

Pepperdine Dispute Resolution Law Journal

Volume 13 | Issue 2


Article 2

4-15-2013

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Recommended Citation

Tzipora Goodfriend-Gelernter, *How to Avoid the Death of Your Case by Two Billion Paper Cuts: Encouraging Arbitration as an Alternative Way to Resolve Costly Discovery Disputes*, 13 Pepp. Disp. Resol. L.J. Iss. 2 (2013)
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol13/iss2/2>

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How to Avoid the Death of Your Case by Two Billion Paper Cuts: Encouraging Arbitration as an Alternative Way to Resolve Costly Discovery Disputes¹

Tzipora Goodfriend-Gelernter²

I. INTRODUCTION

American discovery has been a key component of our litigation system for over a century.³ Some would say that discovery practice is so essential to our American civil litigation system that it affects whether a suit is taken to trial or settled.⁴ However, the major role discovery currently plays in our

1. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 20 (2007).

Take . . . for example, litigation in which the universe subject to search stands at one billion e-mail records, at least 25% of which have one or more attachments of varying length (1 to 300 pages). Generously assume further that a model “reviewer” (junior lawyer, legal assistant, or contract professional) is able to review an average of fifty e-mails, including attachments, per hour. Without employing *any* automated computer process to generate potentially responsive documents, the review effort for this litigation would take 100 people, working ten hours a day, seven days a week, fifty-two weeks a year, over fifty-four *years* to complete. And the cost of such a review, at an assumed average billing of \$100/hour, would be \$2 billion.

Id.

2. Tzipora Goodfriend-Gelernter received her Juris Doctor from Pepperdine University School of Law in 2012 and her MBA from the Graziadio School of Business & Management in 2013. Thank you to Raphael for all of his assistance in the writing of this article.

3. SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, *ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE CASES AND MATERIALS 2* (2009).

4. *Id.* at iii.

civil litigation process was not always so broad.⁵ It was the adoption of the Federal Rules of Civil Procedure, in 1938, which expanded discovery rights tremendously and really gave way to the discovery revolution.⁶ In the spirit of this expansion, Rules 26(b)(1) and 34(a) were amended in 1946.⁷ Specifically, Rule 26(b)(1) was amended to reflect that information being requested need not be admissible to be discoverable,⁸ and Rule 34(a) was amended to specify that categorical requests of discovery were valid.⁹ Today, broad discovery has become “a procedural institution .†.†. of virtually constitutional foundation.”¹⁰

The development of technology has permeated into our daily lives.¹¹ Over the past decade we have experienced explosive growth in computer usage.¹² From the use of social media to unleash the Arab Spring¹³ to the Supreme Court of Pennsylvania establishing a Twitter feed to “increase online access to its rulings,”¹⁴ blogging, facebooking, g-chatting, texting, instant messaging, and using iPods and iPads have all been established as normal and impactful activities.¹⁵ This use of technology has found its way into our professional lives as well.¹⁶ Email as a form of communication is commonplace in the workplace.¹⁷ Computer programs are frequently used to prepare documents of all kinds.¹⁸ Document drafts can be distributed to twenty people at once who can make edits, leave comments, change formats, and respond all without leaving their desks.¹⁹ In fact, 32 million emails were

5. *Id.* at 2.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 3 (citing Geoffrey C. Hazard, *From Whom No Secrets are Hid*, 76 TEX. L. REV. 1665, 1694 (1998)).

11. See Barry Friedman, *Privacy, Technology, And Law*, N.Y. TIMES, Jan. 29, 2012, <http://www.nytimes.com/2012/01/29/opinion/sunday/in-the-gps-case-issues-of-privacy-and-technology.html>.

12. Steven C. Bennett, *E-Discovery Issues: What Parties and Their Counsel Need to Know in Anticipation of and During Arbitration*, 64 DISP. RESOL. J. 20, 22 (2009).

13. Rebecca J. Rosen, *So, Was Facebook Responsible for the Arab Spring After All?*, THE ATLANTIC, Sep. 3, 2011, <http://www.theatlantic.com/technology/archive/2011/09/so-was-facebook-responsible-for-the-arab-spring-after-all/244314/>.

14. Administrative Office of Pennsylvania Courts, *Pennsylvania Supreme Court to Tweet Rulings*, AOPC (Oct. 18, 2011), http://www.courts.state.pa.us/NR/rdonlyres/79B24780-E1F8-4B8F-B0B4-FEECDB2D3730/0/Twitter_101811.pdf.

15. See Paul & Baron, *supra* note 1, at 14.

16. See Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation*, 2000 FED. CTS. L. REV. 2, 3 (2000).

17. See Bennett, *supra* note 12, at 22.

18. See *id.* at 22–24.

19. See Paul & Baron, *supra* note 1, at 8.

at the center of the discovery controversy in *U.S. v. Philip Morris*²⁰ while nearly 6,000 backup tapes containing emails related to the Iran-Contra affair were subject to a preservation order issued to the White House during the George Bush administration.²¹ In addition to the mass volume of data created in the workplace, employees may be conducting work from multiple locations and storing work related documents on multiple media tools.²² An organization might have some employees working on desktop computers, while others conduct work on laptops at home, saving information to personal organizers; removable disks; mobile phones; and other data storage media, all which may contain potentially relevant discoverable records.²³

This increase in our usage of electronically-stored information (ESI) has inevitably impacted the discovery process.²⁴ Along with this increase in forms of ESI comes a predictable flurry of costly E-Discovery disputes, which have led to shamed clients, harried judges, and sanctioned attorneys.²⁵

Another effect of our increasingly digital world is the need for lawyers to understand the technical aspect of discovery, as technologically deficient counsel can result in the production of privileged information, defective use

20. See *United States v. Philip Morris USA*, 449 F. Supp. 2d 1, 943 (D.D.C. 2006) (1,600 page opinion by Judge Gladys Kessler).

21. *Armstrong v. Executive Office of the President*, 810 F. Supp. 335 (D.D. Cir. 1993)(Judge Richey ruled that computer tapes containing copies of email messages by Reagan and Bush White House staff must be preserved because the electronic versions were not simply duplicates of paper printouts, but contained additional information beyond the paper copies such as who has received the information in the emails and when).

22. Withers, *supra* note 16.

23. *Id.*

24. See SCHEINDLIN, *supra* note 3, at 45–52. The authors of this casebook list the following as some of the potential electronically stored information (ESI) data that could exist within an enterprise and that needs to be considered when responding to discovery requests: graphical presentation programs, financial management programs, database programs, document scanning programs, spreadsheet programs, and document publishing programs. *Id.* at 46.

25. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005) (the Supreme Court addressed Arthur Andersen's challenge to the jury instructions given and ruled that to be a "knowingly corrupt persuader" one must contemplate an official proceeding in which documents would be material and still persuade the shredding of those documents); *Rambus, Inc. v. Infineon Techs. AG*, 222 F.R.D. 280, 298 (E.D. Va. 2004) ("The company's plan was to destroy discoverable documents as part of its litigation strategy. . . . Infineon has made a prima facie showing that Rambus intentionally engaged in the spoliation of evidence."); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 424 (S.D.N.Y. 2004) ("This is the fifth written opinion in this case . . . in which discovery has now lasted over two years."); *Cache La Poudre Feeds, LLC v. Land O'Lakes Farmland Feed, Inc.*, 244 F.R.D. 614, 636-37 (D. Colo. 2007) ("Defendants' failure to preserve . . . relevant . . . information by wiping clean computer hard drives . . . has interfered with the judicial process. . . . [A] monetary sanction is appropriate.").

of selection criteria and filtering to manage ESI, and grossly negligent oversight of litigation holds, all activities which have resulted in waiver of privileged information, default judgments, adverse inferences, and even dismissals in some instances.²⁶

This article analyzes the costly effect of electronic information on discovery practice and advocates for the arbitration of discovery disputes. Part II discusses the background of electronic discovery, the evolution of our reliance on ESI as part of our modern day discovery practice, and the benefits and detriments of electronic discovery.

Part III discusses the effects of our reliance on electronic discovery and the implications of those effects on litigating parties. It examines how the increasingly computer-based world of discovery has increased the cost of litigation disputes significantly and proposes using the patent arbitration model as a blueprint for a discovery dispute arbitration scheme.

Part IV studies the impact that the ability to arbitrate discovery disputes would have on parties and courts alike.

Lastly, Part V advocates for the use of mandatory binding arbitration as an alternative cost-effective way for the courts and the litigating parties to determine the outcome of their discovery disputes.

II. BACKGROUND

What is Electronic Discovery?

Electronic discovery is the discovery of electronically stored information, which is commonly known as ESI.²⁷ ESI includes any

26. Hopson v. Mayor & City Council of Baltimore, 232 F.R.D. 228 (D. Md. 2005). Judge Grimm discussed at length the risk of inadvertent waiver of privileged information which is multiplied when parties are producing vast amounts of electronic documents. *Id.* at 232; *see also* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008). In this case Judge Grimm ruled that the privilege protection of 165 electronic documents containing email communications between the Defendants and their attorneys, draft discovery responses, information relating to settlements of unrelated litigation, and comments from a defendant to his counsel regarding discovery responses was waived by defendant's counsel because of the voluntary production of the documents to plaintiff. *Id.* at 254. Judge Grimm noted that "[w]hile keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them," one of those risks being that keyword searches will be under inclusive and result in the disclosure of protected information to an adverse party. *Id.* at 263. Perhaps Judge Grimm expressed the risks related to production of ESI when stating "any order issued now by the court to attempt to redress these disclosures would be the equivalent of closing the barn door after the animals have already run away." *Id.*

27. The Sedona Conference Working Grp. on Elec. Document Retention & Prod., *Best Practices Recommendations & Principles for Addressing Electronic Document Production*, THE SEDONA PRINCIPLES: SECOND EDITION, 1 (June 2007), http://www.thosedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf; *see* Bennett, *supra* note 12 (discussing the growing use of electronically stored information). The Sedona Conference Working Group Series is a series of

information that is stored on a computer device and which can only be read through the use of an electronic medium.²⁸ Such information includes computer databases, word processing files, emails, video files, audio files, web pages, instant messages, software development programs, image editing programs and is found on electronic media such as cell phones, personal digital assistants (PDAs), cameras, iPods, laptops, and desktops.²⁹ Whereas conventional discovery refers to paper based record keeping systems and to the discovery of tangible property, information that does not require the aid of a computer to interpret, electronic discovery refers to the discovery of relevant information from any electronic source available.³⁰

Benefits of Electronic Discovery

Electronic discovery, because of its massive impact on the cost of a lawsuit and the new risks it creates, can alter the incentive for litigants to file

think-tank groups made up of consultants, experts, lawyers, and leading jurists which work together with the common goal of addressing “tipping point” issues in different areas of the law under consideration. See *The Sedona Conference*, THE SEDONA CONFERENCE, <http://www.thesedonaconference.org> (last visited Jan. 8, 2012). The Conference has created the Sedona Conference Cooperation Proclamation to specifically address the “the contentious practices that have grown up around civil discovery . . .” *Id.* The proclamation calls on the legal community to refocus their current adversarial practices and work towards substantively resolving disputes. *Id.* The Conference has developed the three step ACT process which encourages lawyers and judges to develop: Step one is Awareness of the need for cooperation, step two is a Commitment to understanding the interests and motivations of other parties, and step three is to gain the Tools necessary to help train and support judges and lawyers in the techniques of discovery cooperation. *Id.* This Cooperation Proclamation has been well received by jurists and lawyers alike, and as of January 12, 2012, has been cited over twenty-five times, and has received judicial endorsements from the Honorable Robert N. Block, U.S. District Court for the Central District of California, Honorable Susan Y. Illston, U.S. District Court for the Northern District of California, Honorable Shira A. Scheindlin, U.S. District Court for the Southern District of New York, and Honorable John M. Facciola, U.S. District Court for the District of Columbia, to name a few. *Id.*; see *The Sedona Conference Cooperation Proclamation*, THE SEDONA CONFERENCE, http://www.thesedonaconference.org/content/tsc_cooperation_proclamation (follow “Judicial Endorsements” hyperlink) (last visited Jan. 8, 2012). The Conference is an invaluable tool in researching and understanding the full effect that the prevalent adversarial attitude, adopted by many when confronted with an electronic discovery dispute, has on both parties to a litigation, and is a pioneer in the field of implementing a process to better resolve such disputes. For more on the Sedona Conference visit their website at <http://www.thesedonaconference.org>.

28. The Sedona Conference Working Grp. on Elec. Document Retention & Prod., *supra* note 27.

29. *Id.*; SCHEINDLIN, *supra* note 3, at 46.

30. Withers, *supra* note 16, at 2–3; see The Sedona Conference Working Grp. on Elec. Document Retention & Prod., *supra* note 27.

suit.³¹ Further, the possibility of being faced with the daunting task of producing electronic discovery from all relevant sources very often will serve as an incentive for parties to settle an existing lawsuit.³² Moreover, E-Discovery may result in the production of information that otherwise would have not been revealed, and depending on whether the information produced is positive or negative in relation to either party, settlement offers are likely to be quickly accepted by the party to which the information is detrimental.³³

For example, plaintiff patient and defendant hospital are in the beginning stages of a medical malpractice suit and have exchanged initial discovery.³⁴ Both sides have produced information that reflects their case in a positive light, as they are each hoping to influence their opponent's perception about the case; plaintiff produces time logs showing his doctor's continuous shift of sixteen hours without any sleep break hoping to increase settlement offers, and defendant produces testimony of standard industry practice being a sixteen hour shift as normal hoping to portray an image of a strong defense so as to lower settlement demands. Plaintiff puts forward a settlement demand of two million dollars. Defendant takes plaintiff's information into account and refuses to settle. Plaintiff decides to go forward, and after a request for all policies and procedures on record, a hospital policy requiring all doctors to take a two hour break after a shift of fourteen consecutive hours is discovered. Plaintiff puts forward another settlement demand, this time for four million dollars. Defendant hospital

