendants argued that it was 1.64%. *Id.*

445 *Id.* at 575.

446 *Garbe*, 2014 WL 12787823, at *1.

sample backup tape.[447] The court found that the number was "quite low when compared to the volume of documents produced," and required plaintiff assume thirty percent of the cost.[448] Some courts have required that the sample contain admissible evidence. In *Schweinfurth v. Motorola, Inc.*, the court found the discovery was relevant, "however . . . the Court, at this juncture, cannot say the material will be admissible at trial. Therefore, the Court orders Plaintiffs to pay 50% of the document production costs."[449]

In contrast, in *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp*., the court ordered sampling, which showed approximately ten percent of the email searched contained keywords, of which an unidentified number were, in fact, relevant.[450] The court held that the "*existence* of the e-mails on the five backup tapes is sufficient to establish that further discovery of the backup tapes may lead to the discovery of relevant evidence." [451] In other words, finding some potentially relevant email was enough.

The cases offer a wide spectrum for defining the importance of the discovery, with both ends creating perverse incentives. *Hagemeyer North America, Inc.* arguably sets the bar too low: keyword search can return any number of "hits" without returning any relevant documents.[452] *Schweinfurth* sets the bar too high: modifying the rules of discovery to require proof of admissibility. *Wiginton* and *Quinby* offer a middle ground, yet the lines they draw are problematic.

Low prevalence is not necessarily the result of a poorly tailored request, it is often an inherent characteristic of ESI collections. Practitioners suggest original collections have a prevalence rate that is usually less than five percent and often less than one percent.[453] Scholars utilize "realistic document collection[s]" that have prevalence rates ranging from 0.34% to 3.92%, with a mean of 1.175% to study predictive coding

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447 Quinby v. WestLB AG, 245 F.R.D. 94, 106 (S.D.N.Y. 2006).

448 *Id.* at 109, 111.

449 Schweinfurth v Motorola, Inc., No. 05CV0024, 2008 WL 4449081, at *2 (N.D. Ohio Sept. 30, 2008).

450 Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 597–98, 603 (E.D. Wis. 2004).

451 Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., No. 97-CV-00635, at *10 (E.D. Wis. Dec. 27, 2004), ECF No. 173 (emphasis added).

452 Doug Austin, *Sometimes, Your Wildcard May Not Be 'Wild' Enough*, eDISCOVERY DAILY (Sept. 13, 2016), https://cloudnine.com/ediscoverydaily/electronic-discovery/sometimes-wildcard-may-not-wild-enough-ediscovery-best-practices/ (noting a keyword search intending to retrieve variations on "mine," "mines," and "mining" retrieved over 300,000 files because there are 269 words in English that begin with "min").

453 Ralph Losey, *Project Cost Estimation Is Key to Opposing ESI Discovery as Disproportionately Burdensome Under Rule 26(b)(1)*, L. & TECH. (May 6, 2018), https://e-discoveryteam.com/2018/05/06/project-cost-estimation-is-key-to-opposing-esi-discovery-as-disproportionately-burdensome-under-rule-26b1/.

algorithms.[454] In other words, scholars and practitioners assume the number of relevant documents will be "quite low when compared to the volume."[455]

In analyzing sample results, courts should do the same. If they do so, the courts have an objective measure of both cost and benefit, as defined by the existence of relevant documents. The parties need not argue about, and the court need not rule on "a pig in a poke."[456]

3. Core Discovery

In defining the importance of discovery, there is a second, objective alternative that incorporates the best practices found in some of the judicial decisions reviewed. Some courts have expressly recognized the benefits of tiered discovery. The court in *Kleen Products, LLC v. Packaging Corp. of America* noted, "[i]n pursuing a collaborative approach, some lessons have been learned . . . to the extent possible, discovery phases should be discussed and agreed to at the onset of discovery."[457] The Sedona Conference's Commentary on Proportionality advocates conducting discovery in phases, "starting with discovery of clearly relevant information located in the most accessible and least expensive sources."[458]

Tiered discovery could be used in the cost-shifting analyses as well, not based on accessibility, but by distinguishing between core discovery and more marginally relevant discovery. Practitioners have negotiated discovery protocols for adverse employment and FLSA cases that provide for disclosure of "core discovery" at the beginning of the case.[459] Arbitration bodies such as FINRA have identified core discovery that the parties are expected to produce, e.g., securities firms are expected

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454 Gordon V. Cormack & Maura R. Grossman, *Evaluation of Machine-Learning Protocols for Technology Assisted Review in Electronic Discovery*, *in* SIGIR '14: PROCEEDINGS OF THE 37TH INTERNATIONAL ACM SIGIR CONFERENCE ON RESEARCH & DEVELOPMENT IN INFORMATION RETRIEVAL 154–55 (2014).

455 Quinby v. WestLB AG, 245 F.R.D. 94, 109 (S.D.N.Y. 2006).

456 Kipperman v. Onex Corp., 260 F.R.D. 682, 690 (N.D. Ga. 2009).

457 Kleen Prods. LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *19 (N.D. Ill. Sept. 28, 2012), *aff'd*, 2013 WL 120240 (N.D. Ill. Jan. 9, 2013); *see also* Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 295 (S.D.N.Y. 2012); Moore v. Publicis Groupe, 287 F.R.D. 182, 184–85 (S.D.N.Y. 2012), *adopted sub nom.* Moore v. Publicis Groupe SA, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012); Tamburo v. Dworkin, No. 04 C 3317, 2010 WL 4867346, at *3 (N.D. Ill. Nov. 17, 2010); Barrera v. Boughton, No. 07cv1436, 2010 WL 3926070, at *3 (D. Conn. Sept. 30, 2010).

458 Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 157.

459 Steven S. Gensler & Lee H. Rosenthal, *Breaking the Boilerplate Habit in Civil Discovery*, AKRON L. REV. 683, 698 (2018).

to produce all agreements and all correspondence with the customer.[460] The Federal Circuit has identified "core documentation" in patent litigation.[461]

In many cases, there are commonly requested documents that support the claims and defenses in routinely litigated matters. There is "core discovery that reasonable lawyers know they will have to produce in any event," and there is value in having it early in the case.[462] An evaluation of "core discovery" in the case provides an objective basis for analyzing the importance of the discovery in dispute. If it is core discovery from key players, the traditional presumption should apply.[463] If not, this factor should weigh in favor of cost shifting.

Advance agreement regarding core discovery in a particular field is unnecessary. Judge Grimm has authored a trans-substantive discovery order that incorporates phased discovery.[464] He suggests:

> [T]he logical starting place ought to be the causes of actions and defenses actually pleaded, the elements of proof that must be met for each, and the information that the party does not already have from sources other than their adversary. At a minimum, discovery should be phased to focus first on the actual evidence needed to prove the pleaded claims and defenses.[465]

The focus here is on the claims and defenses, rather than accessibility or cost. This same distinction between core and more marginally relevant discovery could apply to the cost-shifting analysis.[466]

Some courts have done just that. In *Lawson v. Spirit AeroSystems, Inc.*, the court examined whether the disputed discovery went to "the very heart of the litigation," and shifted costs after determining it did not.[467] In *United States ex rel. Bibby v. Wells*

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460 Financial Industry Regulatory Authority, *Discovery Guide and Document Production Lists*, FINRA CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES, https://www.finra.org/sites/default/files/ArbMed/p394527.pdf (last visited Mar. 22, 2018).

461 Fed. Cir. Advisory Council, *An E-Discovery Model Order*, U.S. CT. APP. FOR FED. CIR., http://www.cafc.uscourts.gov/announcements/model-e-discovery-order-adopted-federal-circuit-advisory-counsel-0 (last visited June 18, 2020).

462 Judicial Roundtable, *supra* note 75, at 33 (Judge Koeltl's comments).

463 *See* Elizabeth D. Laporte & Jonathan M. Redgrave, *A Practical Guide to Achieving Proportionality Under New Federal Rule of Civil Procedure*, 9 FED. CTS. L. REV. 19, 54 (2015) ("Core discovery will virtually always be proportional.").

464 *See generally* Paul W. Grimm, *Discovery Order*, U.S. DIST. OF MD., www.lfcj.com/uploads/3/8/0/5/38050985/grimm_discovery_order.pdf (last visited Mar. 22, 2019); *see also* Paul W. Grimm, *Practical Ways to Achieve Proportionality During Discovery and Reduce Costs in the Pretrial Phase of Federal Civil Cases*, 51 AKRON L. REV. 721, 734–35 (2018).

465 Grimm & Yellin, *supra* note 13, at 518.

466 *Id.* at 523–24.

467 Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *15 (D. Kan. June 18, 2020) (citing Oxbow Carbon & Minerals LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 8 (D.D.C. 2017)).

Fargo Bank, the court ordered relators to pay fifty percent of the costs of production for documents originated after a specified date because they were "far less likely to bear fruit."[468] It declined to shift the costs of production of documents that "constitute the meat of this lawsuit."[469] In *Unknown Parties v. Johnson*, the court declined to shift the costs of preserving a video recording given "the importance of the evidence."[470] In *Williams v. Angie's List*, the court declined to order cost shifting for information "critical" to plaintiff's claims.[471]

Similarly, in *Solo v. United Parcel Service Co.*, where plaintiffs sought ten years of ESI, the court distinguished between time periods for which there were potentially dispositive contractual defenses and those for which there were not.[472] It shifted costs for the former, but ordered defendant to pay for and produce data from a sample of the latter.[473] In *FDIC v. Brudnicki*, the court adopted an ESI protocol shifting the cost of imaging and hosting charges for production requests at the "outer boundaries of relevant information," because of its modest expense and the fact that plaintiff was producing "at no cost . . . the key documents" in the case.[474]

Scholars have also suggested that the perverse incentives created by straight application of either the traditional presumption or a requester-pays rule can be mitigated by "having initial rounds of discovery under the traditional responder pays cost allocation rules" and then, "at some point the cost allocation rule is reversed and requester pays."[475] The hard part is identifying that point. Some have suggested a case-by-case application.[476] The Sedona Conference draws a line between accessibility and inaccessibility, encouraging the courts to address cost shifting only after all relevant reasonably accessible information has been produced and reviewed.[477] The Federal Circuit Model Order Regarding E-Discovery in Patent Cases mandates disclosure of

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468 United States *ex rel.* Bibby v. Wells Fargo Bank, N.A., 165 F. Supp. 3d 1340, 1355–56 (N.D. Ga. 2015).

469 *Id.* at 1356.

