SALMON P. CHASE COLLEGE OF LAW

Dennis Honabach, A.B., J.D.
Dean & Professor of Law

Lawrence Rosenthal, B.A., J.D., LL.M.
Associate Dean for Academics

Jenny Young
Registrar of the College of Law

Lisa Moore, B.A., J.D.
Director of Career Services

Molly Tami
Associate Dean for Student Affairs and Admissions & Director of Pro Bono Services

Ashley Gray, B.A., J.D.
Director of Admissions

Karen Ogburn, B.A., M.P.A.
Associate Dean for Administration

Sherrie Turner, B.S.
Budget Analyst

David H. MacKnight, B.S., J.D.
Associate Dean for Law School Advancement

Michael Whiteman, B.A., M.S.L.S., J.D.
Associate Dean for Library Services and Information Technology & Professor of Law

FACULTY

Richard A. Bales, B.A., J.D.
Professor of Law & Associate Dean of Faculty Development

Iain Barksdale, B.A., M.Phil., M.L.S., J.D.
Assistant Professor of Library Services
Assistant Director of Information Technology

Donna S. Bennett, A.B., M.A., M.S.L.S.
Professor of Library Services & Assistant Director for User Services

John M. Bickers, A.B., J.D., LL.M.
Assistant Professor of Law

Roger D. Billings, Jr., A.B., J.D.
Professor of Law

Carol Breedemeyer, A.B., M.S.L.S.
Professor of Law Library Services & Assistant Director of Faculty Services

Alea Brown, B.A., J.D.
Visiting Professor of Legal Writing

David A. Elder, A.B., J.D., LL.M.
Professor of Law

Nancy L. Firk, B.S., J.D., LL.M.
Professor of Law

Carol Furnish, B.A., M.L.S.
Professor of Library Services & Assistant Director for Instruction & Outreach

Christopher Guinello, B.A., J.D., LL.M.
Associate Professor of Law

Thomas E. Heard, B.A., M.L.S., J.D.
Associate Professor of Library Services & Associate Director for Library Services

Davida H. Isaac, B.A., J.D.
Associate Professor of Law

Emily Janoski-Haeblin, B.S., J.D., M.L.S.
Assistant Professor of Library Services
Assistant Director for Research and Online Services

Kathleen Johnson, B.A., J.D.
Assistant Professor & Associate Director of the Chase Center for Excellence in Advocacy

Jennifer Jolly-Ryan, B.A., J.D.
Professor of Legal Writing

Kenneth D. Katkin, A.B., J.D.
Professor of Law

Donald K. Kazee, B.A., M.A., J.D.
Associate Professor of Legal Writing

Jennifer Kreider, B.A., J.D.
Associate Professor of Law

Sharlene Lassiter-Boltz, B.A., J.D.
Professor of Law

Alberto Lopez, B.S., M.S., J.D., J.S.M.
Professor of Law

Michael J.Z. Mannheimer, B.A., J.D.
Associate Professor of Law

Barbara McFarland
Acting Director of Student Success Initiatives
Assistant Professor

Liubomir Nacev, B.A., J.D., LL.M.
Professor of Law

Adrienne Noble Nacev, B.A., J.D.
Visiting Assistant Professor of Legal Writing

Sherry Porter,
Director for the Center for Excellence in Transactional Law

Lowell F. Schechter, B.A., J.D.
Professor of Law

David Singleton, B.A., J.D.
Visiting Professor of Law

William Siostrom, B.A., J.D.
Professor of Law

Phillip Sparks, B.S., J.D., LL.M.
Assistant Professor of Law & Director of Chase Local Government Law Center

Mark M. Stavsky, B.A., J.D., LL.M.
Professor of Law

Henry L. Stephens, Jr., B.A., J.D.
Executive Director of Chase Center for Excellence in Advocacy
Professor of Law

John T. Valauri, B.A., J.D.
Professor of Law
CARYL A. YZENBAARD, A.B., J.D.
Professor of Law

CLAUDIA ZAHER, B.A., M.S.L.S.
Associate Professor of Library Services
Assistant Director for Collection Development
Acquisitions and Serials

EMERITI FACULTY
CAROL B. ALLRED, B.A., M.S.L.S., J.D.
ROBERT M. BRATTON, A.B., M.A., J.D.
EDWARD P. GOGGIN, J.D., LL.M.
W. JACK GROSSE, B.S.C., M.B.A., J.D.
MARTIN J. HUELSMAN, B.B.A., J.D.
WILLIAM R. JONES, B.S., M.A., J.D.
KAMILA M. MAZENAC, A.B., J.D., LL.M.
FREDERICK R. SCHNEIDER, B.A., J.D.
ROBERT L. SEAVER, A.B., J.D.
DAVID C. SHORT, B.A., J.D., LL.M.

ADJUNCT FACULTY
HON. GREGORY M. BARTLETT, A.B., M.A., J.D.
HON. WILLIAM O. BERTELSMAN, B.S., J.D.
BRYANT BREWER, B.A., J.D.
LOUISE BROCK
SHAWN P. BURTON
KELLY CANTRALL, B.A., J.D.
LISA DAVIDSON, B.A., J.D.
KRISTI DAVIDSON, B.A., J.D.
REBECCA DILORETO
DOREENA FOX, B.S., J.D.
ROBERT A. GOERING, B.A., J.D.
HON. DANIEL T. GUIDUGLI, B.A., J.D.
MICHAEL HAWKINS, B.A., J.D.
HON. STEVEN R. JAEGER

RICHARD KATZ, B.A., J.D.
JENNIFER LAWRENCE, B.S., J.D.
HENRY E. MENNINGER, B.A., J.D.
KEVIN ROONEY, B.A., J.D.
E. ROBERT SANDERS, B.A., B.S., J.D.
HON. AMUL THAPAR
HON. KAREN A. THOMAS, B.A., J.D.
BERNADINE C. TOPAZIO, B.A., M.B.A., J.D.
MARY WAGNER, B.S./B.A., M.B.A., J.D.
HON. WILLIAM J. WEHR, B.A., J.D.
HON. J. GREGORY WEHRMAN, B.A., J.D.
DAVID WHELAN, B.A., J.D.
JUSTICE DONALD C. WINTERSHEIMER, A.B., M.A., J.D.
J. STEPHEN WIRTHLIN, JR., B.A., J.D.
Electronic Discovery Issue

INTRODUCTION

Introduction: Navigating the Changing Ethical and Practical Expectations for E-Discovery
Jennifer Anglim Kreder and Bryce C. Rhoades

ARTICLES

E-Pitfalls: Ethics and E-Discovery
Debra Lyn Bassett

The Ethics of Legal Outsourcing
Steven C. Bennett

Avoiding an E-Discovery Odyssey
Roland Bernier

Some Thoughts on the Lawyer’s E-volving Duties in Discovery
Steven S. Gensler

NOTES

Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations
Robert E. Altman and Benjamin Lewis

The Ethical Dilemma of Scrubbing Metadata: The Pathway to a Better Approach
Emily N. Litzinger

The Decision to Compel Unrestricted Forensic Imaging: A Note Discussing John B. v. Goetz
Christen M. Steimle
INTRODUCTION:
NAVIGATING THE CHANGING ETHICAL
AND PRACTICAL EXPECTATIONS FOR E-DISCOVERY

Jennifer Anglim Kreder* and Bryce C. Rhoades**

This issue of the Northern Kentucky Law Review stems from the 2009 Spring Symposium, *Navigating the Changing Ethical and Practical Expectations for E-Discovery*, held on February, 28, 2009. The Northern Kentucky Law Review owes a debt of gratitude to the speakers who made the symposium a success for the over 140 Chase students and 80 alumni and other attorneys in attendance.

The symposium kicked off with Roland Bernier, Attorney and Senior ESI Consultant with Forensics Consulting Solutions, LLP, who laid the groundwork for the two panels. Mr. Bernier explained to the audience the scope of data available and how electronically stored information (ESI) can be inadvertently spoliated without intent and hidden from the view of one with limited IT sophistication. He also explained how lawyers and the IT industries must work together to maximize efficient results and comply with ethical obligations.

Second, panelists on the first panel, which was dedicated to “Changing Ethical Expectations” in e-discovery, were Professor Debra Lyn Bassett of the University of Alabama School of Law; Hon. John L. Carroll, Dean and Professor of Cumberland School of Law at Samford University (and former U.S. Magistrate Judge); and Gregory Harrison, a Partner at Dinsmore & Shohl LLP in Cincinnati. Professor Kreder had the pleasure to moderate this panel. Professor Bassett observed that ethical issues concerning e-discovery arise in the same manner as they do with physical documents, but that the largest difference is the sheer volume and number of documents. She pointed out how an average employee generates 75 e-mails per day, whereas an average employee rarely generates 75 pieces of paper per day.

Next, in regard to attorney competence, Mr. Harrison indicated that, as in all areas of representation, Model Rule 1.1 requires the level of competence that is

* Professor Kreder is an Associate Professor of Law at Northern Kentucky University Salmon P. Chase College of Law. She previously taught at Stetson University College of Law. Prior to entering academia, she was a Litigation Associate with Milbank, Tweed, Hadley & McCloy, LLP in New York. Professor Kreder also clerked for Hon. Barefoot Sanders, United States District Court for the Northern District of Texas. She is a graduate of the Georgetown University Law Center, and received her Bachelor of Arts with High Honors in Political Science from the University of Florida. Along with Professor Richard Bales, she moderated the 2009 Northern Kentucky Law Review Spring Symposium.

** Bryce Rhoades is a 2009 juris doctor candidate at NKU Chase College of Law. He is the 2008-2009 Spring Symposium Editor of the Northern Kentucky Law Review.
reasonably necessary to represent the client. There is no separate obligation for e-discovery, but because of its nature, e-discovery requires widespread attorney education on new issues. Judge Carroll emphasized that most judges did not work as attorneys in an e-discovery environment. Therefore, attorneys today must not only understand the infrastructure of their clients’ IT systems, but they must be ready once litigation is reasonably anticipated to tell their client how to not delete anything, which often requires suspending routine IT maintenance.

Mr. Harrison offered the interesting observation that in his experience, which is large corporate cases, he does not find most of the problems on the defense side, because large corporate defendants typically have some kind of knowledge that litigation is coming. He observed that the problem often comes from the plaintiff’s side, because it has to anticipate filing the complaint at a time when it is not particularly thinking about preserving information.

In regard to whether attorneys seem to be meeting their ethical obligations not to needlessly increase the cost of litigation, Judge Carroll stated that there is a great potential for abuse because the cost of e-discovery can become so expensive that the party settles to avoid unnecessary costs. Professor Bassett offered general observations about ethics since the critical Zubulake decision, which pre-dated the e-discovery amendments. In regard to the pivotal Qualcomm case, she offered two observations for avoiding attorney sanctions: (1) attorney supervision of their clients’ data collection activities is critical, and (2) attorneys and clients must work together cooperatively to understand how and where ESI is maintained. Mr. Harrison offered that Qualcomm potentially drives a wedge between attorney and client, because attorneys must cover themselves to avoid sanctions when the client does not follow ESI advice.

Lastly, the panel shifted to discuss new Federal Rule of Evidence 502. Judge Carroll described how it was intended to reduce the cost of the most expensive aspect of e-discovery—privilege review—by reducing the need for it to be completed “perfectly” to avoid waiver. Mr. Harrison summed up practitioners’ concern that, although the new rule provides some comfort, it is “cold comfort,” because once the privileged document is “out there,” the bell can’t be “un-rung.”

Finally, panelists on the second panel, dedicated to “Best Practices in E-Discovery,” were Thomas Y. Allman, Co-chair of the Sedona Conference; Steven C. Bennett, a Partner at Jones Day LLP (New York); Professor Steven Gensler of the University of Oklahoma College of Law; and Hon. Robert E. Wier, U.S. Magistrate Judge for the Eastern District of Kentucky. Professor Richard Bales of NKU Chase moderated this second panel. Judge Wier started

---

the panel with a discussion of cooperation. He stressed how the Federal Rules of Civil Procedure emphasize cooperation, and that in the area of e-discovery, this is particularly important, but must still come up against the need for zealous advocacy. Mr. Allman pointed those in need of direction to the Sedona Conference Cooperation Proclamation\(^4\) included in the Symposium materials, but admitted that coming recently from a large corporate legal department, he had mixed feelings about the Proclamation. Mr. Bennett offered the Boy Scout motto of “Be Prepared,” emphasizing that early preparation will pay off in the end, because it allows one to offer opponents documents early, which will be helpful should the opposition complain later to the judge about the discovery process. Professor Gensler emphasized that, while there is no duty in the Rules to cooperate, the rewards usually are worth the effort.

The panel also explored the role of vendors, which can be sensitive. Mr. Bennett explained that, despite the claim of some vendors to make lawyers’ jobs in e-discovery a “breeze,” the lawyer has ultimate responsibility to supervise the vendor and insure that discovery obligations are met. Professor Gensler stated that this also requires detailed, up-to-date knowledge of the client’s IT systems, for which a current data map is extremely useful. Mr. Allman mentioned that one of the fascinating points in the Qualcomm case was the focus on the ethical rules of supervision. Judge Wier emphasized that, under Federal Rule of Civil Procedure 26(g), an attorney’s signature certifies that he or she has performed due diligence and evaluated the benefit and burden of what has been requested. Professor Gensler discussed how new Federal Rule of Evidence 502 contemplates that parties may agree to perform a less perfect (or even no) privilege review without waiving privilege in a “sneak peak”. Mr. Allman indicated that the intent of the new rule was to reduce the cost and risk of privilege review by greatly and uniformly reducing the risk of waiver.

During the panel’s discussion of sanctions, Mr. Allman discussed how Federal Rule of Civil Procedure 37(e), adopted via the 2006 amendments, utilizes a “good faith” standard to determine when sanctions are warranted, which was emphasized in the Qualcomm opinion. Judge Wier emphasized that an attorney must not only fully understand the client’s IT systems and the scope and diligence of the search for responsive information that was completed, but must also be able to communicate it clearly to a judge in plain English. Mr. Bennett predicted that e-discovery would become more complicated and voluminous and even hypothesized that the day may come when we are discovering molecularly or biologically stored data. Professor Gensler concluded by predicting that a reasonableness standard is being woven into the case law.

This volume includes articles from four of the Symposium participants, who have agreed to share their expertise here. Additionally, the three student notes in this issue add depth to the subject of e-discovery. We hope that these articles and notes increase the legal community’s understanding of this developing issue.
E-PITFALLS: ETHICS AND E-DISCOVERY

Debra Lyn Bassett∗

Written for a symposium on e-discovery, this Article addresses the convergence of ethics and e-discovery, and contends that the surprise and concern often expressed regarding ethical issues in e-discovery, which seem to view the use of such ethical considerations as novel, unusual, and contrary to traditional discovery practices, are overstated. In particular, this Article argues that, despite the seeming distinctiveness of issues concerning electronically stored information, well-established ethical rules apply to these issues in very familiar patterns and approaches. After examining the interplay between legal ethics and the practice of law generally, the Article analyzes the recent Qualcomm Inc. v. Broadcom Corp.1 decision and offers some insights into both the reasons behind the Qualcomm court’s insistence on employing ethical precepts in the e-discovery context, and why the use of ethical principles in discovery is likely to continue.

INTRODUCTION

Constant communication has become a ubiquitous part of our lives generally, and of the practice of law in particular. Clients often have both their lawyers’ office phone number and cell phone number, giving them either direct and immediate access or the ability to leave a voicemail message. Cell phones also potentially offer text messaging opportunities. In addition, clients typically have their lawyers’ e-mail addresses, which may also offer an instant messaging opportunity. Even if the lawyer is out of the office, the combination of remote e-mail access and the proliferation of BlackBerry® and iPhone® devices have rendered lawyers perpetually available to clients.

This accessibility is generally a good thing, but communication technologies also carry risks.2 The Federal Rules of Civil Procedure (hereinafter Federal Rules) expressly include “electronically stored information” within their

∗ Professor of Law and Judge Frank M. Johnson, Jr., Scholar, University of Alabama. I would like to thank the NKU Law Review for the invitation to present this paper at its “Symposium on E-Discovery: Navigating the Changing Ethical and Practical Expectations.” Many thanks also to the Symposium panelists and attendees for their helpful comments, to Rex Perschbacher for his comments on an earlier draft, and to Dean Ken Randall for his encouragement and research support. I presented an earlier version of this article at a meeting of the Tallahassee Bar Association.


2. INFORMATION SECURITY FOR LAWYERS AND LAW FIRMS 35-36 (Sharon Nelson et al. eds., ABA Publishing 2006) [hereinafter INFORMATION SECURITY].
discovery provisions. These discovery provisions potentially render voicemail, e-mail, text messages, and instant messages open to discovery, as well as, at least in some instances, metadata embedded in those communications.

This Article initially addresses ethics in the practice of law generally, and then turns to some of the ethical issues that can arise in connection with communication technologies, specifically focusing on e-mail communication. This ethical tour begins, in Part I, with some foundational ethical precepts. Part II analyzes the interplay between e-mail and ethics generally, encompassing issues of competence, communication, confidentiality, recordkeeping, and supervision. Part III explores the convergence of ethics, e-mail and e-discovery by examining and analyzing the decision in Qualcomm, Inc. v. Broadcom Corp., and offers some insights into the Qualcomm court’s use of ethical precepts. Finally, Part IV explains why courts likely will continue to rely on ethical principles in the discovery context.

I. ETHICAL FOUNDATIONS

In the United States, a lawyer’s ethical obligations are governed by a combination of sources. Prominent among these sources is the guidance found in model codes and rules promulgated by the American Bar Association, supplemented by the American Law Institute’s Restatement (Third) of the Law Governing Lawyers. Both the American Bar Association and the American


5. See infra notes 10-77 and accompanying text.

6. See infra notes 78-146 and accompanying text.


8. See infra notes 147-204 and accompanying text.

9. See infra notes 205-225 and accompanying text.

10. See Christine Parker & Adrian Evans, Inside Lawyers’ Ethics 3-5 (Cambridge Univ. Press 2007) (stating that there are two sources of ethical expectations, professional conduct, including the law of lawyering and rules of professional responsibility and social ethics, including moral and philosophical values).


Law Institute provisions are potential sources of ethical guidance in a broad variety of areas, ranging from conflicts of interest, to fees, to confidentiality, to the sale of a law practice, to multi-jurisdictional practice, to trial publicity, to restrictions on the right to practice law.13

However prominent nationally, these provisions are not self-executing and carry no independent authority—ultimately a lawyer’s ethical obligations are determined by the laws (or rules) of the state (or states) in which the lawyer is licensed to practice.14 In other words, a state must formally adopt the provisions set forth in the American Bar Association or American Law Institute provisions in order to render those provisions enforceable in that state.15 In adopting model provisions, of course, the state has the authority to accept some provisions and reject others, as well as to amend model provisions or create new ones.16 Almost all of the states have adopted the substance of the American Bar Association’s Model Rules of Professional Conduct (hereinafter Model Rules), usually with revisions that typically are minor.17

The ethical rules adopted by a particular state are often supplemented by Ethics Opinions—some promulgated by courts in the course of litigation or upon formal request by individual lawyers or bar associations, and others adopted by specialized ethics entities, including the American Bar Association, various state bar associations, and various local bar associations.18 Ethical rules often are also supplemented by statutory law that creates responsibilities or liabilities in specific contexts.19 Again, however, despite this broad diversity with respect to


13. *See, e.g., Model Rules of Prof’l Conduct* R. 1.7 (2008) (stating the rule regarding concurrent conflicts of interest); *id.* at R. 1.8 (stating the rules regarding current client interests); *id.* at R. 1.9 (stating the duties owed to former clients); *id.* at R. 1.10 (stating the rule regarding imputation of client conflicts on those who are associated in a firm with the lawyer); *id.* at R. 1.13 (stating the special rules which apply when the client is an organization rather than an individual); *id.* at R. 1.18 (stating the duties owed to prospective clients); *id.* at R. 1.5 (fees); *id.* at R. 1.6 (confidentiality); *id.* at R. 1.17 (sale of law practice); *id.* at R. 5.5 (multi-jurisdictional practice); *id.* at R. 3.6 (trial publicity); *id.* at R. 5.6 (restrictions on the right to practice).


17. *See id.*

18. *See generally ABA/BNA Lawyers’ Manual on Prof’l Conduct* (containing formal and informal ethics opinions).

19. For example, California supplements its Rules of Professional Conduct with a number of statutory provisions within its Business and Professions Code. *See, e.g., Cal. Bus. & Prof. Code* § 6068 (duties of attorney); *see also id.* § 6090.5 (prohibited agreements); *id.* § 6103.5 (written
the sources of ethical obligations, a lawyer’s ethical duties are much the same from state to state.20

A lawyer’s ethical obligations are anchored in the underlying tenets of loyalty, honesty, and confidentiality.21 Examples of each of these basic tenets can be found within specific provisions from the Model Rules.22 The concept of loyalty is encompassed in a number of the Model Rules, including those covering conflicts of interest, in which we insist that a lawyer’s loyalty to a client cannot be compromised by conflicting loyalties to (or interests of) other clients, former clients, third parties, or the lawyer’s own self-interest.23 The concept of honesty is also encompassed in a number of the Model Rules, insisting that a lawyer may not make a false statement of law or fact to a third party generally or to a tribunal specifically;24 a lawyer may not offer evidence that the lawyer knows to be false;25 a lawyer may not assert frivolous claims or defenses;26 and a lawyer may not falsify evidence.27 The concept of confidentiality is encompassed in the Model Rules restricting the circumstances under which a lawyer may reveal information conveyed within the lawyer-client relationship, and protects the information regarding current clients, former clients, and even merely prospective clients.28

There is sometimes a tendency to want to separate questions, problems, or issues that are “legal” from those we regard as “ethical.” We are not always completely clear as to when and how those concepts overlap, and sometimes we

offers of settlement); id. § 6126 (unauthorized practice of law); id. § 6147 (contingency fee contracts); id. § 6152 (prohibition of solicitation).