31. See James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of E-Discovery: Options for Future Research*, RAND INST. FOR CIVIL JUSTICE 13 (2008), http://www.rand.org/content/dam/rand/pubs/occasional_papers/2008/RAND_OP183.pdf. In addition to case value, calculated by taking into account the range and probability of positive plausible outcomes of the case if it is taken to trial versus the potential liability and reputational harm caused by going to trial, plaintiffs and defendants also consider the prospective costs of litigating a case before making a decision to move forward. *Id.* at 14. These costs include the cost of discovery. *Id.* In an age where information is stored electronically and is so fluid, there is a higher volume of potentially relevant information and therefore the possibility of higher litigation costs. *Id.*; see The Sedona Conference Working Grp. on Elec. Document Retention & Prod., *supra* note 27, at 2. Higher costs include: higher deposition costs, data recovery costs, attorney document review costs, and discovery related motions costs. See Dertouzos, *supra* note, at 15. The magnitude of these costs raises the prospective cost of litigation overall and therefore act as a deterrent to potential litigants. *Id.* at 13–14. Prospective costs associated with litigating a case will increase the incentive to settle for both plaintiffs and defendants. *Id.* at 15.

32. See Dertouzos et al., *supra* note 31, at 13. For a plaintiff, the decision to litigate is made after calculating the perceived case value minus litigation costs. *Id.* at 14. If litigation costs increase, due to the higher costs associated with electronic discovery, the decision to litigate will no longer seem beneficial and the incentive to settle will grow. *Id.* at 14–15. For a defendant, a settlement offer for a number less than the cost of litigating is very attractive. *Id.* Thus, the prospective cost of discovery, electronic discovery included, will increase the incentive to settle. *Id.* at 15.

33. See *id.* at 17.

34. See *id.* at 15–16. This hypothetical is based on information found on pages 15–16.

quickly accepts.³⁵ In these ways electronic discovery serves the beneficial function of decreasing potential frivolous litigation and increasing settlements of current litigation.³⁶

In addition, the exchange of electronic data reduces cost and delay.³⁷ The technology that hosts the data can save review time and thereby reduce

35. *See id.* at 15–16.

Before discovery, a belief about case value depends on a distribution of plausible case outcomes based on closely held information. In one simple formulation, litigants expect an average outcome based on that distribution of feasible case outcomes. After e-discovery, these expectations are modified based on information received. For example, if the plaintiff discovers an unusually high amount of negative information, settlement demands will increase. However, if the amount of negative information falls below average, demands will diminish.

Id. at 16.

36. *See id.* at 13–17. The authors do a nice job of grouping types of cases into a class and discussing how the various classes are affected, both negatively and positively, by electronic discovery. The authors lay out the following classes as examples of case groups that are affected by electronic discovery, because of its effect on the structure of litigation costs as well as the parties' expectations about case value: employment actions, business versus business cases, regulatory actions, and product liability class actions. *Id.* at 17–18. Taking a wrongful termination action as a specific example the authors discuss how a typical wrongful termination action has a relatively low case value, but because of the cost increase to the defendant employer, caused by the various electronic discovery, such as emails and personnel records it is most likely in possession of and will have to pay in-house counsel to review and produce, a settlement demand by plaintiff employee will most likely be accepted. *Id.* at 17. Not only will plaintiff employee have his or her settlement demand seriously entertained, but the average figure will increase because of the combination of costs faced by defendant employer if they refuse to settle and choose to litigate. *Id.* at 17–18. The theme stays the same for the other types of cases, with the main difference being the impact that the value of the information discovered will have on parties to settle versus the effect the economic burden of producing discovery has on parties to settle. *Id.*

37. Withers, *supra* note 16, at 1. The Sedona Conference has also recognized the unique traits of electronic discovery. Comparing the qualitative and quantitative differences between producing paper documents and electronic information, the Conference has summed up the differences between traditional paper discovery and electronic discovery by creating six broad categories that are unique to electronic discovery: volume and duplicability—because electronic information is created and replicated at much greater rates than paper documents, there is substantially more electronic information than paper documents; persistence—electronic information is more persistent than information recorded on paper in that it is more difficult to dispose of. Deleting an electronic file is a misnomer since electronic information is not destroyed when deleted, but rather is re-categorized by the computer as “not used” and can still be retrieved; dynamic, changeable content—unlike paper documents, electronic information is not fixed in a final form. Computer information has content that is designed to change over time. For example, there are systems that automatically update files, and simply booting up your laptop may alter data contained on it; metadata—unlike paper, electronic information has ghost like qualities. It contains information imbedded in it about the handling, transfer, and storage of the document that cannot be seen by the naked eye; environment-dependence and obsolescence—many times electronic data needs its source to be comprehensible. For example, if you were to remove a spreadsheet from its underlying environment of excel it would read as a whole

attorney costs tremendously by organizing relevant evidence through keyword searching and other sorting programs.³⁸ Photocopying costs, manual labor costs, scanning costs are all reduced, or even eliminated altogether, when the information is already in digital form and can simply be emailed to the requesting party.³⁹ Furthermore, because electronic discovery can be used as electronic evidence, more precise and efficient courtroom presentations can be made using these documents that are adaptable to electronic media.⁴⁰ Finally, conventional paper-based evidence that would have been hard to obtain, can now, as electronic discovery, become “part of the truth seeking process.”⁴¹

Detriments of Electronic Discovery

The existence of computerized communications tools has resulted in an electronic discovery data explosion.⁴² This data explosion has placed fear in the hearts of potential defendants and has caused them to invest in archive systems, which, after the infamous Zubulake decisions rendered between the years 2003 through 2005, ordering all defendants to preserve data “upon reasonable anticipation of litigation,” became more of a necessity than a choice.⁴³ Almost seven years later it seems like those cautionary

bunch of numbers, as opposed to the orderly columns and formulas it should contain. Additionally, because of rapid changes in technology computer systems become obsolete rather quickly; and finally, dispersion and searchability-unlike the traditional paper documents that can be found in a handful of filing cabinets, electronic data is dispersed between hard drives, network servers, backup tapes, laptops, desktops, flash drives and CDs. Although electronic data is so dispersed, it does have the beneficial trait of being easily searchable via automated methods. The Sedona Conference Working Grp. on Elec. Document Retention & Prod., *supra* note 27 at 2–5.

38. Withers, *supra* note 16, at 1.

39. *See id.* Withers points out that in the nationwide product liability litigation, *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 174 F. Supp. 2d 1242 (N.D. Ala. 2001), converting just one third of the court papers and discovery documents to computer form resulted in an estimated savings of over one million dollars, \$1,146,500 to be exact, in copying costs for each party requesting a complete set of the documents! *Id.* at 1 n.9.

40. *See id.* at 1.

41. *See id.* at 2. Paper documents are routinely lost or destroyed; in contrast, documents that are in an electronic format are often easily retrievable by virtue of the fact that they are usually sent to multiple parties, and exist on multiple media. *Id.*

42. Allison Walton, *Backup Tapes and Archives Bursting at the Seams? The Seven Year Itch Has Technology to Answer the Scratch*, E-DISCOVERY 2.0 (Dec. 12, 2011), http://www.clearwellsystems.com/e-discovery-blog/2011/12/12/backup-tapes-and-archives-busting-at-the-seams-the-seven-year-itch-has-technology-to-answer-the-scratch/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+e-discovery-blog+%28e-discovery+2.0%29.