470 Unknown Parties v. Johnson, No. CV-15-00250, 2017 WL 7520603, at *7 (D. Ariz. Dec. 19, 2017).

471 Williams v. Angie's List, Inc., No. 16-CV-00878, 2017 WL 1318419, at *6 (S.D. Ind. Apr. 10, 2017).

472 Solo v. United Parcel Service Co., No. 14-12719, 2017 WL 85832, at *1 (E.D. Mich. Jan. 10, 2017).

473 *Id.* at *3–4. If plaintiff then sought production of the entirety of the ESI from that period, plaintiff would have to pay for it. *Id.*

474 F.D.I.C. v. Brudnicki, 291 F.R.D. 669, 677 (N.D. Fla. 2013).

475 Kobayashi, *supra* note 14, at 1496–97.

476 *Id.* at 1497.

477 Sedona Conference, *Resources for the Judiciary*, *supra* note 121, at 41 ¶ 14.3.2.

core documents and then draws a line: no cost shifting for requests of up to five search terms directed to up to five custodians, and beyond that cost shifting.[478]

Yet, case-by-case standards provide little guidance, and an accessible-inaccessible divide fails to recognize the growing pressure to make information inaccessible. With increasing cybersecurity risks, there are costs to maintaining information on active servers. With cost shifting for inaccessible information, there are incentives to "downgrade information" to "inaccessible forms" in order to avoid discovery or shift costs.[479] At the same time, numerical limits discourage the use of narrowly defined terms and ignore the reality that the number of key players will vary, as will the accessible ESI they possess.

A better line creates a presumption against cost shifting if the discovery relates to a core issue, as defined by the pleaded claims and defenses.[480] Doing so acknowledges the truth-seeking function of discovery,[481] and that "[d]ocuments create a paper reality we call proof."[482] Doing so enables a court to make legal decisions regarding relevancy, rather than technical decisions regarding accessibility and burden.

Successfully defining "core discovery" will depend on cooperation, in the form of disclosure. Scholars suggest tailoring discovery is dependent on the judge or magistrate having sufficient information to evaluate the utility of the discovery.[483] The Sedona Conference likewise urges disclosure and cooperation:

> Parties who wish to conduct phased discovery must communicate . . . about the issues relevant to the litigation and making meaningful disclosures about the repositories . . . that may contain relevant information. Moreover, the parties must cooperate with one another to prepare and propose to the court a phased discovery plan.[484]

Cooperation and disclosure regarding "core discovery" focuses the discussion. It focuses the discovery, and, in most cases, it offers an objective basis for defining importance. The question to ask here is, have the parties disclosed the information necessary to define core discovery in the case? If so, and if the disputed discovery

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478 Fed. Cir. Advisory Council, *supra* note 461, at 3.

479 Mast, *supra* note 13 at 1839; Kara A. Schiermeyer, Note, *The Artful Dodger: Responding Parties' Ability to Avoid Electronic Discovery Costs Under 26(b)(2)(B) and 26(b(2)(C) and the Preservation Obligation*, 42 CREIGHTON L. REV. 227, 261 (2009).

480 Grimm & Yellin, *supra* note 13, at 517–18.

481 United Consumers Club, Inc. v. Prime Time Mktg. Mgmt. Inc., No. 07 CV 358, 2009 WL 3200540, at *2 (N.D. Ind. Sept. 25, 2009) ("Discovery is a search for the truth."); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 214 (S.D.N.Y. 2003); Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc., 54 F.R.D. 551, 553 (S.D.N.Y. 1972) ("The purpose of discovery is to provide an orderly, efficient and effective means for ascertaining the truth in order to expedite a determination of the controversy on the merits.").

482 *Zubulake IV*, 220 F.R.D. at 214.

483 Kobayashi, *supra* note 14, at 1497.

484 Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 159.

seeks information from key players about key facts, this factor should weigh in favor of the traditional presumption. If not, the courts should consider cost shifting.

F. Defining Burden and Benefit

Courts have struggled to define burden. There are two steps that would enable courts to move beyond estimates as advocacy and increase objectivity: first, require multiple estimates for any disputed discovery; and, second, if costs are shifted, share control of the process or limit cost shifting. The standard for cost shifting, like preservation, should be reasonableness, not perfection.

1. Cooperation & Estimates

Courts should require parties to follow common practice in obtaining bids for large projects—talk to more than one vendor. One court has done so: In *Escamilla v. SMS Holdings Corp.*, the court held defendant "SMS has not met its burden of demonstrating that the costs to restore and search the data will create an undue burden or cost. SMS's entire argument relies on the cost estimates provided by only one vendor."[485] The court emphasized the importance of this, noting that defendant "admits that it has only provided 'comprehensive estimates from one vendor,'"[486] and the estimates are speculative because defendant relied on "a number of industry standard assumptions" rather than case-specific variables determined by sampling.[487] Compare this to *Verigy US, Inc. v. Mayder*, where defendant failed to substantiate its ballpark estimate of "$50,000 – $100,000" in costs, and the court found "[n]evertheless, it seems fair to assume that obtaining the requested records . . . will entail some cost."[488] The court then found it fair to split the costs.[489]

The common advice given to practitioners is to obtain three estimates before hiring an eDiscovery vendor to perform work.[490] The same advice should apply to cost shifting. By requiring more than one estimate in cost shifting or proportionality disputes, courts encourage efficiency. One vendor will have every incentive to inflate an estimate to satisfy a client looking to argue undue burden. Competing vendors will

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485 Escamilla v. SMS Holdings Corp., No. 09–2120, 2011 WL 5025254, at *9 (D. Minn. Oct. 21, 2011); *see also* Black Love Resists in the Rust v. City of Buffalo, N.Y., 334 F.R.D. 23, 29 (W.D.N.Y. 2019); Best Buy Stores, L.P. v. Developers Diversified Realty Corp., No. 05–2130, 2007 WL 333987, at *1 (D. Minn. Feb. 1, 2007).

486 *Escamilla*, 2011 WL 5025254, at *9.

487 *Id.*

488 Verigy US, Inc. v. Mayder, No. C07-04330, 2008 WL 4786621, at *3 (N.D. Cal. Oct. 30, 2008).

489 *Id.*

490 *See, e.g.*, SEDONA CONFERENCE, BEST PRACTICES FOR THE SELECTION OF ELECTRONIC DISCOVERY VENDORS: NAVIGATING THE VENDOR PROPOSAL PROCESS (2007), https://thesedonaconference.org/sites/default/files/publications/Navigating%20the%20Vendor%20Proposal%20Process%20Bet%20Practices%20for%20the%20Selection%20of%20Electronic%20Discovery%20Vendors%20June%202007.pdf. See *id.* at Appendix E for a sample decision matrix that contemplates scoring and ranking three separate vendors.

have less incentive to do so if they know that the court will order work done by or reimbursed at the rate of the low-cost provider.

The incentive to inflate estimates decreases further if courts require and consider a requesting party's alternative proposal and estimate.[491] Prior to hearing a cost-shifting motion, courts should mandate disclosure of sufficient information to allow the requesting party to obtain an estimate for the work to be done. If the requesting party does not have enough information to obtain an estimate, there has not been enough cooperation, and the court should deny the motion.

A court requiring at least two estimates from the producing party and one from the requesting party would alleviate many of the current problems with litigants using estimates as advocacy. It may be difficult to create apples-to-apples comparisons as the software and processes used by different vendors differ, but the information disclosed will ground the discussion in fact and offer the court options.

2. Shared Expenses & Shared Control

That range of options will inevitably include debates over use of "obsolete technology" and technology that is "an albatross around the neck of electronic data discovery."[492] The debate may focus today on forms of production or how to collect ESI from mobile devices and something else tomorrow. Rule 1 encourages the courts to focus on efficiency. If it orders cost shifting, courts should do so at rates utilizing the most cost-effective means available to produce the information.

In thinking about process, litigants make choices regarding who performs the work and how they do it. In *Spieker v. Quest Cherokee*, when defendant sought to outsource the work and shift over $100,000 in costs, the court directed the parties "to consider . . . using defendant's recently installed software and in-house IT staff and . . . utilizing Rule 502 to minimize the expense of a detailed privilege review."[493] The court found defendant's reliance on its vendor's estimate "greatly exaggerated."[494] In *Adair v. EQT Production Co.* the court again found that in-house technology provided a "reasonable" means to facilitate review. The responding party had the ability to filter and keyword search email,[495] and though keyword has its limitations, it was "reasonable under the circumstances."[496]

Compare *Connecticut General Life Insurance Co. v. Earl Scheib, Inc.*, discussed *supra,*[497] where the amount in controversy was $120,000 and defendant's estimate

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491 *See* N. Shore-Long Island Jewish Health Sys., Inc. v. MultiPlan, Inc., 325 F.R.D. 36, 53 (E.D.N.Y. 2018) (inviting submission of estimates from both producing and requesting parties).

492 BALL, *supra* note 337, at 21.

493 Spieker v. Quest Cherokee, LLC, No. 07–1225, 2009 WL 2168892, at *2 (D. Kan. July 21, 2009).

494 *Id.* at *3.

495 Adair v. EQT Prod. Co., No. 10cv00037, 2012 WL 1965880, at *3–5 (W.D. Va. May 31, 2012), *aff'd*, 2012 WL 2526982 (W.D. Va. June 29, 2012).

496 *Id.*

497 *See supra* text accompanying notes 321–25.

from a multi-national eDiscovery vendor was that it would cost $121,000, exclusive of attorney review time, to produce email from nineteen employees.[498] What if, instead of simply shifting these costs, the court had encouraged the parties to negotiate an alternative protocol for the three key custodians instead of all nineteen employees? Two hundred nineteen gigabytes would have been reduced to fifty-five gigabytes, and $121,183.65 to $32,294.53.[499] Producing in native file format would have eliminated imaging costs and reduced that sum to $17,856.53.[500] Purchasing a license for an eDiscovery tool, as defendant proposed in *Semsroth*, would have eliminated the data extraction fees, resulting in costs of less than $10,000 instead of $121,000.[501]

There is still a cost to the discovery. Somebody has to do the work. Somebody has to review the documents. But tailored discovery and alternative workflows would have reduced the cost in the above example to a small fraction of the $121,000 estimated. The proportionality analysis becomes very different at that point. Is it worth spending several thousand dollars, exclusive of review time, to determine what three key players wrote?

Some courts and scholars have proposed another alternative: provide the ESI to the opposing party to search. As discussed above, *Rowe* sets out a protocol for the requesting party to restore and then search the backup tapes in question.[502] Other courts have required production of entire databases to the requesting party, despite objections that irrelevant information and confidential information may be included.[503]

Scholars have suggested that assigning the responding party the task of defining keyword searches and training predictive coding tools creates "misaligned incentives" because of cross-party agency costs.[504] It is the requesting party that has the incentive

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498 Conn. Gen. Life Ins. Co. v. Earl Scheib, Inc., No. 11–CV–0788, 2013 WL 485846, at *1 (S.D. Cal. Feb. 6, 2013).