20. See PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES, supra note 16, at 107-14 (contrasting each state’s ethical provisions regarding the mandatory and permissive disclosures of confidential client information).


23. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.7 (2008) (stating the rule regarding concurrent conflicts of interest); id. at R. 1.8 (stating the rules regarding current client interests); id. at R. 1.9 (stating the duties owed to former clients); id. at R. 1.10 (stating the rule regarding imputation of client conflicts on those who are associated in a firm with the lawyer); id. at R. 1.13 (stating the special rules which apply when the client is an organization rather than an individual); id. at R. 1.18 (stating the duties owed to prospective clients).


25. Id. at R. 3.3(a)(3).

26. Id. at R. 3.1.

27. See id. at R. 3.4.

28. See, e.g., id. at R. 1.6 (stating the rules regarding disclosure of client confidences); id. at R. 1.7 (stating the rule regarding concurrent conflicts of interest); id. at R. 1.8 (stating the rules regarding current client interests); id. at R. 1.9 (stating the duties owed to former clients); id. at R. 1.10 (stating the rule regarding imputation of client conflicts on those who are associated in a firm with the lawyer); id. at R. 1.13 (stating the special rules which apply when the client is an organization rather than an individual); id. at R. 1.18 (stating the duties owed to prospective clients).
entertain the uneasy suspicion that the two concepts actually have nothing to do with each other. My argument, as you are about to see, is that actually these two concepts have everything to do with each other.

In 2000, the American Law Institute issued a Restatement specifically aimed at lawyers’ ethics. Like its previous Restatements, this Restatement also has a specific subject-matter title—the Restatement (Third) of the Law Governing Lawyers. With the issuance of this Restatement has come a shift in terminology from an almost exclusive use of the word “ethics” to the term “law of lawyering.”

I posit that, by referring to the ethical rules as the “law of lawyering,” the American Law Institute’s Restatement is reflecting a practical reality. Many people think of the ethical rules as something separate—as an additional restriction on, or perhaps even as a distraction from, what they think of as the real practice of law, meaning the underlying substantive law. However, the ethical rules are part of the day-in, day-out practice of law.

Within the world of law generally, legal norms and processes necessarily intersect with the rules regulating those who are engaged in the day-to-day business of invoking, or avoiding, or challenging those norms—that is, lawyers. These rules and concepts that regulate lawyers, which we formerly called simply the ethical rules, are what are known today as the law of lawyering. All of law practice is interlaced with these complex issues of intersection and interaction. Typically, however, legal norms are viewed as distinct from lawyers’ professional obligations, and so to the extent that anyone thinks about this interaction, there is typically an assumption that the rules regulating practitioners are neutral—that they leave intact the underlying legal norms and processes which are the subject of lawyers’ practices. And sometimes they do. But many times, perhaps even more often than not, the law of lawyering—lawyers’ professional obligations—will advance or hinder, or clarify or distort, the underlying norms and procedures within any given area of practice.

30. Id.
31. The Restatement (Third) of the Law Governing Lawyers was not the first use of the “law of lawyering” term. For many years, Professors Hazard and Hodes had employed the term “law of lawyering” for “ethics” in the title of their highly esteemed ethics treatise. 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct, at Iv (3d ed. 2001).
33. See 1 Hazard, supra note 31, at § 1.1.
34. See id.
35. See Rhode, supra note 32, at 1.
36. Id. (discussing the assumptions previously held by those teaching legal ethics in law school).
37. Id.
38. Id. at 7.
In this relationship, the ethical rules—the law of lawyering—constitute part of the substantive practice of law.\(^{39}\) As a beginning illustration, let us turn to the notion of fiduciary duty. There are many areas of the law in which one is said to have a fiduciary duty to another.\(^{40}\) Some conventional fiduciary relationships include trustee-trust beneficiary, agent-principal, lawyer-client, guardian-ward, director-corporation, and partner to fellow partner and partnership.\(^{41}\) Atypical or non-conventional fiduciary relationships have been found, at least under some circumstances, between such actors as stockbroker-client,\(^{42}\) bank-depositor,\(^{43}\) financial institution-loan applicant,\(^{44}\) and others.\(^{45}\)

The term “fiduciary” generally applies to “any person who occupies a position of peculiar confidence towards another,”\(^{46}\) refers to “integrity and fidelity,”\(^{47}\) and “contemplates fair dealing and good faith.”\(^{48}\) Generally, fiduciary relationships arise in one of four situations:

1. when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first,
2. when one person assumes control and responsibility over another,
3. when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or
4. when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client . . . .\(^{49}\)

“Generally, a fiduciary owes his or her principal ‘a high duty of good faith, fair dealing, honest performance, and strict accountability.’”\(^{50}\) These general

---

39. See 1 HAZARD, supra note 31, at § 1.3.
40. See Andrew D. Shaffer, Corporate Fiduciary-Insolvent: The Fiduciary Relationship Your Corporate Law Professor (Should Have) Warned You About, 8 AM. BANKR. INST. L. REV. 479, 483-84 (2000) (noting that “a full catalog of fiduciary relationships would be a large volume” but that “[a]mong the more established fiduciary relationships are the doctor-patient, attorney-client, and the principal-agent relationships”).
41. Id.
42. See generally Pace v. McEwen, 574 S.W.2d 792, 796 (Tex. App. 1978) (finding fiduciary relationship between stockbroker and client).
47. Id.
49. BLACK’S LAW DICTIONARY 1315 (8th ed. 2004).
duties include the duties of “loyalty and utmost good faith,”51 “candor,”52 “full disclosure,”53 and “to refrain from self-dealing.”54

The attorney-client relationship has been described as one of “most abundant good faith”55 and it requires “absolute and perfect candor or openness and honesty; the absence of any concealment or deception . . . .”56 Moreover, “[t]he attorney has an affirmative duty to make a full and accurate confession of all his fiduciary activities, transactions, profits, and mistakes.”57

Breach of fiduciary duty by an attorney most often involves the attorney’s failure to disclose conflicts of interest, failure to deliver funds belonging to the client, placing personal interests over the client’s interests, improper use of client confidences, taking advantage of the client’s trust, engaging in self-dealing, and making misrepresentations.58

Unlike the general perception that the primary remedy for an ethical violation is a disciplinary proceeding, remedies for violations of fiduciary duty by a lawyer can include out-of-pocket losses,59 lost profits,60 damages for mental anguish,61 and in appropriate cases, fee forfeiture62 and profit disgorgement.63

Accordingly, the law applicable to fiduciary duty can best be understood as responsive to circumstances that justify the expectation that an actor’s conduct will be loyal to the interests of another.64 In law, this underlying fiduciary duty is the basis for nearly all of the ethical rules that are mandatory (rather than permissive) in nature—and this underlying fiduciary duty is part and parcel of the substantive practice of law.65 For example, Model Rule 1.1 requires lawyers to “provide competent representation to a client.”66 Model Rule 1.3 requires lawyers to “act with reasonable diligence and promptness.”67 Model Rule 1.4

52. Jennings, supra note 50, at 847 (quoting Hawthorne v. Guenther, 917 S.W.2d 924, 934 (Tex. App. 1996)).
53. Id. (quoting Chien v. Chien, 759 S.W.2d 484, 495 (Tex. App. 1988)).
54. Id. (citing Dearing, Inc. v. Spiller, 824 S.W.2d 728, 733 (Tex. App. 1992)).
56. Id.
62. See Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999) (finding that the remedy of fee forfeiture exists to protect relationships of trust by discouraging disloyalty by agents).
64. See Gillers, supra note 14, at 65.
65. See id.
67. Id. at R. 1.3.
requires lawyers to keep their clients reasonably informed and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions.” Model Rule 1.5 prohibits lawyers from charging an unreasonable fee. Model Rule 1.6 generally prohibits lawyers from revealing confidential client information without the client’s informed consent. Model Rules 1.7, 1.8, 1.9, 1.10, 1.13, and 1.18 all deal with conflicts of interest in various contexts, and generally prohibit lawyers from being disloyal to their clients. Model Rule 1.15 requires lawyers to safeguard their client’s property and to maintain appropriate client trust accounts.

My point is that as a general matter, our rules of ethics primarily reflect our underlying fiduciary duty to our clients and are largely a matter of common sense—they are part and parcel of the duties owed generally by lawyers (and non-lawyers) in positions of trust. One would be hard-pressed to justify engaging in any of the prohibited behaviors in light of the well-established fiduciary duty between lawyer and client.

In other words, much of what often is characterized as merely ethics—and by virtue of that characterization, is often considered somehow supplemental to, or different from, the actual practice of law—is, in fact, actually part of the parcel of lawyers’ legal duties to their clients, a legal duty that is part of the substantive practice of law and enforceable as such. Accordingly, the ethical rules are not a separate and independent overlay—they are integral to the practice of law, and the basic underlying ethical concepts are integrated into the substantive law more thoroughly than we sometimes recognize. Ethics is a full partner in the substantive practice of law.

II. E-MAIL (AND OTHER E-DISCOVERY) AND GENERAL ETHICAL CONCERNS

Because e-mail is no longer a novelty, it is important to see how e-mail both resembles older, more traditional means of communication—such as letters and telephone calls—and how e-mail is distinctively different due to its informality.

68. Id. at R. 1.4.
69. Id. at R. 1.5.
70. Id. at R. 1.6.
71. MODEL RULES OF PROF’L CONDUCT R. 1.7 (2008) (stating the rule regarding concurrent conflicts of interest); id. at R. 1.8 (stating the rules regarding current client interests); id. at R. 1.9 (stating the duties owed to former clients); id. at R. 1.10 (stating the rule regarding imputation of client conflicts on those who are associated in a firm with the lawyer); id. at R. 1.13 (stating the special rules which apply when the client is an organization rather than an individual); id. at R. 1.18 (stating the duties owed to prospective clients).
72. Id. at R. 1.15.
73. See GILLERS, supra note 14, at 63-67.
74. Id.
75. See 1 HAZARD, supra note 31, at §§ 1.7-1.17 (listing the different methods of enforcing the law of lawyering).
76. See id.
77. See id.
and greater dangers of exposure. As a general matter, e-mail implicates practical concerns and ethical rules pertaining to communication, confidentiality, competence, and diligence. This Section examines those considerations.

A. Communication

ABA Model Rule 1.4 is entitled “Communication” and provides: “(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

This provision has several implications for e-mail and e-discovery. E-mail has greatly enhanced lawyers’ ability to maintain regular contact with clients and to keep clients informed. Unlike telephoning a client’s business number, where the central switchboard may shut down at the close of business hours, the lawyer who sends an e-mail message may do so at any hour, thereby generating a written record of the message’s content, when the message was sent, and, at least potentially, may receive confirmation that the client received the message by return receipt. Lawyers who are traveling need not worry about time zones. E-mail eliminates potential concerns about calling at an inopportune time, interrupting a meeting, being trapped in a lengthy conversation, or having one’s conversation overheard by others. E-mail would thus appear to be a boon to the legal profession, which has often been criticized for failing to communicate regularly with clients. Despite these genuine benefits, however, e-mail also suffers from some serious drawbacks.

From a general business perspective, one of e-mail’s greatest dangers is actually its ease and frequency of use. Perhaps because e-mail is a common means of communicating with friends and family as well as clients; perhaps because the instantaneous nature of e-mail seems to command an immediate response; or perhaps because the instantaneous nature of e-mail seems to command an immediate response; or perhaps because many individuals are multi-tasking, there is a

---

79. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.6 (2008) (confidentiality); id. at R. 1.1 (competence); id. at R. 1.3 (diligence).
80. Id. at R. 1.4.
82. See id.
83. See, e.g., Aris v. Mukasey, 517 F.3d 595, 598 (2d Cir. 2008) (discussing prior counsel’s numerous failures to communicate with his client); Valentine v. U.S., 488 F.3d 325, 332 (6th Cir. 2007) (discussing allegations that counsel did not communicate client’s desire to take plea deal).
84. See INFORMATION SECURITY, supra note 2, at 10 (discussing some of the dangers associated with e-mail and breach of the duty of confidentiality).
notable tendency to draft e-mail messages in a casual and hasty manner. Typographical and grammatical errors, informal language, and content lacking clarity, detail, and depth of reasoned reflection are common characteristics of e-mail messages. The potential problem is that an e-mail message to a client is an official business communication, even if the lawyer was jotting a hasty one-liner on her BlackBerry® while stuck in traffic or attending a child’s soccer game. Informalities in an e-mail message may be interpreted as curtness, rudeness, or nonchalance by the client, thereby causing unintended offense that can undermine the attorney-client relationship. Thus, the specific content of the e-mail communication can undermine the value of e-mail as a means of keeping clients informed.

B. Confidentiality

A second drawback of e-mail communication is the potential for misdirecting e-mail messages, resulting in an unintended sharing of confidential information. The ability to “reply to all” rather than one particular recipient is perhaps the least of one’s worries in this regard. Inadvertent sharing can also occur when one forwards a message without carefully checking the message’s entire content. A sender who forwards an interesting message without scrolling the entire length of the message, checking all attachments, or reading all previous exchanges within the thread may be sharing much more information than she realized. Auto-completion features in many e-mail systems enhance the possibility of clicking on the wrong recipient—and not discovering the error until the very moment of clicking “send.” Such errors can be embarrassing when, for example, a personal message is mistakenly sent to a work colleague. When, however, the misdirected e-mail message contains confidential client information, the ramifications go beyond mere embarrassment.

The lawyer’s duty of confidentiality is governed by Model Rule 1.6, which provides:

---

86. Id.
87. Id.
88. Id.
89. See INFORMATION SECURITY, supra note 2, at 25-27 (citing MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 16 (2008) and MODEL RULES OF PROF’L CONDUCT R. 1.6, cmt. 17 (2008)); see also RIHODE, supra note 32, at 141-45 (discussing the different approaches to inadvertent sending and receipt of client confidences by opposing counsel).
91. See id.
92. Id.
93. See INFORMATION SECURITY, supra note 2, at 27-28 (listing the possible ramifications of misdirecting an e-mail containing confidential information).
(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;
(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
(4) to secure legal advice about the lawyer’s compliance with these Rules;
(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
(6) to comply with other law or a court order.94

Even if inadvertently shared information comes within the attorney-client privilege, and even if the lawyer uses a disclaimer at the bottom of every e-mail message stating that its contents are privileged, carelessness in transmission has the potential to result in a waiver of the privilege.95 And even if privilege is not an issue, the broader duty of confidentiality may nevertheless still be a problem.96 The duty of confidentiality is central to the attorney-client relationship, and when a client’s confidential information is compromised, the violation of trust is likely to irreparably damage that relationship.97 Depending on the specific content of the misdirected message, the error may impact potential settlement value, may cause the client to terminate the firm’s services, or may result in the filing of a malpractice or disciplinary action.98

C. Competence and Diligence

A lawyer owes her client a duty of competence and diligence under Model Rules 1.1 and 1.3, which provide: “A lawyer shall provide competent

---

94. MODEL RULES OF PROF’L CONDUCT R. 1.6 (2008).
95. See INFORMATION SECURITY, supra note 2, at 130-31; see also RHOE, supra note 32, at 141-45 (discussing the different approaches to inadvertent sending and receipt of client confidences by opposing counsel).
96. See INFORMATION SECURITY, supra note 2, at 28.
97. See id.
98. See id. at 27-28.
representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation,"99 and “[a] lawyer shall act with reasonable diligence and promptness in representing a client.100

These duties of competence and diligence dovetail with the lawyer’s duty of confidentiality to require particular care in the drafting and transmission of e-mail messages.101 A competent lawyer is careful and thoughtful; a diligent lawyer is attentive and focused.102 The comments to Model Rule 1.6’s duty of confidentiality expressly state that “[a] lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure.”103 Similarly, the comments to Model Rule 1.6 also state that “[w]hen transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients.”104

In the context of e-mail communications, these provisions require lawyers to remain cognizant of their role as counsel and their concomitant responsibilities.105 E-mail requires heightened, not lessened, attention.106 Although most lawyers will be accustomed to using e-mail casually and informally, the lawyer must adopt a different, more formal, approach when dealing with clients or client information. Careless drafting or careless transmissions hold the very real potential for costing the client her case, and costing the lawyer her job.107 Turning to e-discovery in a broader sense, there are additional areas in which ethical considerations are implicated.108 These additional areas are the subject of the next Section.

100. Id. at R. 1.3.
101. See id. at R. 1.1 (competence); id. at R. 1.3 (diligence).
102. See, e.g., id. at R. 1.3 cmt. 2; id. at R. 1.1 cmt. 5.
103. Id. at R. 1.6, cmt. 16.
104. Id. at R. 1.6, cmt. 17.
105. See Model Rules of Prof’l Conduct R. 4.4(b) (2008) (“A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”). But see id. at R. 4.4 cmt. 2 (stating that the rules refuse to take a position on whether or not the inadvertent action results in the waiver of privilege).
106. The rules regarding whether or not an inadvertent disclosure will result in waiver of privilege are not uniform among the jurisdictions, this is why the Model Rules refuse to take a position in this debate. Model Rules of Prof’l Conduct R. 4.4 cmt. 2 (2008).
108. See infra notes 109-138 and accompanying text.
D. Additional E-Discovery Areas with an Ethical Component

This Section addresses four additional areas related to e-discovery that carry an ethical component: supervision of attorneys, supervision of clients, managing electronic documents, and metadata.

1. Supervision of Attorneys

Discovery traditionally has been the province of new associates and paralegals, and the Model Rules of Professional Conduct impose ethical responsibilities upon both supervising and subordinate lawyers. The responsibilities of lawyers who supervise other lawyers are detailed in Model Rule 5.1, which provides, in pertinent part:

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
(c) A lawyer shall be responsible for another lawyer’s violation of the Rules of Professional Conduct if:
   (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
   (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The responsibilities of lawyers who supervise non-lawyers are detailed in Model Rule 5.3, which provides, in pertinent part:

With respect to a nonlawyer employed or retained by or associated with a lawyer: . . .
(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and
(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
   (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
   (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its

109. MODEL RULES OF PROF’L CONDUCT R. 5.1 (2008) (rule governing the ethical responsibilities of supervisory lawyers over other lawyers); id. at R. 5.3 (rule governing the ethical responsibilities of supervisory lawyers over non-lawyer employees); id. at R. 5.2 (rule governing the ethical responsibilities of subordinate lawyers).
110. Id. at R. 5.1(b); id. at R. 5.1(c).
consequences can be avoided or mitigated but fails to take reasonable remedial action.\textsuperscript{111}

Subordinate lawyers also have ethical responsibilities under the Model Rules.\textsuperscript{112} In particular, Model Rule 5.2 provides:

\begin{itemize}
\item[(a)] A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
\item[(b)] A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.\textsuperscript{113}
\end{itemize}

Although Model Rules 5.1, 5.2, and 5.3 have long imposed these ethical duties, some former practices raise problems in the context of e-discovery because the nature of supervision is more complicated.\textsuperscript{114} Unlike paper documents kept in storage cabinets, which can be sorted readily by a conscientious attorney (or paralegal), e-discovery requires sophisticated knowledge—both of a party’s specific systems and operations, and of preservation, search, and retrieval techniques.\textsuperscript{115} Due to the need to attain the requisite knowledge and achieve the requisite techniques, partners can no longer assign new associates or paralegals to discovery involving electronic data and assume that careful reading and common sense will suffice.\textsuperscript{116} Instead, attorneys may need, or likely will need—to retain a technology expert or other consultants to aid in the process of e-discovery.\textsuperscript{117} The need for an outside expert or consultant raises its own ethical issues in the form of potential confidentiality issues.\textsuperscript{118} The use of an outside consultant falls within Model Rule 5.3 above, and the necessity of retaining an outside consultant in computer forensics carries over into the subject of the next subsection, involving the management of electronic documents.\textsuperscript{119}

\textsuperscript{111} Id. at R. 5.3.
\textsuperscript{112} See MODEL RULES OF PROF’L CONDUCT R. 5.2 (2008).
\textsuperscript{113} Id.
\textsuperscript{115} See generally Shira A. Scheindlin et al., ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 45-76 (2009) (discussing the different types of ESI, methods of storage and retrieval of the information).
\textsuperscript{116} See id. at 481.
\textsuperscript{117} Id.
\textsuperscript{118} See Ferron v. Search Cactus, L.L.C., No. 2:06-CV-327, 2008 WL 1902499, at *4 (S.D. Ohio Apr. 28, 2008) (holding that both the plaintiff’s and the defendant’s computer experts would be deemed officers of the court in order to protect the confidentiality of the material unrelated to the present suit which was on the plaintiff’s computer at the time the mirror image of the hard drive was created).
\textsuperscript{119} See MODEL RULES OF PROF’L CONDUCT R. 5.3 cmt. 1 (2008).
2. Supervision of Clients

Federal Rule 11 provides, in part, that attorneys, by presenting any “pleading, written motion, or other paper” to the court, are certifying that “the factual contentions [contained therein] have evidentiary support.” However, Rule 11, by its terms, does not apply to discovery, and Federal Rule 37, the discovery sanction rule, permits a tailoring of any discovery sanctions to apply to “the disobedient party, the attorney advising that party, or both”—thereby implicitly acknowledging that attorneys often do not have personal knowledge of the adequacy of their clients’ discovery responses. Similarly, the ethical rules observe that although attorneys are responsible for drafting pleadings and other litigation documents, they “usually [are] not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, . . . not assertions by the lawyer.” Nevertheless, attorneys cannot hide behind their clients’ representation of the facts blindly, without inquiry or substantiation. In particular, Federal Rule 26 creates its own signature-as-certification provision, in which “every discovery request, response, or objection” must be signed by an attorney of record, and thereby constitutes a certification that, “to the best of the [attorney’s] knowledge, information, and belief formed after a reasonable inquiry,” it is “complete and correct” (if a discovery disclosure), and is “consistent with these rules” (if a discovery request, response, or objection).