43. *Id.*; *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.”). This 2003 opinion by Judge Shira Scheindlin is fondly referred to as “Zubulake IV” as it is the fourth in a series of five ground breaking opinions issued by Judge Scheindlin in the area of

corporations or individuals who have implemented archival systems are feeling the seven-year itch.⁴⁴ For approximately seven years these systems have been collecting a massive amount of data, consisting of emails, document drafts, metadata, and other regular by-products of corporate routine, most recently which has come to include social media content and cloud content, most of which will never be relevant or be at the center of any litigation.⁴⁵ Additionally, the implementation of archival systems has meant expenditures on internet technology (IT) personnel and training sessions for employees not familiar with the systems functions, as well as expenditures on attorney-drafted litigation hold policies to govern the procedures implemented by the IT personnel who create these archive systems.⁴⁶ The cautionary individuals, who were spooked into investing in an archive system, albeit wisely so, are now faced with bloated hard drives and incomprehensibly organized backup tapes.⁴⁷ It seems like the existence of the mere possibility of being required to produce electronic discovery has resulted in an extraordinary and costly undertaking by these individuals who will now have to invest further and implement “good information governance hygiene” that will allow them to clean up their infrastructures, which are currently suffering from retention overload.⁴⁸

Second, the digital age presents new legal ethics challenges to attorneys practicing in all areas of the law that must be confronted on a daily basis.⁴⁹ ABA Model Rule 1.1 clearly states that “[a] lawyer shall provide competent

e-discovery. See *Zubulake v. Warburg*, WIKIPEDIA, http://en.wikipedia.org/wiki/Zubulake_v._UBS_Warburg#cite_note-4 (last visited Jan. 5, 2012).

44. Walton, *supra* note 42.

45. *Id.*

46. *See id.*

47. *See id.*

48. *See id.* Even the revered Judge Scheindlin recognized that “[e]lectronic evidence only complicates matters.” *Zubulake*, 220 F.R.D. 212, 214 (S.D.N.Y. 2003), and who better to know than Judge Scheindlin. In her opinion, Judge Scheindlin specifically mentions electronic discovery’s negative aspect in that it presents a difficult task to litigants who are faced with the requirement to preserve it, aside from the issue that it can be easily tampered with and deleted. *Id.* at 214. Judge Scheindlin further recognized the potential disastrous effect archival systems might have on businesses and in her opinion states “[m]ust a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, “no”. Such a rule would cripple large corporations.” *Id.* at 217. It is as if Judge Scheindlin was forecasting the state of affairs of most large corporations’ information storage systems.

49. See SCHEINDLIN, *supra* note 3, at 443–79.

representation to a client.”⁵⁰ ABA Model Rule 1.6(a) requires that a lawyer “shall not reveal information relating to the representation of a client.”⁵¹ ABA Model Rule 3.4 instructs that a lawyer shall not “obstruct another party[’s] access to evidence or unlawfully . . . conceal a document or other material having potential evidentiary value,” and ABA Model Rule 4.4(b) promulgates that “a lawyer who receives a document relating to the representation of the lawyer’s client and knows . . . that the document . . . was inadvertently sent shall promptly notify the sender.”⁵² Additionally, Rule 26(a) of the Federal Rules of Civil Procedure makes mandatory initial disclosures between the parties, Rule 26(f) sets forth the requirement that the parties “meet and confer” to discuss any discovery issues, and Rule 16 puts in place a scheduling conference with the court, and allows the court the discretion to “modify the extent of discovery” and take appropriate action to control and schedule discovery.⁵³ All of the above rules place both producing and receiving attorneys in a tenuous position when it comes to metadata, transparency in electronic discovery, and counsel’s obligation to supervise to ensure that litigants comply with their duty to preserve.⁵⁴ With regard to metadata, producing attorneys are faced with the quandary of whether they have an affirmative duty, under Model Rule 1.1, to ensure that confidential metadata is not inadvertently produced,⁵⁵ and receiving attorneys must decide whether reviewing, or “mining,” inadvertently produced metadata is a part of their duty to provide their clients with diligent representation, or whether it is unethical under Model Rule 4.4(b).⁵⁶ With regard to transparency in discovery, Rule 16’s and Rule 26’s undertone of required cooperation and transparency between parties places litigators in a position to solve a seemingly unsolvable oxymoron: whether they can be

50. American Bar Association, *Client-Lawyer Relationship: Rule 1.1 Competence*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html (last visited Nov. 15, 2012).

51. American Bar Association, *Client-Lawyer Relationship: Rule 1.6 Confidentiality of Information*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html (last visited Nov. 15, 2012).

52. American Bar Association, *Advocate: Rule 3.4 Fairness to Opposing Party And Counsel*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons.html (last visited Nov. 15, 2012); American Bar Association, *Transactions With Persons Other Than Clients: Rule 4.4 Respect For Rights Of Third Persons*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons.html (last visited Nov. 15, 2012).

53. FED. R. CIV. P. 26(a); FED. R. CIV. P. 26(f); FED. R. CIV. P. 16(b)(3)(B)(ii).

54. See SCHEINDLIN, *supra* note 3, at 443–79.

55. See *id.* at 443–48.

56. See *id.* at 443–79.

“zealous advocates” for their clients and also conform to the rules’s encouragement of candor and fairness in discovery.⁵⁷ With regard to the obligation of counsel to oversee and ensure that the litigants are complying with their preservation obligations, Rule 1.1’s duty of competence requires that counsel be fully informed of the scope of the preservation requirement over the course of the litigation, and take affirmative steps to monitor compliance.⁵⁸ This massive undertaking places counselors in the position of oftentimes having to hire help in the form of outside experts and litigation support personnel.⁵⁹ This means that counsel, at the risk of being sanctioned should he or she fail, is now required to manage the e-discovery team and bears the ultimate responsibility of making sure that the client and all team members are upholding the Rules of Professional Conduct and the Rules of Civil Procedure.⁶⁰

Furthermore, the digital age places an additional burden on attorneys. Comment 6 to ABA Model Rule 1.1 states: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁶¹ This comment makes clear that the duty of competence is interpreted to mean that all practicing attorneys must have a working knowledge of electronic discovery issues, a duty that is incomprehensibly burdensome to

57. *See id.* at 453.

58. *Id.* at 476.

59. *Id.*

60. *See id.* ABA Model Rule 5.1 places a responsibility on partners, managers, and supervisory lawyers to make “reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct,” and ABA Model Rule 5.3 provides that with respect to outside experts retained by a lawyer, a lawyer “shall make reasonable efforts to ensure . . . that the person’s conduct is compatible with the professional obligations of the lawyer.” American Bar Association, *Law Firms And Associations: Rule 5.1 Responsibility of Partners, Managers, And Supervisory Lawyers*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer.html (last visited Nov. 15, 2012); American Bar Association, *Law Firms And Associations: Rule 5.3 Responsibility Regarding Nonlawyer Assistants*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html (last visited Nov. 15, 2012).