499 Ahmadian Declaration, *supra* note 322, at 2.

500 *Id.*

501 *Id.*

502 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432–33 (S.D.N.Y. 2002); *see also In re* Onglyza (Saxagliptin) & Kombiglyze XR (Saxagliptin & Metformin) Prods. Liab. Litig., No.18-MD-2809, 2020 WL 2739176, at *4–5 (E.D. Ky. May 26, 2020); Davis v. E. Idaho Health Servs. Inc., No. 16-CV-00193, 2017 WL 1737723, at *4 (D. Idaho May 3, 2017); Viet. Veterans of Am. v. CIA, No. 09–CV–0037, 2012 WL 2375490, at *3 (N.D. Cal. June 22, 2012); Fendi Adele S.R.L. v. Filene's Basement, Inc., No. 06 Civ. 244, 2009 WL 855955, at *10 (S.D.N.Y. Mar. 24, 2009).

503 *Compare* High Point SARL v. Sprint Nextel Corp., No. 09-2269-CM, 2011 WL 4526770, at *12 (D. Kan. Sept. 28, 2011) (requiring production of entire database), *and* Goshawk Dedicated Ltd. v. Am. Viatical Servs., LLC, No. 05-CV-2343, 2007 WL 3492762, at *1 (N.D. Ga. Nov. 5, 2007) (same), *with* Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 305 (S.D.N.Y. 2012) (not requiring production of entire database), *and* Daugherty v. Murphy, No. 06–CV–0878, 2010 WL 4877720, at *7 n.5 (S.D. Ind. Nov. 23, 2010) (same), *and* Nicholas J. Murlas Living Tr. v. Mobil Oil Corp., No. 93 C 6956, 1995 WL 124186, at *5 (N.D. Ill. Mar. 20, 1995) (same).

504 Kobayashi, *supra* note 14, at 1504.

to optimally invest in searching the ESI, and advanced search technologies can mitigate the asymmetric information problems that otherwise exist when a requesting party is searching a data set.[505]

While concerns about privilege make turning over ESI to the requesting party unrealistic in many cases,[506] doing some of the work in-house is not. Ninety-five percent of Fortune 1000 companies, along with over two billion smaller organizations, now use cloud-based productivity solutions with basic eDiscovery functionality.[507] There are also an increasing number of options for outsourcing work to vendors offering simplified workflows, including technology assisted review.[508] The point is that litigants have choices. The question is, do they have the incentives to choose a "reasonable," cost-effective option?

Cases report "overblown" cost-shifting arguments estimating forty hours to extract the requested information and six times that for quality assurance.[509] Litigants estimate costs based on a "page-by-page" review of 1.2 million electronic documents, without use of any search terms or "automated screening" technology.[510] Or, they assume the need to decrypt an entire database and $3.125 million in costs to manually review each transaction, instead of using commercially available software to identify relevant files.[511] Litigants then estimate review costs based on hourly rates charged by senior associates charging $410 an hour.[512] Experts write about vendors projecting over $25,000 in costs for processing ordinary business data, work done in twelve hours of

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505 *Id.* at 1506.

506 Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *20 (D. Kan. June 18, 2020) (sampling showed 95% of the corpus was expected to be non-responsive and contain privileged and work-product communications, proprietary information unrelated to the case, and confidential third-party and customer information); Mast, *supra* note 13, at 1830.

507 *See* Michael Brown, *Why Moving to the Cloud is a Legal Conversation*, LIGHTHOUSE (July 23, 2019), https://blog.lighthouseglobal.com/why-moving-to-the-cloud-is-a-legal-conversation; Mark Johnson et al., *eDiscovery in Office 365*, MICROSOFT, https://docs.microsoft.com/en-us/microsoft-365/compliance/ediscovery?view=o365-worldwide#ediscoverycases (last updated Jan. 12, 2021); Liam Tung, *Google: G Suite Now Has 2 Billion Users*, ZDNET (Mar. 13, 2020), https://www.zdnet.com/article/google-g-suite-now-has-2-billion-users/.

508 Rob Robinson, *An eDiscovery Challenge: Pricing Consistency and Transparency*, COMPLEXDISCOVERY (May 16, 2017), https://complexdiscovery.com/an-ediscovery-challenge-pricing-consistency-and-transparency/.

509 Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 307 (S.D.N.Y. 2012).

510 Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc., No. CV 14-03053, 2018 WL 5816108, at *4 (C.D. Ca. Apr. 25, 2018).

511 Sung Gon Kang v. Credit Bureau Connection, Inc., No. 18-CV-01359, 2020 WL 1689708, at *3–4 (E.D. Ca. Apr. 7, 2020).

512 Zubulake v. UBS Warburg LLC (*Zubulake II*), 216 F.R.D. 280, 290 (S.D.N.Y. 2003); *see also* Covad Commc'ns Co. v. Revonet, Inc. 254 F.R.D. 147, 151 (D.D.C. 2008) (splitting the cost of privilege review costs of up to $4,000 based on the cost of paralegal review).

largely unattended machine time, and over $125,000 in costs to process data into a review tool, again work that could be done in a day and largely by a machine.[513] Panels of experts have suggested that about seventy percent of the money spent on eDiscovery is wasted.[514]

Even in cases with an engaged judge, well-versed in eDiscovery, the costs can be "overblown". When the court in *Lawson v. Spirit Aerosystems, Inc*. shifted more than $750,000 in eDiscovery costs, industry analysts compared the costs with industry pricing surveys, and asked, were costs "shifted" or was the requesting party "shafted"?[515] In *Lawson*, the court shifted processing costs that were over three times the reported industry average.[516] It shifted attorney per document review costs that were almost three times the reported industry average.[517] It shifted per gigabyte predictive coding/technology assisted review costs that were at least 2.8 times the reported industry average,[518] and hosting costs double the reported industry average.[519]

What is lacking are the incentives to find the most cost-effective solution. The responding party, presumed best situated to determine how to preserve and produce its information, confronts perverse incentives where finding the most cost-effective solution decreases the likelihood of prevailing in a proportionality motion seeking to preclude the discovery or, in the alternative, shift its costs. In cases where the courts shift costs after the fact, the parties are left to argue about the legally defined

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513 Craig Ball, *Unconscionable*, BALL IN YOUR COURT, (June 19, 2014), https://ballinyourcourt.wordpress.com/2014/06/19/unconscionable/.

514 *See* Craig Ball, *Ten Things That Trouble Judges About E-Discovery*, BALL IN YOUR COURT (Aug. 9, 2013), https://craigball.net/2013/08/09/1370/.

515 Greg Buckles, *Nuggets of Gold from a TAR Fight – Pt 2*, EDISCOVERY JOURNAL, https://ediscoveryjournal.com/nuggets-of-gold-from-a-tar-fight-pt-2/ (last visited Feb. 5, 2021) (citing Rob Robinson, *Balancing Relevance and Reality? Winter 2021 eDiscovery Pricing Survey Results*, COMPLEX DISCOVERY, https://complexdiscovery.com/balancing-relevance-and-reality-winter-2021-ediscovery-pricing-survey-results/ (last visited Feb. 5, 2021)); Doug Austin, *Shifted or Shafted? Greg Buckles Applies Rob Robinson's Pricing Survey Results to the Lawson Case*, EDISCOVERYTODAY, https://ediscoverytoday.com/2020/12/10/shifted-or-shafted-greg-buckles-applies-rob-robinsons-pricing-survey-results-to-the-lawson-case-ediscovery-trends/ (last visited Feb. 5, 2021).

516 Buckles, *supra* note 515. Most survey respondents (53.2%) identified their per GB processing costs as falling in the range of $25-75, compared to $182 paid by Aerospirit and then shifted to Lawson. *Id*.

517 *Id*. Most survey respondents (48.1%) identified their attorney cost per document as falling in the range of $.50 - $1.00, compared to $2.24 per document paid by Aerospirit and then shifted to Lawson. *Id*.

518 *Id*. Most survey respondents (53.2%) identified their predictive coding/technology assisted review costs were "less than $75" per gigabyte, compared to the $214 per gigabyte price paid by Aerospirit and then shifted to Lawson.

519 *Id*. Most survey respondents (54.4%) identified their monthly hosting costs as falling within a range of $10-20, compared to the $30 paid by Aerospirit and then shifted to Lawson.

"reasonableness" of the choice made,[520] but "[t]here is a big difference between reasonable and competitive."[521]

At the same time, if courts approve of oversized cost estimates and then shift all or a portion of those costs, responding parties have little incentive to invest in technology to efficiently preserve and produce ESI. Deciding whether to perform some eDiscovery-related functions in-house depends, in part, on the investment the responding party makes in advance of the litigation. Entities that have chosen to upgrade to modern backup technology can search backup media with little to no extra cost over searching active servers. Entities that have chosen to upgrade to modern document management systems are able to preserve, collect, and complete basic search-related tasks, without engaging an outside vendor.

All of which makes part of Judge Facciola's analysis in *McPeek* less compelling. In *McPeek,* he wrote that a parties' "choice" to use computers "assumes an alternative" and "[w]hat alternative is there? Quill pens?"[522] Framed as a binary choice, to use computers or not, there is little alternative. But the choices are more complicated.

Courts have long acknowledged that parties make choices about how to store information, and those parties are responsible for their choices.[523] Courts do not hesitate to shift costs as a sanction when one party fails to comply with discovery obligations.[524] Courts do not hesitate to shift costs when the responding party breaches a duty to preserve, requiring costly steps to restore or recover relevant information.[525]

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520 "To determine the amount of expenses to allocate to Lawson, the court must independently analyze the reasonableness of Spirit's expenses." Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 6343292, at *2 (D. Kan. Oct. 29, 2020), *aff'd*, No. 18-1100-EFM, 2020 WL 6939752 (D. Kan. Nov. 24, 2020).

521 *Id*.

522 McPeek v. Ashcroft, 202 F.R.D. 31, 33 (D.D.C. 2001).

523 *See, e.g.*, Baine v. Gen. Motors Corp., 141 F.R.D. 328, 330–32 (M.D. Ala. 1991); Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721, 724 (2003); R. Thomas Howell, Jr. & Rae N. Coger, *Developing and Implementing A Record Retention Program*, 50 PRAC. L. 21, 28–29 (2004).

524 *See, e.g.*, Youngevity Int'l Corp. v. Smith, No. 16-cv-00704, 2017 WL 6541106, at *12 (S.D. Cal. Dec. 21, 2017); Est. of Shaw v. Marcus, No. 14 Civ. 3849, 2017 WL 825317, at *6 (S.D.N.Y. Mar. 1, 2017); Wingnut Films, Ltd. v. Katja Motion Pictures, Corp., No. CV 05–1516, 2007 WL 2758571, at *20 (C.D. Cal. Sept. 18, 2007).