Accordingly, just as an attorney may not blindly rely on a client’s representations in drafting pleadings, the attorney may not blindly rely on the client’s production in response to a discovery request. The “reasonable inquiry” necessary under Federal Rule 26 requires attorney involvement; thus in the e-discovery context, attorneys must supervise not only subordinate lawyers and employees, but must also supervise their clients. As explored in greater detail later in this Article, this “reasonable inquiry” standard has an ethical component, and although the ethical component involved in the supervision of clients is perhaps less direct, it nevertheless exists.

121. Id. 11(d).
122. Id. 37(b)(2)(C); see also id. 37(a)(5).
3. Managing Electronic Documents

As one resource explains:

A “records retention policy” is generally understood to mean a set of official guidelines or rules governing storage and destruction of documents or [electronically stored information]. Such policies typically define different types of records, how they are to be treated generally under the policies for retention purposes, and often provide retention schedules defining specific time periods for retention of certain records.127

Records retention policies are common,128 and Federal Rule 37 contains a safe harbor for electronic information that is lost due to the “routine… operation of an electronic information system.”129 However, Federal Rule 37’s safe harbor is tempered by both ethical considerations and common sense.130

Before the proliferation of electronic information, counsel could not, as an ethical matter, avoid producing damaging information in discovery through the intentional destruction of relevant documents.131 Model Rule 3.4 expressly prohibits lawyers from “unlawfully . . . destroy[ing] or conceal[ing] a document or other material having potential evidentiary value.”132 The same basic principle holds true with respect to electronic information.133 The advisory committee note to Federal Rule 37 explains:

A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” Among the factors that bear on a party’s good faith in the routine operation of an information system are the steps the party took

---

127. SCHIEFELBEIN, supra note 115, at 76.
128. See Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280, 294 (E.D. Va. 2004) (stating that one of the litigants “correctly notes that today virtually all companies have document retention policies”).
129. Fed. R. Civ. P. 37(e) (“Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”).
130. Fed. R.Civ. P. 37 advisory committee’s note (creating a good faith requirement in order to invoke the “safe harbor” provision of rule 37(f)).
132. Id.
133. See Fed. R. Civ. P. 37 advisory committee’s note.
Consistent with a common sense implementation of these principles and provisions, the courts have closely examined litigants’ claims regarding “records retention policies” to ensure that such policies are not used to mask intentional destruction of relevant information. As one court noted, in finding spoliation:

[A]lthough [this party] has presented evidence that, in concept, it structured its document retention program like a lawful program and that some of its articulated reasons for adopting the policy were conceptually valid, these arguments ignore the rather convincing evidence that [the party] intentionally destroyed potentially relevant documents notwithstanding that, when it did so, it anticipated litigation. In any event, even if [the party] had been instituting a valid purging program, it disregarded the principle that even valid purging programs need to be put on hold so as to avoid the destruction of relevant materials when litigation is “reasonably foreseeable.”

Again, ethical considerations—in this instance the proscription against destroying potential evidence—are at work in the substantive practice of law,

134. Id. The idea of a litigation hold letter has been with us for some time now. See In re Prudential Ins. Co. of Am. Sales Practices Litig., 169 F.R.D. 598 (D.N.J. 1997). In the Prudential case, the court ordered the parties to preserve all documents and other records relevant to the litigation. Unfortunately, despite the court’s order, documents were destroyed at several Prudential offices. Although Prudential’s management had distributed document retention instructions to agents and supervisory employees via e-mail, some employees lacked e-mail access and others did not read their e-mail messages. The court held that Prudential lacked a “clear and unequivocal document preservation policy,” inferred that the destroyed documents were relevant and would have reflected negatively on Prudential, and imposed $1 million in sanctions. One of the lessons from the Prudential case is that senior management cannot treat a litigation hold obligation lightly, nor merely delegate the matter to lower-level management without follow up. As the Prudential court observed, as of the entry of the court order, “it became the obligation of senior management to initiate a comprehensive document preservation plan and to distribute it to all employees.” This idea, of course, has continued in subsequent court decisions. See, e.g., Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216-17 (S.D.N.Y. 2003) (“[T]he 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. . . . While a litigant is under no duty to keep or retain every document in its possession, . . . it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery and/or is the subject of a pending discovery request.”). Of particular note is the potential for the duty to preserve to predate the formal filing of a complaint. See Zubulake, 220 F.R.D. at 216 (noting that “the duty to preserve may have arisen even before the EEOC complaint was filed”). See also Fed. R. Civ. P. 37 advisory committee’s note (“When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a ‘litigation hold.’”) (emphasis added).


136. Id.
ultimately governing the interpretation and implementation of the discovery provisions.137

4. Metadata

Metadata—“[i]nformation describing the history, tracking, or management of an electronic file”138—has generated some spirited debate,139 and ethics opinions have reached differing conclusions as to whether metadata is fair game for analysis when produced during discovery.140 The advisory committee notes to the Federal Rules of Civil Procedure decline to provide a hard-and-fast rule in this regard, instead stating that “[w]hether this information should be produced may be among the topics discussed in the Rule 26(f) conference.”141 The Sedona

138. Fed. R. Civ. P. 26 advisory committee’s note. One resource provides an exceptionally thorough explanation, defining metadata as:
Data typically stored electronically that describes characteristics of ESI, found in different places in different forms. Can be supplied by applications, users or the file system. Metadata can describe how, when and by whom ESI was collected, created, accessed, modified and how it is formatted. Can be altered intentionally or inadvertently. Certain metadata can be extracted when native files are processed for litigation. Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept. Metadata is generally not reproduced in full form when a document is printed to paper or electronic image. Scheindlin, supra note 115, at 692.
140. Compare N.Y. State Bar Ass'n, Comm. on Prof'l Ethics, Op. 749 (Dec. 14, 2001) (asking if a lawyer “ethically may use available technology to surreptitiously examine and trace e-mail and other electronic documents” and concluding that “in light of the strong public policy in favor of preserving confidentiality as the foundation of the lawyer-client relationship, use of technology to surreptitiously obtain information that may be protected by the attorney-client privilege, the work product doctrine or that may otherwise constitute a ‘secret’ of another lawyer’s client would violate the letter and spirit of these Disciplinary Rules”), and Scheindlin, supra note 115, at 449-50 (citing N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 749 (Dec. 14, 2001)), with Md. State Bar Ass’n, Comm. on Ethics Op. 2007-092 (2006) (“[T]his Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney’s direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata.”). See also Scheindlin, supra note 115, at 450-51 (citing Md. State Bar Ass’n, Comm. on Ethics Op. 2007-092 (2006)); Pa. Bar Ass’n Formal Op. 2007-500 (“[I]t is the opinion of this committee that each attorney must . . . determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer’s judgment and the particular factual situation.”); Scheindlin, supra note 115, at 451-52 (citing Pa. Bar Ass’n Formal Op. 2007-500).
Conference Working Group on Electronic Document Production provides that production should “take[ ] into account the need to produce reasonably accessible metadata.”  

Perhaps metadata is a particularly difficult area because on one hand, in light of the ethical rule of confidentiality and the general admonition against the inadvertent disclosure of client confidences, a general presumption against disclosing metadata absent the litigants’ agreement or a court order might seem appropriate. However, on the other hand, metadata certainly has the potential for leading to additional relevant evidence, such as additional editing—and additional editors—of the document. Yet with this potential for yielding additional relevant evidence comes, as observed in the Sedona Principles, an equally cautionary potential for yielding inaccurate information. Accordingly, it would appear that the intermediate approach adopted by the Federal Rules may


Absent party agreement or court order specifying the form or forms of production, production should be made in the form or forms in which the information is ordinarily maintained or in a reasonably usable form, taking into account the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party where appropriate or necessary in light of the nature of the information and the needs of the case.

Id. This position represents a change from the original Sedona Principles, which had provided that “[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.” SEDONA CONFERENCE WORKING GROUP ON ELECTRONIC DOCUMENT PRODUCTION, SEDONA PRINCIPLES FOR ELECTRONIC DOCUMENT PRODUCTION, Principle 12 (July 2005 version); see id. at Cmt. 12.a (“Although there are exceptions to every rule, especially in an evolving area of the law, there should be a modest legal presumption in most cases that the producing party need not take special efforts to preserve or produce metadata.”). See also Aguilar v. Immigration & Customs Enforcement Div., No. 07-8224, 2008 U.S. Dist. LEXIS 97018, at *11-15 (S.D.N.Y. Nov. 20, 2008) (noting that the second edition removed any presumption against the production of metadata).

143. SCHEINDLIN, supra note 115, at 449 (citing N.Y. State Bar Ass’n, Comm. on Prof’l Ethics, Op. 749 (Dec. 14, 2001)).


Care should be taken when using metadata, as the content of a given piece of metadata may convey information that is contextually inaccurate. For example, when a Microsoft Word document is created, the computer on which that document is saved may automatically assign the document an “author” based on the information available on that computer. That document may be used as a template by other persons, but the “author” information is never changed. Thus, subsequent iterations of the document may carry as an “author” a person with no knowledge of the content of the document . . . .

Id.
indeed be the most useful, whereby metadata is one of the topics for conference discussion.

As we have seen, a host of ethical issues exists in the e-discovery context. The next Section returns to the specific example of e-mail, which I use as an archetype in examining the interplay between discovery issues and ethical considerations. Despite the seeming distinctiveness of issues concerning electronically stored information, I argue that well-established ethical rules apply to these issues in very familiar patterns and approaches.

III. E-MAIL, E-DISCOVERY, AND CONSIDERATIONS OF ETHICS

The 2006 amendments to the Federal Rules codified existing practices that rendered e-mail and other electronic information subject to discovery. The vortex at which e-mail, e-discovery, and ethics intersect raises a number of difficult issues. Some groundbreaking court decisions have been at the center of this vortex, placing those cases at the forefront of the discussion in this area. Accordingly, this Section begins with an examination of ethics issues in discovery generally, and then analyzes the Qualcomm case—currently the most prominent decision involving ethics and e-discovery.

A. Generally

As an initial matter, the basic dangers of e-mail communication outlined in the previous section—the tendency to draft e-mail messages casually and hastily, and the potential for misdirected e-mail transmissions that result in inadvertent sharing—are dangers not only for e-mail messages by lawyers to clients, but also for e-mail messages by clients to lawyers, e-mail messages sent within an organization, e-mail messages sent by clients to third parties, and countless other scenarios.

In brief, ethical issues arise in e-discovery in the same general manner in which ethical issues arise in discovery more generally—in retaining documents

145. Scheindlin, supra note 115, at 453 (stating that metadata poses ethical concerns).

146. See Fed. R. Civ. P. 34 advisory committee’s note (noting that “[l]awyers and judges interpreted the term ‘documents’ [in Rule 34] to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. . . . Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.”).

147. Some examples of the ethical issues which arise in the discovery of ESI such as e-mail include: when does the duty to preserve evidence attach, what steps need to be taken in order to comply with preservation obligations and to what extent do discovery obligations require the use of forensic computer experts.


149. See supra notes 73-81 and accompanying text.
Although massive document productions are not new in civil litigation, the sheer number of e-mail transmissions, and the relative permanency of those transmissions, complicate discovery. With the average user processing at least seventy-five e-mail messages per day, the number of messages that may need to be retained and reviewed for potential responsiveness to a document request can quickly become overwhelming, even if the pool of relevant information can be narrowed to a relatively small number of individuals. After all, the average worker does not generally produce seventy-five paper documents per day; e-mail raises retention and review to exponentially higher levels. Magnifying the sheer number of e-mail messages is their unique permanence: unlike older methods of creating documents that involved typing and carbon paper, deleting an electronic document—or even shredding a paper document—today often does not genuinely eliminate the document. Not only may the document still actively exist (or be retrievable) from the original word processing program, but marked-up copies and even signed copies often are scanned and transmitted as attachments to e-mail messages, thus creating a potentially permanent record or e-trail.

Precisely due to this permanence—because deleting an e-mail message and emptying the deleted messages folder does not truly erase the e-mail message—most organizations have no real choice but to adopt retention-management-purging practices. Thus, unlike business practices before the era of electronic information, it has become much more difficult to maintain comprehensive archives due to the storage needs necessary to accommodate the tremendous increase in the number of documents generated. Moreover, far more information is potentially available, not just in terms of the number of documents, but also in terms of potential details—details found through information embedded within the document (metadata) and details found through intermediary and supplementary messages, documents, and general information. For example, although one formal document may purport to summarize a proposal, an event, or an individual’s job performance, e-mail messages may constitute a source of valuable additional information, offering

150. See Wachtel v. Health Net, Inc., 239 F.R.D. 81, 91-94 (D.N.J. 2006) (discussing the party’s failure to produce requested documents during the three year discovery period).
152. Id.
154. See id. at 39-40.
155. INFORMATION SECURITY, supra note 2, at 333.
156. Id. at 233.
157. See SCHEINDLIN, supra note 115, at 476.
158. See id. at 41-42.
159. See Dertouzos, supra note 153, at 40.
perhaps more candid reactions to, and assessments of, that proposal, event, or
individual’s job performance. Accordingly, due to its rich and voluminous
potential, one must anticipate and assume that discovery in any civil lawsuit will
include requests for electronic information.¹⁶⁰

In terms of retaining electronic information, the ethical issues that arise are
the same as those in discovery generally.¹⁶¹ Intentional destruction of electronic
documents raises ethical issues beyond a mere procedural failure to produce,
identical to those raised by the intentional destruction of non-electronic
documents.¹⁶² To the extent that the intentional destruction of non-electronic
documents may be part of a routine periodic document purge, the lawyer,
pursuant to the ethical duty of competence, has a responsibility to send the client
a litigation hold letter, directing the client to suspend such scheduled procedures,
when the attorney or the client has reason to believe that litigation may be
filed.¹⁶³ The same ethical duty of competence also requires a litigation hold
letter when electronic information is the subject of the client’s routine purges.¹⁶⁴

Similarly, in producing documents, the analysis is a parallel one. The
production of documents is, in most ways, identical for electronic and non-
electronic documents.¹⁶⁵ And although the general parameters of discovery in
the federal courts are set forth in the Federal Rules of Civil Procedure, much of
the practical implementation of those provisions—for both electronic and non-
electronic information—has an ethical component.¹⁶⁶

In other words, the Federal Rules contain guidance, such as the presumptive
number of interrogatories and the basic scope of discovery, but an ethical
component often plays a role in evaluating the reasonableness of the action
undertaken and whether sanctions are warranted.¹⁶⁷ This ethical component is
seen even when the ostensible legal source is a specific Federal Rule, such as
provisions for sanctions under Rule 11 or Rule 37.¹⁶⁸ The Federal Rules do not
stand alone in determining the propriety of sanctions, but instead operate within

¹⁶⁰. See INFORMATION SECURITY, supra note 2, at 334.
¹⁶¹. MODEL RULES OF PROF’L CONDUCT R. 3.4 (2008) (including the duty to preserve evidence);
see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (2000) (prohibiting the
destruction of evidence).
¹⁶². MODEL RULES OF PROF’L CONDUCT R. 3.4 (2008) (including the duty to preserve evidence);
see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 118 (2000) (prohibiting the
destruction of evidence).
¹⁶⁴. Id.
¹⁶⁵. See FED. R. CIV. P. 34.
¹⁶⁶. FED. R. CIV. P. 37 (implementing a requirement to, in good faith, confer with the party not
making the disclosure in the hope that the matter may be resolved without court action).
¹⁶⁷. See id.
¹⁶⁸. See id.
a broader ethical sphere. An example of this phenomenon occurred in the recent high-profile decision in Qualcomm Inc. v. Broadcom Corp.

B. Taking Ethics Seriously: The Qualcomm Case

Qualcomm has variously been referred to as an e-discovery case and as an ethics case. In reality, it is both. In Qualcomm, the federal magistrate judge imposed $8.5 million in sanctions and referred to the State Bar six attorneys who failed to reasonably respond to requests to produce electronically stored information. In brief, Qualcomm sued Broadcom for patent infringement; Broadcom’s defense was that the patents were unenforceable due to waiver. During discovery, Broadcom sought, among other things, all documents given to, received from, or reflecting interactions between Qualcomm and the Joint Video Team (JVT); JVT was the group responsible for creating the H.264 standard relating to the processing of digital video signals for the Qualcomm patent. Qualcomm, in response, argued aggressively that it did not participate in the JVT during the time that the H.264 standard was being developed.

While preparing a Qualcomm employee to testify at trial, Qualcomm’s counsel learned of twenty-one e-mail messages between that employee and the JVT. However, Qualcomm did not produce these e-mail messages to Broadcom. Broadcom eventually learned of the existence of the e-mail messages by “ask[ing] the right question” at trial while cross-examining the employee. In the course of post-trial proceedings, Qualcomm searched the e-mail archives of its “employees and located more than forty-six thousand documents (totaling more than three hundred thousand pages), which had been

169. See Metro. Opera Ass’n, Inc. v. Local 100, 212 F.R.D. 178, 221 (S.D.N.Y. 2003) (finding that mandatory sanctions must be imposed under Fed. R. Civ. P. 26(g) when a party’s participation in discovery “was in no way ‘consistent with the spirit and purposes of Rules 26 through 37,’ . . . ”).
171. See SCHEINDLIN, supra note 115, at 425-40 (reprinting portions of the case as an example of discovery violations and the possible sanctions).
172. Qualcomm, 2008 WL 66932, at *17-18. The federal district court subsequently left intact the $8.5 million sanction, but vacated the portion of the order involving the State Bar referral to permit the attorneys to introduce additional evidence. As of the time of this writing, the additional evidence has not yet been introduced and there has been no further court ruling, so it is unknown whether the portion of the original order pertaining to the State Bar referral will eventually be reinstated. Qualcomm, 2008 WL 638108, at *2.
173. Qualcomm, 2008 WL 66932, at *18. Id.
175. Id. at *2.
176. Id. at *1.
177. Id. at *3.
178. Id. at *4.
180. Id.
requested but not produced in discovery.” As summarized by the federal district judge,

Qualcomm withheld tens of thousands of emails showing that it actively participated in the JVT in 2002 and 2003 and then utilized Broadcom’s lack of access to the suppressed evidence to repeatedly and falsely aver that there was ‘no evidence’ that it had participated in the JVT prior to September 2003. Qualcomm’s misconduct in hiding the emails and electronic documents prevented Broadcom from correcting the false statements and countering the misleading arguments.

Thus, in Qualcomm, the underlying issue implicated both e-discovery and ethics, but the problem arose due to very traditional types of litigation failures: the initial problem was a failure to locate relevant and responsive documents, which was then followed by the failure to produce those documents. Accordingly, three more ethics-based factors become relevant to our consideration—candor, fairness, and good faith.

The duty of candor is governed by Model Rule 3.3, and provides in part:

A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal . . . ; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

In Qualcomm, the e-mails were inconsistent with Qualcomm’s representations at trial, where Qualcomm had argued that it had not participated in creating the H.264 standard and therefore was not required to license them royalty-free.

More broadly, the ethical duty of fairness requires that:

A lawyer shall not:
(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

181. Id. at *6.
182. Id.
183. See id. at *7-8.
184. See MODEL RULES OF PROF’L CONDUCT R. 3.3 (2008) (candor towards the tribunal); id. at R. 3.4 (fairness towards opposing party and counsel); id. at R. 4.1 (truthfulness in statements to others).
185. Id. at R. 3.3.
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of the tribunal, except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.  

In Qualcomm, of course, Qualcomm’s counsel initially “fail[ed] to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party” under subsection (d), by failing to search diligently for responsive electronic documents. This initial failure was followed both by “unlawfully obstruct[ing] another party’s access to evidence” through its gamesmanship during discovery, and by “unlawfully . . . conceal[ing] a document or other material having potential evidentiary value” under subsection (a), by failing to disclose the twenty-one e-mail messages discovered while preparing the Qualcomm employee to testify—and then calling the Qualcomm employee as a witness but carefully structuring the direct examination so as not to reveal the existence of the e-mail messages.

The events in Qualcomm also raise the related issue of failing to act in good faith. Model Rule 3.1 provides that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .” The comments to Model Rule 3.1 go on to explain that “[t]he law, both procedural and substantive, establishes the limits within which an advocate may proceed.” Similarly, Model Rule 1.16 requires a lawyer to withdraw from representing a client if “the representation will result in violation of the Rules of Professional Conduct or other law.”

The Qualcomm court’s imposition of $8.5 million in monetary sanctions and State Bar referrals grabbed attention, due in part to the large dollar amount, but also due to the ethical foundation of the sanctions. More typically, the

---

188. Id. at R. 3.4(d).
191. Id.
193. Id. at *6 (finding that there was clear and convincing evidence that Qualcomm intentionally prevented Broadcom from obtaining relevant evidence).
195. Id. at R. 3.1, cmt. 1.
196. Id. at R. 1.16(a)(1).
consequences of discovery misbehavior tend to include fee shifting, adverse inferences, or perhaps default judgments. As a practical matter, the sanctions imposed in Qualcomm were chosen for two very specific reasons: (1) Federal Rule of Civil Procedure 26(g) authorizes sanctions only as to the attorney who signs the discovery response (or request), and only one attorney had signed the discovery responses in Qualcomm, not all six attorneys, and (2) in seeking an appropriate sanction without the aid of Federal Rule 26(g), the attorneys’ ethically questionable conduct invited a court reaction with an ethical foundation. In Qualcomm, the court fashioned an appropriate penalty, relying primarily on ethical provisions rather than the formally limited procedural remedies. As the next Section explains, this approach is likely to continue.

