

# Capping E-Discovery Costs: A Hybrid Solution to E-Discovery Abuse

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CAPPING E-DISCOVERY COSTS: A HYBRID SOLUTION  
TO E-DISCOVERY ABUSE

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## INTRODUCTION

E-discovery, or the process that compels litigants to share electronically stored information and documents, has become the most prominent form of information sharing in modern-day litigation. It is also the most expensive. Data is produced at rates never thought possible. Documents are backed up many times over and replicated many times more. The information is then stored indefinitely, accruing to vast volumes which make traditional paper discovery file-box storerooms pale in comparison. Producing this electronically stored information during discovery becomes incredibly expensive.<sup>1</sup>

Rising e-discovery costs over the past several decades have made the current system for allocating discovery expenses prone to exploitation.<sup>2</sup> Because the current discovery rules were designed to deal with paper discovery, they place the burden of e-discovery costs largely on the producing party.<sup>3</sup> Plaintiffs take advantage of this and leverage high e-discovery costs to settle weak, meritless, and even frivolous claims.<sup>4</sup> By intentionally making overbroad e-discovery requests, requesting parties drive up the producing party's e-discovery bill.<sup>5</sup> Producing parties have no choice but to settle or pay exorbitant discovery costs—regardless of whether they are likely to win or lose on the merits of the actual case.<sup>6</sup>

Some courts have attempted to solve this problem by shifting e-discovery costs under 28 U.S.C. § 1920.<sup>7</sup> Section 1920 allows for courts to tax certain litigation costs against the losing party.<sup>8</sup> This method does not adequately address the problem, however, because it vests the court with an optional and controversial power instead

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1. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (noting that modern e-discovery is a “potentially enormous expense”).

2. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549-51 (2010).

3. See Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774-75 (2011).

4. See Beisner, *supra* note 2, at 549, 574.

5. See Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 500 (1994); Redish & McNamara, *supra* note 3, at 802-03.

6. See Beisner, *supra* note 2, at 550-51.

7. 28 U.S.C. § 1920 (2012).

8. *Id.*

of creating a set, predictable rule.<sup>9</sup> Consequently, courts sparsely use and unevenly apply § 1920 to tax e-discovery costs, leaving the parties uncertain as to a suit's e-discovery cost allocation.<sup>10</sup> Nevertheless, proposals for a universal taxation rule are not without merit because many address the underlying causes behind the e-discovery abuse phenomenon.<sup>11</sup> Still, such a narrow approach to the problem often excludes creation, third-party vendor, and review costs, and therefore does not go far enough to dissuade requesting parties from inflating the e-discovery bill.<sup>12</sup>

Unsurprisingly, reforming the rules for allocating e-discovery costs, particularly cost shifting, has become a popular topic among scholars. Professor Redish has proposed a rule that would shift costs for discovery requests involving a significant amount of information that is not reasonably accessible to the producing party.<sup>13</sup> Judge Hedges has suggested, "If discovery is sought that is relevant to a claim or defense, the producing party [should] bear the costs. If the requesting party can show good cause for 'expanded' discovery under Federal Rule of Civil Procedure 26(b)(1), it [should] bear the costs."<sup>14</sup> Since 1994, Professors Cooter and Rubinfeld have advocated a model in which the responding party would "bear the costs of reasonable compliance up to a level deemed appropriate for this class of cases, beyond which the reasonable costs of complying with further discovery requests would shift to the plaintiff."<sup>15</sup>

Regardless of the model, scholars have discussed the importance of the "American" rule—which makes each party responsible for their own litigation costs and effectively places the burden of e-discovery on the producing party—and protecting American plaintiffs'

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9. See *infra* Part II.B.

10. See *infra* Part II.B.

11. See, e.g., Jacqueline Hoelting, Note, *Skin in the Game*, 60 CLEV. ST. L. REV. 1103, 1124 (2013) (highlighting the merits of adopting a universal rule to tax copying and scanning e-discovery costs under § 1920).

12. See *id.* at 1120-21.

13. See Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 608 (2001).

14. Ronald J. Hedges, *A View from the Bench and the Trenches: A Critical Appraisal of Some Proposed Amendments to the Federal Rules of Civil Procedure*, 227 F.R.D. 123, 129 (2005).

15. Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 455-56 (1994).

rights to bring meritorious suits.<sup>16</sup> Most agree that a pure “English” rule, or loser pays rule, would make the litigation system inaccessible to poor and risk-adverse plaintiffs.<sup>17</sup> Instead of filing meritorious claims, plaintiffs would be too scared to risk losing the suit for fear of having to pay for all of the e-discovery costs.<sup>18</sup> In fact, some critics take the extreme view that all cost shifting, both under § 1920 and under any version of the loser pays rule, is too harmful and oppressive to requesting parties.<sup>19</sup> Others, like Professor Fitzpatrick, simply highlight risks associated with cost shifting and stress that cost shifting is not the only viable solution to resolve current trends in discovery abuse.<sup>20</sup>

This Note proposes a new solution to the problem. Specifically, it proposes a hybrid rule that would cap e-discovery costs paid by the producing party at one-half the value of the claim in question. This hybrid rule takes the best from both the American and English rules and would balance plaintiff and defendant interests to make e-discovery costs manageable and proportional to each suit.<sup>21</sup> Producing parties would be required to pay the e-discovery costs initially, as the current American rule dictates. But because the hybrid rule would shift the cost to the requesting party once the e-discovery expenses passed the halfway mark, producing parties would be shielded from exploitation—much like producing parties are shielded under the English rule. The proposed hybrid rule would therefore keep the incentives for plaintiffs to pursue meritorious claims without fear of being stuck with the final e-discovery bill, but also provide incentives for requesting parties to narrow their discovery requests lest they surpass the cap and be required to pay the rest of the bill. The rule would further encourage efficient settlement and foster cooperation of both the parties to keep e-discovery costs down across the board.

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16. See, e.g., Beisner, *supra* note 2, at 551.

17. See *id.*; Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a “Better Way:” Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 887-88.

18. See Rowe, *supra* note 17, at 888-89.

19. See, e.g., Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235, 271-75 (2012).

20. See, e.g., Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1643-46 (2012).

21. See *infra* Part III.

Part I of this Note sets out the background information and the problem with rising e-discovery costs and e-discovery exploitation under the status quo. Part II explains why the major reforms in this field have failed to adequately address this problem. Part III explains this Note's proposed solution. Lastly, Part IV analyzes the major counterarguments against the proposed solution.

## I. THE RISING COST OF E-DISCOVERY

Advances in modern technology have caused the production of information at incredible rates, which in turn has driven the cost of e-discovery skyward. Due to major differences between traditional discovery and e-discovery, chief among which is the sheer disparity in volume of stored information, traditional discovery costs have been far superseded by incredible modern e-discovery costs. Requesting parties have capitalized on this trend and use it to force arbitrarily high settlements from producing parties who have no choice but to settle or pay the even higher price of e-discovery.

### *A. Key Differences Between Traditional Discovery and E-Discovery*

There are a myriad of differences between traditional discovery and e-discovery that explain the diverging costs. Traditional discovery was designed mainly for managing paper documents.<sup>22</sup> E-discovery deals with electronically stored information (ESI).<sup>23</sup> Applying the traditional discovery rules to ESI has resulted in an explosion in the volume of discoverable information. Simply put, companies and people today store more information in electronic format than was ever feasible via paper.

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22. THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 (2d ed. 2007), available at <http://perma.cc/A4GY-GVDV> (explaining that traditional discovery handles "information recorded on paper, film, or other media," including the discovery of tangible things such as physical objects, which can all be inspected "without the aid of a computer").

23. *Id.* at 1 ("Electronically stored information includes email, web pages, word processing files, audio and video files, images, computer databases, and virtually anything that is stored on a computing device—including but not limited to servers, desktops, laptops, cell phones, hard drives, flash drives, PDAs and MP3 players.").

First, the widespread use of technology results in the creation of more information. Whereas companies and individuals certainly documented important transactions and communications before the computer age, the availability and pervasive use of computers, the internet, email, smartphones, and scanning methods now allow for documentation in a greater volume.<sup>24</sup> Ordinary, day-to-day activities of companies now generate information which traditionally went unrecorded.<sup>25</sup> Business communication is a prime example. Conventional means of communication such as the telephone, the postal service, and even face-to-face interaction are often replaced by e-mail, instant messaging, or collaboration software, all of which leave electronic records.<sup>26</sup> Consequently, communications not warranting documentation before the widespread use of e-mail are now commonly saved, backed up, and stored in company archives.<sup>27</sup>

The scope of this automated record trail is vast. As noted by one commentator, “virtually every aspect of an employee’s daily tasks creates some type of ESI.”<sup>28</sup> In 2006, an average employee created nearly 800 megabytes of electronic information.<sup>29</sup> In 2007, the average employee sent and received 135 e-mails each day.<sup>30</sup> Similarly,

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24. See CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE, § 2218 (3d ed. 2014) (“[I]t has become evident that computers are central to modern life and consequently also to much civil litigation. As one district court put it in 1985, “[c]omputers have become so commonplace that most court battles now involve discovery of some computer-stored information.” (quoting *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985))); Hoelting, *supra* note 11, at 1108 (“Through the proliferation of use of computers, the Internet, smart phones, and all other forms of technology, the volume of information in existence is greater than ever.”).