525 *See, e.g.*, Coyne v. Los Alamos Nat'l Sec., LLC, No. CIV 15-0054, 2016 WL 9488766, at *2–3 (D.N.M. Dec. 16, 2016); Sophia & Chloe, Inc. v. Brighton Collectibles, Inc., No. 12cv2472, 2014 WL 12642170, at *8 (S.D. Cal. May 28, 2014); Stewart v. Cont'l Cas. Co., 2014 WL 12600282, at *4 (S.D. Ala. Jan. 9, 2014); Quinby v. WestLB AG, 245 F.R.D. 94, 106 (S.D.N.Y. 2006) ("[I]f a party creates its own burden or expense by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.").

The same issues arise with the choices parties make regarding document retention policies.[526] In *Wagoner v. Lewis Gale Medical Center, LLC*, defendant implemented a three-day auto-delete policy and then argued its ESI was inaccessible and the opposing party's discovery not proportional. The court rejected the argument, citing case law holding that "the Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive."[527] Courts have drawn the same distinction in ruling on cost-shifting motions. In *DeGeer v. Gillis*, the court split the cost of producing some information, but refused to do so where a party had adopted a policy of immediately deleting emails to avoid production during discovery.[528]

Judges have warned that "[t]he proliferation of electronically stored information and the resulting increasing reliance on retention policies make the concept of 'willful blindness' all the more acute."[529] Courts must ensure that companies cannot "blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy."[530]

While the current rules encourage parties to make their information inaccessible as quickly as possible, making the process more expensive and cost-shifting arguments more persuasive,[531] investment in a "well-organized document management system will ultimately reduce litigation expenses through more efficient document retrieval during discovery requests."[532]

Courts considering cost shifting should consider the incentives they create. What this Article proposes, is that courts require and consider alternative processes, and if costs are shifted, shift the incentives. If costs are shifted, allow the requesting party to seek out and engage a lower cost provider *or* reimburse the responding party at a competitive rate, assuming sound information governance and cost-effective

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526 *See, e.g.*, *In re* Weekley Homes, L.P., 295 S.W.3d 309, 312 (Tex. 2009) (noting that a thirty-day document retention policy for email resulted in only one responsive email); Connor v. Sun Tr. Bank, 546 F. Supp. 2d 1360, 1366–68, 1375–77 (N.D. Ga. 2008) (observing that a thirty-day document retention policy for email resulted in deletion of relevant email and spoliation claim).

527 Wagoner v. Lewis Gale Med. Ctr., LLC, No. 7:15CV570, 2016 WL 3893135, at *3 (W.D. Va. July 14, 2016) (internal quotations omitted); *see also* Starbucks Corp. v. ADT Sec. Servs., Inc., No. 08-CV-900, 2009 WL 4730798, at *6 (W.D. Wash. Apr. 30, 2009) (internal quotations omitted).

528 DeGeer v. Gillis, 755 F. Supp. 2d 909, 930 (N.D. Ill. 2010).

529 Brookshire Bros. v. Aldridge, 438 S.W.3d 9, 37 (Tex. 2014) (Guzman, J., dissenting).

530 *Id.*

531 Schiermeyer, *supra* note 479, at 227–28; Mast, *supra* note 13, at 1839; Groot, *supra* note 438, at 2.

532 Jessica Lynn Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 297 (2004).

eDiscovery practices. If a responding party chooses a preferred process or vendor in lieu of a more cost-efficient one, it should bear the added expense.

Absent that, the current legal standard will continue to reward those who create undue burden: those who do not invest in technology that enables the efficient production of information, and those who hire the highest price vendor. There are choices to be in made in responding to requests for ESI, and the courts' decisions regarding cost shifting influence those choices.

3. Costs of Review & Other Costs

Nowhere are those choices more evident than with the cost of review. Most of the surveyed decisions that consider whether to shift the cost of review shift the cost of restoration and or search, but not the cost of review.[533] In *Zubulake*, the court emphasized that the parties could reach an agreement "and thereby avoid *any* cost of reviewing . . . for privilege."[534] *Rowe* reached the same conclusion: "the sanctity of defendants' documents can be adequately preserved at little cost by enforcement of a confidentiality agreement and . . . a protocol" that contained claw-back and non-waiver provisions.[535]

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533 *See., e.g.*, OptoLum Inc v. Cree Inc., No. 1:17CV687, 2018 WL 6834608, at *9 (M.D.N.C. Dec. 28, 2018); Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc, No. CV 14-03053, 2018 WL 5816108, at *7 (C.D. Ca. Apr. 25, 2018); EQT Prod. Co. v. Terra Servs., LLC, No. 14-1053, 2017 WL 10457417, at *1 (W.D. Pa. Apr. 19, 2017); Estate of Shaw v. Marcus, No. 14 Civ. 3849, 14 Civ. 5653, 2017 WL 825317, at *6 (S.D.N.Y. Mar. 1, 2017); Elkarwily v. Franciscan Health Sys., No. 3:15-cv-05579-RJB, 2016 WL 4061575, at *3 (W.D. Wash. July 29, 2016); United States *ex rel.* Guardiola v. Renown Health, No. 3:12-cv-00295, 2015 WL 5056726, at *4 (D. Nev. Aug. 25, 2015); Hausman v. Holland America Line-USA, No. 13cv00937, 2015 WL 11234152, at *1 (W.D. Wash. Mar. 17, 2015); United States *ex rel.* Garbe v. Kmart Corp., No. 12-CV-881, 2014 WL 12787823, at *3–4 (S.D. Ill. May 2, 2014); Cochran v. Caldera Med., Inc., No. 12-5109, 2014 WL 1608664, at *2 (E.D. Pa. Apr. 22, 2014); Thornton v. Morgan Stanley Smith Barney, LLC, No. 12-CV-298, 2013 WL 1890706, at *2–3 (N.D. Okla. May 3, 2013); Remy Inc. v. Tecnomatic, S.P.A., No. 1:11-cv-00991, 2013 WL 1310216, at *8 (S.D. Ind. Mar. 27, 2013); Adair v. EQT Prod. Co., No. 1:10cv00037, 2012 WL 1965880, at *4–5 (W.D. Va. May 31, 2012); Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *4 (Dec. 27, 2012); Couch v. Wan, No. CV08–1621, 2011 WL 2551546, at *4 (June 24, 2011); Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *6 (N.D. Ill. May 17, 2011); Radian Asset Assurance, Inc. v. Coll. of the Christian Bros. of N.M., No. CIV 09-0885, 2010 WL 4928866, at *5 (D.N.M. Oct. 22, 2010); Universal Del., Inc. v. Comdata Corp., No. 07-1078, 2010 WL 1381225, at *8 (E.D. Pa. Mar. 31, 2010); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *11–12 (N.D. Ill. June 3, 2002); Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, No. 07-2388, 2008 WL 3822773, at *7, *10 (D. Kan. Aug. 13, 2008); Semsroth v. City of Wichita, 239 F.R.D. 630, 638–41 (D. Kan. 2006); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 574–77 (N.D. Ill. 2004); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 290 (S.D.N.Y. 2003); Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 318 (S.D.N.Y. 2003); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *5–8 (E.D. La. Feb. 19, 2002); Rowe Ent., Inc. v. William Morris Agency., Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002); Bills v. Kennecott Corp., 108 F.R.D. 459, 462–63 (D. Utah 1985).

534 *Zubulake III*, 216 F.R.D. at 290–91 (emphasis added).

535 *Rowe*, 205 F.R.D. at 432.

The costs are significant. The 2012 RAND study *Where the Money Goes* found attorney review for relevance, responsiveness, and privilege accounted for seventy-three percent of the total cost of the discovery.[536] Empirical studies suggest that discovery costs account for between twenty and fifty percent of total litigation costs.[537] Impressionistic studies suggest that discovery costs in cases that do not go to trial are closer to seventy percent of total costs. If less than one percent of all federal cases now go to trial,[538] seventy percent of the costs of those cases are attributable to discovery, and seventy-three percent of those costs are generated by attorney review, then shifting review costs to the opposing party potentially shifts the majority of litigation costs.

Since 1796, the Supreme Court has repeatedly affirmed the American Rule, so that those with limited resources "should not be unjustly discouraged from vindicating their rights."[539] Shifting the costs of review does just that. It penalizes those who cannot pay, and it undermines Supreme Court jurisprudence, not by congressionally enacted statute, but by interlocutory discovery order. Yet, the cost of review is logically part of the burden of discovery. At the end of the day, somebody must pay for it. Framed as a binary choice between who should bear that burden, the issue presents harsh choices. The question to ask first is, is there a better way?

The Sedona Conference's *Commentary on Protection of Privileged ESI* acknowledges that "the procedure and process for protecting privileged ESI from production is broken," and preparation of a privilege log alone can consume hundreds of thousands of dollars.[540] The solution is not to shift the costs of a broken system onto the requesting party; the solution is to re-evaluate the methodology.

In the context of cost shifting, this means evaluating different methods of review when assessing the burden, and, if courts ultimately choose to shift costs then determining how much to shift. If a party seeks to shift costs, it should not dictate the costs by controlling the methodology. Instead, the courts should limit the costs shifted to those associated with the least expensive means of review aided by technology and a Rule 502(d) order.

Some courts have already done this. Judge Francis's protocol in *Rowe* allowed the requesting party to designate an expert to restore the backup tape in question and offered the responding party a choice: produce that tape to the requesting party without

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536 PACE & ZAKARAS, *supra* note 28, at xiv–xv.

537 Emergy G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L. J. 765, 781 (2010).

538 *Id.*

539 Fleishmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("[S]ince litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.").

540 Sedona Conference, *Commentary on Protection of Privileged ESI*, 17 SEDONA CONF. J. 95, 103, 155 (2016).

review, subject to a claw-back agreement, or review at its own expense the restored email communications.[541] Other courts have adopted similar protocols.[542]

Still, others have explored options between linear review and no review.[543] The Sedona Conference discusses the use of "general and matter- or entity-specific privilege ontology searches" and the use of email addresses and domain names to identify counsel.[544] Email threading and concept engines can also be used to identify privileged documents.[545] The court in *Good v. American Water Works Co.* encouraged the use of technology assisted review for privilege in lieu of the manual review,[546] and there is now machine learning-based "attorney-client privilege detection" built into widely used productivity software.[547] Elsewhere, practitioners have proposed streamlined privileged log protocols utilizing automated metadata logs and sampling.[548] In short, the producing party has choices when it comes to review.[549]

Traditionally, the producing party "unilaterally decides on the review protocol,"[550] and some have objected to attempts to encourage use of technology assisted review that forgoes linear review. They argue that this infringes on attorney-client privilege and work product protections.[551] The concern is "that electronic searching is not adequate to protect its rights."[552]

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541 *See* Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432–33 (S.D.N.Y. 2002).

542 Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ.A. 99-3564, 2002 WL 246439, at *8–9 (E.D. La. Feb. 19, 2002); *see also* Remy Inc. v. Tecnomatic, S.P.A., No. 1:11–CV–00991, 2013 WL 1310216, at *8 (S.D. Ind. Mar. 27, 2013); Radian Asset Assur., Inc. v. Coll. of the Christian Bros. of New Mexico, 2010 WL 4928866, at *4–5 (D.N.M. Oct. 22, 2010).