61. American Bar Association, *Client-Lawyer Relationship: Rule 1.1 Competence - Comment: Maintaining Competence*, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html.

those who are not technologically savvy, and which has already resulted in harsh reprimands of attorneys who were not up-to-date with technology.⁶²

Third, the risk of waiver of the attorney-client privilege, or waiver of the work-product privilege, is significantly greater when dealing with the production of electronic discovery, thus resulting in harsh penalties for attorneys and clients alike whom inadvertently produce privileged information in an effort to comply with the production requirement of the discovery rules.⁶³ Past penalties have been as harsh as monetary sanctions of \$8,568,633.24 against a defendant as well as referral of defendant's attorneys to the state bar. In addition, penalties can potentially be even harsher in that inadvertent production of privileged electronic information can constitute subject matter waiver. This means that a client must not only suffer the repercussions of having the inadvertently produced documents be deemed as waived, but also have to make further production of all privileged communications relating to the waived subject matter.⁶⁴ The greater risk of waiver caused by the massive amounts of electronic data that is relevant to the litigation also has the detrimental consequence of tremendous costs resulting in necessary extensive pre-production privilege review of all electronic data that might be produced.⁶⁵

Fourth, the Federal Rules of Evidence have not completely caught up to the technology explosion, causing somewhat of a grey area when it comes to digital evidence and the court room.⁶⁶

All of the above highlight the need to reform the current way we resolve discovery disputes.

62. See Charles Skamser, *eDiscovery and the Lawyer's Duty of Competence*, *EDISCOVERY TIMES* (Wed., Dec. 28, 2011), <http://ediscoveryconsulting.blogspot.com/2011/12/ediscovery-and-lawyers-duty-of.html>. The burden placed on those attorneys that are not the most tech friendly is exemplified by the following cases: In *Dubois v. Butler* the Florida District Court of Appeal, Fourth District, questioned the effectiveness of the plaintiff's attorney who relied solely on directory assistance for an address to serve the defendant. *Dubois v. Butler*, 901 So. 2d 1029, 1030-31 (Fla. Dist. Ct. App. 2005). Admonishing the attorney, the court scathingly called such a search method in the age of the internet the equivalent of "the way of the horse and buggy and the eight track stereo." *Id.* at 1031; see also John Browning, *The Affirmative Legal Duty to Address Social Media Evidence (Guest Attorney Blogger Edition)*, *NEXT GEN EDISCOVERY LAW & TECH BLOG*, (Dec. 19, 2011, 2:07 PM), <http://blog.x1discovery.com/2011/12/19/the-affirmative-legal-duty-to-address-social-media-evidence-guest-attorney-blogger-edition>, for a humorous, yet cautionary tale of mishaps caused by attorneys who were not competent in their representation of their clients because they were not up to speed with the use of internet, Google, social media, and other electronic resources.

63. See SCHEINDLIN, *supra* note 3, at 486-99.

64. *Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 (S.D. Cal. Jan. 7, 2008) *vacated in part by*, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008); see SCHEINDLIN, *supra* note 3, at 486.

65. See SCHEINDLIN, *supra* note 3, at 486-488.

66. See *id.* at 517-21 (discussing the gamut of evidentiary issues raised by the novelty that is E-Discovery, such as the authentication requirement under Federal Rule of Evidence 901 and the hearsay problem under Federal Rule of Evidence 801 cropping up most often).

III. ANALYSIS

E-Discovery an Increasingly Important Issue

The explosion of technology and its prevalence in our daily lives points to E-Discovery, which takes on an extremely important role in our litigation system.⁶⁷ Currently, we are at a point where E-Discovery plays a central role in our quest to seek justice.⁶⁸ Unfortunately, we are in a state where many bemoan the excessive use of E-Discovery in our litigation system because of its negative impact on litigating parties, their attorneys, and ultimately, the court system as a whole.⁶⁹ In comparison to court litigation, arbitration as a way to resolve E-Discovery disputes is taking on a new attractiveness.⁷⁰ Because of the fundamental role E-Discovery plays in the life of a lawsuit and its complexities and novelties, I advocate for a broader view than the current method of litigating E-Discovery disputes. I advocate for the implementation of mandatory arbitration of all discovery disputes, specifically E-Discovery disputes, as a way to positively impact the upward rise of cost and time, for both the private litigating parties and the courts serving as the venue for these disputes.

67. See *supra* notes 42–66 and accompanying text.

68. See *supra* notes 42–66 and accompanying text.

69. See Gregg A. Paradise, *Arbitration of Patent Infringement Disputes: Encouraging the Use of Arbitration Through Evidence Rules Reform*, 64 *FORDHAM L. REV.* 247, 253 (1995) (“[O]ften, the largest component of . . . exorbitant litigation costs is attributable to discovery. Almost eighty percent of all legal fees are incurred during discovery. Zealous attorneys, fighting for large stakes for their clients, often seek “[e]xcessive, lengthy, and costly discovery.”); Giacomina Rojas Elgueta, *Understanding Discovery in International Commercial Arbitration Through Behavioral Law and Economics: A Journey Inside the Mind of Parties and Arbitrators*, 16 *HARV. NEGOT. L. REV.* 165, 172 (2011) (“[D]iscovery has traditionally been viewed as an overly intrusive, time-consuming, and expensive process that is susceptible to abuse by parties.”).

70. See Aaron Pereira, *Licensing Technology to the BRICs: The Case for ADR*, 11 *CARDOZO J. CONFLICT RESOL.* 235 (2009). The author discusses how globalization of our national economies, due to capital flows, migration, and the spread of technology, has necessitated a review of the way international patent disputes are resolved, and proposes an application of mechanisms of Alternative Dispute Resolution to overcome existing problems within international patent litigation. *Id.* at 235–36. The author explores the option of ADR mechanisms as an “attractive alternative to the traditional system of patent litigation and its . . . shortcomings. *Id.* at 244. Similarly, I am exploring the option of arbitration as an attractive alternative to the current way we process our discovery disputes.

Proposing Arbitration as a Solution

Now that we are aware of the extreme role E-Discovery plays in the litigation system, the question arises of how to allow for the use of our increasingly relevant E-Discovery as part of the discovery process that is so unique and fundamental to our American judicial system, yet avoid creating an uphill climb for those attorneys who will face the mountains of documents that are generated by a discovery process which now includes E-Discovery? How do we promote the truth-seeking policies behind the Federal Rules, yet create a system that is not increasingly more expensive and contrary to the communicative tone encouraged by our rules that relate to discovery?⁷¹

I propose arbitration as a solution. I advocate for the use of mandatory, binding arbitration to solve discovery disputes, specifically E-Discovery disputes, as a method to resolve the problem of an overtaxed court system bogged down by long, exhaustive, and expensive disputes over documents.⁷² I advocate for the use of arbitration as an alternate method to resolve discovery disputes in an attempt to avoid expending court time on frivolous arguments that are non-substantive and are essentially disagreements over information only.