25. See GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 4 (2006) (“Organizations have thousands if not tens of thousands of times as much information within their boundaries as they did 20 years ago.”); THE SEDONA CONFERENCE, *supra* note 22, at 2.

26. See Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 174 (2006).

27. See *id.*; see also THE SEDONA CONFERENCE, *supra* note 22, at 2.

28. Hoelting, *supra* note 11, at 1108.

29. Withers, *supra* note 26, at 173-74 (“Almost 800 megabytes of recorded information is produced per person each year, 92% of which is in magnetically stored form, on computers or computer storage media. To visualize this amount of information, it would take about 30 feet of books to store the equivalent of 800 MB of information on paper.”).

30. LiveOffice, *LiveOffice Survey Reveals Organizations Are Unprepared for E-Discovery Requests* (June 25, 2007, 8:10 AM), <http://www.marketwired.com/press-release/liveoffice-survey-reveals-organizations-are-unprepared-for-e-discovery-requests-745509.htm>

a mid-sized company with 500 employees generated more than 17.5 million e-mails each year.<sup>31</sup> And a single large corporation “can generate and receive millions of emails and electronic files each day.”<sup>32</sup>

This is made possible by the availability of cheap and effective electronic storage. Communication that used to require file cabinets, storerooms, and excess space can now be stored on external hard drives or backup tapes requiring a tiny fraction of that storage room.<sup>33</sup> An average small business today has the electronic storage capacity equivalent to 2000 four-drawer file cabinets capable of holding 10,000 sheets of paper each.<sup>34</sup> Bigger businesses frequently store much more, utilizing thousands of large-capacity storage devices with terabytes of storage space.<sup>35</sup> Even though lack of space often necessitated the shredding and disposal of old documents, companies now often keep stored information “because there is no compelling reason to discard it.”<sup>36</sup> In fact, it may cost more to effectively discard ESI than to keep it, as electronic forms of information tend to be extremely difficult to eradicate completely.<sup>37</sup>

Moreover, ESI is stored in multiple formats and locations. It is common corporate practice to use multiple storage devices to manually back up the same information.<sup>38</sup> Most companies also use periodic, automated system backups, both as a safety net in case of catastrophic loss, and as a way to archive data for later reference.<sup>39</sup> Duplicate copies of the same material may be stored using internal hard drives and files, external hard drives and backup tapes, system

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[<http://perma.cc/U5B6-GGF6>].

31. *Id.*

32. THE SEDONA CONFERENCE, *supra* note 22, at 2.

33. *Id.* (“While a few thousand paper documents are enough to fill a file cabinet, a single computer tape or disk drive the size of a small book can hold the equivalent of millions of printed pages.”).

34. PAUL & NEARON, *supra* note 25, at 5.

35. THE SEDONA CONFERENCE, *supra* note 22, at 2.

36. *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

37. *See Withers*, *supra* note 26, 174 (noting that the term “deleted” does not correspond to “destroyed,” because deleted information is nearly always easily recoverable from metadata or replicated copies); THE SEDONA CONFERENCE, *supra* note 22, at 3 (explaining that deleted data can still be recovered until it is overwritten, leaving the vast majority of deleted data accessible and discoverable).

38. MICHAEL R. ARKFELD, ARKFELD’S BEST PRACTICES GUIDE FOR ESI PRETRIAL DISCOVERY § 3.4(B), (E) (2014-2015 ed. 2015).

39. *Id.* § 3.4 (E).



storage, or online cloud computing.<sup>40</sup> Multiple versions of a single document are also saved and replicated over time to keep track of edits, changes, and prior “snapshot” versions of a document.<sup>41</sup>

Similarly, ESI necessarily creates metadata, or additional data about the documents not readily apparent from the screen view.<sup>42</sup> This includes information such as who created the document and when, prior history and edits, and who accessed the document and when.<sup>43</sup> Metadata is generated automatically, is often inaccessible to the average computer user, and can contain an enormous amount of information about a single document.<sup>44</sup> Consequently, metadata can be very costly to produce during discovery.<sup>45</sup>

Unlike traditional discovery, e-discovery places the economic burden of finding, restoring, assembling, reviewing, and presenting documents on the producing party.<sup>46</sup> In traditional discovery, the producing party was still required to locate the requested documents in the company’s storage system, assemble them in request or business order, and present them to the requesting party for inspection and copying.<sup>47</sup> However, this process was relatively easy and inexpensive.<sup>48</sup> Furthermore, cost-sharing techniques helped balance the cost between the two parties because the requesting party bore the cost of transporting, copying, and reviewing the documents

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40. *Id.*

41. *Id.*; THE SEDONA CONFERENCE, *supra* note 22, at 3, 60.

42. THE SEDONA CONFERENCE, *supra* note 22, at 3.

43. *Id.*

44. *Id.* (“Indeed, electronic files may contain hundreds or even thousands of pieces of such information. For instance, email has its own metadata elements that include, among about 1,200 or more properties, such information as the dates that mail was sent, received, replied to or forwarded, blind carbon copy (‘bcc’) information, and sender address book information. Typical word processing documents not only include prior changes and edits but also hidden codes that determine such features as paragraphing, font, and line spacing. The ability to recall inadvertently deleted information is another familiar function, as is tracking of creation and modification dates.”).

45. *Id.* at 62; Hoelting, *supra* note 11, at 1110.

46. See Marnie H. Pulver, Note, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1407 (2000).

47. *Id.* at 1386; Withers, *supra* note 26, at 181-82.

48. See Robert E. Altman & Benjamin Lewis, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 569 (2009); Withers, *supra* note 26, at 181-82.

for relevance.<sup>49</sup> Conversely, equivalent cost sharing for e-discovery—allowing the requesting party access to the producing party’s computers, backup tapes and ESI storage systems—is not practicable.<sup>50</sup> As a result, producing parties now spend more time, resources, and money at the production stage of discovery than ever before.

### *B. The Cost of E-Discovery*

All of the aforementioned reasons fuel rising e-discovery costs. But due to the growth of production costs, the lion’s share of e-discovery bills must now be borne by the producing party—typically the defendant.

Production costs associated with e-discovery have grown exponentially.<sup>51</sup> The sheer volume of ESI—generated through the creation of more data, the availability of cheap storage space, and the practice of replication and duplicate backups—is enough to drive production costs up.<sup>52</sup> But producing ESI is also more expensive because it “frequently requires restoration and even re-creation of electronic databases from backup tapes, archives, and computer hard drives.”<sup>53</sup> Searching and locating the appropriate files is more expensive, as is reproducing them in a readable format.<sup>54</sup>

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49. See Withers, *supra* note 26, at 181-82 (noting that cost sharing techniques, namely requiring the requesting party to review the documents for relevance, tilted the burden in favor of producing parties).

50. See 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, 268-69 (2004) (explaining that cost sharing is not feasible for many reasons, including the need to restrict access for confidentiality, and because familiarity with the producing party’s ESI storage system is often a prerequisite for locating relevant files).

51. See Beisner, *supra* note 2, at 550; Withers, *supra* note 26, at 182; Hoelting, *supra* note 11, at 1110-12.

52. See Beisner, *supra* note 2, at 565; Withers, *supra* note 26, at 182; Hoelting, *supra* note 11, at 1110.

53. Altman & Lewis, *supra* note 48, at 569; Withers, *supra* note 26, at 182 (“The costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion.”).

54. See Beisner, *supra* note 2, at 565 (“Unlike paper documents, electronic data must be processed and loaded into a special database before they can even be reviewed for potential relevance.”); Withers, *supra* note 26, at 182 (“Organizations without state-of-the-art electronic information management program [sic] in place, which classify information and routinely cull outdated or duplicative data, face enormous ... costs and burdens.”).

Backup tapes are particularly problematic. ESI stored on backup tapes is compressed to preserve space, so retrieving the information first requires decompression of the entire tape.<sup>55</sup> And because “backup tapes often lack a directory or catalogue of the information they contain, a party may need to search an entire tape—or perhaps all of an opponent’s tapes—to locate a single file.”<sup>56</sup> Because the purpose of backup tapes is often to provide a disaster recovery system, resources are not expended to organize the contained ESI in a systematic manner or to allow for easy recovery of single files.<sup>57</sup> The restoration of the tapes results in huge expenditures for the producing party.<sup>58</sup>

Requests to discover metadata and deleted data are similarly expensive. As noted by one commentator, “the metadata information contained in a single electronic document can be enormous, and thus very costly to produce.”<sup>59</sup> This is precipitated by the fact that recovering metadata requires techniques beyond those with which the average computer user is familiar, and may require the use of third-party vendors and forensic experts.<sup>60</sup> Like metadata, deleted data is less accessible and may be fragmented, likewise requiring the use of forensics to restore and retrieve the data in a readable state.<sup>61</sup> Alternatively, deleted data may be retrievable only from backup tapes or archives, adding to the cost of production.<sup>62</sup>

Producing parties also hire third-party vendors when the company lacks the technical expertise or manpower to comply with e-discovery requests. Companies without internal IT departments or personnel may lack the needed knowledge and familiarity with ESI and e-discovery procedures, making hiring a third-party vendor

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55. See Altman & Lewis, *supra* note 48, at 569; Beisner, *supra* note 2, at 565.