543 *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 574–77 (N.D. Ill. 2004).

544 Sedona Conference, *Commentary on Protection of Privileged ESI*, *supra* note 540, at 169.

545 *Id.* at 170.

546 Good v. Am. Water Works Co., No. 2:14-01374, 2014 WL 5486827, at *2–3 (S.D. W. Va. Oct. 29, 2014).

547 *Set up attorney-client privilege detection in Advanced eDiscovery*, MICROSOFT, https://docs.microsoft.com/en-us/microsoft-365/compliance/attorney-privilege-detection?view=o365-worldwide (last visited Feb. 4, 2021).

548 *EDRM Streamlined Privilege Log Protocol*, EDRM, https://edrm.net/wp-content/uploads/2020/11/EDRM_Privilege-Log-Protocol_Draft-as-of-11_30_20.pdf (last visited Feb. 4, 2021).

549 *See, e.g.*, Sun Gon Kang v. Credit Bureau Connection, Inc., No.1:18-cv-01359, slip op. at 6–7 (E.D. Ca. Apr. 7, 2020); Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc, No. CV 14-03053, 2018 WL 5816108, at *4–5 (C.D. Ca. Apr. 25, 2018).

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

551 *Almont*, 2018 WL 5816108, at *4–5; Adair v. EQT Prod. Co., Nos. 1:10CV00037, 1:10CV00041, 2012 WL 2526982, at *3–4 (W.D. Va. June 29, 2012).

552 *Adair*, 2012 WL 2526982, at *3–5.

Yet, courts have long recognized manual review is no longer realistic, and perfect review is impossible. Fifteen years ago, Judge Grimm acknowledged "the unavoidable truth" that discovery may encompass millions of electronic records that are discoverable and "to insist in every case upon 'old world' record-by-record pre-production privilege review . . . would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation."[553] As a result, the rules now "encourage" the requesting party to agree not to assert waiver where a responding party agrees to produce ESI without doing "a full-fledged privilege review."[554]

Some courts now find cost shifting unnecessary "because those costs could be mitigated by the use of electronic searching and production, together with the protections of the Protective and Clawback Orders."[555] Other courts decline to shift the costs of review because of the protections now afforded by Fed. R. Evid. 502: while defendant "is, of course, free to engage in as exacting a privilege review as it wishes, entry of a Rule 502(d) order will protect against waiver if it opts to conduct a more economical analysis."[556]

The Advisory Committee Notes to Rule 502 make the same points: analytics facilitate review,[557] and 502(d) "enable[s] a court to enter an order . . . that will allow the parties to conduct and respond to discovery expeditiously, without the need for exhaustive pre-production privilege reviews, while still preserving each party's right to assert the privilege."[558]

Courts acknowledge this means "errors will be made and privileged documents will sometimes be produced inadvertently."[559] Yet, the risk of such inadvertent production is present regardless of "whether the documents are searched and reviewed electronically or by human eyes."[560]

Litigants may reasonably choose to lay eyes on each document prior to production. The added cost may be worth it. However, given Rule 502(d) and the technology available to reduce costs, the cost of a traditional review—the cost of a "broken" system—is not reasonably imposed on the requesting party in a cost-shifting

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553 Hopson v. Mayor of Balt., 232 F.R.D. 228, 244 (D. Md. 2005).

554 *Id.* at 234–35.

555 *Adair*, 2012 WL 2526982, at *3–5.

556 Fleisher v. Phoenix Life Ins. Co., No. 11 Civ. 8405, 2012 WL 6732905, at *3–5 (S.D.N.Y. Dec. 27, 2012); *see also* Almont Ambulatory Surgery Ctr. LLC v. UnitedHealth Grp., Inc., LLC, No. CV 14-03053, 2018 WL 5816108, at *4–5 (C.D. Cal. Apr. 25, 2018); Thornton v. Morgan Stanley Smith Barney, LLC, No. 12-CV-298, 2013 WL 1890706, at *2–3 (N.D. Okla. May 3, 2013).

557 FED. R. EVID. 502, advisory committee's note to 2007 amendment.

558 FED. R. EVID. 502, add. to advisory committee's note to 2007 amendment, *quoted in Adair*, 2012 WL 2526982, at *5.

559 MVB Mortg. Corp. v. F.D.I.C., No. 2:08-CV-771, 2010 WL 582641, at *4 (S.D. Ohio Feb. 11, 2010); *accord* Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 388 (7th Cir. 2008).

560 *Adair*, 2012 WL 2526982, at *4.

motion.[561] For those courts that shift the cost of review, an inquiry into the most efficient means, with the understanding that Rule 502(d) is designed to obviate the need for exhaustive review, should be part-in-parcel of any analysis.

Note the incentives this creates. Computers are good at finding key words like "work product," and "attorney-client." They are good at using metadata to create communication maps and pattern recognition to create subject matter clusters and rankings. If those maintaining large stores of information know in advance that their ability to assert privilege or protection over material depends on use of technology assisted review and that such review is bolstered by properly labeling the material in the first place, they are more likely to do so.[562]

Failure to label work product as work product and confidential attorney communications as confidential communications creates expense. It is a variation on the same failure to organize that courts have for decades held lies with the party who created the expense. In *Rowe*, the court found "defendants retained privileged or confidential documents in electronic form but failed to designate them to specific files," and this was "analogous to where a company intermingles confidential documents with non-confidential, discoverable papers."[563] *Rowe* found "the expense of sorting such documents is properly borne by the responding party."[564] Courts "will not shift the burden of discovery onto the discovering party where the costliness of the discovery procedure involved is entirely a product of the defendant's record-keeping scheme over which the plaintiff has no control."[565] A legal norm that suggests "if you

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561 Litigants have testified that total privilege review costs exceeding $7 million could have been avoided using Rule 502 and technology to cull out and prioritize privilege review. *See* Committee on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., *Report of the Advisory Committee on Evidence Rules*, U.S. CTS. 27–28 (May 15, 2007), https://www.uscourts.gov/sites/default/files/fr_import/2007-05-Committee_Report-Evidence.pdf (summarizing joint testimony of Patrick Oot & Anne Kershaw), *quoted in* Sedona Conference, *Commentary on Protection of Privileged ESI*, *supra* note 541, at 102 n.1.

562 Work product, by definition, is limited to documents and tangible things "prepared in anticipation of litigation or for trial" by or for a party or its representative. FED. R. CIV. P. 26(b)(3)(A). If the party or its representative "anticipates" litigation, there is an opportunity to label work product accordingly. Assertion of attorney-client privilege generally requires a confidential communication made to get or give legal advice between an attorney and a client. *See, e.g.*, United States v. Int'l Brotherhood of Teamsters, 119 F.3d 210, 214 (2d Cir. 1997); United States v. White, 950 F.2d 426, 430 (7th Cir. 1991). Again, this standard presupposes intentional action, again offering an opportunity to label the communications as confidential. What precludes parties from better organizing privileged or protected information in the first place?

563 Rowe Ent., Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 432 (S.D.N.Y. 2002).

564 *Id.*; *see also* Davis v. E. Idaho Health Servs., Inc., 2017 WL 1737723, at *4 (D. Idaho May 3, 2017).

565 Delozier v. First Nat'l Bank of Gatlinburg, 109 F.R.D. 161, 164 (E.D. Tenn. 1986); *see also* Sun Gon Kang v. Credit Bureau Connection, Inc., No. 1:18-cv-01359, 2020 WL 1689708, at *6 (E.D. Ca. Apr. 7, 2020) ("[T]he fact that there are numerous files, or Defendant has stored them in an unorganized fashion, does not excuse their production."); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73, 77 (D. Mass. 1976).

want protect a privileged document, label it properly" would save untold sums over the long term.

Litigation costs will decrease, and so will profits, for some. While litigants use estimates as advocacy, reports suggest law firms use discovery as a profit center. In one survey, ninety-three percent of the firms surveyed reported revenue from eDiscovery "exceeded expectations."[566] Some law firms have marked up contract attorney review rates 513 percent.[567] Some law firms have sought $550 - $1,000 per hour for contract attorneys doing review work paid at $40-$60 per hour.[568] Commentators worry about "stratospheric" mark-ups taking "advantage of the client by taking a low-priced resource and billing them as a high-priced resource."[569] Attorneys have defended the markup as necessary to cover overhead costs.[570] But should profit margins and overhead costs be shifted to an opposing party or used to preclude otherwise relevant discovery?

The Sedona Conference Commentary on Protection of Privileged ESI acknowledges that the parties should make use of processes and technologies to reduce the cost associated with the assertion of privilege.[571] Courts can, through the legal standards they adopt, provide incentives to do so. Refusal to shift the cost of review will, over the long run create incentives for better document management and more efficient review.

G. Relative Ability of Each Party to Control Costs

There is little dispute that the specificity of the request defines its costs. The real question is, how do you get to narrowly tailored discovery? In short, it is an iterative process, and it requires cooperation.

The party asserting undue burden has the burden to support its motion with affidavits and evidentiary proof, or at least "detailed explanations."[572] The requesting

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566 *HBR Releases Results of Law Firm e-Discovery Strategy Survey*, BUSINESSWIRE (May 27, 2015), https://www.businesswire.com/news/home/20150527006283/en/HBR-Releases-Results-Law-Firm-e-Discovery-Strategy.

567 Doug Austin, *This Firm Marked Up Reviewer Billings over 500 Percent and that's Not the Worst Part*, EDISCOVERYDAILY (June 3, 2015), https://www.edrm.net/2015/06/this-firm-marked-up-reviewer-billings-over-500-percent-and-thats-not-the-worst-part-ediscovery-trends/.

568 Martha Neil, *Does Legal Fees Motion in $590M Citigroup Case Include $1K Per Hour for Low-Paid Contract Lawyers?*, A.B.A. J. (Jan. 3, 2013), https://www.abajournal.com/news/article/does_legal_fees_motion_in_590m_citigroup_case_include_1k_per_hour_for_low-p.

569 Gina Passarella, *Are Contract Attorney Markups of Any Concern to Clients?*, LEGAL INTELLIGENCER (June 2, 2015), https://plus.lexis.com/api/permalink/6f80d68f-c152-4f40-89ec-d15c2a37fd26/?context=1530671.

570 Austin, *supra* note 567.

571 Sedona Conference, *Commentary on Protection of Privileged ESI*, *supra* note 540, at 154 (Principle 4).

572 Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, No. 07-2388, 2008 WL 3822773, at *6 (D. Kan. Aug. 13, 2008); Semsroth v. City of Wichita, 239 F.R.D. 630, 633 (D. Kan.

party has the burden to rebut that showing.[573] Yet, the case law shows, time and again, that litigants fail to provide even basic information about burden, and they fail to cooperate to narrowly tailor the discovery in dispute. The solution proposed here is to require both: as a pre-requisite to motion practice, require cooperation in the form of disclosure of sufficient information to narrowly tailor discovery and obtain an independent estimate of the costs.