Why Arbitration?

In order to understand why I advocate for arbitration as a solution I believe some background information and clarification is necessary to

71. See FED. R. CIV. P. 26(f) requiring meet and confers between parties to discuss their discovery plans. The Federal Rules of Evidence were crafted with the goal of allowing parties to operate cooperatively and “with minimum . . . judicial intervention.” DAVID I. LEVINE, WILLIAM R. SLOMANSON & ROCHELLE J. SHAPELL, *CASES AND MATERIALS ON CALIFORNIA CIVIL PROCEDURE* 310, (4th ed. 2011). The authors, quoting *Clement v. Alegre*, 177 Cal. App. 4th, 1277, 1291 (2009), take note that a judicially effective discovery system is “one that operates without judicial involvement.” *Id.* The insinuation is that the measure of success for a discovery process is when parties cooperate with each other and handle their discovery issues amongst themselves, and outside of the court system. This was the intent of the rules. See *id.* at 379 (reporting that as per FRCP 26(f)(3)(D) parties are encouraged to cooperate). The Rule encourages counsel and litigants to confer in general, and specifically, to agree on their own procedures that will govern how they assert claims of privilege should they inadvertently produce protected material. *Id.*

72. United States Senator Russ Feingold realized the tremendous benefits of mandatory arbitration, even while criticizing the process and arguing that powerful parties in the employment sector, automobile franchise sector, and consumer credit sector are abusing the Federal Arbitration Act by using mandatory arbitration clauses to deprive others that have contracted with their right to pursue their claims in the court system. See Senator Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 288-98 (2002). Although he proposes new legislation to invalidate mandatory, binding arbitration provisions in consumer credit agreements, Senator Feingold states that “[a]rbitration can be a fair and efficient way to settle disputes. We ought to encourage alternative dispute resolution. Arbitration can settle conflicts fairly . . . when it is entered into knowingly and voluntarily.” *Id.* at 298.

explain what arbitration is, and how it evolved to become a prominent form of alternative dispute resolution.

On February 12, 1925, President Calvin Coolidge signed the Federal Arbitration Act (FAA) into law.⁷³ Congress passed the act with the motivation to counteract the cost and length of litigation, stating in the House Judiciary Committee report on the bill that “[a]ction should be taken at this time when there is so much agitation against the costliness and delays of litigation,”⁷⁴ and that they believed that arbitration would serve to “eliminate” those problems.⁷⁵ Support for the bill was based on the desire to “settle . . . disputes expeditiously and economically” and on the desire to “reduce the congestion in the Federal and State courts.”⁷⁶ The Supreme Court expressed its recognition of Congress’s motivation to realize the efficiency gains of arbitration, and in the 1984 *Southland Corp. v. Keating* decision, it ruled that with the passage of the act, Congress “declared a national policy favoring arbitration and ‘withdrew’ from the states the power to ignore agreements to arbitrate.”⁷⁷

What is Arbitration Exactly?

Arbitration is an alternative method to resolving disputes, which consists of a neutral third party—either in the form of an arbitrator or a panel of arbitrators—that reviews the parties’ arguments in an arbitration hearing and then issues a decision favoring one party or another.⁷⁸ The rules of evidence and the rules of civil procedure can be instituted in these hearings, but they are not a requirement of arbitration.⁷⁹ The arbitrator and the parties have the discretion to agree to use more flexible rules than the rules of evidence and procedure; a discretion that the courts do not have.⁸⁰

73. *Id.* at 284.

74. *Id.* at 284–85. Back in 1925 congress already recognized the need to utilize an alternative method to dispute resolution in order to avoid the rising costs and time consuming actions involved with litigation, all the more so the need to implement arbitration now that technology has brought about an information explosion. *See id.*

75. *Id.* at 285.

76. *Id.* at 286; *Hearing on S. 4213 and S. 4214 before a Subcomm. Of the Senate Comm. On the Judiciary*, 67th Cong. 2 (1923) (testimony of the chairman of the New York Chamber of Commerce, which sought the bill’s introduction.)

77. Feingold, *supra* note 72, at 286 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

78. *Id.* at 283.

79. *Id.*

80. *See id.*

There are two forms of arbitration parties can agree to enter into.⁸¹ Parties can agree to enter into binding arbitration or non-binding arbitration.⁸² If parties agree to binding arbitration they are agreeing in advance to abide by the final arbitration decision, whether it favors them or not.⁸³ If parties agree to non-binding arbitration then the decision only takes effect if the parties agree to it after they know the decision.⁸⁴ Additionally, arbitration can be mandatory or voluntary.⁸⁵ Voluntary arbitration allows a party the option of opting into arbitration, or pursuing their grievance via the court system.⁸⁶ Mandatory arbitration eliminates the option of filing suit, and if agreed to, is the exclusive remedy with which the parties can resolve their dispute.⁸⁷ Thus, the result of mandatory binding arbitration is that a party may only challenge an arbitration decision in court if a narrow set of circumstances is met, such as when the arbitrator exceeds his powers, commits fraud, or is guilty of misconduct.⁸⁸ In sum, mandatory binding arbitration ensures that parties that have already resolved their disputes do not burden the court system with an appeal simply because they are unhappy with the result.⁸⁹ Rather, access to the court system is restricted unless an extreme grievance on the part of the arbitrator can be proven.⁹⁰

Because of its binding nature, its cost efficient core, and an arbitrator's opportunity to decide in his discretion how much discovery to allow during the process, or whether to allow discovery at all, I believe arbitration is a plausible solution for the prohibitively expensive and time consuming alternative, which is dragging discovery disputes through our court system via litigation.

Patent Arbitration

Patent arbitration was adopted because of the inadequacies of the federal courts to

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See* 9 U.S.C. § 10(a) (lists the grounds for vacating an arbitration award); *see also* Wilko v. Swan, 346 U.S. 427, 436 (1989), *overruled on other grounds by* Rodriguez de Quijas v. Shearson/Am. Express Inc., 490 U.S. 477 (1989) (stating that “[p]ower to vacate an award is limited.”).

89. Feingold, *supra* note 72, at 283.

90. *See supra* note 88 and accompanying text.

resolve patent disputes.⁹¹ In August 1982, Congress enacted Public Law 97-247 in response to the increasing caseload of patent disputes brought on by patent protection being extended to computer programs, and its exacerbation of the deficiencies in the litigation process on an already burdened federal court system.⁹² The House Judiciary Committee stated that they intended for this new act to “relieve some of the burdens on the overworked Federal courts” by dramatic savings arbitration would allow in the costs and time normally incurred in litigation.⁹³ Public Law 97-247 was later codified as 35 U.S.C. § 294.⁹⁴

35 U.S.C. § 294 authorizes the use of arbitration as a remedy for patent disputes involving infringement claims, interference claims, and questions of inventorship.⁹⁵ Specifically, section 294 authorizes submission to arbitration either by execution of an arbitration clause prior to any dispute arising, or by a written agreement to arbitrate signed by the parties after their dispute arises.⁹⁶

The similarities between the needs that prompted the implementation of arbitration in patent disputes—the prohibitive costs and time associated with litigation; the requirement of a qualified third party with expertise in the specific area in dispute to resolve the parties’ disagreement; and the desire to create a system more conducive to maintaining relationships —and the needs that are prompting a modification of our current forum for discovery disputes—rising costs of litigating discovery disputes; excessive time spent on discovery spats; and the desire for a forum that is encouraging of cooperation are uncanny. Thus, implementing an arbitration process for discovery disputes that models itself on the already existing patent arbitration form will be a successful endeavor.