56. Beisner, *supra* note 2, at 565.

57. See Sarah A.L. Phillips, Comment, *Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for “Not Reasonably Accessible” Data?*, 83 N.C.L. REV. 984, 990-91 (2005); see also Withers, *supra* note 26, at 176.

58. Beisner, *supra* note 2, at 565 (“Restoring backup tapes for review can easily cost millions of dollars.”); Phillips, *supra* note 57, at 991.

59. Hoelting, *supra* note 11, at 1110; see Beisner, *supra* note 2, at 570; see also THE SEDONA CONFERENCE, *supra* note 22, at 62.

60. THE SEDONA CONFERENCE, *supra* note 22, at 40.

61. *Id.* at 18 (noting that “data that was ‘deleted’ but remains in fragmented form, require[s] a modern version of forensics to restore and retrieve.”).

62. Phillips, *supra* note 57, at 991-92.

specializing in e-discovery a necessity.<sup>63</sup> Furthermore, producing parties may simply be ill-equipped to handle broad e-discovery requests, lacking proper software or personnel to adequately process a court-sanctioned discovery request.<sup>64</sup> Regardless of the reason, hiring a third-party vendor has become the norm in most modern e-discovery litigation,<sup>65</sup> and it often accounts for a significant portion of the producing party's e-discovery bill.<sup>66</sup>

Lastly, producing parties typically spend an excessive amount of money reviewing the assembled ESI for relevance and privilege before sending it to opposing counsel. As the volume of ESI created and stored has grown, so has the amount of time and resources that producing parties must dedicate to reviewing the information at the production stage.<sup>67</sup> Under traditional discovery, both parties often share review costs.<sup>68</sup> Producing parties needed to conduct only a cursory review of stored documents, and left the requesting party to sift through boxes of files for relevant documents.<sup>69</sup> Under e-discovery, the producing party must now review for relevance up front, especially if the ESI is not easily accessible and is located on backup tapes or archives, is fragmented, or is imbedded in metadata.<sup>70</sup> Document review now accounts for the greatest portion of e-discovery cost—estimated at roughly 70 percent of total e-discovery costs in any given litigation.<sup>71</sup>

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63. See ARKFELD, *supra* note 38, § 2.2(E); THE SEDONA CONFERENCE, *supra* note 22, at 40.

64. See ARKFELD, *supra* note 38, § 2.2(E); Hoelting *supra* note 11, at 1111-12.

65. See ARKFELD, *supra* note 38, § 2.2(E); Hoelting *supra* note 11, at 1111-12.

66. *E-Discovery Can Be Costly - But Not Doing It Right Can Cost Much More*, E-DISCOVERY BRIEF (LexisNexis), Aug. 3, 2012, <http://www.lexisnexis.com/legalnewsroom/litigation/b/e-brief/archive/2012/08/03/caution.aspx> [<http://perma.cc/9AFM-LCW3>] (reporting that in 2012 vendor expenditures accounted for about 26 percent of e-discovery costs). See generally Seth Eichenholtz, *Pricing Processing in E-Discovery: Keep the Invoice from Being a Surprise*, PRETRIAL PRACTICE AND DISCOVERY, Winter/Spring 2011, available at <http://perma.cc/AW94-C3YG> (describing the vendor costs of processing ESI).

67. See James N. Dertouzos, Nicholas M. Pace & Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, RAND INST. FOR CIV. JUST. 2-3 (2008), [http://www.rand.org/content/dam/rand/pubs/occasional\\_papers/2008/RAND\\_OP183.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2008/RAND_OP183.pdf) [<http://perma.cc/PKG6-PTYQ>].

68. See *supra* note 49 and accompanying text.

69. See *supra* note 47 and accompanying text.

70. See *supra* note 50 and accompanying text.

71. *E-Discovery Can Be Costly* Brief, *supra* note 66; see also Dertouzos, Pace & Anderson, *supra* note 67, at 3 (indicating that document review of ESI can comprise up to 75 to 90 percent of additional e-discovery costs).

Altogether, e-discovery costs in recent years have dwarfed traditional discovery expenses, with the producing party bearing the brunt of the bill. In 2009, litigants spent an incredible \$2.8 billion on e-discovery, a 10 percent increase from 2008, and a 46 percent increase from 2006.<sup>72</sup> On average, a gigabyte of ESI costs from \$125 to \$6,700 to collect, from \$600 to \$6,000 to process, and from \$1,800 to \$210,000 to review.<sup>73</sup> With a medium-sized suit typically involving 500 gigabytes of ESI alone, e-discovery will range the parties between a total of \$2.5 and \$3.5 million.<sup>74</sup> It is no wonder that e-discovery costs are now typically higher than the potential reward in many small-to medium-sized lawsuits.<sup>75</sup>

The problem is exacerbated because the scope of discovery requests is entirely in the control of requesting parties. Requesting parties seeking information to build their case make initial requests for production, generally free from all but the broadest relevance constraints.<sup>76</sup> Producing parties must then bear the cost of complying with these requests, including the costs of “interpreting the demand, gathering the information, and formulating and delivering a response.”<sup>77</sup> And unlike attorneys’ fees and other litigation costs, producing parties cannot limit their e-discovery expenses through strategic planning and decision making.<sup>78</sup> A producing party’s dis-

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72. See Hoelting, *supra* note 11, at 1112 (citing George Socha & Tom Gelbmann, *Climbing Back*, L. TECH. NEWS (2010)).

73. *E-Discovery Can Be Costly*, *supra* note 66; see also Beisner, *supra* note 2, at 566 (noting that Verizon estimates that producing one gigabyte of ESI costs between \$5,000 and \$7,000).

74. Beisner, *supra* note 2, at 566 (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES* 29 n.2 (2008)).

75. See Altman & Lewis, *supra* note 48, at 569; Daniel M. Kolkey & Chuck Ragan, *Reevaluating the Rules for e-Discovery*, L.A. DAILY J., May 21, 2010, at 1, available at <http://perma.cc/7RVL-CR33> (“[T]he costs of e-discovery have become disproportionate to the value of the controversy at issue.”).

76. See Beisner, *supra* note 2, at 559-63; Redish & McNamara, *supra* note 3, at 779-80.

77. See Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 466 (1994); see also *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“[T]he presumption is that the responding party must bear the expense of complying with discovery requests.”).

78. See, e.g., Redish & McNamara, *supra* note 3, at 779 (explaining that a producing party has “full decisionmaking power” to control its expenditures on legal fees and related costs but no power to control the cost of complying with an opponent’s discovery request).

covery costs are “determined not by the litigant himself but by the scope and content of the request filed by his opponent.”<sup>79</sup>

Under traditional discovery procedures, requesting parties had an incentive to limit their requests, at least somewhat.<sup>80</sup> Because they had to spend the time searching and reviewing the documents, submitting narrower requests limited their review time.<sup>81</sup> Under modern e-discovery, the requesting party has no incentive whatsoever to narrowly tailor their requests.<sup>82</sup> This is largely the product of the current legal scheme governing the distribution of discovery costs.

### *C. The American Rule Governing E-Discovery Costs*

The current scheme governing the distribution of e-discovery costs is obsolete. It is a specter of paper discovery. And at its heart is the old American rule.

The American rule requires that each party to a lawsuit pays its own litigation expenses, including discovery costs.<sup>83</sup> This rule is traditionally subject only to statutory and contractual exceptions,<sup>84</sup> as well as a handful of narrower common law exceptions such as the “obdurate behavior,”<sup>85</sup> the “common fund,”<sup>86</sup> and “private attorney

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79. *Id.* (noting further that “none of those [e-discovery] expenditures benefits the producing party’s own case. To the contrary, discovery costs benefit the requesting party and actually impose both a financial and a legal detriment on the producing party”).

80. Hoelting, *supra* note 11, at 1111 n.48.

81. *Id.*

82. See Beisner, *supra* note 2, at 584-85 (“The most pernicious problem with the American discovery system is that it incentivizes parties to seek overbroad and burdensome discovery.”); Kolkey & Ragan, *supra* note 75, at 1 (“The result is little incentive exists to properly tailor a document request, which translates into exorbitant discovery costs.”).

83. See 20 AM. JUR. 2D *Costs* § 55 (2005); see also, e.g., *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *ACMAT Corp. v. Greater N.Y. Mut. Ins. Co.*, 923 A.2d 697, 701 (Conn. 2007); *Tonti v. Akbari*, 553 S.E.2d 769, 771 (Va. 2001); *State Bd. of Tax Com’rs v. Town of St. John*, 751 N.E.2d 657, 658 (Ind. 2001); Beisner, *supra* note 2, at 551.

84. See, e.g., *ACMAT*, 923 A.2d at 701; *Tonti*, 553 S.E.2d at 771; *St. John*, 751 N.E.2d at 659.

85. See, e.g., *St. John*, 751 N.E.2d at 658 (“[C]ourts impose costs upon defendants as a punishment for bringing frivolous actions or otherwise acting in bad faith.”).

86. *Id.* (“[A]n award [that] benefits members of an ascertainable class, and the court reimburses the prevailing litigant’s attorney fees out of that pool of money to prevent the unjust enrichment of free riders.”).

general” exceptions.<sup>87</sup> By default, however, “the presumption is that the responding party must bear the expense of complying with discovery requests.”<sup>88</sup>

The roots of the American rule lie in the premise that the system cannot hold the threat of litigation expenses over the heads of potential litigants, but rather should encourage meritorious litigation.<sup>89</sup> Such a rule may have been warranted under traditional discovery, when the volume of information created was much smaller,<sup>90</sup> when technology limited the space and forms of data storage,<sup>91</sup> and when requesting parties had an incentive to narrow their requests.<sup>92</sup> But with the dramatic rise of e-discovery costs, the American rule creates an incentive quite contrary to encouraging meritorious litigation.