The case law shows responding parties failing to provide "any *evidence* showing the expenditure of time, effort or money that would be necessary to produce the requested documents."[574] Courts find, "frankly, the parties' broad claims about their respective discovery proposals are too speculative . . . this is less a situation where the scales are evenly balanced, and more one where the court has been given nothing to place on either side."[575] Courts lament "*ipse dixit* assertions by counsel that requested discovery of electronic records is overbroad, burdensome or prohibitively expensive [that] provide no help at all to the court."[576]

Litigants will pointedly refuse to provide information about the operating systems in question, the number of drives, the size of each, and the database management software. [577] They refuse to list employees or key players. [578] They refuse to identify

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2006); Quinby v. WestLB AG, 245 F.R.D. 94, 101 (S.D.N.Y. 2006); Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 573 (N.D. Ill. 2004); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 283 (S.D.N.Y. 2003).

573 *See* United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 243 (S.D. Cal. 2015).

574 *Foreclosure Mgmt. Co.*, 2008 WL 3822773, at *7; *see also* Hoist Fitness Sys., Inc. v. TuffStuff Fitness Int'l, Inc., No. EDCV 17-1388, 2019 WL 121195, at *3 (C.D. Cal. Jan. 7, 2019); Cooper Clinic, P.A. v. Pulse Sys., Inc., No. 14-1305, 2017 WL 396286, at *7 (D. Kan. Jan. 30, 2017); State Farm Mut. Auto. Ins. v. Healthcare Chiropractic Clinic, Inc., No. 15-cv-2527, 2016 WL 9330708, at *3 (D. Minn. Sept. 2, 2016); Nogle v. Beech St. Corp., No. 2:10-cv-01092, 2012 WL 3687570, at *8 (D. Nev. Aug. 27, 2012); Dahl v. Bain Cap. Partners, LLC., 655 F. Supp. 2d 146, 149 (D. Mass 2009).

575 W Holding Co. v. Chartis Ins. Co. of Puerto Rico, 293 F.R.D. 68, 74 (D.P.R. 2013).

576 *In re* Coventry Healthcare, Inc., ERISA Litig., 290 F.R.D. 471, 475 n.5 (D. Md. 2013) (citations omitted); Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98–99 (D. Md. 2003); s*ee also* Nehad v. Browder, No. 15-CV-1386, 2016 WL 3769807, at *2 (S.D. Cal. July 15, 2016); *Bridgepoint Educ., Inc.*, 305 F.R.D. at 243; Cochran v. Caldera Med., Inc., No. 12-5109, 2014 WL 1608664, at *2–3 (E.D. Pa. Apr. 22, 2014); Stewart v. Cont'l Cas. Co., No. 12-00532, 2014 WL 12600282, at *4 (S.D. Ala. Jan. 9, 2014); U.S. Bank Nat'l Ass'n v. GreenPoint Mortg. Funding, Inc., 939 N.Y.S.2d 395, 400 (N.Y. App. Div. 2012); Mikron Indus., Inc. v. Hurd Windows & Doors, Inc., No. C07-532RSL, 2008 WL 1805727, at *1–2 (W.D. Wash. Apr. 21, 2008); S. Cap. Enters., Inc. v. Conseco Servs., LLC, No. 04-0402, 2005 WL 8155415, at *3 (M.D. La. Oct. 6, 2005).

577 Willett v. Redflex Traffic Sys., Inc., No. 1:13-CV-1241, 2015 WL 13662593 (D.N.M. May 8, 2015).

578 DeGeer v. Gillis, 755 F. Supp. 2d 909, 929–30 (N.D. Ill. 2010).

the search terms to be used.[579] Litigants refuse to define what is inaccessible, or how they arrive at their cost estimates.[580] In other cases, litigants refuse to answer questions regarding the content of the hard drives in question, provide access to any of them, explain whether any of the data might be derived from other sources, or discuss the costs of alternatives.[581] Litigants will argue undue burden, but "keep[] its computer systems secret."[582] Litigants will seek to shift the cost of converting documents to searchable form, without identifying the number of documents or custodians; they will "fail[] to provide any support whatsoever" for their estimate.[583] Litigants look for the court to "rubberstamp" assertions of burden.[584]

Some courts are critical of this failure to cooperate. They find the responding party "should have been up-front . . . regarding its proposed custodians and search terms and then receptive to defense counsel's input. . . . The requesting party should not have had to file a motion to compel to obtain disclosure of this information."[585] They expect the parties to work together to arrive at reasonable search terms and cooperate to refine them.[586] Some courts acknowledge that the "most important ingredient for the analytical process to produce a fair result is a particularization of the facts to support any challenge to discovery of electronic records."[587]

Some courts reject cost shifting and undue burden arguments because of a failure to cooperate. Judge Grimm's standing order makes clear that a parties' lack of cooperation will be held against them.[588] In *Pippins v. KPMG LLP*, Judge Francis found defendant's refusal to "engage in good faith negotiations over the scope of the preservation" unreasonable and defendant "hoist on its own petard."[589]

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579 *Id*.; Burd v. Ford Motor Co., No. 3:13-CV-20976, 2015 WL 4137915, at *2 (S.D.W. Va. July 8, 2015).

580 Hallmark v. Cohen & Slamowitz, LLP, No. 11-CV-842, 2016 WL 1128494, at *3 (W.D.N.Y. Mar. 23, 2016).

581 Pippins v. KPMG LLP, 279 F.R.D. 245, 250–51 (S.D.N.Y. 2012).

582 Labrier v. State Farm Fire & Cas. Co., 314 F.R.D. 637, 642 (W.D. Mo. 2016) (refusing to shift cost based on responding party's refusal to provide information regarding its databases), *order vacated on other grounds sub nom. In re* State Farm Fire & Cas. Co., 872 F.3d 567, 577 (8th Cir. 2017).

583 Proctor & Gamble Co. v. S.C. Johnson & Son, Inc., No. 9:08-CV-143, 2009 WL 440543, at *1 (E.D. Tex. Feb. 19, 2009).

584 *Hallmark*, 2016 WL 1128494, at *3. *See generally* Cargill Meat Sols. Corp. v. Premium Beef Feeders, LLC, No. 13-CV-1168, 2015 WL 3937410 (D. Kan. June 26, 2015).

585 DeGeer v. Gillis, 755 F. Supp. 2d 909, 929–30 (N.D. Ill. 2010).

586 UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs., No. 16-cv-81180, 2017 WL 4785457, at *3 (S.D. Fla. Oct. 20, 2017).

587 Thompson v. U.S. Dep't of Hous. & Urban Dev., 219 F.R.D. 93, 98 (D. Md. 2003).

588 Grimm, *Discovery Order*, *supra* note 464, at 2.

589 Pippins v. KPMG LLP, 279 F.R.D. 245, 254, 256 (S.D.N.Y. 2012); s*ee also* Pyle v. Selective Ins. Co. of Am., No. 2:16-cv-335, 2016 WL 5661749, at *2 (W.D. Pa. Sept. 30, 2016)

In some cases, there is an iterative process where disclosure is followed by more narrowly tailored discovery during litigants' motion practice. The discovery that gave rise to the seminal *Zubulake* opinions did not start narrowly tailored. Plaintiff's first request sought production of "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff."[590] Defendant's objections gave rise to a motion to compel, an exchange of letters with the court, and a telephone conference before a magistrate judge.[591] Following that telephone conference, defendant agreed to produce email from the accounts of five individuals named by plaintiff over a twenty-nine month period.[592] Judge Scheindlin went on to find, as revised, "[t]his is a relatively limited and targeted request."[593]

Compare this to plaintiff's request in *Rodriguez-Torres v. Government Development Bank of Puerto Rico*, an employment discrimination case seeking "all e-mail communications and calendar entries describing, relating or referring to plaintiff" for a three-year period.[594] In *Rodriguez-Torres*, the record shows no hearing and exchange of information enabling the parties to limit the request to key custodians. The court simply found the discovery presented "too high" a cost and was "a fishing expedition."[595] The very same discovery resulted in one case in production of relevant email from key custodians and in another no production at all. The difference was that one court required cooperation, which allowed the parties to agree on key custodians. The second court simply found the discovery overly broad.

The solution proposed here is to mandate cooperation *before* the motions get filed. Courts should require disclosure of information sufficient to narrowly tailor the discovery in question and allow the requesting party or the court to obtain an independent estimate of the cost of that more narrowly tailored discovery. Courts should require joint submissions, as part of a Rule 26(c) or 37(a) certification, and in them require the parties disclose information regarding information systems, key

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(internal quotations omitted) ("Among the items about which the court expects counsel to 'reach practical agreement' without the court having to micro-manage e-discovery are 'search terms, date ranges, key players and the like.'"); Romero v. Allstate Ins. Co., 271 F.R.D. 96, 109 (E.D. Pa. 2010); Wachtel v. Health Net, Inc., 239 F.R.D. 81, 94 (D.N.J. 2006) (finding that the meet and confer process was "compromised by [a] willful failure to identify to the Plaintiffs the full range of documents that were responsive to Plaintiffs' document requests.").

590 Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 312–13 (S.D.N.Y. 2003); s*ee also* Schachter v. Sunrise Senior Living Mgmt., Inc., No. 3:18 CV 953, 2020 WL 486880, at *6 (D. Conn. Jan. 30, 2020); Webasto Thermo & Comfort N. Am. v. BesTop, Inc., 326 F.R.D. 465, 469 (E.D. Mich. 2018); Cooper Clinic, P.A. v. Pulse Sys., Inc., No. 14-1305, 2017 WL 396286, at *2 (D. Kan. Jan. 30, 2017); Hawa v. Coatesville Area Sch. Dist., No. 15-4828, 2017 WL 1021026, at *1 (E.D. Pa. Mar. 16, 2017).

591 *Zubulake I*, 217 F.R.D. at 312–13.

592 *Id.*

593 Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 285 (S.D.N.Y. 2003).

594 Rodriguez-Torres v. Gov't Dev. Bank of P.R., 265 F.R.D. 40, 43 (D.P.R. 2010).

595 *Id.* at 43–44.

custodians, key sources of ESI, key terminology, and date ranges in order to specifically tailor the discovery.[596]

Any evaluation of burden, including the "extent to which the request is specifically tailored to discover relevant information," should be preceded by an evaluation of the extent to which the parties have cooperated. If the responding party has not disclosed information necessary to specifically tailor the discovery, that fact should weigh against cost shifting. If there is a meaningful exchange of information, then a requesting party's refusal to cooperate in tailoring the discovery to that information should weigh the analysis in favor of cost shifting.[597]

Litigants can propound discovery and depose their way to understanding who the key players are, where the key sources of data are, how it is stored and the like. Or the courts can create incentives for early case assessment and an iterative process of disclosure leading to narrowly tailored requests, by conditioning cost-shifting analyses upon it. The question to ask here is, has there been meaningful cooperation, i.e., a meaningful exchange of information to enable a narrowly tailored request?