First, the reform of patent litigation was prompted by the explosion in filings of patent-related cases caused by new technology.⁹⁷ After the Supreme Court extended patent protection to digital computer programs in

91. Paradise, *supra* note 69, at 255.

92. *Id.* at 256.

93. *Id.* at 257; *id.* at 261 (reciting how when President Reagan signed the bill, he listed the “inordinately high cost of patent litigation” as one of the chief reasons for authorizing arbitration as a method to resolve patent disputes.).

94. *Id.* at 256 n.74.

95. See 35 U.S.C. § 294 (2006); see also 35 U.S.C. § 135(d) (2006); *Miner Enters., Inc. v. Adidas AG*, No. 95 C 1872, 1995 WL 708570, at *3 (N.D. Ill. Nov. 30, 1995).

96. See 35 U.S.C. § 294(a).

97. See Paradise, *supra* note 69, at 256–57.

the early 1980s, the number of patent suits increased significantly, exacerbating the existing deficiencies of the litigation system in place for patent disputes and bringing into focus the need to reform this system.⁹⁸ This reform was achieved by authorizing and encouraging the arbitration of patent disputes.⁹⁹ Similarly, the ever-increasing growth of data-producing technology is causing, and will continue to cause, an explosion in discovery disputes.¹⁰⁰ Because new technology has enabled us to create and have access to more information than ever before, parties are at odds over the discoverability of this data more frequently than before, and court systems are being burdened by this increase in adversarial filings involving discovery disputes.¹⁰¹

Second, patent arbitration was implemented in an effort to avoid the time and costs incurred in litigation.¹⁰² Arbitrating a patent dispute costs approximately eighty-five percent less than litigating the same dispute.¹⁰³ This large savings is made possible in part because of “the ability to eliminate ‘blunderbuss discovery requests and to avoid discovery disputes.’”¹⁰⁴ The dramatic reduction in time is made possible because of the streamlined nature of arbitration, the ability of the parties to agree on timelines, their ability to choose arbitration terms best suited to their needs, and their ability to choose an arbitrator that is an expert in the field relevant to the dispute lends itself to good case management, and as a result arbitrations are resolved much more quickly than litigation.¹⁰⁵ Similar needs to cut costs drastically and shorten the life of a case dramatically are faced by litigants operating in our court system today, under what has become a heavy “cloud”¹⁰⁶ of increasing discovery disputes.¹⁰⁷

98. *Id.* at 256.

99. *See id.* at 256–57.

100. *See supra* notes 24–25 and accompanying text.

101. *See supra* notes 24–26 and accompanying text.

102. Paradise, *supra* note 69, at 255.

103. *Id.* at 261.

104. *Id.* How appropriate that one of the main considerations of the economic benefits of arbitrating a patent dispute in contrast to litigating that dispute is the huge cost savings made possible by avoiding of discovery differences.

105. *See id.* at 262–65 (“Flexibility allows the parties to choose those arbitration terms best suited to resolving their particular dispute. Some parties may want to specify that the dispute must be resolved in six months.”). *Id.* at 265.

106. This heavy “cloud” of data is now innovatively being seen as a potential cash cow to those interested in renting their own large data centers out as space to companies looking to save on the costs of storage systems. This business of renting out one’s remote use of its technology infrastructure is commonly known as “cloud” computing. Big hitters, such as Netflix, 3M, Eli Lilly, and NASA are some of entities currently using some form of cloud computing. *See* Brad Stone & Ashlee Vance, *Companies Slowly Join Cloud-Computing*, N.Y. TIMES, Apr. 19, 2010, at B1, available at <http://www.nytimes.com/2010/04/19/technology/19cloud.html?pagewanted=1>.

107. *See supra* notes 25–26 and accompanying text.

Third, the attractiveness of preserving commercial relationships really spoke to those in support of implementing an arbitration system for patent disputes.¹⁰⁸ The legitimate concern of finding a forum where parties could have grievances addressed, yet not become infuriated with one another because of perceived unfair litigious tactics, was extremely important in facilitating a policy that encourages the preservation of relationships between opposing parties.¹⁰⁹ Likewise, parties currently embroiled in a discovery dispute will often let the claws out, causing the victim of any unfair tactics to be reluctant to proceed with the rest of the life of the suit in a cooperative manner.¹¹⁰ This is definitely not the intent of the legislature, as evidenced by the cooperative undertone in the Federal Rules of Civil Procedure,¹¹¹ and only leads to further time and expense as each party perceives themselves to be victims of unjust actions and seeks to retaliate by trying to extend and delay proceedings as much as possible.¹¹²

Finally, the need and desire for a decision maker who is knowledgeable in the technical aspect of patents was the driving force behind implementing the ability to arbitrate patent disputes, and that gave the parties the choice to appoint an arbitrator who is familiar with the complexities of patent disputes.¹¹³ So too, the need to have someone who is savvy in all the aspects of E-Discovery—because it is such a large part, if not all, of what constitutes discovery these days¹¹⁴—is especially important if we are to have an efficient, fair, and thorough resolution of discovery disputes. Unfortunately, many of our judges and jurors do not have the technical expertise that is often required to fully understand many of the issues that arise in E-Discovery battles,¹¹⁵ and therefore, authorizing a system where parties can have their discovery disputes presided over by an arbitrator who is well-versed in the technological aspects of discovery is imperative.

108. See Paradise, *supra* note 69, at 264.

109. *Id.*

110. See Elgueta, *supra* note 69, at 172–73. The author notes that the burden of discovery often “jeopardizes the cooperative climate between parties” and acts as a wedge to any efforts towards a relationship because it is used in an adversarial manner. *Id.*

111. See *supra* note 71 and accompanying text.

112. See Elgueta, *supra* note 69, at 172–73.

113. See Anne Louise St. Martin & J. Derek Mason, *Arbitration: A Quick and Effective Means for Patent Dispute Resolution*, 12 N.C.J.L. & TECH. 301, 318–19 (2011).

114. See SCHEINDLIN, *supra* note 3, at 45–52.

115. See *supra* note 24 (discussing some of the technologies associated with ESI that one must be familiar with to have a firm handle on a matter involving current-day discovery).

Implementing an Arbitration System for Discovery Disputes

Focusing on the already-existing model of patent arbitration, codified under 35 U.S.C. § 294, as a helpful tool to setting up a successful framework for arbitrating discovery disputes, my vision includes a federal statute mandating that all discovery disputes be submitted to arbitration. I also promote the state courts encouraging arbitration for discovery disputes as well. All courts, federal and state alike, would benefit tremendously from requiring parties to arbitrate their discovery disputes.