#### *D. Exploitation of the American Rule*

Plaintiffs have not been oblivious to the rising e-discovery costs that producing parties must shoulder under the American rule. They have capitalized on the rule by leveraging overbroad discovery requests for favorable settlements. Instead of encouraging meritorious litigation, the rule now encourages producing parties to settle all cases to avoid high e-discovery costs.

The American rule leaves discovery open for exploitation by requesting parties. Instead of tailoring their requests to discover relevant information, requesting parties now have an incentive to draft overbroad requests designed to inflate producing parties’ e-

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87. *Id.* at 659 (“[C]ourts award fees to litigants who bring actions to protect important social policies or rights.”).

88. *Oppenheimer*, 437 U.S. at 358; *see also* 20 AM. JUR. 2D *Costs* § 55 (“Many states generally follow the ‘American Rule.’”).

89. *See Tonti*, 553 S.E.2d at 771 (noting that the purpose of the American rule is to “avoid stifling legitimate litigation by the threat of the specter of burdensome expenses being imposed on an unsuccessful party”); *St. John*, 751 N.E.2d at 658 (quoting *Fleischmann Distilling Corp. v. Maler Brewing Co.*, 386 U.S. 714, 718 (1967)) (“Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and 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.”).

90. *See supra* notes 24-27 and accompanying text.

91. *See supra* note 36 and accompanying text.

92. *Compare supra* notes 80-81 and accompanying text *with supra* note 82 and accompanying text.



discovery costs.<sup>93</sup> As Professor Redish put it, “the bigger the expense to be borne by the opponent, the bigger the incentive to make the request.”<sup>94</sup> In fact, requesting parties go out of their way to find remotely relevant ESI to request, even when it is unnecessary to the litigation of the case.<sup>95</sup> And as long as requesting parties meet the relatively low requirements under Federal Rule of Civil Procedure 26(b)(1), there is little that producing parties can do except fund the production costs or settle the case.<sup>96</sup> The Supreme Court recognized this problem in *Bell Atlantic Corp. v. Twombly*, when it warned that “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial].”<sup>97</sup>

Consequently, the status quo also encourages frivolous suits. Companies would rather settle a case than litigate to summary judgment or a favorable verdict.<sup>98</sup> Settling early on makes business sense, especially if the requesting party has inflated the e-discovery costs of a claim beyond the monetary value of the suit itself.<sup>99</sup>

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93. See, e.g., Beisner, *supra* note 2, at 584-85; Kolkey & Ragan, *supra* note 75, at 1; Redish & McNamara, *supra* note 3, at 802-03; Withers, *supra* note 26, at 181-82; Hoelting, *supra* note 11, at 1113-14; Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1533 (2010).

94. Redish, *supra* note 13, at 603.

95. Beisner, *supra* note 2, at 579 (“[P]laintiffs can still routinely engage in fishing expeditions and compel the production of documents and information that are only tangentially related to the claims or defenses at issue.”).

96. See Vainberg, *supra* note 93, at 1533 (“So long as a plaintiff could meet the minimal threshold requirements of Rule 26(b)(1) for the discoverability of information, it could present the defendant with a Hobson’s choice of funding prohibitively expensive discovery or settling the suit.”).

97. 550 U.S. 544, 548 (2007); see also Vainberg, *supra* note 93, at 1533 (“For example, when plaintiffs suing a small company realized that it held about 115 backup tapes in a small warehouse, they strategically pushed the magistrate judge to grant their motion to compel, presenting a \$1.25 million price tag for the small company and resulting in an instant settlement.”).

98. See Beisner, *supra* note 2, at 574 (noting that corporations pay billions of dollars each year “to settle frivolous lawsuits because the burdens of litigating until summary judgment or a favorable verdict are too onerous”).

99. See Redish & McNamara, *supra* note 3, at 802-03 (citing Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 193 (1992)) (commenting on discovery abuse through “forc[ing] favorable settlements by driving up the other party’s discovery costs beyond the case’s value, calculated in terms of the likelihood of a favorable outcome, the value of such an outcome, and the cost of litigating the case to conclusion”); see also Hoelting, *supra* note 11, at 1113-14 n.76.



Opportunistic plaintiffs take advantage of this and file frivolous suits in hopes of securing a bloated nuisance settlement.<sup>100</sup>

These abuses must not be allowed to continue. The entire litigation process is undermined when cases are settled not on their merits, but on a party's ability and willingness to pay for the e-discovery.<sup>101</sup> Abuse of the American rule has distorted the true values of lawsuits and settlements, and thus undermined litigation as an efficient means to settle disputes.<sup>102</sup> The result is a system in which a growing number of controversies are resolved through a process lacking redeeming value.<sup>103</sup>

## II. FAILED REFORMS

Legislators, courts, and commentators have voiced concerns over the aforementioned problems for over a decade. Several solutions and reforms have been implemented to try to stem discovery abuses. To date, none have been comprehensive or truly effective.

### A. 2006 Amendments to the Federal Rules of Civil Procedure

On December 1, 2006, the Federal Rules of Civil Procedure were amended to recognize the role of electronically stored information and the problems it poses in modern litigation.<sup>104</sup> Among the goals behind the reforms, the amendments aimed "to reduce the costs of [electronic] discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management."<sup>105</sup> Unfortunately, the amendments did not go far enough to address the source of the problem and left

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100. See Beisner, *supra* note 2, at 593 ("Under the current system, even an entirely frivolous lawsuit can compel a defendant to expend millions of dollars collecting, reviewing, producing, and preserving records. Given the exponential rise in electronic discovery costs, this possibility exerts enormous pressure on defendants to settle cases quickly.")

101. See Hoelting, *supra* note 11, at 1113-14.

102. See Kolkey & Ragan, *supra* note 75, at 1.

103. Redish & McNamara, *supra* note 3, at 803.

104. See generally COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. c at 21-51 (2005), available at <http://perma.cc/YS55-L4JZ> (describing the proposed amendments to the Federal Rules of Civil Procedure with a focus on ESI and its problematic proliferation).

105. *Id.* at 21.

experts and litigants uncertain over the meaning of key standards.<sup>106</sup> Courts today remain divided over how to best distribute e-discovery costs.<sup>107</sup>

Notably, the amendments officially recognized ESI as a form of discoverable information under Federal Rule of Civil Procedure 34(a).<sup>108</sup> Parties did not have to specify their need for ESI, and were now entitled to ESI as long as they requested documents.<sup>109</sup> Rule 34(b) mandated that ESI needs to be produced only in one format—reducing replication costs—and specified a preference for easily producible forms.<sup>110</sup> Amendments to Rules 26(f)<sup>111</sup> and 16(b)<sup>112</sup> also required the parties to confer, meet, and cooperate over ESI requests as early as practicable, make a reasonable discovery plan, and include ESI issues in the scheduling order.

Most importantly, however, the amendments attempted to provide a more efficient means to distribute e-discovery costs among the requesting and producing parties. The reforms created a two-prong proportionality test under Rule 26(b)(2)(B), which producing parties can use to challenge particularly burdensome and expensive e-discovery requests.<sup>113</sup> First, the producing party must show that the ESI the requesting party seeks is “not reasonably accessible because of undue burden or cost.”<sup>114</sup> If the first prong is satisfied, then the requesting party has a burden to demonstrate “good cause” for producing that particular evidence in order for the court to compel discovery.<sup>115</sup> The court *may* then compel the producing party to comply with the e-discovery request, but shift part or all of the production cost onto the requesting party.<sup>116</sup> Problems lie in the meaning of the terms “not reasonably accessible” and “good cause.”

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106. See Beisner, *supra* note 2, at 583-84; Hoelting, *supra* note 11, at 1115-16.

107. See Beisner, *supra* note 2, at 583; Vainberg, *supra* note 93, at 1558-59.

108. See FED. R. CIV. P. 34(a); Withers, *supra* note 26, at 194-96.

109. See FED. R. CIV. P. 34 advisory committee’s note.

110. See *id.* 34(b)(2)(E).

111. See *id.* 26(f) (dealing with cooperation about e-discovery issues at the pretrial conference).

112. See *id.* 16(b) (providing a provision for disclosure or discovery of ESI in the content of the judge’s scheduling order).

113. See *id.* 26(b)(2)(B).

114. *Id.*

115. *Id.*

116. See *id.* 26(b)(2)(B) advisory committee’s note.

The advisory committee's notes and leading case law pose two separate interpretations of how ESI can be reasonably accessible. The leading case, *Zubulake v. UBS Warburg LLC* looked at the means of storage and held that active, online data on hard drives, easily-searchable near-line data, and offline archives such as optical disks are reasonably accessible.<sup>117</sup> Backup tapes, disaster recovery systems, legacy data, and deleted, fragmented, or damaged data are not.<sup>118</sup> The Rules and the advisory committee's notes, however, make no mention of specific storage methods.<sup>119</sup> In fact, ESI stored in accessible means such as offline archives may nevertheless be "not reasonably accessible within the meaning of [Rule] 26(b)(2)(B)."<sup>120</sup> Regardless, by function of both interpretations, all data deemed reasonably accessible is ineligible for cost-shifting mechanisms and must be produced.<sup>121</sup>

Courts similarly apply an inconstant standard for "good cause."<sup>122</sup> The advisory committee's notes list seven factors for judges to weigh good cause:

- (1) the specificity of the discovery request;
- (2) the quantity of information available from other 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.<sup>123</sup>

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117. 217 F.R.D. 309, 318-19 (S.D.N.Y. 2003).