H. The Factors from A to G

At the end of the day, all of these factors boil down to a cost-benefit analysis. Is the discovery worth it? The answer remains elusive. How courts answer the question varies dramatically, though the analysis is now often skewed in favor of cost shifting. Moreover, there is little indication that these factors address all that needs to be addressed. What if the requesting party offers to pay all or a portion of the costs? Some courts consider this a factor favoring permitting the discovery; others do not.[598]

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596 *See* Seventh Circuit Council on eDiscovery and Digital Information, *Model Discovery Plan*, EDISCOVERYCOUNCIL.COM 6–7, https://www.ediscoverycouncil.com/content/model-discovery-plan-and-privilege-order (last visited June 19, 2020) (proposing disclosure of this type of information as part of the Rule 26(f) meet and confer).

597 *See, e.g.*, Lawson v. Spirit AeroSystems, Inc., No. 18-1100-EFM-ADM, 2020 WL 3288058, at *21 (D. Kan. June 18, 2020) (shifting costs after warning the requesting party three times to cooperate in narrowly tailoring discovery requests); Surplus Source Grp., LLC v. Mid-Am. Engine, Inc., No. 4:08-cv-049, 2009 WL 961207 (E.D. Tex. Apr. 8, 2009) (shifting costs of repeated search to requesting party given failure to timely communicate regarding search terms).

598 *Compare* Estate of Boles v. Nat'l Heritage Realty, Inc., No. 4:07-CV-99, 2010 WL 2038611, at *5 (N.D. Miss. May 20, 2010), *aff'd*, 2010 WL 3087472 (N.D. Miss. Aug. 6, 2010), *and* Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94CIV.2120, 1995 WL 649934, at *3 (S.D.N.Y. Nov. 3, 1995), *and* Nat'l Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980), *and* PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657, 2007 WL 2687670, at *10 (N.D.N.Y. Sept. 7, 2007), *with* Cognex Corp. v. Electro Sci. Indus., Inc., No. Civ.A 01CV10287, 2002 WL 32309413, at *5 (D. Mass. July 2, 2002) ("There is something inconsistent with our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it. There are limits on the number of depositions and interrogatories even though more might well produce relevant information. There is no exception to those limitations based upon one party's willingness to pay. The sense of fairness underpinning our system of justice will not be enhanced by the courts participating in giving strategic advantage to those with deeper pockets."), *and* 2006 Advisory Committee Note to Rule 26(b)(2)(B) ("A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause.").

What if a party seeks to shift costs after the fact, after the discovery is complete? Some courts permit this; some do not.[599] If cost shifting is warranted, how much of the costs should be shifted? Courts struggle to articulate more than a suggestion that twenty-five, fifty, or seventy-five percent seems fair.[600]

What can be said here, with regard to the factors the courts do examine, is that cost shifting should be predicated on cooperation. Judge Grimm does this in his discovery orders: "the parties and counsel are expected to work cooperatively during all aspects of discovery. . . . The failure of a party or counsel to cooperate will be relevant in resolving any discovery disputes [and] who shall bear the cost of that discovery."[601] And there are courts that have followed suit.[602]

The proposal here is to go further. Courts should require cooperation before considering a motion to shift the costs of or say no to otherwise relevant discovery. The cooperation required by the courts should include disclosure by both parties of the information necessary for the parties to narrowly tailor the discovery and accurately estimate its costs and benefits. Only after the parties have exchanged this information, should the court consider the motion.

When it does hear the motion, courts should require from the parties objectively verifiable information for each factor. If cost shifting is warranted, courts should share control over the process or limit shifting of costs to those associated with efficient information governance, review, and production.

The responding party has choices, and not all choices are created equal. Analyzing these choices may tax a court with a crowded docket and limited resources, but it can be managed through a joint submission process. As with a joint case management plan, it forces the parties to talk, and, if the template is sound, exchange specific information that bears directly on the costs of the discovery and means to reduce it.

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599 *Compare* Cason-Merenda v. Detroit Med. Ctr., No. 06-15601, 2008 WL 2714239 (E.D. Mich. 2008), *with* State Farm Mut. Auto. Ins. Co. v. Healthcare Chiropractic Clinic, No. 15-cv-2527, 2016 WL 9330708, at *3 (D. Minn. Sept. 2, 2016), *and* Am. Water Heater Co. v. Taylor Winfield Corp., No. 2:16-CV-00125, 2017 WL 7732713, at *3 (E.D. Tenn. Nov. 17, 2017), *objections overruled sub nom.* Am. Water Heater Co. v. Taylor-Winfield Techs., Inc., No. 2:16-CV-125, 2018 WL 3339189 (E.D. Tenn. Jan. 23, 2018).

600 *See, e.g.*, First Fin. Bank, N.A. v. Bauknecht, No. 12-CV-1509, 2013 WL 3833039, at *4 (C.D. Ill. July 23, 2013); Clean Harbors Env't Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 WL 1897213, at *2, *6 (N.D. Ill. May 17, 2011); Habtegiorgis v. OIC of Wash., No. CV-08-3077, 2010 WL 11618662, at *3 (E.D. Wash. Mar. 29, 2010), *on reconsideration in part*, 2010 WL 2232142 (E.D. Wash. June 2, 2010); Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 284, 289 (S.D.N.Y. 2003). Other courts simply pick a number, an amount of costs to shift, without discussion. Zeller v. S. Cent. Emergency Med. Servs., Inc., No. 1:13-CV-2584, 2014 WL 2094340, at *10–11 (M.D. Pa. May 20, 2014).

601 Grimm, *Discovery Order*, *supra* note 464, at 2 (citing Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 356 (D. Md. 2009)).

602 Design Basics, LLC v. Carhart Lumber Co., 2014 WL 6669844, at *5 (D. Neb. Nov. 24, 2014).

As John Adams famously noted, "facts are stubborn things."[603] The case law makes clear that "facts" are commonly absent from cost-shifting motions.[604] The goal here is to require them and base decisions on them.

VI. CONCLUSION

Of the 178 judicial decisions analyzed for this research, seventy decisions, thirty-nine percent, ordered some form of cost shifting. Eighty-four decisions, forty-seven percent, denied requests to shift costs, and the remainder either denied the discovery outright or denied the request pending additional discovery or motion practice. Of the fifty decisions handed down since the 2015 amendments, the court shifted all or a portion of the costs in thirty percent of the cases.[605] The actual numbers are higher, as this excludes an increasing number of decisions where the discovery is denied outright, or the motion is denied pending additional discovery or motion practice.

There are those who argue that this percentage should be higher still: The courts should flip the presumption that the responding party pays to a presumption that the requesting party pays all or part of the costs of responding to discovery, i.e., switch to a user-pays model.[606] Practitioners, and some of the courts, have argued that absent cost sharing the requesting party does not have "skin in the game."[607] Courts and commentators note that, "[a]side from the comparatively minimal costs of drafting their discovery requests and considering the responses, litigants bear none of the costs of producing the information that they demand."[608] As the argument goes, this creates incentives to propound broad-brush discovery.[609] There is "no economic incentive for the party asking for information to moderate its requests to ensure that they are proportional to the issues at stake and not excessively expensive to the producing party."[610] According to some, "[t]he American rule is perhaps the greatest single catalyst of discovery abuse," because it allows plaintiffs to impose tremendous costs on defendants at virtually no cost to themselves.[611]

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603 DAVID MCCULLOUGH, JOHN ADAMS 68 (2001).

604 *See supra* notes 574–95.

605 Research for the Article excluded decisions addressing cost-shifting requests by non-parties responding to a subpoena and cost-shifting imposed as a sanction because the legal standards are different. *See* FED. R. CIV. P. 37, 45(d)(1).

606 *See, e.g.*, Redish & McNamara, *supra* note 8, at 773; Beisner, *supra* note 13*,* at 586.

607 Grimm & Yellin, *supra* note 13, at 521.

608 Redish & McNamara, *supra* note 8 at 800; *accord* Mast, *supra* note 13, at 1830; Pulver, *supra* note 13, at 1401–02.

609 *See, e.g.*, Lubber, Inc. v. Optari LLC, No. 3:11-0042, 2012 WL 899631, at *2 (M.D. Tenn. Mar. 15, 2012); Major Tours, Inc. v. Colorel, No. 05-3091, 2009 WL 3446761, at *6 (D.N.J. Oct. 20, 2009), *aff'd*, 720 F. Supp. 2d 587 (D.N.J. 2010).

610 Grimm & Yellin, *supra* note 13, at 521.

611 Beisner, *supra* note 13*,* at 587 (noting contrary views found in Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 787 (2010)); *accord* Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of*

The solution, it is said, is to require "skin in the game."[612] If requesting parties are required to pay the expense of producing the discovery, they will internalize its costs and ask for only what they are willing to pay to obtain.[613] Some advocate adopting a user pays rule for all discovery.[614] Some propose such a rule for all discovery, but with government subsidies for the financially weak in public interest litigation.[615] Some propose one-way fee-shifting if plaintiff's case is dismissed on summary judgment,[616] and some a presumption in favor of reimbursing the responding party for some or all costs, depending on "the resources of the plaintiffs' attorneys."[617] Some propose a "co-pay" for discovery where the requesting party is assessed ten percent of the costs of the responding party.[618] Some propose special rules just for eDiscovery: a user-pays rule for all eDiscovery; or increased cost shifting for eDiscovery;[619] or cost shifting when seeking inaccessible ESI;[620] or cost shifting if the discovery doesn't turn up anything.[621]

The problem is that the "invisible hand of incentives" moves whether the responding or requesting party pays. Experiments with loser-pay regimes suggest that routine cost shifting can dramatically *increase* overall spending: when Florida experimented with a loser pays regime in medical malpractice cases, defendant's cost rose 100%.[622] With cost shifting motions, the case law shows, time and again, that the

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Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 STAN. L. REV. 1393, 1398–99 (1994); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a)—'Much Ado About Nothing?*, 46 HASTINGS L.J. 679, 701 (1995); Peggy E. Bruggman, *Reducing the Costs of Civil Litigation: Discovery Reform*, PUB. L. RSCH. INST. (1995), http://w3.uchastings.edu/plri/fal95tex/discov.html; Amelia F. Burroughs, Comment, *Mythed It Again: The Myth of Discovery Abuse and Federal Rule of Civil Procedure 26(b)(1)*, 33 MCGEORGE L. REV. 75, 91–92 (2001).