Similar to 35 U.S.C. § 294, I advocate for a statute authorizing submission to arbitration only after a discovery dispute arises. Requiring the parties to submit to mandatory binding arbitration only after a dispute arises between them allows the parties to enter arbitration more thoroughly prepared to resolve their dispute efficiently because they will have a fuller sense of the stakes present and they can then plan adequately to control risks, i.e., by possibly building in provisions to their arbitration agreement limiting the monetary sum that can be sought by either party and agreeing on a maximum time frame for the arbitrator to render a decision.¹¹⁶ I would go a step further and propose that mandatory binding arbitration be the only alternative for such parties, thus ensuring that parties that have had an opportunity to be heard do not defeat the purpose and benefits of arbitration by turning back to the court system to appeal an arbitration decision they are unhappy with.¹¹⁷

IV. IMPACT

Based on the positive feedback practitioners and courts have given patent arbitration,¹¹⁸ Congress and the state courts would do well to authorize arbitration for discovery disputes. There are a myriad of benefits, similar to those experienced from authorizing the arbitration of patent disputes, that our judicial system would obtain from adopting an arbitration system to resolve parties' discovery disputes.

116. See Paul M. Janicke, "Maybe we Shouldn't Arbitrate": *Some Aspects of the Risk/Benefit Calculus of Agreeing to Binding Arbitration of Patent Disputes*, 39 HOUS. L. REV. 693, 724 (2002) for a discussion of how submitting already ripened disputes to arbitration helps the parties in that it more easily leads to formulation of risk controls.

117. See *supra* notes 81–84 for a more detailed explanation of the process of mandatory binding arbitration.

118. See The WIPO Arbitration, Mediation Center, Update on the WIPO Arbitration and Mediation Center's Experience in the Resolution of Intellectual Property Disputes, 44 *les Nouvelles* 49, 54 (March 2009); see also Randy Berholtz, et. al, Improving Patent Adjudication: An Updated and Revised Survey of Practitioners' Experience and Opinions, 32 T. Jefferson L. Rev. 223, 224 (2010) (stating that in 1997, when Eugene R. Quinn Jr. surveyed patent litigators' attitude towards patent arbitration he found that they were increasingly utilizing arbitration to resolve their patent disputes).

Incredible savings of cost and time would occur if arbitration is instituted.¹¹⁹ Our increasingly computer-based world has augmented the cost of litigation significantly.¹²⁰ ESI, specifically, has led to an increase in discovery disputes that are timely, costly, and stressful.¹²¹ When discovery disputes and litigated parties are left drained mentally and financially, and judges are left frustrated that they must preside over petty differences that should never have seen the light of a courtroom.¹²² In contrast, arbitration offers the parties a quicker, less expensive, and more flexible way to resolve their differences. If the parties arbitrate their disputes, they can select arbitrators with the requisite expertise in modern technology to hear their dispute and dictate the timeline and maximum cost of the arbitration, leading to more satisfied parties and more focused judges who can get back to rendering judicious opinions on substantive matters.¹²³

Additionally, mandatory binding arbitration is a method that results in finality.¹²⁴ A party cannot appeal an arbitrator's decision simply because they are unhappy that they are required to assume some of the costs associated with the retrieving the data they have requested.¹²⁵ Finality allows for certainty. The parties can know that the decision that has been made will stand and they can adjust their litigation strategy accordingly.¹²⁶ Both parties to the dispute can plan their budgets and tactics to conform to the decision that has been made.¹²⁷ Furthermore, arbitration is more private than court litigation.¹²⁸ This expended privacy offered through arbitration is extremely important for corporations involved in litigation—many times corporations do not want public disclosure of their objections to certain discovery responses, or public disclosure of documents that are being requested, because disclosure can hurt their image and as a result hurt their bottom line.¹²⁹ The privacy offered via arbitration is important to private

119. See Paradise, *supra* note 69, at 261.

120. See *supra* notes 24–25 and accompanying text.

121. See *supra* notes 24–25 and accompanying text.

122. See *supra* note 26 and accompanying text.

123. See *supra* notes 78–80 and accompanying text.

124. See Feingold, *supra* note 72, at 283.

125. See *supra* note 88 and accompanying text.

126. See Janicke, *supra* note 116, at 724.

127. See *id.* at 724.

128. See Pereira, *supra* note 70, at 248.

129. See *id.* at 248–49.

parties as well—private parties value the ability to keep certain information out of the public eye.¹³⁰

Most importantly, authorizing an arbitration system to resolve discovery disputes would further the public policy the Federal Rules aim to promote. The Rules aimed at discovery are intended to promote the ascertaining of the truth in a simple, convenient, and inexpensive way through the cooperation of the parties.¹³¹ Unfortunately, we currently see the rules frequently being manipulated in a way that is most uncooperative.¹³² Arbitration offers a forum for parties that is more conducive to maintaining relationships and cooperation. In an arbitration setting, parties feel that they have a measure of control. They are able to pick their arbitrator and are able to agree to relax the standards of the Rules of Evidence and Rules of Civil Procedure.¹³³ This allows the parties to work together towards a solution, making them less adversarial and more prone to communicate.

V. CONCLUSION

It is my hope that through the implementation of mandatory arbitration we can avoid exhausting the finances and patience of conscientious litigants who are involved in discovery disputes, and find a solution to the over-use of our taxed court system.

If mandatory arbitration for resolving discovery disputes would have existed in 1981, then perhaps the counselor would not have produced documents, in response to a discovery request, in a box containing horse manure.¹³⁴ The level of frustration exhibited in this behavior points to the need to reform our litigation system and reexamine the way we currently

130. See Paradise, *supra* note 69, at 264. “Some parties to an arbitration want to keep private the ‘dirty linen’ of a loss.” *Id.*

131. See Levine et al., *supra* note 71, at 308.

132. See *infra* note 134 and accompanying text.

133. See Paradise, *supra* note 69, at 264–65, 270.

134. See *Greenup v. Rodman*, 42 Cal. 3d 822, 825 (Cal. 1986), for an extreme example of the absurdity of some discovery disputes.

Following unsuccessful demurrers, defendants answered and plaintiff commenced discovery. Rodman was recalcitrant throughout this process, actively resisting both document production and deposition. After repeated failures to appear and numerous postponements, he appeared at a deposition on February 12, 1981, rescheduled at his request, only to refuse to answer questions because it was Lincoln’s Birthday - assertedly a “legal holiday.” At a June 1981 deposition, on a court order to appear with records at the office of plaintiff’s counsel, Rodman produced an assortment of papers in a box filled with straw and horse excrement, which he laughingly dumped on the table. After counsel and the court reporter had inspected the documents for an hour, Rodman announced they must be sure to wash their hands thoroughly because the straw had been treated with a toxic chemical readily absorbed through the skin. The reporter asked to be excused, and the session was terminated by plaintiff’s counsel.

Id. (emphasis added).

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resolve our discovery disputes. Mandatory arbitration offers a solution to the problems we currently face in allowing discovery disputes to be litigated in our courts and can be a resolution to the inevitable explosion in future discovery disputes caused by the speedy growth of our information banks.