118. See FED. R. CIV. P. 26(b)(2)(B) advisory committee's note; *Zubulake*, 217 F.R.D. at 319-20.

119. See FED. R. CIV. P. 26(b)(2) advisory committee's note ("It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.").

120. *W.E. Aubuchon Co. v. BeneFirst, LLC*, 245 F.R.D. 38, 43 (D. Mass. 2007) (considering factors besides storage—including lack of an indexing system—to determine whether the requested ESI was not reasonably accessible).

121. See Hoelting, *supra* note 11, at 1117.

122. See Beisner, *supra* note 2, at 582; Hoelting, *supra* note 11, at 1117; Vainberg, *supra* note 93, at 1558-59.

123. FED. R. CIV. P. 26(b)(2) advisory committee's note.

As in the first prong of the Rule 26(b)(2)(B) test, *Zubulake* provides a competing standard, this time in the form of a similar but distinct “good cause” seven-factor test. Although the advisory committee’s notes standard is similar to the *Zubulake* test, it excludes two *Zubulake* factors—the relative ability of the parties to control e-discovery costs and the relative benefits of obtaining the information.<sup>124</sup> The test provided by the committee note also creates a new factor not present in *Zubulake*, a “quasi-punitive measure,” which favors cost shifting when a producing party converts accessible data into an inaccessible form after discovery obligations arise.<sup>125</sup> Courts are split in the application of these two alternate tests.<sup>126</sup>

The functionality of the “good cause” prong is even more problematic. The notes provide no guidance as to how each factor is to be weighed.<sup>127</sup> It is no wonder, then, that experts are perplexed as to what “good cause” means.<sup>128</sup> The *Zubulake* test, on the other hand, clearly prioritizes the first two factors—or the “marginal utility test.”<sup>129</sup> As the court in that case stated, “The first two factors ... are the most important.”<sup>130</sup> The extent to which the e-discovery request is specifically tailored and the availability of that information in

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124. See *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003) (listing the factors relevant to determining good cause as: “(1) the extent to which the request is specifically tailored to discover relevant information; (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”); see also Vainberg, *supra* note 93, at 1560.

125. See Vainberg, *supra* note 93, at 1560.

126. See, e.g., *W.E. Aubuchon Co. v. Benefirst, LLC*, 245 F.R.D. 38, 42-45 (D. Mass. 2007) (applying the 26(b)(2)(B) test); *Quinby v. WestLB AG*, 245 F.R.D. 94, 106-11 (S.D.N.Y. 2006) (applying the *Zubulake* test); *Redish & McNamara*, *supra* note 3, at 782 (noting that courts are inconsistent in the application of cost-shifting tests); *Hoelting*, *supra* note 11, at 1117 & n.110. Some courts have even applied a third test, established in *Rowe Entertainment v. William Morris Agency, Inc.* See *Redish & McNamara*, *supra* note 3, at 782 n.38 (citing 205 F.R.D. 421, 429 (S.D.N.Y. 2002)).

127. See Vainberg, *supra* note 93, at 1560.

128. See *Beisner*, *supra* note 2, at 582; Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 72 (2007); Vainberg, *supra* note 93, at 1525.

129. See *Zubulake*, 217 F.R.D. at 323.

130. *Id.*

other sources then become the great bulk of the *Zubulake* test, which seems contrary to proportionality aspect of the Rule.<sup>131</sup>

Another major oversight is the amendment's neglect of fishing expeditions. Requesting parties can still make overbroad requests to drive up the producing party's costs without running afoul of the rules.<sup>132</sup> As one commentator on this subject explained, "[T]his rule encourages plaintiffs to seek broad electronic discovery from sources from which retrieving information will be costly, and to invent reasons why such information is necessary or reasonably accessible."<sup>133</sup>

Next, there is the fact that the good cause standard of Rule 26(b)(2)(B) and the proportionality test of 26(b)(2)(C) seem to be redundant.<sup>134</sup> Judge Scheindlin, who decided the *Zubulake* case and at one time sat on the advisory committee, conceded that the test's seven factors "overlap the proportionality considerations of Rule 26(b)(2)(C)."<sup>135</sup> Indeed, the 26(b)(2)(C)(iii) proportionality language<sup>136</sup> is reminiscent of the seven-factor test promulgated in the advisory committee's notes.<sup>137</sup> Similar concerns appear to have motivated Judge Rosenthal when she lamented that "Rule 26(b)(2)(B) does not create new authority for judges to limit discovery or to allocate the costs of [e-discovery]."<sup>138</sup>

These oversights combine to make Rule 26 an ineffective mechanism for redistributing e-discovery costs. Perhaps it is for these

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131. In fact, the court in *Wiginton v. CB Richard Ellis Inc.* rejected the *Zubulake* prescribed weight and modified the factors and their weight to emphasize the proportionality test of Rule 26(b)(2)(C)(iii). 229 F.R.D. 568, 573 (N.D. Ill. 2004).

132. See Beisner, *supra* note 2 at 583; Hoelting, *supra* note 11, at 1117; Vainberg, *supra* note 93, at 1555-56.

133. See Beisner, *supra* note 2, at 583.

134. See Noyes, *supra* note 128, at 72; Phillips, *supra* note 57, at 986 (arguing that the 2006 Rule 26(b)(2)(B) "good cause" amendment provided "no greater protection from discovery" than the old proportionality test).

135. Noyes, *supra* note 128, at 72 (citing SHIRA A. SCHEINDLIN, E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 17 (2006) (supplement to JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE (3d ed. 2006))).

136. See FED. R. CIV. P. 26(b)(2)(C)(iii) ("[T]he burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.").

137. See *id.* 26(b)(2) advisory committee's note.

138. Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery after December 1, 2006*, 116 YALE L.J. POCKET PART 167, 181 (2006), <http://www.yalelawjournal.org/forum/a-few-thoughts-on-electronic-discovery-after-december-1-2006> [<http://perma.cc/T6NK-BHF6>].

reasons that very few courts have actually shifted e-discovery costs under the 26(b)(2)(B) standard.<sup>139</sup> Or maybe it is because courts have “historically ignored proportionality concerns.”<sup>140</sup> The fact remains that the 2006 Amendments to the Federal Rules of Civil Procedure have not met their purpose in making e-discovery more bearable.

*B. 28 U.S.C. § 1920*

In the absence of clarity in the 2006 Amendments, courts have sought an effective means to balance the interests of requesting parties to bring suit and maintain access to discovery against the interests of producing parties to litigate claims on their merits. One influential method has been to tax e-discovery under 28 U.S.C. § 1920.<sup>141</sup>

In recent years, federal courts have attempted to deal with rising e-discovery costs through the power of Rule 54,<sup>142</sup> thereby using the mechanism of § 1920. Rule 54 allows that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.”<sup>143</sup> Producing parties have argued that this gives courts discretion to award e-discovery costs to the prevailing party, and some have pointed to the language in § 1920 that specifically grants courts the power to award the costs of making copies.<sup>144</sup> Yet, federal law remains largely unclear as to whether e-discovery costs qualify under § 1920.<sup>145</sup>

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139. See, e.g., Hedges, *supra* note 14, at 127 (“The proportionality principle of Rule 26(b)(2) ... is not being utilized by judges.”); Redish & McNamara, *supra* note 3, at 780-81 (explaining that the Rules’ “proportionality requirement has not proven to be an effective limitation on the scope or costs of discovery”); Vainberg, *supra* note 93, at 1565 (noting that absent party consent to bear some of the cost, courts are extremely skeptical of producing parties’ requests to shift e-discovery costs under Rule 26(b)(2)(B)).

140. See Beisner, *supra* note 2, at 583.

141. See 28 U.S.C. § 1920 (2012) (“A judge or clerk of any court of the United States may tax as costs the following: ... (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case .... A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.”).

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

143. *Id.*

144. 28 U.S.C. § 1920(4).