612 Grimm & Yellin, *supra* note 13, at 521.

613 *Id.*; *see also* Laethem Equip. Co. v. Deere & Co., 261 F.R.D. 127, 146 (E.D. Mich. 2009).

614 Beisner, *supra* note 13, at 587–88; Grimm & Yellin, *supra* note 13, at 521–22.

615 *See* Redish & McNamara, *supra* note 8, at 815–16.

616 Cameron T. Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117, 2119 (2018).

617 Redish & McNamara, *supra* note 8, at 822.

618 Robert D. Owens & Francis X. Nolan, *Skin in the Game: A Proposed Co-Pay Requirement for Discovery-Requesting Parties*, LEGAL BACKGROUNDER, Oct. 6, 2017, at 3.

619 Redish, *supra* note 13; Mast, *supra* note 13, at 1837–38.

620 *See, e.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 601–03 (E.D. Wis. 2004); Beisner, *supra* note 13, at 584–86; Pulver, *supra* note 13, at 1424.

621 OptoLum Inc. v. Cree Inc., No. 17CV687, 2018 WL 6834608, at *3 (M.D.N.C. Dec. 28, 2018).

622 Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L., ECON., & ORG. 345, 355–78 (1990).

responding party has "every incentive to respond extravagantly to discovery requests."[623]

These incentives to "respond extravagantly to discovery requests" to argue undue burden align with the incentives of law firms and vendors to use the discovery process as a profit center. As discussed *supra*, court filings show law firms marking up the costs of attorney review over 500%, and the Sedona Conference finds the process for protecting privileged ESI from production simply "broken."[624] Industry insiders describe an eDiscovery industry where vendors "racked up immense bills without delivering immense value."[625] Others in the industry have described eDiscovery as "an insanely inefficient process" that involves "a lot of nickel-and-diming."[626]

Those nickels and dimes add up. Litigants spent an estimated $10.11 billion on eDiscovery in 2018.[627] Analysts predict that will grow to $18.7 billion by 2023.[628] Reversing the presumption for who pays for discovery simply shifts the burden of funding industry growth from $10.1 billion to $18.7 billion. Focusing only on proportionality and cost shifting codifies the waste inherent in an "insanely inefficient process." It ensures that costs remain high. It ensures that relevant discovery takes a back seat to "discovery wars" aided by a multi-billion-dollar industry.[629]

As Judge Grimm notes, reversing the presumption that the producing party must pay its own costs in responding to proper discovery requests would be "a radical departure from the method by which civil cases have been litigated in federal court since the adoption of the discovery rules in 1938."[630] Similarly, the Advisory

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623 Norris, *supra* note 616, at 2119.

624 Sedona Conference, *Commentary on Protection of Privileged ESI*, *supra* note 540, at 103, 155 (Principle 4).

625 Ansel Halliburton, *Modus Is Trying to Shake Up the Fat eDiscovery Industry*, TECHCRUNCH (Apr. 3, 2013), http://techcrunch.com/2013/04/03/modus-is-trying-to-shake-up-the-fat-ediscovery-industry/.

626 Matt Weinberger, *How One Startup Wants to Solve an 'Insane' Problem for a $400 Billion Industry*, BUS. INSIDER, http://www.businessinsider.com/logikcull-is-trying-to-fix-ediscovery-2015-5#ixzz3e0YnJAH9 (last visited June 24, 2015); Erin E. Harrison, *E-Discovery a 'Stain' on the Legal System*, LEGAL TECH. NEWS (July 21, 2015), http://www.legaltechnews.com/id=1202732652593/EDiscovery-a-Stain-on-the-Legal-System?kw=E-Discovery%20a%20%E2%80%98Stain%E2%80%99%20on%20the%20Legal%20System&et=editorial&bu=Law%20Technology%20News&cn=20150721&src=EMC-Email&pt=Daily%20Alert&slreturn=20150621115743.

627 Rob Robinson, *An eDiscovery Market Size Mashup: 2018-2023 Worldwide Software and Services Overview*, COMPLEX DISCOVERY (Aug. 29, 2017), https://complexdiscovery.com/an-ediscovery-market-size-mashup-worldwide-software-and-services-overview-2018-2023/.

628 *Id.*

629 Practitioners used the term "Discovery Wars" when writing about Rule 30(b)(6) depositions. Madhavi K. Seth & Vikram S. Arora, *Discovery Wars*, 108 ILL. BAR J. 38, 38 (2020).

630 Grimm & Yellin, *supra* note 13, at 522.

Committee Notes to the 2015 amendments to Rule 26 suggest the change "does not imply that cost-shifting should become common practice" and the former chair of the committee cautioned, "[c]ost shifting is now and should be in the future a rare occurrence."[631] Yet, cost shifting has, in fact, become common practice.[632]

This Article proposes an alternative to this radical shift: make the cost-shifting analysis more objective and the process cheaper. Require cooperation before cost shifting. Cooperation will lead to "just, speedy, and efficient" discovery methods that simply shifting costs will not, because asking "can it be done more efficiently" results in a different answer than asking "is the discovery unduly burdensome"?

Change starts with courts interpreting the proportionality and cost-shifting factors to require objective information to answer both questions. As set out above, the courts should interpret each factor to call for verifiable information. One can objectively determine the importance of the issues, by analyzing whether the case impacts more than the named litigants. One can more objectively define the value of the case, by requiring submission of evidence regarding the amount in controversy and the non-monetary relief requested. One can objectively define the parties' relative access to information by examining access at the file level, as opposed to the type of information. One can objectively define the parties' resources by requiring evidence of the same, rather than exploring resources theoretically available to the parties. One can objectively analyze the importance of the discovery by requiring disclosure of information necessary to define core discovery in that case. One can more objectively define the burden and benefit of this discovery by mandating cooperation in the form of disclosure of information sufficient to enable both parties to obtain cost estimates and explore alternatives.

This last step allows the courts to ask, is there a better way, prior to considering whether the discovery is unduly burdensome. In doing so, this Article suggests that courts follow the best practices of practitioners when they outsource work: require multiple proposals.[633] Require the responding party obtain and submit more than one proposal. Require the responding party share sufficient information to enable the requesting party to obtain an estimate. If the parties are required to obtain multiple estimates in advance of the discovery, vendors, knowing there is competition, have incentives to propose efficient alternatives, and the courts have choices.

Mandating this type of cooperation means requiring disclosure of key information. As a precondition to reviewing a cost-shifting or proportionality motion, courts should require an exchange of information regarding the information technology systems at issue, key custodians, key terms, key sources of ESI, and date ranges in order to specifically tailor the discovery.[634] There is nothing new about requiring the exchange of this type of information: it is supposed to happen in the Rule 26(f) conference. But the case law suggests that litigants routinely fail or refuse to provide this information regarding contested discovery.

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631 *See* Sedona Conference, *Commentary on Proportionality*, *supra* note 190, at 166 n.45.

632 *See* Judicial Roundtable, *supra* note 75, at 30.

633 *See generally* Sedona Conference, *Guidance for the Selection of Electronic Discovery Providers*, 18 SEDONA CONF. J. 55, 136 (2017).

634 *See supra* notes 574–95.

This Article argues a responding party's failure to cooperate by timely sharing this information should serve as a basis for denying requests to preclude discovery or shift its costs.[635] Equally important, a requesting party's failure to cooperate by failing to engage in an iterative process to narrowly tailor discovery should serve as a basis for shifting costs.[636] As early as the 1980s, courts emphasized the importance of cooperation in producing ESI.[637] Decades later, courts still lament the "discovery slugfest"[638] and practitioners still write about "discovery wars."[639] Cooperation has not happened by proclamation or exhortation. It will, if discovery depends on it.

Finally, if costs are shifted, courts should share control over the process or limit reimbursement. As discussed above, from preservation to production, litigants have options, and the standard for cost shifting, as with discovery, should be reasonableness not perfection.[640]

Costs are determined by process, and courts have long held that a burden voluntarily undertaken is not an undue burden.[641] Yet, the courts continue to approve use of high-priced vendors and processes, doubling the costs in some cases, and then shifting them.[642] If the responding party chooses to employ a more expensive process, e.g., producing static images instead of native files, that party should pay for it. If the responding party has adopted information governance practices that require expensive discovery, e.g., short auto-delete periods and inaccessible backup media, that party should pay the costs associated with producing information from those sources.

Creating incentives to utilize efficient processes should include incentives to limit the seventy-three percent of the discovery costs spent on attorney review.[643] One way is to exclude them from the cost-shifting analysis.[644] The majority of cases on cost shifting do so, citing the American Rule and the responding party's exclusive ability to control the cost of review.[645] This Article suggests that, if courts do shift the costs of review based on proportionality considerations, they should allocate only those costs associated with the least expensive means of review aided by technology and a

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635 *See supra* notes 585–97.

636 *See supra* notes 601–04.

637 Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986).

638 UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs. LLC, No. 16-CV-81180, 2017 WL 4785457, at *3 (S.D. Fla. Oct. 20, 2017).

639 Seth & Arora, *supra* note 629, at 38.

640 *See* Hon. Craig B. Shaffer, *Deconstructing "Discovery About Discovery"*, 19 SEDONA CONF. J. 215, 220 (2018) ("discovery is governed by a standard of reasonableness, not perfection.").

641 *See supra* notes 101–02, 369–73.

642 *See supra* notes 317–32.

643 PACE & ZAKARAS, *supra* note 28, at xiii- xv.

644 *See supra* notes 533–35.

645 *See supra* notes 533–39.

Rule 502(d) order.[646] If the responding party chooses linear review for all or a portion of the production set, the traditional cost-allocation rules should apply.[647] If the responding party chooses to review ESI unlikely to contain privileged material, e.g. a customer calls database, the traditional cost-allocation rules should apply.[648] Doing so not only minimizes costs in litigation, it encourages sound information governance practices. Parties that properly label and organize information in advance will have higher recall rates. In short, the cost-shifting analysis can encourage efficiency.

As set out above, in 2010, the Duke Conference concluded that cooperation, proportionality, and sustained, hands-on judicial case management were needed.[649] The 2015 revisions to the federal rules codified two legs of that three-legged stool, with amendments to the rules addressing proportionality and case management.[650] A two-legged stool, however, is a precarious perch—one almost impossible to balance. Mandating cooperation to produce better information, better processes, and better incentives provides the third leg. Doing so does not require a rule change; it does require consistent application of the best practices now found in some of the case law. Focusing solely on cost shifting or proportionality will not result in a "just, speedy, and efficient" determination of an action. Requiring cooperation will.

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646 *See supra* notes 555–65.

647 *See supra* Part IV.F.4.

648 *Id.;* Boeynaems v. LA Fitness Int'l, LLC, 285 F.R.D. 331, 341–43 (E.D. Pa. 2012).

649 2014 Judicial Conference Summary Report, *supra* note 21, at Rules App. B-2–B-3.

650 *Id.* at B-11–B-12.