IV. CONTINUING TO TAKE ETHICS SERIOUSLY IN DISCOVERY

There is reason to believe that we will continue to see the courts using ethical precepts in the context of e-discovery—and in the context of discovery more generally—due to the provisions of Federal Rule 26. Specifically, two provisions within Federal Rule 26(g) invite the use of ethical principles: (1) the limited nature of Rule 26(g)’s authorization of sanctions, and (2) the “reasonable inquiry” required by Federal Rule 26(g) before signing a disclosure, discovery request, or response.


200. Fed. R. Civ. P. 37(c)(1). See also Metro. Opera Ass’n, Inc., 212 F.R.D. at 219 (stating that the entering of a default judgment is an appropriate remedy for serious discovery violations as authorized by Fed. R. Civ. P. 37(c)(1)).


202. Id. (the Magistrate used the ethical precept of “good faith” to impose sanctions). This part of the opinion, with regard to the six objecting attorneys, was vacated by Qualcomm, Inc. v. Broadcom Corp., No. 05CV1958-RMB (BLM), 2008 WL 638108, at *1 (S.D. Cal. March 5, 2008) (vacating “the court’s [prior] order denying the self defense exception to the attorney-client privilege”).

203. Metro. Opera Ass’n, Inc. v. Local 100, 212 F.R.D. 178, 221 (S.D.N.Y. 2003) (finding that mandatory sanctions must be imposed under Fed. R. Civ. P. 26(g) when a party’s participation in discovery “was in no way ‘consistent with the spirit and purposes of Rules 26 through 37,’ . . . .”).


A. Limited Sanctions

As observed in the previous Section, Federal Rule 26(g) contains a limitation on the authorization of sanctions.206 Federal Rule 26(g)(3) provides for the imposition of sanctions “on the signer [of the disclosure, discovery request, or response], the party on whose behalf the signer was acting, or both.”207 The term “signer” suggests, and practical reality bears out, that only one attorney signs the document and accordingly only one attorney carries responsibility.208 Although in many lawsuits only one lawyer is handling discovery, in many other lawsuits a number of lawyers participate in the discovery process. In the latter circumstance, if the court determines that sanctions are warranted due to a violation of Federal Rule 26(g), the court may decide that the appropriate imposition of sanctions reaches beyond just the signer.209 In such a situation, Qualcomm’s analysis provides a ready precedent for relying on ethical rules as a supplemental basis for sanctions.210

B. Reasonable Inquiry

In signing a disclosure, discovery request, or response, Federal Rule 26(g) provides that the signature acts as a certification.211 Federal Rule 26(g) states, in pertinent part:

(1) Every disclosure made pursuant to subdivision (a)(1) or subdivision (a)(3) shall be signed by at least one attorney of record…The signature of the attorney… constitutes a certification that to the best of the signer’s knowledge, information and belief, formed after a reasonable inquiry the disclosure is complete and correct as of the time it is made.
(2) Every discovery request, response or objection… The signature of the attorney… constitutes a certification that to the best of the signer’s knowledge, information and belief, formed after a reasonable inquiry the request, response or objection is:
(A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
(B) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and

206. FED. R. CIV. P. 26(g)(3).
207. Id.
209. Id. (holding that the court may use the “Court’s inherent power” to impose sanctions on attorneys other than the signer).
210. See id. at *13-14.
211. FED. R. CIV. P. 26(g)(1).
(C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation.212

In Qualcomm, the court analyzed this “reasonable inquiry” standard, noting that “[t]he Federal Rules [of Civil Procedure] impose an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a ‘reasonable inquiry’ to determine whether discovery responses are sufficient and proper.”213 As the Qualcomm court explained:

For the current “good faith” discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client’s or attorney’s discovery obligations.214

“Reasonable inquiry,” although ostensibly a legal standard, employs an ethical foundation in practical application.215 In particular, the focus of reasonable inquiry is essentially Model Rule 3.4’s ethical duty of fairness. As discussed above, Model Rule 3.4 prohibits an attorney from “unlawfully obstruct[ing] another party’s access to evidence or unlawfully alter[ing], destroy[ing] or conceal[ing] a document,” and requires an attorney to “make reasonably diligent effort[s] to comply with a legally proper discovery request by an opposing party.”216 Rather than permitting lawyers to circumvent these requirements through claims of burdensomeness, Qualcomm illustrates not only a willingness, but an insistence, by the courts to take these ethical precepts seriously.217

Qualcomm is not alone in viewing the “reasonable inquiry” requirement as having an ethical component.218 In Mancia v. Mayflower Textile Services Co., the court, in discussing Federal Rule 26(g), observed:

A lawyer who seeks excessive discovery given what is at stake in the litigation, or who makes boilerplate objections to discovery requests without particularizing their basis, or who is evasive or incomplete in

214. Id. at *9.
215. See id. at *13.
216. MODEL RULES OF PROF’L CONDUCT R. 3.4(a), (d) (2008). See also supra notes 132, 188-89 and accompanying text (discussing Model Rule 3.4).
responding to discovery, or pursues discovery in order to make the cost for his or her adversary so great that the case settles to avoid the transaction costs, or who delays the completion of discovery to prolong the litigation in order to achieve a tactical advantage, or who engages in any of the myriad forms of discovery abuse that are so commonplace is, as Professor Fuller observes, hindering the adjudication process, and making the task of the “deciding tribunal not easier, but more difficult,” and violating his or her duty of loyalty to the “procedures and institutions” the adversary system is intended to serve. Thus, rules of procedure, ethics, and even statutes make clear that there are limits to how the adversary system may operate during discovery.  

The Mancia court specifically cited to Model Rules 3.4 and 4.4, making clear that complying with Federal Rule 26(g) is not only a procedural requirement, but also an ethical obligation. 

The recent precedents created by Qualcomm and Mancia provide compelling rationales for integrating ethical considerations into discovery in a direct manner. In light of Federal Rule 26(g)’s “reasonable inquiry” standard, and the Rule’s limited provision for imposing sanctions solely upon the signer, to the exclusion of other attorneys who also bear responsibility for the sanctionable behavior, courts are likely to draw on these precedents in future cases.

**CONCLUSION**

In sum, the surprise and concern expressed regarding ethical issues in e-discovery, which seem to view the use of such ethical considerations as novel, unusual, and contrary to traditional discovery practices, are overstated. Ethics is, in fact, an integral part of the substantive practice of law, not merely a narrow set of rules to be trotted out on rare and sporadic occasions. Obstreperousness, obstructionism, and evasion have never been the hallmarks of adversarial lawyering; adversarial lawyering does not require doing, literally, everything in one’s power to help one’s clients at any cost. Recent court decisions employing ethical precepts in the discovery context are likely the beginning of the wave of the future. Ethical rules provide a useful supplement to Federal Rule 26, because subsection (g)’s provision for the imposition of sanctions only on the

---

219. Id.  
220. See id.  
222. See Rhode, supra note 32, at 1.  
223. See Scheindlin, supra note 115, at 482.
signing attorney will be too narrow in many cases.\textsuperscript{224} In addition, the Rule’s “reasonable inquiry” standard implicates not only procedural requirements, but also ethical principles.\textsuperscript{225} Ethical considerations are part and parcel of the substantive practice of law, and the use of ethical rules in recent discovery decisions merely reflects this reality.\textsuperscript{226}

\begin{flushleft}
\textsuperscript{225} See \textit{id}.
\textsuperscript{226} See RHODE, \textit{supra} note 32, at 1.
\end{flushleft}
THE ETHICS OF LEGAL OUTSOURCING

Steven C. Bennett*

I. INTRODUCTION

As Thomas Friedman famously wrote, “The World is Flat.” The development of pervasive electronic systems as a backbone of the world economy has brought nearly-instant communications, enormous data processing, transfer and storage capacities, and vast new opportunities for start-up businesses operating across borders in a global information exchange.

A significant phenomenon associated with this global information-based economy involves the “outsourcing” of business functions. Where a discrete portion of a company’s many functions can be performed effectively by a service provider external to the company, at substantially lower cost, the company may choose to outsource that function, retaining for itself more of the core, high-value aspects of its business.

One clear illustration of the outsourcing function is the operation of call centers for customer interactions, such as reservations, purchasing and warranty/complaint processing. Higher-level functions, such as the operation of help desks, may also often be outsourced.

Although outsourcing service providers are not confined to any one country or region, such providers often operate in locations with lower prevailing wage rates, where a skilled work-force is available. Countries such as India, with good university systems, widespread use of English, robust communications and computing infrastructure, a stable political system and an increasingly entrepreneurial business culture, have flourished as centers for outsourcing. Many other countries, and many lower-cost geographical areas in the United States, have developed significant outsourcing capabilities.

The outsourcing trend has not escaped the legal sphere. Increasing costs for legal services, wider regulatory obligations (such as Sarbanes-Oxley disclosure requirements), and the explosive growth of electronic discovery as a major factor in corporate litigation, have all driven businesses (and law firms) to consider the outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service. The ability to provide “24/7” availability, and offer rapid

* The author is Chair of the Jones Day E-Discovery Committee, and teaches E-Discovery at Rutgers Law School. The views expressed are solely those of the author, and should not be attributed to the author’s firm or its clients.

2. See generally Erran Carmel & Paul Tha, Offshoring Information Technology: Sourcing and Outsourcing to a Global Workforce (Cambridge Univ. Press 2005).
turn-around for labor-intensive projects, has created additional incentives to consider legal outsourcing. Although precise projections are difficult to develop, many analysts suggest that legal outsourcing will become a multi-billion dollar business within the next few years.4

The legal outsourcing trend brings with it new challenges in maintaining high standards of practice within the legal profession. Several influential ethics opinions over the past few years, including a recent pronouncement by an American Bar Association (“ABA”) ethics committee, have helped to clarify the professional responsibility issues presented by legal outsourcing. This Article outlines and summarizes the major principles that may be derived from these ethics opinions, and suggests certain “best practices” that should be associated with legal outsourcing efforts. The practice of outsourcing is evolving, and no doubt new ethics issues may arise as the trend unfolds; but these essential principles offer useful guides to spot issues and construct policies and procedures that should satisfy the essential professional obligations of lawyers involved in outsourcing.5

II. ROLE OF OUTSOURCING IN PROVIDING LEGAL SERVICES

To some extent, forms of outsourcing are inherent in the modern legal system. When a corporation engages a lawyer, for example, in most instances the services will be performed, in part, by several persons. The lawyer typically provides legal analysis and advice, but much of the processing of the minutiae of the matter may be provided by support staff within the firm: paralegals, secretaries, word-processing and copy staff, file clerks and others. The lawyer, moreover, may require assistance from other lawyers within the firm, to provide specialty expertise and (quite frequently) to assign tasks that require less


experience to lower-cost junior lawyers. Even without formal outsourcing, therefore, legal services are often provided by a conglomerate of personnel.

Outsourcing in low-level forms, moreover, has occurred in legal practice for years. Many law firms, for example, use outside photocopy, messenger and other basic services. And many firms use temporary secretaries and support staff, as well as “contract” attorneys for over-flow operations. Formal outsourcing of parts of legal services merely takes the pre-existing realities of the legal market to new levels.

The ABA Standing Committee on Ethics and Professional Responsibility, in its Formal Opinion, “Lawyer’s Obligations When Outsourcing Legal and Non-Legal Support Services” (“ABA Opinion”), described the trend toward increased outsourcing as “salutary.” As the ABA Committee explained, outsourcing may reduce costs for law firms and their clients. Outsourcing, moreover, may permit smaller firms to perform labor-intensive tasks (such as large-scale e-discovery processing), thus increasing the range of options available to clients in their choice among legal service providers. The ABA Committee, moreover, recognized that legal outsourcing may involve a global network of service providers, increasing competition in the market for legal support services. The ABA Committee concluded that “there is nothing unethical” about the outsourcing of portions of legal services, so long as all services are provided with the “legal knowledge, skill, thoroughness and preparation reasonably necessary” for representation, and the lawyers involved satisfy their other professional obligations. To determine the scope of these professional obligations, however, in the context of legal outsourcing, requires careful attention from the principal supervising lawyer.

III. UNAUTHORIZED PRACTICE OF LAW

A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of the unauthorized practice of law. Similarly, a lawyer cannot bait a client into believing that the lawyer will provide legal services, and then switch total responsibility for the matter to a non-lawyer. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state’s bar, or pro hac vice admission for purposes of a specific matter, perform unlicensed legal

7. Id.
8. Id.
9. See id.
10. Id. (quoting MODEL RULES OF PROF’L CONDUCT R.1.1 (2008)).
services in a foreign jurisdiction. Nor may a lawyer encourage or abet the unauthorized practice of law by others.

The precise contours of these rules are somewhat ill-defined. In the modern economy, for example, business operations and legal concerns of clients often cross state (and international) boundaries. And the fracturing of legal services into various higher and lower level components may mean that portions of legal services are performed by lawyers in multiple jurisdictions, or by support staff who lack legal training, and who are not subject to the rigors of licensing.

In the outsourcing context, several authorities have suggested that supervision of all work by a fully-qualified lawyer is “key.” Thus, the supervising lawyer must “independently verify” any work performed, to ensure that competent service has been provided. The lawyer cannot wholesale delegate the matter to an outsourcing service, and claim the work as his or her own. Wholesale delegation of legal work (without supervision), in the words of one recent ethics opinion, would make the lawyer the “tail” on the “dog.”

The lawyer, moreover, must be diligent in supervision of the service provider. Supervision must be “direct”; the lawyer must be “readily” available to answer questions concerning the work.

The recent ABA Opinion noted that the Model Rules of Professional Conduct (“Model Rules”) require that a lawyer who employs, retains or associates with non-lawyers must “make reasonable efforts to ensure that the

17. Id.
18. Id.
person’s conduct is compatible with the professional obligations of the lawyer.” 23 “The challenge for an outsourcing lawyer,” as the ABA Committee observed, is to “ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately.” 24 The ABA Opinion further suggested that the supervising lawyer:

- May use electronic communications to “close the gap” in distance between the supervising lawyer and the outsourcing vendor, but such communications “may not be sufficient to allow the lawyer to monitor the work of the lawyers and non-lawyers working for her in an effective manner.” 25
- Should “consider conducting reference checks and investigating the background” of the outsourcing vendor. 26
- Might consider interviewing the principal lawyers, if any, involved in the project on behalf of the vendor, and also inquire into the vendor’s hiring practices. 27
- Should consider investigating the security of the provider’s premises, computer networks, and “perhaps even its recycling and refuse disposal procedures,” to ensure that confidential information is kept secure. 28

The ABA suggested that “in some instances” it “may be prudent to pay a personal visit” to the vendor’s facility, “regardless of its location or the difficulty of travel,” to get a firsthand sense of the vendor’s operations, for which the supervising lawyer will have ultimate responsibility. 29 Such a visit might permit the lawyer to review information on similar projects (in process or completed), to review work flow processes, and to meet with team leaders and their staff at the outsourcing firm.

Standards for the supervision of legal outsourcing firms probably cannot be stated in precise terms, as the form and degree of supervision required will vary depending on the character of the project. What seems clear from the ABA Opinion, however, is that the keys to effective supervision include: pre-hiring inquiry into the capabilities of the vendor, regular communication during the


24. Id. at 3. This requirement comports with the lawyer’s fundamental duty to provide competent representation to the client, and to make “reasonable efforts” to ensure that services provided by the law firm conform to standards of professional conduct. Accord MODEL RULES OF PROF’L CONDUCT R. 1.1 (2008).


26. Id.

27. Id.

28. Id.

29. Id. The ABA Opinion separately raised concerns about the vendor’s ability and willingness to maintain the standards of confidentiality that a U.S. client would normally expect. This Article discusses the confidentiality issue below.
course of the project, some form of quality control, and other reasonable steps to ensure that services are rendered competently to the client. The supervising lawyer, moreover, must know enough about the subject matter of the outsourced work to judge the quality of the work.31

IV. CONFLICTS

A fundamental principle of professional responsibility is the duty of loyalty the attorney owes to the client.32 A lawyer generally cannot represent a client if the representation involves a conflict of interest.33 Conflicts rules are more complicated than this simple principle suggests. Under the Model Rules, for example, a lawyer may represent a client, despite a potential conflict, where the lawyer believes that competent representation is possible, the representation is not prohibited by law, the representation does not involve assertion of a claim by one client against another client, and each affected client gives informed consent.34 Due to these kinds of complexities, most U.S. law firms have rigorous systems for “conflict clearance” before any legal engagement is accepted.35

The conflicts of one lawyer in a law firm may be attributed to other lawyers in the firm.36 The ABA, moreover, in an earlier ethics opinion, suggested that
even a temporary lawyer in a firm may be treated as being “associated” with a law firm, where the temporary lawyer has access to confidential client information, and there is thus a “risk of improper disclosure or misuse of information relating to representation of other clients of the firm.” Although the most recent ABA Opinion does not address the potential for conflicts arising from a law firm’s use of an outsourcing firm, the issue clearly may arise in that context. Just as an expert working for one client might divulge information about that client to a lawyer working for an adverse client, so a contract lawyer (or non-lawyer) working for an outsourcing vendor might gain access to confidential information regarding one client and improperly divulge such information to another client.

The risk of (at least) claims of conflicts of interest, and the attendant disruption and cost for the supervising lawyer from such claims, suggests that, as part of the investigation of the background and capabilities of the outsourcing vendor, the supervising lawyer should address potential conflicts. A recent New York City Bar Association opinion suggested that the supervising lawyer should:

- Inquire as to the vendor’s “conflict-checking procedures and about how it tracks work performed for other clients.”
- Inquire whether the vendor is performing, or has performed, any services for parties adverse to the lawyer’s client.
- “[P]ursue further inquiry as required.”
- Remind the vendor, “preferably in writing,” of the need to “safeguard the confidences and secrets” of the vendor’s “other current and former clients.”

A recent Florida Bar opinion further suggested that a supervising lawyer should take “extra steps” to make sure that the vendor is familiar with legal build “Chinese Walls,” to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict.


41. Id.

42. Id.

43. Id.
conflict rules.44 Such “extra steps,” although not stated in the Florida Opinion, might include determining whether the vendor has the ability to establish “Chinese walls” between matters (where necessary), and inquiring about the vendor’s willingness to make binding representations as to the absence of conflicts in taking on the work.45 Such steps may be supplemented, or modified, as the matter requires. Where the law firm, client and vendor have long-standing relations, for example, the supervising lawyer may have greater confidence in the vendor’s efforts to avoid conflicts of interest.

V. CONFIDENTIALITY

Another fundamental principle embodied in the attorney/client relationship is the duty of the lawyer to protect the confidences and secrets of a client.46 The lawyer’s obligation, moreover, extends to persons providing service to the client at the lawyer’s direction. Thus, commentary to the Model Rules states: “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.”47

The applicability of these principles to the outsourcing context seems obvious. The recent ABA Opinion, and several other opinions, suggest that the client’s “informed consent” to the activities of the vendor is a key requirement in outsourcing; since:

[N]o information protected by [Model] Rule 1.6 [concerning confidentiality] may be revealed [to anyone] without the client’s informed consent. The implied authorization [in the Rules] to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control.48

Beyond informing the client that an outsourcing vendor may obtain access to some of the client’s confidential information, additional practical suggestions arise in the ABA Opinion and other recent opinions:

45. See id.
46. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2008) (“[P]ublic interest is usually best served by a strict rule” regarding confidentiality).
47. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 16 (2008).
48. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 5 (2008) (citing MODEL RULES OF PROF’L CONDUCT R. 1.6 (a), 1.6 cmt. 5 (2008)).
“Written confidentiality agreements” are “strongly advisable in outsourcing relationships.”

The lawyer should limit the vendor’s access to information to “only the information necessary to complete the work for the particular client,” and should “provide no access to information about other clients of the firm.”

The extent of such precautions presumably must be commensurate with the risk of confidentiality breach involved in the vendor’s services for the client. Concerns for data security in telecommunications, and even the coverage of foreign laws regarding data protection, for example, may require additional inquiry by the supervising lawyer. The ABA Committee’s suggestion of a “personal visit” in some instances, to get a “firsthand sense” of the vendor’s operation, may also hold particular force where great concerns for confidentiality appear.

VI. FEES AND DISCLOSURES

Lawyers are not permitted to charge “unreasonable fees” for their services; nor may they collect “an unreasonable amount of expenses.” Legal ethics also prohibit lawyers from sharing legal fees with non-lawyers; and formation of a “partnership” with a non-lawyer that includes the “practice of law” is forbidden. For these purposes, as the ABA Standing Committee on Ethics concluded in 1993, third parties providing services in aid of a lawyer (such as a court reporter or a travel agent) must be treated as a non-lawyer whose fees


50. Prof’l Ethics of the Fl. Bar, Op. 07-2 (2008), available at http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af792dd018996bf24985257494006247a?OpenDocument (lawyer should require “sufficient and specific assurances” that information, once used for the service requested, “will be irrevocably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service”).

51. Id.

52. See id. (“Risks inherent to transmittal of information.”); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 at 4 (2008) (noting risk that documents “may be susceptible to seizure” by authorities in some foreign countries, despite claims of confidentiality).


54. MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2008) (listing eight potentially relevant factors). Factors to be considered in determining the reasonableness of fees generally include the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal service, and other considerations.

cannot be included in the lawyer’s fees. In 2000, the ABA Committee extended the application of the fee rule to temporary lawyers, noting that a “surcharge” could be added to the contract lawyer’s costs, but only if the total charge remains “reasonable.” In substance, although a lawyer cannot take a contract lawyer’s work, mark it up as his or her own, and then charge a premium, a lawyer could use the contract lawyer’s work as the base for the lawyer’s own work, and then charge for the lawyer’s services (paying the contract lawyer separately, out of the lawyer’s own funds).

Predictably, the ABA Committee, in its 2008 Opinion (on outsourcing) applied the same approach as in its 2000 surcharge opinion on fees for contract lawyer services. Other recent opinions, however, offer more restricted views on appropriate forms of billing for outsourced legal support services. The New York City Bar Committee, for example, held that “[a]bsent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead.” The Los Angeles Bar Ethics Committee took the view, under California law, that “the attorney must accurately disclose [to the client] the basis upon which any cost is passed on to the client.”

56. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-379 (1993) (“A lawyer may not charge a client more than her disbursements for services provided by third parties . . . except to the extent that the lawyer incurs costs additional to the direct cost of the third party services.”).

57. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000). The ABA Committee noted:

When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer’s fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer’s services.


These suggestions for full disclosure of fee arrangements actually echo some of the suggestions (but not requirements) outlined in the ABA surcharge opinion from 2000.\textsuperscript{61} That opinion suggested:

- “In many instances,” the fee and cost structure for a legal engagement is the subject of a formal agreement between client and lawyer. Such an agreement, “or a disclosure concerning fees and costs, may be required by the rules in some circumstances.”\textsuperscript{62}
- Although the ABA Committee found “no requirement under the rules for disclosing the identity of specific personnel assigned to a client’s matter absent client inquiry,” the Committee recognized that “client expectations, and the overall client-lawyer relationship may make such disclosure desirable.”\textsuperscript{63}
- The Committee opined that the “spirit” of the Rules “best is served by communications whenever the fee basis or rate structure for services provided to a regularly represented client changes.”\textsuperscript{64}

Concerns for potential client misunderstandings about fee structures for outsourcing services, coupled with concerns about client confidentiality and conflicts (discussed above), all suggest that careful discussion with a client on the nature and arrangements for outsourcing support may be the best way to uphold the lawyer’s obligation to provide the client competent and effective services.\textsuperscript{65} The New York City Bar Association, in this regard, has opined on circumstances where disclosure may be essential:

- Where the outsourcing service will “play a significant role in the matter,” for example, where “several non-lawyers are being hired to do an important document review.”\textsuperscript{66}
- Where “client confidences and secrets must be shared.”\textsuperscript{67}
- Where “the client expects that only personnel employed by the law firm will handle the matter.”\textsuperscript{68}

\textsuperscript{61} ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000). The ABA Committee also noted several state ethics opinions, which “expressly or impliedly observe that it is improper to add surcharges on payments made to a contract lawyer when billed to the client as disbursements unless there is an agreement with the client or disclosure about a markup in advance of the billing.”

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Id. (citing Model Rules of Prof’l Conduct R. 1.5(b) (2008)).

\textsuperscript{65} See Model Rules of Prof’l Conduct R. 1.4(a)(2)-(3) (2008) (a lawyer shall: “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” and “keep the client reasonably informed about the status of the matter”); Model Rules of Prof’l Conduct R. 1.4(b) (2008) (lawyer must explain a matter to a client, “to the extent reasonably necessary to permit the client to make informed decisions regarding the representation”).


\textsuperscript{67} Id.

\textsuperscript{68} Id.
Where outsourcing services are to be billed to the client on a basis "other than cost."69

In short, the client is entitled to know who is providing it legal representation, and is entitled to know the basis on which an outsourcing service may be assisting the supervising lawyer.70

VII. SOME PARTING THOUGHTS

Basic professional ethics rules were formed in an earlier era, when the relationships between attorneys and their clients were relatively simple and predictable. The practice of law, however, is changing, and rapidly. Outsourcing of legal services is just one part of a larger wave of change, which may require concerted thinking about the adaptation of basic rules of legal ethics to a dynamic world, where the interactions between attorneys, clients and the service providers who may aid them both, can become quite complicated.71 In this dynamic environment, the best approach for the responsible lawyer is to become educated on new technologies and new methods of practice, to remain alert to potential ethical issues involved in the employment of these technologies and methods of practice, and encourage candid discussion, among attorney, client and vendor, about the best means both to serve the client’s interests, and serve the ends of justice.

---

69. Id.

70. See id. Accord New York State Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 715 (1999), available at http://www.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=18875 (where a contract lawyer is making “strategic decisions” or performing “other work that the client would expect of the senior lawyers working on the client’s matters,” the firm should disclose the nature of the work performed, and obtain client consent); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 00-420 (2000) (“Clients are entitled to know who or what entity is representing them.”).

71. See Qualcomm, Inc. v. Broadcom Corp., No. 05cv1958-B, 2008 WL 66932, at *12-13, *13 n.10 (S.D. Cal. Jan. 7, 2008) (court held that lawyers were required to advise their client to produce essential discovery materials, and were required to resign if the client refused to follow that advice). The Qualcomm judge criticized lawyers for misrepresenting information in their client’s possession, which had not been properly produced. Despite the warnings in Qualcomm, in other cases, where a client, or a vendor at the direction of the client, takes principal responsibility for conducting the collection and production of information, it may be very difficult for an outside lawyer to ensure that he or she has full knowledge of the precise discovery steps taken.
Avoiding an E-Discovery Odyssey

Roland Bernier

I. Introduction: Avoiding the Attention of the Modern-Day Homer

Sing to me of the man, Muse, the man of twists and turns driven time and again off course . . .

Pity poor Odysseus. Admire him, if you prefer. The heroic warrior, after all, travels through 12,109 lines of poetry in the form of dactylic hexameter, skirting monsters and whirlpools, suffering seven years of imprisonment by the nymph Calypso, fighting pirates, helplessly watching the transformation of half his men into swine by the evil Circe (always a nuisance), being driven half-mad by recklessly exposing himself to the songs of the Sirens, and suffering through at least two ship wrecks. He endures all this after ten years at war, and makes good on his quest to return home to his beloved Ithaca, even if rather belatedly and with the complete loss of his crew.

Odysseus faced outrageous challenges. The attorney navigating his own e-discovery ocean may occasionally feel justified in comparing his own situation to that described by Homer. After all, his own quest is no walk in the wading pool. The waters he must navigate may seem as deep and dark as any Odysseus crossed. The dangers lurking in the hidden eddies and islands, unseen and unknown, are just as treacherous. The navigation across this binary gulf is just as difficult. In response, he should seek to treat his own dangers with more caution and more foresight than did good Odysseus.

One can imagine Hermes, the messenger of the Gods, dispatched from the heights of Olympus to deliver a message of warning to the reluctant captains of pre-litigation. What would he say? Do not become as distracted and unfocused as Odysseus, but rather, be methodical and systematic. Do not give credence to the sirens who insist upon shortcuts. Use all of the devices available to you to safely navigate your way across the uncharted depths. Unlike Odysseus, whose quarrel with the sea god Poseidon nearly caused his doom, Hermes would...

---

* Attorney and Consultant with Forensics Consulting Solutions LLP, Mr. Bernier works from his office in Houston where he helps other attorneys and corporate legal departments develop strategies for tackling large, complex discovery projects. Mr. Bernier has worked technology in legal settings for nearly 15 years, first as a computer programmer and database administrator, and now in his current capacity.
2. Id.
3. Id.
admire those perceptive enough to listen to stay on the good side of the Judges and Magistrates, to whose good judgment, and graces, they entrust not only their own fate, but that of their client as well.

You may pity poor Odysseus for all of the troubles he endured, some of which he obviously brought upon himself, or you may admire him for enduring to the end and finding his way back to his family in Ithaca. Whatever you do, however, do not follow in his footsteps. Cast aside the follies of those who traveled through these treacherous waters before you. Learn from them. Understand what they did wrong, so that you will avoid the same traps. Begin not your own odyssey, but rather, plan a straightforward and uneventful trip; and do so down to the smallest detail possible. It may be tedious, and it certainly will not be easy. It may be boring, but excitement in this area is to be shunned. So feel free to admire Odysseus the adventurer, but do not emulate him.

This article will discuss how to build and implement a discovery process that is systematic and cyclical in nature. It will begin by briefly discussing the huge societal changes that affected discovery and forced changes by the legal profession. It will examine how communication between opposing counsel can thwart surprises and clear some of the challenges from one’s path. It will discuss the benefits of obtaining competent technical assistance. The main body of the article then examines the fundamentals of searching and retrieval operations, how to define the term “success” and illustrates how a “process based” approach may be incorporated into the discovery project workflow. The article then concludes by noting the dangers of making decisions on discovery processes in an arbitrary manner.

This article’s purpose is to discuss measures that may be taken to strengthen the defensibility of the search protocol. And to keep you off of Circe’s island... squealing like a pig and rooting around in the mud.

II. INTERESTING TIMES

“We live in tumultuous times.” All around us, change is occurring at a pace heretofore not experienced. The development of computer technology and the global reach of the internet have, among other things, transformed our way of life. Nearly every industry has been affected by the revolution associated with

5. See id. (“It is widely acknowledged that established relationships [between societal actors] are undergoing major change and that, in addition, the pace of change is quicker than at any time in history.”); George L. Paul, Foundations of Digital Evidence 3 (2008) (noting that changes attributed to new technologies developed over the last twenty years have “altered commerce, everyday communication, government, public discourse—indeed almost everything,” including “civilization’s system of writing”).
6. See, e.g., Ben Schneiderman, Universal Usability: Pushing Human-Computer Interaction Research To Every Citizen, COMM. OF THE ACM, May 2000, at 88 (“[S]tabilizing forces of standard hardware, operating systems, network protocols, file formats, and user interfaces are undermined by
ubiquitous computing and data storage. Though the true extent to the transformation to our society that increasingly powerful computing and global connectivity will reap is still obscured to us, we can find an analogy in our past.

When William Caxton brought the first printing press to England in 1476, Edward IV, “sun of York,” was King of England, giving the island kingdom a welcomed respite from the series of skirmishes known as the Wars of the Roses. It would be seven years before Edward’s brother, Richard, would ascend to (or usurp) the throne, clearing the way by murdering his two young nephews, if Shakespeare is to be believed. Two years after that, Henry Tudor would defeat the last Plantagenet King at Bosworth Field to establish the Tudor dynasty and end the Wars of the Roses forever.

Edward’s government could hardly be said to have foreseen danger or have objected to the press, because the first dated work printed in England by Caxton is said to have been The Dictes or Sayengis of the Philosophres (“Sayings of the Philosophers”), written by Earl Rivers, who was Edward’s brother-in-law. Later rulers would see danger in the power of the press.

The impact of the printing press on society is often under-appreciated:

It is almost impossible for us to appreciate the revolutionary impact on people, institutions and governments of the vastly enlarged power granted by the invention of printing to disseminate ideas and criticisms,
including anonymous attacks on those in power, and to communicate to large numbers of people over extensive areas.\textsuperscript{15}

The commentator contends that the capture of these abilities altered humans in a fundamental way. The technologies behind the information age, like the printing press, have been triggers for sweeping changes. They also are being credited for changes that have yet to occur. Jeffrey Cole, director of the Center for the Digital Future, a study on attitudes of users toward the World Wide Web, stated:

“The internet has become an essential source of entertainment, information and communication... However, in 2006, we are beginning to measure real growth and discover new directions for the internet as a comprehensive tool that Americans are using to touch the world.”\textsuperscript{16}

The internet has become much more than a method for distributing or creating works: it is becoming part of the very fabric of life.\textsuperscript{17} This revolution is still happening, and it is altering the world as dramatically as did the printing press. The difference is that in this day and age those alterations are taking place much more quickly.\textsuperscript{18} It’s as though we are watching events through time-lapse photography.

The spread of computers, the advent of ubiquitous computing, and the connectivity provided by the internet have combined to generate not only transformative, but also disruptive forces on society. The authors of \textit{Unleashing the Killer App: Digital Strategies for Market Dominance},\textsuperscript{19} have a rule they call the Law of Disruption. This law postulates that technology progresses at an exponential rate while society changes at an incremental rate.\textsuperscript{20} Because social norms and attitudes often lag behind the change, they outlast the very environmental and technological factors that fostered or sheltered them in the first place.\textsuperscript{21} This is one explanation for the legal industry’s attitude toward

\begin{itemize}
  \item \textsuperscript{17} See, e.g., JOHN HARRIGAN & LEE RAINY, PÆW INTERNET & AMER. LIFE PROJECT, THE INTERNET’S GROWING ROLE IN LIFE’S MAJOR MOMENTS (2006), http://www.pewinternet. org/-/media/Files/Reports/2006/PIP_Major%20Moments_2006.pdf (examining the ways in which a growing number of people are using the internet to help them during important milestones in their lives).
  \item \textsuperscript{18} See Moore’s Law, http://www.intel.com/technology/mooreslaw/index.htm (last visited April 19, 2009). The law, created by Intel icon Gordon Moore in 1965, predicted that the number of transistors on a chip will double about every two years and describes an exponential increase in computing power.
  \item \textsuperscript{20} \textit{Id.}
  \item \textsuperscript{21} \textit{Id.}
\end{itemize}
technology, which has been decried for being increasingly disconnected with needs of Information Age clients.

Nevertheless, the legal community has attempted to address the effect of technology on discovery issues. In August 2004, an advisory committee published a proposed set of amendments for the Federal Rules of Civil Procedure designed to guide courts and attorneys on issues associated with electronic discovery.\(^{22}\) The committee passed a revised set, and ultimately these were adopted by the U.S. Supreme Court without any substantive modification.\(^{23}\) The newly enacted Federal Rule of Evidence 502 was passed, in part, to stem concerns that productions of electronically stored information (ESI) were vulnerable to inadvertent production of privileged material and a resulting waiver of privilege.\(^{24}\)

### III. Determining Objectives: Surveying the Landscape

We reached the Aeolian island next, the home of Aeolus, Hippotas’ son, beloved by the gods who never die—a great floating island it was.\(^{25}\)

As did mariners in the time of Odysseus, attorneys seeking accurate maps to help guide their way may search in vain. Case-law is still evolving, while technology standards provide variety, even if they happen to be followed. Technological progress, while holding out the promise of empowerment, can also offer up surprises. Homer described the island Aeolia as floating freely (although it isn’t clear if it floats in the air or the sea).\(^{26}\) Odysseus thus had to not only concern himself with the very real difficulties of trying to navigate through difficult hazards in relatively uncharted territory, but had to deal with a landscape that actually shifted unpredictably. E-discovery offers similar opportunities for surprise. The territory underfoot can change suddenly, and the unprepared can be thrown off balance. Fortunately, there are ways to limit such situations. The most effective measure is the simple, though not always easy, act of communicating with the other side.

The lack of civility in the modern-day practice of law between opposing attorneys has been a source of running commentary in legal literature for some time.\(^{27}\) E-discovery has been the impetus for the emergence of a growing body of

---

23. Id.
25. THE ODYSSEY, supra note 1, at 10.1.
26. Id.
literature which calls for not only early communication by the parties, as is required in the rules, but actual collaboration between the parties and their attorneys.

The Sedona Conference has recently released a memo urging greater cooperation between attorneys during the discovery process. The main theme expressed in the memo is that zealous advocacy does not require counsel to engage in uncooperative behavior during the discovery process, and that the Federal Rules of Civil Procedure mandate cooperation. Other commentators have pursued the point, while case law has begun to speak to the issue with greater assertiveness and frequency.

The bottom line is that by negotiating on production format, search methodologies, and provisions of production protocol as early as possible,
many of the perils of e-discovery can be avoided by both parties. Parties can discuss such items as native file productions vs. tiff or pdf files; whether or not to allow for de-duplication or near de-duplication; what specific legal database application load files to include in productions; what search criteria should be used; what processes may be used to verify search results; provisions for “clawing back” documents inadvertently produced. Parties can reap great advantages by agreeing to such terms early in the process.

A “collaborative” relationship between opponents in a legal matter is probably too much to expect. It is however, “an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purpose of” the relevant rules of procedure. By opening the lines of communication, and taking reasonable stances, and refraining from “obstructionism,” both sides can keep a trial’s discovery phase on course, and keep the terrain from shifting and islands from floating away.

IV. FINDING A NAVIGATOR

Now bright-eyed Athena sent them a stiff following wind blustering out of a clear sky, gusting on so the ship might run its course through the salt sea at top speed . . . .

Homer relates in his lost poem, Cypria, that Odysseus was so reluctant to leave his home to go to war at Troy that he feigned madness in an unsuccessful attempt to opt out. Likewise, attorneys are often dragged, kicking and screaming, into e-discovery.

This reluctance is not surprising. Attorneys as a group are not known to be particularly computer literate, and the case law in this area is volatile in comparison to other, substantive areas. Furthermore, there is constant pressure from clients to reduce costs while still serving up a defensible process. The problem is, though, that there really is no escape. ESI is becoming a standard format for evidence in even “small” cases. Electronic records are literally...
everywhere, and in order to practice today, an attorney needs to understand where these sources of data (read: of evidence) are. A litigator wouldn’t dream of going into a courtroom without a good knowledge of the rules of evidence and procedure. More and more, ESI is a large component of both bodies of rules.

At least one commentator has argued that attorneys today are incompetent to ply their trade due to the combination of their general computer illiteracy and the pervasive nature of electronic evidence. At least one commentator has argued that attorneys today are incompetent to ply their trade due to the combination of their general computer illiteracy and the pervasive nature of electronic evidence. Judicial opinions have expressed distrust of protocols formulated by attorneys, and even judges. Even as younger litigators emerge from the generation some label “digital natives,” and hiring practices are altered to reflect the evolving environment of digital evidence, attorneys will need to rely on knowledgeable people to help them navigate what can be treacherous waters. Even those attorneys well-versed in the basics of information technology will need experienced consultants on a fairly frequent basis. Finding help is often necessary, but the manner in which the decision to hire a consultant or service provider is also a key point in the discovery process. Because a consultant’s or service provider’s qualifications and opinions may be subjected to scrutiny, it makes sense for a competent and diligent attorney to do his or own vetting. Furthermore, should a consultant’s qualifications appear to be lacking, then doubt is cast upon the process undertaken to hire that person, and an attack on the attorney’s vetting process becomes a distinct possibility.

Hiring a consultant does provide certain advantages. The most obvious (and expected) consequence is that a competent advisor may assist in conducting a well-designed and properly executed discovery project. The presence of a consultant or expert may work to shift the burden of competence from attorneys.

39. Why E-Discovery is Ruining Litigation in America and What Can be Done About It, supra note 33. Losey states “[t]o put it bluntly, most of us trial lawyers are not fully competent to practice law in today’s digital age of terabytes of potential evidence. Most of us do not know how to do e-discovery in an efficient and cost effective manner in that kind of an environment, much less employ effective quality control procedures.” Id. He continues by excoriating those who “spin a web of pseudo-competence.” Id.

40. See Victor Stanley, Inc., 250 F.R.D. at 256 (questioning the qualifications of counsel and their client to design “a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review”); Am. Nat’l Bank & Trust Co. v. Equitable Life Assurance Soc’y, 406 F.3d 867, 879 (7th Cir. 2005) (finding fault with a magistrate judge’s “sampling procedure for sanctioning” one of the parties for failure to produce some documents during discovery); O’Keefe, 537 F. Supp. 2d at 24 (concluding that certain types of analyses of search criteria falls within the area of expert witness, governed by Fed. R. Evid. 702); Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 333 (D.D.C. 2008) (“[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer) and requires expert testimony . . . .”).

41. One reason for this is that the nature of e-discovery often requires that expertise from several different technical disciplines. In one discussion, a computer forensics expert may be required, but in a different point, the skill possessed a database administrator, programmer, or storage expert may be needed.

42. Of course, should counsel be required by a client to work with a specific consultant or service provider, the responsibility for vetting should be, at the very least, diminished.
and clients to the expert. However, the mere fact that an expert makes a statement or employs a certain protocol does not necessarily mean that the court need accept it without some examination.

The lesson is to hire an expert that can be trusted; one who can help attorneys and their clients avoid pitfalls. So like Odysseus, the attorney is forced to undertake the journey. The hope is that his will be a safer, shorter journey than was accomplished by our hero from Ithaca.

V. CHARTING THE COURSE

The rest of the winds she stopped right in their tracks, Commanding them all to hush now, go to sleep.

Recent court decisions have placed a greater level of scrutiny upon search protocols used during electronic discovery projects. These decisions call for better crafted search protocols, and specifically call for the use of sampling techniques and methods for confirming the accuracy of initial search criteria. In other words, there’s no forgiveness for merely plotting your course and blindly sailing on without ever taking your bearings and making needed adjustments. You need to be able to make sure you stay on course, and make corrections when you find that you’ve strayed, or when the terrain proves not what was previously assumed. This article will propose a workflow derived from principles gleaned from court decisions that have cast baleful eyes upon inadequate attempts at building search criteria, and appropriate principles now need to be adopted into the e-discovery space. It will help you construct a road map, and adjust to terrain that was previously uncharted territory.

VI. THE SEARCH PROTOCOL: CALIBRATING YOUR COMPASS

if you only knew, down deep, what pains are fated to fill your cup before you reach that shore, you’d stay right here . . . .

44. Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 261 (D. Md. 2008) ("Moreover, if the court is to be given scientific or technical information to resolve a contested discovery matter, what standards should govern its evaluation? Should the court ignore a purported ESI expert's lack of qualifications if that shortcoming is demonstrated by the party opposing his opinion? Should the court accept opinions shown to be unsupported by sufficient facts or based on demonstrably unreliable methodology? The answer is obviously ‘No.’").
45. THE ODYSSEY, supra note 1, at 5.422-23.
47. See Victor Stanley, Inc., 250 F.R.D. at 256-57 (noting that no assertion was made that any sampling was conducted to defend producing party’s search protocol, which the court ruled was not reasonably undertaken, causing a waiver of privilege for any privileged documents erroneously produced to opposing counsel as a result of the search filter).
48. THE ODYSSEY, supra note 1, at 5.228-31.
The reader of Homer’s Odyssey is introduced to the adventure medias res; that is, he or she is dropped into the middle of the action. This is not unlike the feeling often accompanying a lawyer who must begin a case that promises a large discovery phase . . . the action starts immediately. Or at least, it should. Getting a handle on the scope of e-discovery associated with a case is one of the first important accomplishments; it helps to reduce the intensity of the inevitable scramble as deadlines approach.

The search protocol, sometimes referred to as the “filter,” possesses a central place in the e-discovery workflow. In the most common scenarios, it is the search criteria that determine which documents will be reviewed, and which will not. Thus, the “filter” makes an essential determination before review ever occurs: it says that the excluded documents are either not relevant to the case, or they are relevant, they are inaccessible. In some situations, the search protocol is solely responsible for identifying documents that are reviewed for production to opposing counsel. In others, the search protocol substantially determines what documents will be produced, as no, or only limited, review is conducted. Any component making such a significant contribution to the process must certainly be subjected to careful design considerations, periodic verification as the project progresses, and scrutiny by the court and opposing counsel. As Odysseus would see it, this is your compass, your way of keeping tabs over which seas you sail, which locales you visit.

VII. COMPONENTS OF THE SEARCH PROTOCOL

The search protocol is more than just a list of keywords or date ranges. This article uses the term to encompass all steps used by which one begins to examine a data universe for discoverable documents. Thus, the protocol has elements in most of the pre-review phases of e-discovery. A common model often adopted to illustrate e-discovery phases, created by the Electronic Discovery Reference Model (EDRM) is below.
Elements of a search protocol may be applied at any point from the “Identification” stage through the “Processing, Review and Analysis” block illustrated in Figure 1. The first elements of a search protocol could therefore be said to consist of those steps instrumental in ascertaining sources of data likely to contain relevant documents. Some of these elements are discussed below.

VIII. WHAT IS SUCCESS?

What is meant by the success of an e-discovery project, and particularly that of its search protocol? Culling rates are often used by vendors to define, or at least illustrate, success. Clients and attorneys tend to like this measure, as it identifies, in an easy way, a cost savings. If you culled 60% of documents from a population, then that is, roughly, a 60% savings in attorney review time, with attendant reductions on certain costs associated with production and related processes. It must be emphasized, however, that purely discussing the success of a search protocol in terms of how much data is filtered from the eyes of reviewers is a grossly inaccurate method, especially if a significant quantity of documents relevant to the case could be found in the excluded document set. Even clients would be unhappy to learn that relevant documents favorable to their cause had been “left on the table,” sacrificed on the altar of economy. Furthermore, unless given clearance by the court or agreed to by opposing counsel, limiting a document review or production strictly due to volume is impermissible.

To truly define what we mean by success, we need to define the ultimate goal. The goal from an operational standpoint is to supply counsel with the most
“accurate” data set possible. What is meant by the term, “accurate?” One could define the term thusly: a set of documents including all those relevant to the matter whether privileged or not, and excluding all those not relevant to the matter. This is, of course, misleading in its simplicity.

Because the process leading to the formation of a data universe for review or production occurs in multiple steps, this article takes an expansive view of the definition of search protocol, going well beyond the meaning implied by the term “filter.” The search protocol, for the purposes of this article, includes all those components designed to remove all irrelevant material from the review corpus, while preserving that data which is relevant to the matter. It will be useful to examine traditional models defining search accuracy.

IX. RECALL AND PRECISION

Traditionally, information retrieval is divided into two steps: 1) formulating a question aligned with a “specific information need”;50 and 2) translation of language describing that need into a query appropriate for a particular retrieval technology.51 Two terms often used to measure the success of a retrieval transaction are precision and recall.52 Precision may be defined as the proportion of documents that are retrieved that are relevant.53 Recall may be defined as the proportion of relevant documents that are retrieved.54 Perhaps the concept can best be described by inventing an example. A user executes a search. The search returns 10 documents, which the user codes as either “R,” for “relevant” or “N,” for “Not Relevant.” The user ends up categorizing 6 documents as “R,” and 4 as “N.” The precision of the search is 60%, because that’s the proportion of the documents returned by the query that were relevant. Recall measures the effectiveness of the search in getting all the relevant documents from the enterprise. Let’s return to our search. We returned 10 documents, 6 of which were relevant. If there are 20 total documents in the enterprise, and 12 of them were relevant, then our query found one-half of the documents we were looking for. Recall = 50% (6/12). I have seen the concepts of precision and recall illustrated in a fashion similar to Figure 1.55

51. Id. at 192.
52. Id. at 194.
53. Id.
54. Id.
55. Patrick Oot, Director of Electronic Discovery and Senior Litigation Counsel, Verizon Legal Department, Panel Discussion and Presentation at LegalTech West 2008: Searching and Sampling ESI (June 26, 2008).
In this diagram, the term “false positives” describes those documents returned that are not relevant. “True Positives” denote those documents returned by the query that the user hoped to see. The six documents our user above coded as “R” would fall into this sector. This sector would be associated with the 60% in our description above. The “False Negatives” label here is used to describe documents not returned that were relevant to the user’s need. The “true negatives” were those rightly excluded. I feel these labels are slightly misleading. I would tend to associate the term “False Positives” with a document returned by the search despite not meeting the criteria. In other words, a search for a document containing the word “dog,” returns a document without the term. To me, \textit{that} constitutes a false positive; a technical error based on a faulty index or discrepancy within the search engine component itself. If the document is correctly returned by the search, yet isn’t Relevant to the matter, then the reason lies within imperfections in the criteria, and our terminology should reflect this. So, although I hesitate to get lost in the minutiae of syntax, I propose to use different terms. These would be Returned and Relevant (RR), Returned and Not Relevant (RNR), Not Returned and Not Relevant (NRNR), and finally Not Returned and Relevant (NRR). A diagram using this these terms appears below.
Figure 2: Precision-Recall, Slightly Reinvented

It is often stated that the goal of Precision is to reduce the number of documents that are returned not relevant, and the goal of Recall is to reduce the number documents that are not returned and relevant.\(^{56}\) Another way to illustrate the concepts above is by use of a matrix.

<table>
<thead>
<tr>
<th>Not Retrieved</th>
<th>Retrieved</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Relevant</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Not Relevant</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Totals</td>
<td>8</td>
<td>12</td>
</tr>
</tbody>
</table>

Table 1: Precision-Recall Matrix

Precision and Recall are generally expressed in fractional units between 0 and 1.\(^{57}\) Precision would be expressed mathematically as 7/(7+3) = .7. Recall would be 5/(5+5) = .5. Two other measures should be mentioned as well. Fallout is the measure of non-relevant documents existing in the data universe

\(^{56}\) See id. (Mr. Oot, however, used the terminology of false positives, true negatives, etc.).

\(^{57}\) KORFHAGE, supra note 50, at 195.
that were not returned. That would be $3/(20-8) = .25$. Finally, Generality measures the proportion of relevant documents existing within the data universe. Here, there are 12 relevant documents in a universe of 20. $12/20 = .6$.

These concepts are, obviously, best suited for environments that are more controlled and are better organized than most commercial IT enterprises. Nevertheless, by understanding them, an attorney can become more effective when managing the technical sphere of discovery.

X. PLANNING THE PRODUCTION

Among the producing party’s foremost concerns should be drafting a plan that is sufficiently thorough to satisfy valid document requests from the opposing counsel. Avoiding undue conflict and the prospect of court-imposed sanctions due to “missing” or “untimely produced” documents is necessarily an important goal. A particular point of possible contention is in determining the nexus between the legal obligation to produce relevant documents and the effectiveness of the document review process itself.

The requesting party will often press home the point that the legal obligation is not excused merely because an otherwise responsive document fell outside of the boundaries of the document search plan. While no court expects 100% of all relevant documents to be found and produced, it will certainly expect that any plan for searching for and reviewing documents across a data enterprise is competently formulated, is reasonably effective, and can be defended by its creators. This is one area where an agreement at the beginning of discovery may help avoid disputes later.

Although not the only model available, the basic planning model used in this article is based on a typical sequence of activities for discovery projects in which the author has been involved. This type of production is based on the concept that documents found in identified sources and returned by the filter will be reviewed for production. The search protocol in this model is designed to find documents to produce. As documents are categorized by reviewing attorneys, the size of the production grows. The accumulation of responsive, non-

58. Id. at 196.
59. Id.
60. At least to an objective party. This is not to suggest that attorneys go out of their way to placate opposing counsel; that would be a self-destructive goal. Rather, the aim is to comply with the objectives of the discovery rules in creating an effective plan, competently executing that plan, and being able to defend both the plan’s design and implementation.
62. This is sometimes easier said than done. A party with little in the way to produce provides its opponent with little leverage. If, however, both sides will be forced to preserve, collect, and produce significant volumes of material, then it is often easier to find common ground.
privileged documents as discovery progresses can be illustrated visually as a triangle (Figure 3).

![Figure 3: Increasing Production Volume as a Function of Time](image)

The opposite approach begins with the expectation that all files from specific sources will be produced except for those that are returned by the filter ultimately found to be privileged. In that case, the filter exists to find documents that should be removed from the pending production. This process is illustrated below (in Figure 4).  

![Figure 4: Removing Documents with the Filter](image)
Upon receiving requests for documents associated with current or potential litigation, the initial step in extracting the data is the identification of those sources where relevant data resides. At this point preservation policies have been implemented, so many, if not all, of the sources have been identified. Concurrent to source identification will be the formulation of a search criterion. Primarily consisting of keywords and date ranges, the criterion acts as a filter that “catches” documents falling within its boundaries while allowing all other data to remain outside of consideration. After formulation of the criterion, the filter is then applied to the data, resulting in a review concentrating on documents whose contents fall inside the boundaries of the filter. During the review, attorneys and legal assistants categorize the returned documents for relevance and privilege. Periodically, the results of the review process should be examined for additional sources and modifications to the criteria. Finally, those documents chosen as relevant and not privileged are packaged into an appropriate format and produced to opposing counsel. The process as typically implemented is illustrated below (in Figure 5).

Another common approach occurs when a larger universe is subjected to a query designed to responsive documents. The resulting subset (call it presumptively responsive) is then searched by a second query looking for privileged documents. Documents returned by that query (call them presumptively privileged) are then reviewed or withheld, and what’s left of the presumptively responsive set is then produced without being subjected to “eyes on” review. In this case, only the presumptively privileged document set is subjected to human review and categorization. The initial stage consists of activities such as learning of and understanding the dispute, identifying the potential issues of concern, formulating strategies and goals.

Identification of sources is necessary for both implementing a proper document preservation protocol and for targeting documents for possible production. In the “top down” production model, where review is used to

---

63. These data sources are sometimes referred to as “custodians.”

64. Keywords and dates are the most common components in search criteria, although there are additional advanced techniques. There are commentators who urge that “more creative” techniques be looked upon favorably by courts. See George L. Paul & Jason R. Baron, Information Inflation: Can the Legal System Adapt?, 13 RICH. J.L. & TECH. 10, 2-3 (2007), available at http://law.richmond.edu/jolt/v13i3/article10.pdf (concluding that “litigation, as we have known it, is threatened by information’s new hyperflow[,]” while urging that “lawyers and judges…be far more tolerant of using [advanced] techniques . . . as part of a reasonable search process” even in the absence of “adequate” testing).

65. One of the obligations is to identify “key players” and look at the data they create and store. See, e.g., Zubulake v. UBS Warburg, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (stating that becoming familiar with the client’s information system “involve[s] communicating with the ‘key players’ in the litigation, in order to understand how they stored information” and citing “[c]ounsel’s [d]uty to [l]ocate [r]elevant [i]nformation”); Jeffrey S. Follett, Hold Everything? Litigation Response In The Electronic Age, 747 PLI/LIT 237, 249 (2006) (emphasizing that data belonging to “key players” should be most carefully scrutinized, and that “key employees” should be made aware of their obligations”); Mafé Rajul, "I Didn't Know My Client Wasn't Complying!"
accumulate responsive documents, this is the first tool in filtering out non-responsive documents.

Again, formulation of the search criteria is usually based on key words and dates. The process may also involve utilizing special types of queries or search protocols. The scope of the search can be narrowed or widened using various techniques, depending on the search technology employed.

The review stage is used to categorize the documents in various ways. It necessarily identifies responsive documents, and will usually be used to compile a “privilege log.” It may also be used to identify other aspects, such as “hot docs,” or other customized categories.

Note that the process detailed in Figure 5 does not contain a process for adjusting either search terms or sources from the review process. Although this is often incorporated by informal methods, it is also often ignored. Formally including a process by which review informs the upstream processes and allows for adjustments to those processes allows for a more accurate and flexible production plan. It assists the analytical processes involved in discovery by making a determination on the effectiveness of the initial choices for sources and criteria, and may provide information necessary for modifications. It also may make the plan more defensible to the court, and may help to defuse disputes, or perhaps gain leverage, with opposing counsel.

*The Heightened Obligation Lawyers Have To Ensure Clients Follow Court Orders In Litigation Matters*, 2 SHIDLER J.L. COM. & TECH. 9 (2005) (describing the act of “speaking with every key player involved in the litigation” as an “affirmative reasonable step”).
Below, we tinker with this model to try to render it in a more defensible form, including adding some elements not present from that above that allow for some verification of the effectiveness of parts of the plan, and pointing out where modification may increase the efficiency of the plan.

XI. HITTING THE BULL’S EYE

Measuring accuracy within the controlled environments of library bibliographic systems is challenging in itself. When we discuss those same measures in less structured environments that make up the IT systems of corporations and government agencies, and similar institutions, the challenge becomes ever more daunting.
Fortunately, responding parties are not expected to match levels of accuracy comparable to a modern library. They should, however, be able to justify the elements incorporated into the design of the search protocol, whether those elements were reasonable, and whether the protocol as a whole was designed with sufficient care and diligence. Failing to address areas in the process leaves it vulnerable to attack, and an attack by opposing counsel is a much more serious affair than is an irritated reader who can’t find what he wants in a library’s archives.

Another way to view the components making up the steps to production is to see the process in layers. It is possible to perceive that there is a universe of relevant documents existing on the IT infrastructure. This universe of documents is the initial target, and is our first layer. We can imagine it as a circle, resembling Figure 6 below.

![Figure 6: The Universe of Relevant Data](image)

The next layer is comprised of the universe of documents that is responsive to opposing counsel’s discovery requests. It is illustrated in such a manner to reflect the fact that these requests, while encompassing much of the relevant universe, is often overbroad, and strays beyond those boundaries. This is accounted for in the territory beyond the dotted line. So, Figure 7 shows the

---

66. This article uses the term “responding party” to denote the party required by the court to turn over documents and data to the opposing side. This allows us not to get caught up in non-sequiturs involved with identifying parties as plaintiffs or defendants, and tells readers that this is the party who has the obligation in E-Discovery. These obligations, of course, are often so divorced from the underlying issues in the case that the titles dependent upon those issues are usually rendered meaningless for the purposes served here. For the same reasons, I usually label the party who has asked that the data be produced the “requesting party.”
presence, really, of three layers: the total universe of relevant material; the population of material in discovery requests that is relevant, and the set consisting of material in discovery requests that is not-relevant (or is overbroad).

![Figure 7: Overlap between Relevance and Discovery Requests](image)

Notice the use of the term “relevant” rather than “responsive,” is the latter being a favorite term for counsel and e-discovery practitioners. Figure 8 illustrates why I have done so. This particular objective forms the foundation while its alignment and stability affect the entire process.

The duty to produce documents arises in response to valid requests by opposing counsel. These requests outline the scope of the duty. The term “responsive” is used to denote documents that fall within the bounds of these requests. Thus, the universe of responsive documents is dependent upon the requesting party’s view of the matter, and its understanding of the producing party’s data enterprise. However, other duties exist that are broader in scope and likely to be more accurate than the duty to produce. The duty to preserve encompasses that data that is relevant and is not inaccessible. Also, the scope

---


68. See RMS Servs.-USA v. Houston, No. 06-15585, 2007 U.S. Dist. LEXIS 25536, at *4 (E.D. Mich. Apr. 4, 2007) (reminding counsel and their clients that it is their duty to “preserve evidence that may be relevant to this action[,]” and that this duty “extends to documents, data, and
of opposing counsel’s requests tends to become more refined, and expands as the
knowledge of what exists becomes better known. This means the duty expands
as well. Use of such an uncertain, volatile criterion as the foundation for
production potentially subjects the entire process to initial error, and to
adjustments of greater magnitudes than should be required. While the bounds of
the duty to preserve may be subject to modification, they are unlikely to be as
malleable as those of the duty based on outside counsel’s understanding of the
case and the data infrastructure of their opponents. Finally, as the owner of the
data enterprise, it is the producing party who has a better, more certain, foothold
concerning the content of the enterprise, and it is this knowledge that should be
incorporated into the design of the search protocol, rather than basing it on the
requesting party’s best guesses.

After the relevant and responsive universes are plotted, more layers can be
included. Documents that are not “accessible” might be excluded from the
production. Documents that are relevant, but are privileged, may be excluded
from the production. Duplicate documents can also be removed. There are a
number of possible layers that could be inserted, but the idea is that the final
production is a set of documents generated by a culling process that creates a
“shrinking universe.” See Figure 8 below.
To return to our question of what it means to engineer and conduct a successful search protocol, we can see that from an operational standpoint, the goal of the search protocol is not to cull as many documents as possible from the review universe, but rather, to cull as many irrelevant documents from the collection while including as many of the relevant documents as possible.
Additional elements that remove duplicate documents (an element included here), or even near-duplicates, are also pieces of the puzzle. Ultimately, the universe of documents shrinks down to something that we can imagine resembles a bull’s eye.

XII. CONSIDERATIONS FOR BUILDING THE SEARCH PROTOCOL: PLOTTING THE INITIAL COURSE

The review set must be derived from a data universe by formulating a criterion that is consistent with certain objectives. These objectives, in turn, are constructed from the substantive content of the matter (or matters) at issue in the case. The process looks something like that seen in Figure 9.

![Figure 9: Developing the Search Protocol](image)

Initially, the substantive points of the litigation are analyzed, and objectives are identified with respect to the types of documents that will be relevant that exist within the party’s IT enterprise. Those objectives are then transformed into specific elements that will serve as the foundation for the criterion. Next, those elements are used to craft a series of technology neutral questions or queries that, when answered, will return the appropriate documents. Finally, these “statements” are translated into appropriate queries and instructions using the technology at hand. At this point you might be getting concerned with the possibility of scope creep. Where we at one point had a single sentence, we now have found the task expanded to a two part, complex sentence, and finally to a diagram containing four steps.

While the analysis may be more in-depth than some would expect, it should be noted that the effects of more extensive up-front planning often are the reduction of inefficiencies in resulting processes. This leads to cost savings over the whole term of the project. Furthermore, it helps to fortify the process against sanctions by the court. I would suggest that, therefore, it is worth engaging in an appropriate level of planning.

69. Near duplicates are defined differently by different applications. We do not bother to define the term here, because it is tangential to the basic point being made.

70. Again I clarify my terminology. Here, the article refers to the data set derived from all the steps discussed earlier as the “review set,” because the most common use for this data set is to be presented to attorneys for categorization. This is not, as was mentioned earlier, the only scenario.
Thus, the initial stage would involve examination of the issues comprising the lawsuit, and determining what types of documentation would be relevant. So it is at this early stage that relevance must be identified and its effect on the document search defined. Counsel, whether it be in-house attorneys or lawyers from an outside firm, should first extrapolate the issues raised by the complaint. An initial list should be relatively straight-forward, but items may be added as counsel conducts interviews with department heads, section leaders, and others involved with the activities associated with the dispute.

Once a comprehensive list of topics is generated, a collaborative effort should be engaged in an effort to map these topics to:

1. A description of what type of personnel would be considered “key players;”
2. A list of what projects, or categories, might be associated with relevant documents;
3. A list of terms, including those of a general nature, those that are specific to the industry or occupation, and those that are native to the project, department or company.

Once the initial descriptions of sources and document types have been generated in a general format, more precise descriptions should be formulated. These should be neutral to technology involved, although specific custodians and data repositories should be identified. Key word lists should be generated and date ranges identified.

Finally, the formal translation of queries to search syntax, and the generation of formal search protocol documents for each specific data source type should occur. Depending on the workflow used, the generation of multiple queries or protocols isn’t necessarily concurrent. One might first generate a plan for a certain type of custodian or data source before addressing the next. For example, a protocol for the collection of data from custodians’ PC’s might be drafted before looking at plans for collecting data from sources such as network shares or databases.

71. Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (noting that “Key players” are those [data custodians] likely to have relevant information).
72. This will depend upon the business structure of the company and the nature of the lawsuit. For instance, an employment discrimination case would look at documents associated with hiring and firing practices typically associated with a company’s human resources department, as well as the department in which the complainant worked. In contrast, a patent infringement case may require an examination of documents associated with a certain project that extends across various departments. Some companies have a departmental hierarchy, while others are driven by a project-based model, and knowledge of such structural details will inform the analysis.
73. These terms will help to form the core of the key words part of the search protocol. The last type of term mentioned are those that the staff itself coined. Individuals often come up with inventive acronyms or names for elements or inventions associated with their projects. These should also be addressed during custodian interviews.
Once the discovery team members have interviewed the appropriate people, and the initial search protocol has been drawn up, the project is ready to go live. The ship is ready to launch. What must be remembered, though, is that no matter how thorough and well-designed the initial protocol, no matter how true the course is at first, the job is not done. You cannot simply point the ship and fall asleep. At least, not if you want to end up safely on the right shore.