145. See Hoelting, *supra* note 11, at 1119-20.

Courts still widely disagree over whether Rule 54 and § 1920 give judges the power to tax e-discovery costs to the prevailing party.<sup>146</sup> As a result, different jurisdictions use different approaches to taxing e-discovery under § 1920, or none at all.<sup>147</sup> Some courts—such as the Eastern District of Virginia, Eastern District of California, and the Sixth Circuit—tax only scanning and copying costs.<sup>148</sup> These courts generally deny costs associated with creating documents, metadata extraction, file conversion, and “[s]earching and [d]eduping.”<sup>149</sup> The *Mann v. Heckler & Koch Defense, Inc.* court also denied the producing party’s request to tax the creation of a database to effectively present and search the produced ESI, because the creation of the database did not “qualify as ‘copying’ for purposes of § 1920(4).”<sup>150</sup> Similarly, the court in *Fells* declined to tax the defendant’s costs associated with “initial processing, Metadata extraction, [and] file conversion,” reasoning that creation costs were not enumerated in § 1920.<sup>151</sup>

Other courts use § 1920 to tax copying as well as creation costs, arguing that these tasks are both too expensive and necessary to the e-discovery process to be left out. For example, one court opinion noted that e-discovery costs related to preservation, collection, processing, and production are the “21st century equivalent” of the activities delineated in 28 U.S.C. § 1920.<sup>152</sup> In *Race Tires America Inc. v. Hoosier Racing Tire Corp.*, for example, the court awarded costs to the prevailing party and stated that “the requirements and expertise necessary to retrieve and prepare ... e-discovery documents for production were an indispensable part of the discovery

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146. See Christopher Costello, *Loser Pays—At Least the Costs of E-Discovery?*, 11 DIGITAL DISCOVERY & E-EVIDENCE 20, Sept. 29, 2011, at 1 (2011) (“The law, however, has been far from clear as to whether such costs are ‘taxable costs’ that can be recovered by a prevailing party under the Federal Rules.”); *id.* at 2 (“The extent to which such costs are recoverable [under § 1920] is far from clear, particularly as it relates to eDiscovery.”); Hoelting, *supra* note 11, at 1119.

147. See, e.g., Hoelting, *supra* note 11, at 1119-21.

148. See, e.g., *Mann v. Heckler & Koch Def., Inc.*, No. 1:08cv11, 2011 WL 1599580 (E.D. Va. Apr. 29, 2011); *Fells v. Va. Dep’t of Transp.*, 605 F. Supp. 2d 740 (E.D. Va. 2009); *El Dorado Irrigation Dist. v. Traylor Bros.*, No. CIV. 5-03-949, 2007 WL 512428 (E.D. Cal. Feb. 12, 2007).

149. See *Mann*, 2011 WL 1599580, at \*8.

150. *Id.* at \*8-9.

151. *Fells*, 606 F. Supp. 2d at 743.

152. *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009), *vacated*, 654 F.3d 1353 (Fed. Cir. 2011).



process.”<sup>153</sup> Additional costs awarded under this broader interpretation of the taxing power of § 1920 include paying for third-party vendors assisting in the production of e-discovery, as well as costs which actually saved time and money for either party.<sup>154</sup>

Still other courts have refused to tax e-discovery under § 1920 at all. Notably, the Eighth and Tenth Circuits have held that recovery for litigation costs under § 1920 is possible, but they have denied taxing various e-discovery costs as inappropriate.<sup>155</sup> They rely solely on the cost-shifting mechanism of Rule 26(b)(2)(B).<sup>156</sup> As discussed above, however, this effectively entails avoiding cost-shifting altogether.<sup>157</sup>

As may be expected, parties have difficulty predicting the outcome of § 1920 cases on e-discovery cost.<sup>158</sup> Corporations with business operations in multiple jurisdictions must prepare different litigation strategies for what often amounts to the same storage of ESI. Plaintiffs are given the opportunity to forum shop and file suit in jurisdictions with the most favorable interpretations of the statute. Additionally, the distinctions between what courts consider taxable or untaxable under § 1920 are completely arbitrary. This definitely does not comport with the principle that cost shifting should assess whether “the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>159</sup>

Moreover, the status quo under most jurisdictions—except those with the most liberal interpretations—still encourages settling meritless claims to avoid expensive e-discovery bills and rewards plaintiffs for meritless lawsuits. Requesting parties in most states still have an incentive to file overbroad requests to drive up the e-discovery costs. Although some producing parties in the few jurisdictions with the most liberal interpretations might decide to take the risk of refusing to settle in hopes of offsetting their costs for

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153. No. 207-cv-1294, 2011 WL 1748620 at \*9, \*11 (W.D. Pa. May 6, 2011), *aff'd in part, rev'd in part*, 674 F.3d 158 (3d Cir. 2012).

154. See *Lockheed Martin Idaho Techs. Co. v. Lockheed Martin Advanced Env'tl. Sys.*, No. CV-98-316-E-BLW, 2006 WL 2095876, at \*1-2 (W.D. Idaho July 27, 2006) (taxing costs for creating a litigation database which organized the produced ESI).

155. See Gillen, *supra* note 19, at 247.

156. See Vainberg, *supra* note 93, at 1566.

157. *Id.*

158. See Hoelting, *supra* note 11, at 1114.

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



taxed costs under § 1920, most likely do not. The current trend of taxing e-discovery costs under § 1920 does not address the root of the issue, and e-discovery remains fundamentally unfair to producing parties.

### III. THE PROPOSED SOLUTION: A HYBRID RULE

In crafting an appropriate solution, it is necessary to find the right balance between encouraging meritorious litigation and discouraging discovery abuse. The 2006 Amendments attempted this through the proportionality standards. Different courts have attempted this through taxing various e-discovery costs under § 1920. Still, among the various potential solutions, capping the American rule strikes the most appropriate balance between favoring the requesting and producing party. Given the nature and scope of the problem discussed in Part I and the various difficulties with alternative solutions discussed in Part IV, this Note proposes a hybrid rule. This rule would cap e-discovery costs covered under the American rule at one-half the value of the claim, after which the loser in the litigation would pay the remainder of the e-discovery cost.<sup>160</sup> Like the current rule requires, producing parties would still be responsible for paying the e-discovery costs up front.<sup>161</sup> Upon reaching a final judgment—whether that is summary judgment, a verdict, a dismissal of the case, or otherwise—the proposed rule would require the court to tax all e-discovery costs exceeding half the value of the suit to the losing party.

#### A. Model Language for the Proposed Hybrid Rule

Specific Limitations on Electronically Stored Information. The producing party must provide and pay for discovery of electronically stored information up to one-half the value of each claim.

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160. In this regard, the proposed model resembles the Cooter & Rubinfeld cost-shifting model. See Cooter & Rubinfeld, *supra* note 15, at 455. There are two key differences between this Note's proposed model and the Cooter & Rubinfeld model. First, the threshold in this Note's model is always proportional to the value of the suit, whereas the Cooter & Rubinfeld model proposes different thresholds for different classes of suits. See *id.* Second, under this Note's model, the excess e-discovery costs ultimately shift to the losing party, while under the Cooter & Rubinfeld model the excess costs always shift to the requesting party. See *id.*

161. See *supra* note 83 and accompanying text.

The requesting party must pay all e-discovery costs exceeding one-half the value of the claim. On motion to compel discovery or protective order, the producing party must show that the cost of producing the requested information exceeds one-half the value of the claim, but must nonetheless produce the information if the requesting party pays the excess production cost.

Under this rule, requesting parties would have an incentive to keep the e-discovery cost below the half-value cap, but could also opt to request ESI expenses beyond the halfway mark if they were willing to pay for it should they lose. This rule takes the best of both the American and English rules, maintaining incentives for plaintiffs to file meritorious claims and incentives to keep e-discovery costs down. It encourages cooperation among the parties and promotes settlement.

To illustrate, consider this hypothetical: Plaintiff sues Defendant for wrongful termination and age discrimination in employment under state law, demanding \$10,000 in damages. Under the American rule, Plaintiff has an incentive to make broad e-discovery requests, and requests Defendant to produce all company email correspondence and interoffice memoranda from the past ten years. Because of the nature of the suit and Plaintiff's mitigation of damages (for example, Plaintiff found employment elsewhere after several months) Plaintiff can recover only so much in damages under the relevant state statute, in this case a maximum of \$10,000 in backpay damages. But by making such a broad e-discovery request, Plaintiff can make Defendant incur e-discovery costs far in excess of \$10,000. For the purposes of this hypothetical, the cost of complying with Plaintiff's broad e-discovery request is \$30,000.

Under the proposed hybrid rule, Plaintiff could still file suit without having to worry about the initial e-discovery costs. Because the suit is worth \$10,000, however, Defendant is initially responsible for only the first \$5,000 in e-discovery costs, or one-half the value of Plaintiff's suit. Any e-discovery costs in excess of the initial \$5,000 must be paid by the losing party. Thus, if Plaintiff pursues the suit without settling and the jury rules for Defendant, Plaintiff must pay the remaining \$25,000 in e-discovery costs. Conversely, if Plaintiff pursues the suit and wins, Defendant must pay the entire \$30,000 in e-discovery costs.

By making producing parties responsible for all of the initial e-discovery costs—up until half the value of the lawsuit, anyway—this rule protects requesting parties. Plaintiffs have the same incentives to file meritorious claims as under the American rule.<sup>162</sup> Poor parties could still initiate suits against wealthy defendants and large corporations without fear of being stuck with the e-discovery bill.<sup>163</sup> Because they would retain complete control over the scope of their discovery requests, there would be little fear that the e-discovery costs might snowball and surprise them at the judgment stage.<sup>164</sup> The requesting party always retains the right to cut off further discovery.

The incentives change, however, to the extent of discovery requests. The cap encourages requesting parties to find sufficient, relevant information within a narrower scope of discovery, or alternatively to find enough evidence to be able to confidently pursue their claim. As a result, parties would likely be more tactical in their discovery requests, and narrowly tailor their requests to discover only the most helpful and relevant information.<sup>165</sup> The same discovery rules would otherwise apply, so defendants would have the same obligations to comply with the discovery requests and could still motion for the same cost shifting mechanisms currently available in their jurisdiction.<sup>166</sup>

Similarly, the hybrid rule protects defendants from exploitation by capping the e-discovery cost for which they must bear responsibility. This discourages overbroad requests and fishing expeditions by plaintiffs seeking to leverage high e-discovery costs for favorable settlements, because the producing party's share of the e-discovery cost will never be more than half the value of the suit in question.<sup>167</sup> Consequently, both parties have a reasonable option to pursue a

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162. *See supra* note 89 and accompanying text.