XIII. CHECK YOUR PROGRESS

It is essential to be able to plot your current position on a map in order to determine whether or not you've wandered, or have been swept, off course. This is not always an easy matter for those managing complex e-discovery projects, for guidance is often lacking. Neither the law, in case or statutory form, nor technical texts, provide easy metrics and techniques to make determinations. In the (sometimes frustrating) absence of bright line rules, we must instead adopt guidelines that are less direct and satisfying, but also afford the flexibility that is often necessary. In Figure 5, a common process is outlined. Although it is one that is frequently used, it is a defective model. This type of process relies on the belief that initial assumptions on key players, dates and search elements are accurate and never in need of modification. We have already seen that courts are not impressed with such workflows. Therefore, a suitably robust process requires the ability to examine the accuracy of the elements of the search protocol and make adjustments. Such a process would look like Figure 10.
Figure 10: Planning Model Including Feedback Loops

The key idea illustrated above is that the process needs to be cyclical in nature rather than the linear version described earlier. When making decisions on the search protocol, it is recommended that discovery team leaders:

1. Make reasonable initial assumptions;
2. Test those assumptions against results after a sufficiently significant sample of documents have been reviewed and “coded”;
3. Make the appropriate modifications called for by the analyses above; and
4. Execute a new iteration of the protocol, incorporating the modifications made above.

In this model, attorneys look at the responsive data set for clues for refining their initial assumptions. By generating a list of terms contained by relevant documents, discovery team members may find essential terms that were not initially included or find that some terms have been completely ineffective. An examination of e-mail correspondence that is coded as responsive may reveal previous custodians that should be disclosed to the opposing counsel or investigated for inclusion in the review. Analysis of the storage location of electronic files may be helpful in determining what repositories might need further investigation. Key term analysis might indicate helpful key word combinations that could be used in sampling processes of network repositories or shared drives. Documentation of all steps taken to test initial assumptions of and implement any modifications to the search protocol should be vigorously undertaken and carefully guarded to repel concerns over the process.

Challenges exist in implementing a cyclical workflow. First, the pricing models of many litigation database applications are volume-based. This encourages culling operations prior to loading in order to reduce volume stored and cost. This often creates the situation where data is left residing in a number of different repositories. At best, this means implementing a rather inefficient workflow for modifying the search protocol, and at worst, it may make searching some of the data impossible without further technical manipulation and additional costs.

Effective design of a process needing multiple adjustments requires that those modifications be relatively easy to make. Unfortunately, there are no “Discovery in a box” solutions available, so one must deal with a workflow encompassing several technical components, some of which may not be open to customization. They also may not integrate with each other, forcing the need for additional data manipulation or programming. The cyclical process described here is most efficient, however, if accomplished in a setting with maximum integration. If a search filter is applied at the collection, or worse, at the preservation phase of the project, than modifications emanating from the

---

74. At least, the author’s research has discovered none.
75. In other words, one application may be used for preservation and collection of the data, another for culling and de-duplication, another for attorney review, and yet another for processing associated with producing the data to the other side. Attorneys might even utilize another application for post-production evidence management to determine which documents are to be used at depositions and trial. Not every one of these applications will charge for volume, but some of them will. Therefore, parties’ often emphasize minimizing the volume that is passed through those types of programs. An interactive or cyclical process will often cause an increase in volume through one or more of these programs, leading to higher costs, and discouraging use of these types of workflows.
76. The author strongly recommends against using a search filter for determining preservation requirements. In a process that assumes modifications will be necessary for initial assumptions,
review portion of the project become more onerous. In theory, if the entire data universe were already loaded into the review database, then the modification to the search protocol would be much easier to make, because the modifications only need to be propagated through a single database, rather than through multiple datasets residing in separate repositories. Of course, this is an improbable scenario, especially for companies with substantial IT enterprises, due to costs and other considerations.

Next, many of the tools currently used in the E-Discovery space do not possess analytical utilities to accomplish those tasks listed above. The good news is that in many cases, ways can be created to work around the limitations of these applications. Once developed, the utilities would be useful for subsequent matters.

Finally, there are no statistical benchmarks in the case law that will help guide attorneys in their decision making. For example, there is nothing that states what statistical thresholds for sampled data will safely allow a litigant to ignore a repository, or what figure mandates collection and review. Like all decisions on process, those made in this area should be reasonable, the rationales listed in documentation, and should not be merely a “default” decision or action of mere reflex.

XIV. CONCLUSION

“Ah how shameless—the way these mortals blame the gods. From us alone, they say, come all their miseries, yes, but they themselves, with their own reckless ways, compound their pains beyond their proper share.”

Zeus, King of Olympus, makes the above lament on the lack of accountability. Evidently those pleading for relief were often suffering consequences of their own making. Similar sentiment is echoed in opinions by judges on e-discovery. Courts have made it clear that they will often hold

---

77. This statement comes from the author’s experience. On many larger projects, some customization has been required that resulted in the development of either a new utility or process.
78. The Odyssey, supra note 1, at 1.36 – 40.
79. See, e.g., In re September 11th Liab. Ins. Coverage Cases, 243 F.R.D. 114, 125 (S.D.N.Y. 2007) (“Discovery is run largely by attorneys, and a court and the judicial process depend upon honesty and fair dealing among attorneys.”); R & R Sails, Inc. v. Ins. Co. of the State of Pa., 251 F.R.D. 520, 525 (S.D. Cal. 2008) (noting that Fed. R. Civ. P. R. 26(g) “requires that every discovery response be signed by an attorney and the signature ‘certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry’ that the response is complete and correct”).
attorneys responsible for the conduct of their clients’ document productions. 80
Furthermore, during all phases of litigation attorneys are bound by their state bar’s rules for competence and diligence. 81

Attorneys should act proactively to minimize the risks to their clients. Communicate to the other side, and secure agreements to as many difficult issues as possible. Get the help of one or more experts or attorneys to help navigate the route through the discovery phase. Create a plan that is right for the circumstances. Build a workflow and process based on reasonable assumptions that can be defended. Using a cyclical, rather than linear model, test and, when advisable, modify elements of the search protocol to ensure its integrity.

In his epic poem, Dante encounters Odysseus in the eighth circle of Hell. 82 He is walking wrapped in flame, punished for his deception that helped win the war against Troy. By taking the steps outlined above, attorneys might avoid the judicial and business equivalents to Dante’s Inferno: sanctions, loss of one or more clients, and damage to reputations.

80. See Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B(BLM), 2008 U.S. Dist. LEXIS 911, at *71-72 (S.D. Cal. Jan. 7, 2008) (fining Qualcomm $8.5 million and referring several attorneys to the State Bar of California for possible disciplinary action). But see Qualcomm Inc. v. Broadcom Corp., No. 05CV1958-RMB (BLM), 2008 U.S. Dist. LEXIS 16897 (S.D. Cal. Mar. 5, 2008). Although the ruling from January was overturned in order to allow counsel to assert the exception to attorney-client privilege and defend themselves, the opinion stands as a stark warning of the possible consequences when the court suspects malfeasance during discovery. Id. See also Phoenix Four, Inc. v. Strategic Res. Corp., No. 05 Civ. 4837(HB), 2006 U.S. Dist. LEXIS 32211, at *19-20 (S.D.N.Y. May 23, 2006) (fining counsel, who was “grossly negligent,” and client, who was at least negligent for failing to timely produce information residing on the client’s network, though it was not known to exist. Although the case was ultimately dismissed for lack of subject matter jurisdiction, the fines remained in place, though slightly reduced).


82. DANTE ALIGHIERI, THE DIVINE COMEDY: INFERNO Canto XXVI, lines 52-57 (William Longfellow trans., George Routledge & Sons 1867) (c. 1310-1314)
(“Who is within that fire, which comes so cleft
At top, it seems uprising from the pyre
Where was Eteocles with his brother placed.
He answered me: Within there are tormented
Ulysses and Diomed, and thus together
They unto vengeance run as unto wrath.”).
SOME THOUGHTS ON THE LAWYER’S E-VOLVING DUTIES IN DISCOVERY

Steven S. Gensler*

Even the most Luddite litigator knows that we are well into the age of electronic discovery. To be sure, document discovery still will involve a banker’s box or two of printed pages in most cases. But one is hard-pressed to think of many cases these days where one or both of the parties won’t be just as interested – if not more so – in what’s on someone’s hard drive or e-mail server. Indeed, the thought of a litigator not even considering whether to take discovery of the other party’s electronically stored information (“ESI”) almost smacks of malpractice. Setting the question of professional duty aside, the world when document discovery centered on paper and banker’s boxes is just not the litigation world we live in today.

Though the developmental process is hardly complete, the mechanics of e-discovery are rapidly taking form. Most notably, the 2006 amendments to the Federal Rules of Civil Procedure started to answer some of the basic questions underlying e-discovery. Are electronic records discoverable? Of course they are.1 Do parties have to search all of their possible sources of electronic records, even their hard-to-access back-up tapes or other disaster recovery systems? Not initially, but it can be ordered for good cause.2 Must parties produce their electronic records in their native format, or will printed-out pages of the information suffice? That’s for the parties to work out, though the judge has the ultimate say.3 And for the love of all that is holy, who pays for it all? As with ordinary discovery, the responding party presumptively bears the expense of search and production, though the e-discovery amendments give a nod to cost-shifting for so-called inaccessible data.4

The impact of e-discovery goes beyond mechanics. As the discovery rules evolve5 to adapt to the computer age, the role of lawyers in the discovery process is evolving as well. More than ever before, lawyers are finding themselves in the

* Welcome D. & W. DeVier Pierson Professor, University of Oklahoma College of Law. This paper was prepared for the E-Discovery Symposium at the Northern Kentucky University Chase College of Law. Thanks go to the Chase College of Law for hosting the symposium, to the University of Oklahoma College of Law for providing research support, and to Ed Cooper and Rick Marcus for their comments on an earlier draft.

5. See Richard L. Marcus, E-Discovery & Beyond: Toward Brave New World or 1984?, 25 Rev. Litig. 633, 660 (2006) (stating that the e-discovery rules are “consciously evolutionary” in that “they draw upon, and seek to identify “best practices”” that had been developing in the courts for many years).
thick of the search and production process, standing arm-in-arm – if not foot-to-posterior – with their clients at every step. At the same time, judges increasingly are expecting the lawyers to walk hand-in-hand with each other in a cooperative process that starts at the very beginning of the lawsuit and continues to its conclusion.

This article explores three ways in which e-discovery is (or may be) changing the way in which lawyers participate in the discovery process. Part I examines how e-discovery seems to have brought us to the culmination of a process that began in the 1980s and 1990s – the front-loading of discovery. Part II looks at how e-discovery has rekindled interest in the cooperative approach to discovery. Lastly, Part III considers the way in which e-discovery has raised new and challenging questions about the relationship between lawyers and their clients in the process of preserving, identifying, and producing discoverable information.

I. FRONT-LOADING THE DISCOVERY PROCESS

If there is a master blueprint to e-discovery under the Federal Rules, it lies in amended Rule 26(f) and the accompanying Advisory Committee Notes. Rule 26(f) requires the parties to confer early in the lawsuit, in advance of the deadline for the court to hold a scheduling conference and/or issue a scheduling order.6 While the parties are instructed to discuss many subjects, the dominant topic for discussion is discovery.7 Among the discovery issues to be discussed are the exchange of the Rule 26(a)(1) required initial disclosures, the preservation of discoverable information, and, most critically, the development of a proposed discovery plan.

The discovery plan is itself a fairly comprehensive item, now covering six subcategories of discovery issues.9 In it, the lawyers must state their views and proposals on, among others, the following key discovery issues:

• the subjects on which discovery may be needed;
• when discovery should be conducted (e.g., the need for phases) and completed;
• electronic discovery, including form of production;
• the process for claiming privilege or work-product protection;
• whether the court should alter any set limits on discovery; and
• whether the court should enter any case-specific discovery orders.10

---

6. FED. R. CIV. P. 26(f)(1) (note, however, that the parties need not do so in a “proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise”).
7. FED. R. CIV. P. 26(f)(2) (also listing other topics for discussion, such as the nature and basis of the claims and defenses and the possibility of settlement).
The parties must attempt in good faith to agree on these proposals, but if they cannot agree then the discovery plan must set forth their respective views.\textsuperscript{11}

The conference and plan required by Rule 26(f) serve two principal purposes. First, they are thought to facilitate the court’s case management under Rule 16. That is to say, the parties’ dialogue about their respective discovery needs and the resulting discovery plan supply critical inputs informing the court’s choices about the general scope and timing of discovery.\textsuperscript{12} Second, it is believed (or at least hoped) that the parties will be able to agree on various discovery issues thereby streamlining the pretrial process, reducing the number of discovery disputes, and making those that do arise smaller and easier for the court to resolve.\textsuperscript{13}

It is ironic that discovery now pivots on the Rule 26(f) conference. Planning and cooperation in discovery is a concept that was not part of the original rules design. As detailed below, the modern version of Rule 26(f) was adopted almost as an afterthought and principally as a means for implementing the required initial disclosure provisions of Rule 26(a)(1). But the story of Rule 26(f) represents more than just an interesting history lesson. With the 2006 amendments and e-discovery, the Rule 26(f) conference imposes a heavy burden on lawyers to very quickly think through their own discovery needs while simultaneously investigating the information resource capacities of their clients. The story of Rule 26(f) is ultimately a story about how lawyers are now expected to make much more substantial investments in their cases at the very beginning.

\section*{A. Original Expectations}

Modern discovery became a part of the federal litigation scene with the advent of the Federal Rules. Prior to the Federal Rules, there was very little discovery in federal court, either at law or in equity.\textsuperscript{14} With the adoption of the Federal Rules, discovery took a leading role in the litigation process.\textsuperscript{15} As Professor Subrin has documented, the Federal Rules aggregated virtually all of

\begin{flushleft}
\begin{itemize}
  \item FED. R. CIV. P. 26(f)(2), (3).
  \item FED. R. CIV. P. 26(f) advisory committee’s note (1993) (“Their report will assist the court in seeing that the timing and scope of disclosures under revised Rule 26(a) and the limitations on the extent of discovery under these rules and local rules are tailored to the circumstances of the particular case.”).
  \item FED. R. CIV. P. 26(f) advisory committee’s note (2006) (“[D]iscussion [of e-discovery issues] at the outset may avoid later difficulties or ease their resolution.”).
\end{itemize}
\end{flushleft}
the discovery devices being used in the various states in a way that no single state had ever done.\textsuperscript{16}

Despite the centrality of discovery to the Federal Rules system, the 1938 Rules contained virtually nothing about discovery \textit{management}, either by the parties through planning discussions or by the court. Rule 26(f) simply did not exist. None of the rules addressing specific discovery devices mentioned planning. And at that time, Rule 16 had not yet evolved into a case management rule. Its focus was on getting the case ready for trial, much like the final pre-trial conference now governed by Rule 16(e).\textsuperscript{17}

What explains the absence of these now-familiar tools and practices for managing and coordinating discovery? The simple truth is that the original drafters did not include rules for extensive court management of discovery because they did not envision that judges would be very much involved in discovery. The original drafters “designed discovery to make information gathering a self-executing process. In other words, under the rules, the parties were expected to use discovery to prepare their case without having to resort to judicial proceedings.”\textsuperscript{18}

The absence of provisions addressing \textit{party communication} about discovery presents a separate puzzle. After all, it is one thing to leave the judge out of the discovery conversation; whether to require any such conversation at all is a quite different matter. But the answer here seems much the same – the original drafters simply did not envision that the parties (or their lawyers) would need to discuss discovery with each other.\textsuperscript{19} Indeed, the original drafters seemed to be rather optimistic – perhaps naively so – about how lawyers would behave with these new discovery tools at their disposal.\textsuperscript{20}

\begin{enumerate}
\item[16.] See Subrin, \textit{supra} note 14, at 739-40. As stated by Professor Dobie, a member of the original Advisory Committee, “If the term ‘revolutionary’ can be correctly applied to any part of the new rules, that part is discovery.” Armistead M. Dobie, \textit{The Federal Rules of Civil Procedure}, 25 VA. L. REV. 261, 275 (1939).
\item[17.] See Edson R. Sunderland, \textit{Discovery Before Trial Under the New Federal Rules}, 15 TENN. L. REV. 737, 753 (1939) (stating that under Rule 16, the court may “hold a pretrial hearing to consider: (1) Simplifying the issues; (2) Amendments; (3) Admissions of facts or documents; (4) Limiting number of expert witnesses; (5) References; (6) Other matters likely to aid in the disposition of the matter”).
\item[18.] Rogelio A. Lasso, \textit{Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process}, 36 B.C. L. REV. 479, 483-84 (1995). As explained by Professor Shapiro in his study of Rule 16, “extensive management of the pretrial process itself, though not explicitly ruled out by the terms of the rule, did not appear to play an important part in the thinking or deliberations of the rulemakers on Rule 16. In general, such matters as the timing and scope of pretrial discovery were to be handled by the parties, at least in the first instance.” David L. Shapiro, \textit{Federal Rule 16: A Look at the Theory and Practice of Rulemaking}, 137 U. PA. L. REV. 1969, 1981 (1989).
\item[19.] Professor Sunderland, the architect of the 1938 discovery rules, wrote several articles discussing their design and operation. In none of the articles does he mention discussions between the parties.
\item[20.] See Stephen N. Subrin, \textit{Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure}, 46 FLA. L. REV. 27, 34 (1994) (“[T]he reformers
This optimism arose from their predictions about the incentive structures that would be at play. First, there was a sense that lawyers would regulate themselves out of self-interest. That is to say, “[t]he drafters of the 1938 Rules believed that lawyers would not abuse discovery procedures because to do so would cost their clients both time and money.”21 Second, the 1938 Federal Rules did include a fee-shifting mechanism.22 Thus, even for those lawyers who saw profit (rather than cost) for their clients in contentious or excessive discovery, it was thought that the fee-shifting mechanism would be sufficient to discourage “captious refusals” and “unreasonable, unnecessary and vexatious applications.”23

In summary, the philosophy of the original drafters was that, while discovery was a critical complement to the notice pleading scheme, it did not need to be planned or managed because lawyers could be trusted to conduct discovery fairly and sensibly in most cases. Self-interest would guide the lawyers generally, while the fear of sanctions would deter exploitation. It was a nice ideal. It just didn’t work out that way.

B. The Birth and Reincarnation of Rule 26(f)

Rule 26(f) was added in 1980.24 The story behind Rule 26(f) begins four years earlier, however, with Chief Justice Burger’s Keynote Address at the 1976 Pound Conference. Moreover, the real story behind Rule 26(f) centers not so much on its birth in 1980 but on its near-death and reincarnation in 1993.

Chief Justice Warren Burger gave the Keynote Address at the 1976 Pound Conference. Echoing Roscoe Pound’s 1906 criticism of 19th century litigation practice – the condemnation of the so-called “sporting theory of justice”25 – Chief Justice Burger expressed his dismay over “widespread complaints” of lawyers misusing and abusing the pretrial process.26 Shortly thereafter, the American Bar Association formed a Special Committee on Abuse of Discovery (“ABA Special Committee”).27 By December 1977, the ABA Board of

22. The original Rules included a version of Rule 37 that contains many of the sanctions provisions contained in the current version of Rule 37. For the text of original Rule 37, see PALMER D. EDMUNDS, FEDERAL RULES OF CIVIL PROCEDURE 1158 (1938).
24. FED. R. CIV. P. 26(f) advisory committee’s note (1980).
Governors had officially approved the Report of the ABA Special Committee for the Study of Discovery Abuse (“ABA Report”).

The ABA Report made several suggestions to address the alleged problem of discovery abuse, two of which concerned Rule 26. The suggestion that captured most of the headlines – and that proved to be the most controversial – was to amend Rule 26(b)(1) to change the scope of discovery from material “relevant to the subject matter” to material “relevant to the issues raised by the claims or defenses of any party.” Despite pressure from the ABA, the Chief Justice, and the Attorney General, the Advisory Committee ultimately declined to advance that suggestion – at least not at that time – on the basis that it was not persuaded that the reform either was needed or would make things better.

The ABA Report also proposed a new provision authorizing a discovery planning conference. This suggestion was successful, and Rule 26(f) took effect in 1980. But the Rule 26(f) conference created in 1980 was very different from the Rule 26(f) conference we know today. Prior to 1980, there was no mechanism in the Rules by which a party could seek the court’s general or prospective guidance and assistance in discovery. Rule 26(c) and Rule 37(a) authorized motions to address specific discovery problems, but the relief they provided reached only the issues raised by those motions and was only available after-the-fact. Those remedies offered small succor to the lawyer who found herself pitted against an opponent hell-bent on making every aspect of discovery as difficult as possible. The solution offered by the 1980 version of Rule 26(f) was to authorize parties to seek the court’s involvement by motion. Specifically, Rule 26(f) authorized any party to propose a discovery plan to the other parties and obligated those other parties to “participate in good faith” in the framing of such a plan. If those efforts were rebuffed, the party could file a motion seeking a discovery conference with the parties and the judge, following which the judge would enter an order establishing a discovery plan.