163. *See infra* notes 173, 198-99 and accompanying text.

164. *See supra* notes 17-18, 89 and accompanying text; *cf. infra* note 195 and accompanying text.

165. *See supra* note 81 and accompanying text; *cf. supra* notes 93-95 and accompanying text.

166. *See supra* Part II.

167. Unless the court uses its rare discretion to shift the entirety of the cost back on the producing party as a sanction for abusing discovery or spoliation of evidence, or some other similar extenuating circumstance.

case where they believe that they truly have a stronger argument, instead of settling for non-merit based reasons.<sup>168</sup>

Furthermore, a hybrid rule incentivizes parties to keep e-discovery costs down across the board. Requesting parties have an incentive to keep the cost within the capped amount in order to avoid having to pay for e-discovery altogether. Producing parties still have the same incentive to keep the e-discovery bill down because they will not want to risk paying more if they lose. Parties to cases with no “smoking guns” will be encouraged to settle instead of heedlessly prolonging a case and risk paying a large e-discovery bill as part of the judgment.

The rule would also result in earlier settlements. Once requesting parties hit the cap, which will become more likely with the rise of e-discovery costs, they would have to reevaluate their position in the case. If they have not found enough evidence to support their claim, the incentive to settle is stronger than under the American rule, which incentivizes charging more e-discovery requests to the producing party’s account regardless the ability or possibility of prevailing on the merits of the case.<sup>169</sup>

Cases would be resolved more efficiently through a sliding-scale cap, when the plaintiff’s midway reevaluation point would depend on the value of the suit itself. Larger lawsuits requiring more ESI will necessarily have a higher cap. Conversely, e-discovery costs for small to midsize claims would now be kept proportional to their true value, and requesting parties would no longer be able to extort settlements in such lawsuits based on inflated discovery costs.<sup>170</sup> Cases would be resolved more efficiently because excessive resources would not be wasted on claims worth less than the e-discovery bills.<sup>171</sup>

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168. *See supra* notes 99-100 and accompanying text.

169. *See supra* note 94-95 and accompanying text.

170. *See supra* notes 75-78 and accompanying text.

171. *See supra* note 102 and accompanying text.

## IV. COUNTERARGUMENTS

*A. Potential Problems with a Hybrid Rule*

Of course, questions may arise regarding the placement of the cap. This Note recognizes that the one-half mark of the value of the claim may not be the exact, ideal threshold.<sup>172</sup> Empirical studies should be conducted to ascertain the optimal threshold where the majority of discovery requests—average claims with modest needs for ESI—receive protection from cost shifting under the sliding cap, but when excessive requests are shifted to the requesting parties.<sup>173</sup> Regardless of the placement, the cap should remain proportional to the claim value for the benefits of both the American<sup>174</sup> and English<sup>175</sup> rules.

Another concern with the hybrid rule is that it may create an incentive to inflate the value of claims. Because the cap depends on the value of the underlying claim, requesting parties may want to inflate the value of the claim to squeeze out more e-discovery cost utility. Similarly, parties may be encouraged to file more cross and counter claims—each of which would have its own e-discovery costs and inherent cost shifting mechanism—to further handicap the opposing party with extra e-discovery expenses.

Yet, the incentive to inflate the value of the claim already exists in present litigation. Savvy plaintiffs' lawyers know that to start with a stronger negotiating position during settlement talks, it is necessary to claim a higher value in the initial pleadings than a reasonable settlement value. Similarly, the incentive to file cross- and counter-claims is already strong and will continue to serve as

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172. This issue requires analysis beyond the scope and resources of this Note, which aims to focus on the theory and principles of a hybrid solution to the discovery abuse problem rather than the empirical analysis of the optimal threshold value.

173. Professor Redish attempts to balance these very interests by proposing a cost shifting threshold between data not reasonably accessible and the less expensive, reasonably accessible data. See Redish, *supra* note 13, at 608. Although this approach is effective at protecting the producing party from the great expense associated with backup tapes and fragmented data, it is less effective at dissuading expensive fishing expeditions using overbroad requests for easily accessible data.

174. See *supra* note 83 and accompanying text.

175. See *infra* Part IV.C.

a strategic tactic to encourage settlement, discourage suits, and keep damages down by offsetting e-discovery costs. Additionally, courts and parties have access to precedent which provides some measure of objectivity by which to compare and predict the value of claims. As such, it is unclear that basing the cap off the value of the claim will change the already existing incentives to overestimate the value of the claim. Further, even if the rate of overvaluing claims does increase, judges have experience valuing suits and can combat overvaluation more effectively than discovery abuse.

Lastly, some critics may worry that low-value cases with disproportionate needs for ESI will suffer. It does not always follow that lawsuits worth a smaller amount will require a smaller amount of ESI to litigate. E-discovery is expensive across the board, and most suits will likely require a minimum e-discovery cost which requesting parties at the bottom of the case value spectrum may not be able to meet with a half-value cap. This problem is easily fixed, however, with the creation of a need-based exception to the hybrid rule. Since such low-value cases are very unlikely to produce the e-discovery costs that scare producing parties into settling anyway, an exception to the cap would not be unduly burdensome.

### *B. Maintaining the Status Quo*

Some critics may oppose a hybrid rule in favor of maintaining the status quo. Certainly, there is something to be said for letting the states try to solve this problem as independent laboratories of democracy. Given that different jurisdictions are currently applying different approaches, after a period of time, it might be easier to determine which approach is working and which is not. Unfortunately, e-discovery costs have been rising so rapidly that it would be imprudent to wait years before adopting a uniform rule. Plaintiffs and defendants alike benefit from a clear, universal e-discovery cost distribution rule which will take both parties' interests into account.

There are certain benefits to protecting the American rule. Plaintiffs are given the means to sue large corporations and wealthy defendants, a phenomenon made more likely by requiring the producing party to bear the majority of the e-discovery burden.<sup>176</sup>

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176. See *supra* note 89 and accompanying text; cf. *infra* note 201 and accompanying text.

Similarly, meritorious suits are not discouraged by the threat of having to pay e-discovery bills.<sup>177</sup> Encouraging meritorious litigation is most certainly a laudable aim and is embraced by the goals of the Federal Rules of Civil Procedure.<sup>178</sup> Specifically, Rule 1 was included to embody the principle that litigation should not impose “excessive burdens and costs on litigants and the court.”<sup>179</sup>

Furthermore, prevailing defendants are given the chance to recover some of their e-discovery expenses by taxing costs under § 1920 in some jurisdictions, and by shifting costs under Rule 26(b)(2)(B) in others.<sup>180</sup> The modern trend in taxing e-discovery costs under § 1920 is likely to continue, as more courts adopt the holdings of the Sixth Circuit, the Eastern District of Virginia, and the Eastern District of California to tax copying costs against the losing party.<sup>181</sup> Other courts may adopt the § 1920 interpretations of the Seventh Circuit, the Southern and Central Districts of California, and the Eastern District of Pennsylvania and tax a broader array of e-discovery costs for the prevailing party.<sup>182</sup> Though there are different interpretations, the trend seems to favor some cost shifting to relieve defendants facing unreasonable costs or settling frivolous claims.<sup>183</sup>

Undeniably, however, the vast majority of U.S. courts have not held e-discovery costs taxable under the powers of Rule 54 and § 1920. Most are still attempting to use the cost shifting mechanism in Rule 26(b)(2)(B), or rather avoiding cost shifting under the rule altogether.<sup>184</sup> And although progress may come, not all believe that

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177. Cf. *supra* note 89 and accompanying text.

178. See Kathleen L. Blaner, Alfred W. Cortese, Jr. & Donald H. Green, *Federal Discovery: Crown Jewel or Curse?*, LITIGATION, Summer 1998, at 8, 8 (“Discovery was considered a crown jewel because it sought to open the courts to all elements of society. The drafters saw an imbalance of power between the wealthy and the poor. By mandating a full exchange of information, the drafters thought that they could help less powerful litigants prove their legal claims and thus redress the imbalance.”)

179. See THE SEDONA CONFERENCE, *supra* note 22, at v.

180. See *supra* Part II.

181. See *supra* Part II.

182. See *supra* Part II.

183. See Hoelting, *supra* note 11, at 1119-24.

184. See Vainberg, *supra* note 93, at 1565 (“Yet while the amended Rules have not brought uniformity, this Comment’s survey suggests that in the wake of their adoption, courts have become more skeptical of cost shifting. They are more likely to shift costs only when the requesting party volunteers to bear them or when the request is made of nonparties.”).



§ 1920 and Rule 54 give the court the power to tax e-discovery in the first place.<sup>185</sup> If we choose to wait and see, we may be waiting a while before the best solution rises above the e-discovery fray. Meanwhile e-discovery abuse runs rampant and undermines the entire judicial system.<sup>186</sup>

Moreover, none of the taxing approaches under § 1920 go far enough. They do not adequately address the incentives under the current rules, which encourage requesting parties to make overbroad requests to drive up the producing parties' cost.<sup>187</sup> Copying costs are a pittance when compared to the full extent of e-discovery costs the requesting parties can increase.<sup>188</sup> Defendants still have an incentive to settle when a plaintiff requests e-discovery worth more than the value of the suit in question, regardless of the potential to offset a fraction of that cost as copying costs under § 1920 if they prevail in court.<sup>189</sup> Even the broader approaches that tax both copying and creation costs under the statute do not begin to chip away at the behemoth that is the cost of review for relevance and privilege.<sup>190</sup> A solution is needed which appropriately assesses if "the burden or expense of the proposed discovery outweighs its likely benefit."<sup>191</sup>

### *C. The English Rule: Loser Pays*

Another option would be to adopt the English rule, otherwise known as the "loser pays" rule. Under a pure loser pays rule, all e-discovery costs are awarded to the prevailing party as a part of the judgment.<sup>192</sup> Unlike the taxing approaches of some U.S. courts, this rule includes the costs of third-party vendors, creation costs, and even attorney fees for reviewing ESI. This discourages frivolous

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185. See, e.g., Thomas Edge, *Looking at the Small Costs*, 39 N. KY. L. REV. 535, 555 (2012); Gillen, *supra* note 19, at 235-38.

186. See *supra* note 101-03 and accompanying text.

187. See *supra* Part II.

188. See *supra* note 73 and accompanying text. Copying costs were included in the average cost to "process" a gigabyte of information.

189. See *supra* note 99 and accompanying text.

190. See *supra* note 74 and accompanying text.

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

192. See *State Bd. of Tax Comm'rs v. Town of St. John*, 751 N.E.2d 657, 658 (Ind. 2001); 20 AM. JUR. 2D *Costs* § 55 (2014).



lawsuits and incentivizes parties to keep their requests narrowly tailored to discover only relevant ESI.<sup>193</sup> Yet this rule goes too far, discouraging meritorious suits as well as frivolous suits and making litigation inaccessible to the average plaintiff.

Proponents of the loser pays rule argue that it would be fairer, because “victory is not complete in civil litigation if it leaves substantial expenses uncovered.”<sup>194</sup> The underlying theory suggests that having to pay the e-discovery costs would undeservedly penalize innocent parties upon winning their claims.<sup>195</sup> After all, what incentive is there to litigate at all—regardless of merits—if parties must pay the prohibitive cost of e-discovery, win or lose?

Appealingly, a pure loser-pays rule eliminates the perverse incentives under the current system to drive up the costs of e-discovery and file nuisance suits. Requesting parties would have to weigh the possibility of losing, and therefore paying for the e-discovery bill, before they submitted their discovery requests.<sup>196</sup> They would be much more likely to narrow the scope of their request to discover only the most relevant information and minimize the risk of having to pay for the bill if they lose.<sup>197</sup> Defendants would refuse to settle in cases in which they were assured of recouping their costs upon a favorable outcome in the case.<sup>198</sup>

It is also possible that adoption of the loser pays rule would keep e-discovery costs down altogether. Because payment would depend

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193. See Hoelting, *supra* note 11, at 1121.

194. See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the “Odd Man Out” in How It Pays Its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 405 (1999).

195. See Sarah Wise, *Show Me the Money! The Recoverability of Computerized Legal Research Expenses by the Prevailing Party in the Federal Circuits*, 36 CAP. U. L. REV. 455, 460 (2007).

196. See Steven C. Bennett, *Are E-Discovery Costs Recoverable by a Prevailing Party?*, 20 ALB. L.J. SCI. & TECH. 537, 538-39 (2010); see also *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N.D. Ga. 2009) (“Taxation of these costs will encourage litigants to exercise restraint in burdening the [other] party with the huge cost of unlimited demands for electronic discovery.”).

197. See Bennett, *supra* note 196, at 538-39.

198. See Costello, *supra* note 146, at 4 (“As a result, litigants will be less likely to file lawsuits and/or claims of questionable merit ... or to force an opponent to incur substantial eDiscovery costs in the hopes of forcing a settlement, when the plaintiff may well have to foot the bill.”); Hoelting, *supra* note 11, at 1126 (noting that requesting parties “will be held more accountable for bringing frivolous lawsuits” when they might be required to pay some of the e-discovery costs).

on winning, both parties might be wary of hiking up e-discovery costs they might later have to pay.<sup>199</sup> Parties would have to adopt reasonable positions about e-discovery costs early on.<sup>200</sup> Likewise, parties might be inclined to settle, and settle early, due to their mutual desire not to get stuck with the discovery bill.

Nonetheless, the loser pays rule brings with it major disadvantages. Such a broad rule discourages not only frivolous suits but meritorious suits as well.<sup>201</sup> Plaintiffs with good claims would not be willing to expose themselves to the risk of having to pay exorbitant e-discovery costs if they lose, especially poor plaintiffs who have few resources to fund their litigation strategy in the first place.<sup>202</sup> These concerns motivated lawmakers to reject the English rule in the first place, in favor of a rule which opened up courts to bigger cross-sections of society.<sup>203</sup>

Settlements also might not result in greater numbers under a broad loser pays rule because defendants would already have an incentive to cooperate. Because producing parties already have to pay for the e-discovery costs if they lose, and oftentimes even if they win, they already have an incentive to cooperate with requesting parties to settle early.<sup>204</sup> It is unclear that a loser pays rule would impose additional incentives to cooperate.<sup>205</sup>

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199. See Beisner, *supra* note 2, at 588 (“Application of the English rule to discovery disputes would serve to ensure that neither party adopts an irrational position with regard to discovery issues. Further, the risk of having to pay the opposing party’s expenses for contesting a discovery request would help attorneys resist clients who urge them to adopt unreasonable positions.”).

200. See *id.*

201. See Andrew Mast, Note, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. § 1920*, 56 WAYNE L. REV. 1825, 1826 (2010) (citing *Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 317-18 (S.D.N.Y. 2003)).

202. *Id.*

203. See Beisner, *supra* note 2, at 587 (“This rule, designed to dissuade meritless lawsuits, was rejected in the United States because of its propensity to limit access to the courts.”); Hoelting, *supra* note 11, at 1131 (“The American judicial system jettisoned the English Rule in favor of the American Rule based on the policy judgment that the imposition of costs acts as an unacceptable barrier to meritorious litigation.”).

204. See Bennett, *supra* note 196, at 550-51 (noting that, under the status quo, “self-interest generally should motivate responding parties to reduce discovery costs, since it is unlikely that a party would ‘increase its costs unnecessarily without knowing that it would prevail at trial.’”) (quoting *Petersen v. Union Pac. R.R.*, No. 06-3084, 2009 WL 2163470, at \*4 (C.D. Ill. July 17, 2009)).

205. *Id.*

## CONCLUSION

The current rules regulating discovery are outdated and effectively eclipsed through the emergence of electronically stored information as the primary form of information requested in modern litigation. ESI is created, replicated, and stored at astronomical rates, driving the price of producing it during discovery through the roof. Rising e-discovery costs have likewise spurred aggressive discovery abuse. Requesting parties make overbroad requests, file frivolous suits, and otherwise seek to intentionally drive the cost of e-discovery up because the governing American rule places the great bulk of e-discovery expenses on the producing party. By increasing the producing party's e-discovery costs, requesting parties force inflated and nuisance settlements disproportional to the merits and value of the underlying claim. Producing parties have no choice but to settle or pay exorbitant e-discovery costs. As a result, the litigation system is undermined as the efficient means to settle disputes, and more cases are resolved on meritless grounds.

Courts and lawmakers have attempted to deal with this problem in several ways. The drafters of the Federal Rules of Civil Procedure passed the 2006 Amendments, in an attempt to shift some of the cost of burdensome e-discovery onto the requesting party. The cost-shifting mechanism has been a resounding failure, however, causing substantial confusion regarding its application. Federal courts have attempted to resolve the problem by using the power of Rule 54 and the ability to tax costs to prevailing parties under § 1920. Though some jurisdictions have made progress in eliminating the perverse incentives of the American rule, they are too few, too spread out, and too divided among themselves to adequately address the issue.

Several potential approaches to solving the issue are plausible. The first is to allow the courts to find the most efficient mechanism, and then adopt that mechanism either through legislation or a Supreme Court opinion. This is maintaining the status quo. And although some jurisdictions have indeed made promising headway in combating discovery abuse, the rest of the nation should not just wait idly by and apply harmful rules resulting in adverse results. Second, applying the English, or loser pays, rule would award the costs of the entire e-discovery bill to the prevailing party. Such a

rule would disincentivize frivolous claims and overbroad discovery requests, keeping discovery costs down, but it would also close the litigation system to poorer and risk-adverse plaintiffs. Discouraging meritorious claims in such magnitude is unacceptable.

Lastly, this Note supports the use of a hybrid rule, which would cap the American rule at one-half the value of the underlying claim. By using a sliding-scale cap, requesting parties would still be encouraged to bring meritorious claims, but would also have an incentive to keep their discovery requests narrow and tailored to discover only the most relevant information. Producing parties would still have to bear the initial discovery expenses up to half the value of the claim, but would be shielded from the most expensive requests and discovery abuse. The rule would promote efficient resolution of lawsuits and encourage settlement proportional to the merits and value of the suit.

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