29. See id. at 157.
30. See Richard L. Marcus, Discovery Containment Redux, 39 B.C. L. Rev. 747, 756-60 (1998) (chronicling how the Advisory Committee initially proposed and then withdrew a proposal to narrow the scope of discovery along the lines suggested by the ABA Report).
31. See Section of Litigation, supra note 28, at 159.
32. See Fed. R. Civ. P. 26(f) advisory committee’s note (1993) (“This subdivision was added in 1980 to provide a party threatened with abusive discovery with a special means for obtaining judicial intervention other than through discrete motions under Rules 26(c) and 37(a),”).
34. Id. Perhaps the best summary of the operation of the 1980 version of Rule 26(f) is found in the Advisory Committee Note accompanying the 1993 version of Rule 26(f) that replaced it. See Fed. R. Civ. P. 26(f) advisory committee’s note (1993) (“The amendment envisioned a two-step process: first, the parties would attempt to frame a mutually agreeable plan; second, the court would hold a ‘discovery conference’ and then enter an order establishing a schedule and limitations for the conduct of discovery.”).
The 1980 version of Rule 26(f) was a flop. Nobody used it. The dialogue contemplated between the parties and the court was not mandatory, and few lawyers invoked it. Perhaps that should not have been a surprise given that the Advisory Committee all but chided lawyers not to use it, writing in the Advisory Committee Note that “[i]t is not contemplated that requests for discovery conferences will be made routinely.”

A second wave of discovery reform efforts was underway even before the ink was dry on the 1980 amendments. These efforts led to a package of amendments that took effect in 1983, and they marked a turning point in the role of judges in discovery. It was the beginning of the case management era. One critical change was the addition of the proportionality limit to Rule 26(b), an event that presaged a world of greater judicial oversight of discovery. No less critical was the 1983 transformation of Rule 16 from a rule focused on trial to one that encouraged — and in some ways required — judges to take a hands-on approach to managing their cases throughout the life of the lawsuit, especially with respect to pretrial motions and discovery.

With the 1983 changes to Rules 16 and 26, the already little-used Rule 26(f) conference receded into near obscurity. Indeed, with Rules 16 and 26 now explicitly giving federal judges specific means and expansive authority to actively manage discovery, there seemed little reason for keeping Rule 26(f). The Advisory Committee considered dropping Rule 26(f) in 1989 due to its overlap with the expanded Rule 16. Two years later, the Advisory Committee formally proposed to eliminate Rule 26(f) due to its ineffectiveness and the belief that it was no longer needed in light of the supervening changes to Rules 16 and 26.

35. FED. R. CIV. P. 26(f) advisory committee’s note (1980). Stepping back to see the larger picture, the 1980 version of Rule 26(f) was part of an amendment package that was weak at birth and received little nourishment thereafter. Justice Powell dissented from them (joined by Justices Rehnquist and Stewart), calling them “tinkering changes” that would serve only to “delay for years the adoption of genuinely effective reforms.” See Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 523 (1980) (Powell, J., dissenting). This could hardly have inspired lawyers or judges to use them.


37. See FED. R. CIV. P. 26(b) advisory committee’s note (1983) (“The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”).

38. See FED. R. CIV. P. 16(a) advisory committee’s note (1983) (“The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.”).

39. See ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES APRIL 27-29, 1989, at 53, available at http://www.uscourts.gov/rules/Minutes/CV04-1989-min.pdf (“It was decided to retain the provisions of Rule 26(f), although it was acknowledged that there is considerable overlap with Rule 16, because this rule gives the lawyer an entitlement to cabin discovery.”).

Enter the mandatory disclosure debate. The 1991 amendment package that quietly proposed to delete Rule 26(f) also included a highly-publicized and controversial proposal for requiring early mandatory disclosures.\textsuperscript{41} The debates surrounding the merit of what became the 1993 version of Rule 26(a) need not be rehearsed here.\textsuperscript{42} But there was one logistical issue that intersects with our tale of Rule 26(f). Since the beginning of the project, the Advisory Committee had struggled to figure out when the parties should make their initial disclosures. As published, the proposed rule tied the disclosures to service of the answer.\textsuperscript{43} But that was problematic because motions under Rule 12 toll the time to answer, thus potentially deferring the disclosures for a long time or eliminating them altogether in the event of a dismissal.\textsuperscript{44}

A solution emerged during a hearing on the proposed rules held in Los Angeles in November 1991. The mandatory disclosure proposal was modeled after practices in three districts that had adopted initial disclosure rules.\textsuperscript{45} One of these districts – the Central District of California – also required the parties to meet and confer.\textsuperscript{46} At the Los Angeles hearing, lawyers experienced with practice in the Central District of California spoke highly of their local meet-and-confer provision, quite obviously piquing the interest of the Chair of the Advisory Committee.\textsuperscript{47} The meet-and-confer mechanism offered a solution to conference’ envisioned by the 1980 amendment has not proved to be an effective device to prevent discovery abuses.”\textsuperscript{48}

\textsuperscript{41}. Id. at 87-89.

\textsuperscript{42}. For a taste of the commentary, see Linda S. Mullenix, Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. Rev. 795 (1991); Bell et al., supra note 21.


\textsuperscript{46}. See Mullenix, supra note 42, at 811 n.85 (setting forth the text of C.D. Cal. Rule 6).

\textsuperscript{47}. See Hearings on the Proposed Amendments to the Federal Rules of Civil Procedure and Rules of Evidence, Thursday, November 21, 1991, at pp. 175-185 (testimony of Mary Ann Fong). Shortly after Ms. Fong’s testimony, the Chair of the Advisory Committee, Judge Pointer, clearly signaled his interest in pursuing a meet-and-confer mechanism, announcing: “Just to sort of alert those that are coming later this afternoon . . . you might want to address this issue about a meet and confer requirement because it’s, I think, clear that the committee would prefer to have a meet and confer requirement if we thought it was really workable. But we’ve had some questions.” Id. at 191. The minutes of a meeting two years before the hearing show that Judge Pfaelzer, a member of the Advisory Committee and a district judge in the Central District of California, had briefed the committee on the operation of the her district’s local rule on initial disclosures and meet-and-confer, but that concerns were raised about the efficacy of such a requirement. See ADVISORY COMMITTEE ON CIVIL RULES, MINUTES NOV. 17-18, 1989, at 8, available at \url{http://www.uscourts.gov/rules/Minutes/CV11-1989-min.pdf}. Thus, while the published 1991 proposed amendments suggested an “informal meeting of counsel” as the “preferred method of
the timing question: the parties would make or discuss plans for making their initial disclosures at the meeting. Serendipitously, it also solved a number of other thorny problems. It assuaged concerns about the uncertain scope of the initial disclosures: those concerns could be addressed on a case-specific basis by the parties at the meeting.48 It solved the problem of how to coordinate the initial disclosures and party-initiated discovery: the parties would have to wait to begin taking discovery until after they had had their discovery planning conference.49 Lastly, it solved a problem that had plagued practice under Rule 16 – how to get judges the information they needed to make meaningful scheduling orders.50 The parties would be required to prepare a report based on their meeting and submit it to the court in advance of the time for setting the scheduling order.51

At the next Advisory Committee meeting, it was agreed to retain Rule 26(f) but to delete the old text and replace it entirely with a new provision requiring the parties to meet and confer about discovery and to prepare a discovery plan in advance of the Rule 16 scheduling conference and/or order.52 Despite the substantial change to the content of Rule 26(f), the Advisory Committee deemed the revision sufficiently minor so as to not require republication.53 With that, Rule 26(f) was brought back from near death, albeit reincarnated as a much different creature.


48. See FED. R. CIV. P. 26(f) advisory committee’s note (1993) (noting that disclosures might be delayed in some cases “until after the parties have discussed at the meeting the claims and defenses in order to define the issues with respect to which the initial disclosures should be made”).


50. It was initially thought that the judges would devise their own methods for getting the information they needed, either through a conference or otherwise. See FED. R. CIV. P. 16(b) advisory committee’s note (1983) (“[W]hen no formal conference is held, the court may obtain scheduling information by telephone, mail, or otherwise.”). But in reality, the scheduling order was too often pro forma because of insufficient case-specific inputs.


53. Id.
The amendments to Rule 26(f) since 1993 have cemented its central role in discovery planning and case management. In 2000, the local opt-out option was eliminated. The Advisory Committee explained that it “had been informed that the addition of the conference was one of the most successful changes made in the 1993 amendments, and it therefore determined to apply the conference requirement nationwide.” And as discussed earlier, the 2006 e-discovery amendments added several more items for the parties to discuss and report upon.

As of 2006, it is safe to say that the Federal Rules’ approach to discovery planning and management has made a full about-face since 1938. The idea that the parties will conduct discovery unilaterally – without talking to each other and without regulation by the court – is distant history. Today, rather, discovery is discussed, planned, and managed from the very beginning of the lawsuit until its conclusion.

C. E-Discovery and the “Meaningful” Rule 26(f) Conference

At one level, the story of the evolution of Rule 26(f) is simply a sobering tale of great – if not naïve – expectations dashed by a disappointing reality. Discovery is not a self-regulating process, immune from friction or abuse. It requires management. And management requires communication, both between the parties and with the court. But there is a second level to this story, because the communication required by Rule 26(f) requires information. As a result, lawyers must take action earlier than ever to gather that information. This section explores the “front-loading” effect of the 2006 e-discovery amendments.

When discussing the front-loading of the lawyer’s investigative activities, one must start – at the latest – with 1993, which gave us the Rule 26(a)(1) required initial disclosures and added the meet-and-confer requirement to Rule 26(f). Obviously, by requiring the parties to identify individuals likely to have discoverable information, Rule 26(a)(1) imposed a

54. FED. R. CIV. P. 26(f) advisory committee’s note (2000) (noting courts would retain the power to exempt individual cases by a case-specific order). Rule 26(f) also was amended to require only a “conference” rather than a “meeting” to reflect the concern that, while face-to-face meetings are preferable, they are not always practicable. Id.

55. See discussion supra notes 8-11 and accompanying text.

56. In the larger picture, the front-loading of pretrial activities really began in 1983 when Rule 16 was amended to require early case-management as a means of reducing pretrial expense and delay. See FED. R. CIV. P. 16 advisory committee’s note (1983). It is certainly true that setting a discovery schedule often forces the parties to undertake discovery sooner (and perhaps much sooner) than they would if left on their own. Still, the discovery deadline can stretch out months or even years into the future. Thus, for purposes of this article, I have chosen to start with 1993 and the required initial disclosures because of the way in which they force the parties to undertake their own case investigations at the very earliest stages of the litigation.

57. I refer here to the scope of the Rule 26(a)(1) disclosures put in place by the 1993 amendments. In 2000, the duty of disclosure was dialed back to identifying witnesses and documents that the party might use to support its claims or defenses. See FED. R. CIV. P. 26(a)(1)
burden on the parties and their lawyers to conduct an initial investigation into the facts of the case. The front-loading effect of Rule 26(a)(1) did not go unnoticed during the comment period. Both plaintiff and defendant groups voiced concerns that the proposed initial disclosure rule would require them to prepare earlier in the case than they were used to and that, by doing so, it "would change the way in which lawyers traditionally have practiced law." The 1993 version of Rule 26(f) had its own front-loading effect as well. If the lawyers were to be prepared to discuss the general discovery needs of the case and whether the court should alter or impose any limits on discovery, that imposed some corresponding duty to give some early thought to how they intended to pursue their claims or defenses.

The Advisory Committee was not swayed by any of the concerns expressed about shifting too much work to the front of the case. First, Rule 26(a)(1) was carefully written to tie the initial disclosures to the information that would be generated by a reasonable initial investigation. So limited, that did not seem to demand too much early work. Second, and I suspect most fundamentally, there is every reason to think that the Advisory Committee was quite comfortable with the front-loading effect of the 1993 amendments. According to the Advisory Committee Note, “[a] major purpose of the revision [was] to accelerate the exchange of basic information.” The members of the Advisory Committee were not ignorant of the fact that speeding up the exchange of information also meant speeding up the investigation process – they just thought that the net result was a good one. As one commentator explained, one of the purposes of the changes to Rule 26 was to change the way lawyers behave in the belief that “this new way of practicing would benefit the profession.”

The relevant question, then, is not whether the e-discovery amendments have suddenly caused a shift to front-loading the pretrial process; that shift began no later than 1993. Rather, the relevant question is how the e-discovery

---

advisory committee’s note (2000). Presumably, the investigation burden under the 2000 version of Rule 26(a)(1) is less than it was under the 1993 version.

58. Lasso, supra note 18, at 499. A related argument is that lawyers faced with such a short time period to make disclosures would overproduce in order to avoid being sanctioned for underproducing. See Comm’n from the Chief Justice of the U.S. Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. §2072, Amendments to the Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401, 510-11 (Scalia, J., dissenting) (1993); Bell et al., supra note 21, at 43-44. This type of response would represent yet another form of front-loading of effort, though the burden presumably would fall more on the client (who was gathering) than on the lawyer (who was not sifting).

59. See Fed. R. Civ. P. 26(a) advisory committee’s note (1993) (“The rule does not demand an exhaustive investigation at this stage of the case, but one that is reasonable under the circumstances, focusing on the facts that are alleged with particularity in the pleadings.”). Later developments and discoveries would be the subject of supplemental disclosures. Id. Moreover, if there were reasons to forego or delay the effort required to make initial disclosures, the parties could opt out by stipulation or obtain a court order. See Fed. R. Civ. P. 26(a)(1).


61. Lasso, supra note 18, at 499.
amendments might have altered or affected the shift to front-loading. The early returns suggest that the impact has been substantial, both in scope and degree.

The belief that lawyers should, if not must, significantly increase their early efforts in order to properly address the demands of e-discovery seems nearly universal. One reading the Advisory Committee Note to the 2006 amendments to Rule 26(f) could scarcely reach any other conclusion. The Note premises the discussion of amended Rule 26(f) on the idea that lawyers who talk about e-discovery early in the case will have fewer and less difficult problems later. Of course, the lawyers must prepare for that dialogue, and part of that is figuring out what information you need so you can ask your opponent if it exists and where. Conversely, you must learn your own client's information system beforehand so you can answer such questions when they are posed to you. Then at the meeting, the parties can discuss what information they would like and for what time periods, where that information might be found, and if those sources are reasonably accessible or not.

But questions of scope and source are just the beginning. The Advisory Committee Note instructs the parties to discuss the form for producing electronically stored information to “avoid the expense and delay of searches or productions using inappropriate forms.” Relatedly, the parties should discuss the relevance of metadata and whether to produce their ESI in a form that includes the metadata. The Note instructs the parties to discuss how to handle the review for and assertion of privilege and work-product protection, and whether to ask the court to incorporate any such agreements into the case management order. Last but certainly not least, the Note directs the parties to discuss preservation, a topic the Note says “can be particularly important with regard to electronically stored information.”

While the Advisory Committee Note reflects some appreciation for the amount of advance investigation required to do all of the things advised, the only explicit mention is the acknowledgement that it will be “important for counsel to

63. Fed. R. Civ. P. 26(f) advisory committee’s note (2006) (“It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference.”).
66. See Fed. R. Civ. P. 26(f) advisory committee’s note (2006) (“Information describing the history, tracking, or management of an electronic file (sometimes called ‘metadata’) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference.”).
67. Fed. R. Civ. P. 26(f) advisory committee’s note (2006). At the time, the Advisory Committee Note reflected the uncertainty about whether such an order would be binding on third parties. Id. Under new Federal Rule of Evidence 502, enacted in September 2008, it is clear that such orders would be binding on other persons, in other cases, and in other courts. See Fed. R. Evid. 502(d), (e) (addressing the controlling effect of a court order or a party agreement contained in a court order).
become familiar with their clients' information systems. Nonetheless, the rulemakers fully appreciated the front-loading effect the 2006 amendments would have. For example, in discussing the 2006 amendments, Judge Rosenthal, then the Chair of the Advisory Committee, acknowledged that “[t]he amendments increase the demands on lawyers early in the litigation” and that “[e]lectronic discovery imposes new requirements on lawyers and litigants to learn large amounts of information about their own and their adversary’s information systems, early in the case.”

Shortly after the e-discovery amendments took effect, the Federal Judicial Center published a “pocket guide” to e-discovery for judges. The Pocket Guide was unmistakable in its support for early and proactive e-discovery management, advising judges that “[w]hen ESI is involved, judges should insist that a meaningful Rule 26(f) conference take place and that a meaningful discovery plan be submitted.” Moreover, the Pocket Guide made clear that the lawyers had a lot of homework to do in order to make their Rule 26(f) conferences meaningful:

For the ‘meet and confer’ process to be effective, attorneys must be familiar with how their clients use computers on a daily basis and understand what information is available, how routine computer operations may change it, and what is entailed in producing it. Attorneys need to identify those persons who are most knowledgeable about the client’s computer system and meet with them well in advance of the Rule 26 conference; it may also be advisable to have those persons present at the conference.

The larger legal community quickly reached the same conclusions. Perhaps the leading secondary source on e-discovery is The Sedona Principles (Second Edition): Best Practices Recommendations & Principles for Addressing Electronic Document Production (June 2007). It fully endorses both the

71. Rothstein et al., supra note 70, at 4.
72. Id. at 5.
73. THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sedona Conference, 2d ed. 2007), available at http://www.thesedonaconference.org/content/miscFiles/publications.html. In the interests of full disclosure, I am currently a member of The Sedona Conference and participate in its e-discovery activities. I was not currently involved in the drafting of this particular document, however.
desirability of early dialogue about e-discovery and the concomitant need for lawyers to investigate and prepare for that dialogue. Commentators writing in the legal press have consistently emphasized the need for early investigation and preparation. Also joining the chorus are the vendors of e-discovery services, who urge not just early attention but advance attention, including the creation of data maps before lawsuits are filed or the implementation of enterprise content management systems designed to manage e-discovery “proactively.”

Collectively, the guidance from these disparate sources is that “good” lawyers in the age of e-discovery will use the Rule 26(f) conference as an opportunity to take informed, preventive measures to deal with e-discovery. To do that, moreover, these “good” lawyers will need to (1) think through their own discovery needs so that they can discuss scope and source issues for the discovery they want to take from their opponents; (2) learn their client’s information policies and systems so that they can respond to the other party’s scope and source questions for the discovery the other party wants to take; and (3) gather any other information needed to discuss preservation issues. And they will need to do all of that in the brief period leading up to the Rule 26(f)

74. Sedona Principle #3 states: “Parties should confer early in discovery regarding the preservation and production of electronically stored information when these matters are at issue in the litigation and seek to agree on the scope of each party’s rights and responsibilities.” Id. at 21.

75. See id. at ii, 21 (providing extensive list of topics that parties must be prepared to discuss); see also id. at 27 (“Unnecessary controversy over peripheral discovery issues can often be avoided at the outset by discussion of the parties of the potential scope and related costs of collecting relevant data. Accordingly, and consistent with the Federal Rules and best practices, parties should be prepared to discuss the sources of electronically stored information that have been identified as containing relevant information, as well as the steps that have been taken to search for, retrieve, and produce such information.”); id. at 41 (“Rule 26(f)’s early meet and confer obligations . . . imply that counsel must undertake early preparation sufficiently diligent to adequately represent the parties’ positions.”).

76. Ronald I. Raether, Jr., Preparing for the Rule 26(f) Scheduling Conference and Other Practical Advice in the Wake of the Recent Amendments to the Rules Governing E-Discovery, 54 Fed. Law., Aug. 2007, at 22 (asserting that the most significant change caused by e-discovery is that lawyers will have to make early decisions about how to deal with it); James K. Lehman et al., Electronic Discovery and the Rule 26(f) Conference, FOR THE DEFENSE, Jan. 2008, at 60 (arguing that lawyers should undertake early investigation of scope and source issues in order to gain a strategic advantage in the e-discovery planning process); John Rosenthal & Moze Cowper, A Practitioner’s Guide to Rule 26(f) Meet & Confer: A Year After the Amendments, 783 PLI/Lit 231, 236 (2008) (“If the goal is to have a productive Rule 26(f) Conference . . . both inside and outside counsel need to take the time to educate themselves [about the client’s information systems and policies].”).

77. See StoredIQ, Proactive eDiscovery Solution, http://www.storediq.com/solutions/proactive.aspx (last visited Mar. 17, 2009) (“These topology maps can help organizations better prepare for Rule 26(f) conferences, improving their ability to negotiate with the opposing counsel.”).

78. I make no effort here to canvass all of the sources that address the lawyer’s duty to prepare for e-discovery. For example, local rules may more precisely define the steps that lawyers must or should take in preparation for the Rule 26(f) conference. See Suggested Protocol for Discovery of Electronically Stored Information, Protocol 7 (D. Md.), available at http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf (ten pages addressing preparatory steps).
discovery planning conference. That’s a big jump from the front-loading effects of the 1993 amendments, and a world apart from how lawyers approached discovery in 1938.

D. The Impact of Front-Loading

Assuming that the 2006 e-discovery amendments have accelerated the process of front-loading the lawyer’s efforts in discovery, the question then becomes whether that is a good or bad development. My current sense is that it is a mixed blessing, with the positive consequences outweighing the negative consequences in most cases.

In most respects, the type of up-front investigation, analysis, and preparation contemplated by the 2006 version of Rule 26(f) strikes me as a decidedly positive development. After all, one would hardly argue that lawyers should strive to be unprepared, ignorant, or directionless. Moreover, I subscribe to the view (criticized by some79) that judges should manage their cases. If judges are to manage their cases, they will need good inputs from the parties and their lawyers. In order to supply good inputs as to discovery, the parties and their lawyers need to know what information they have to provide to the other side and what information they want in return. In my view, this was the animating premise of the 1993 version of Rule 26(f).

The 2006 version of Rule 26(f) still contemplates a strong role for judicial case management, but in my view it is directed as much, if not more, at the party level. Specifically, it operates from the premise that e-discovery will collapse of its own weight if the court needs to oversee all of the potential details.80 Accordingly, it is the parties who have to make it work by reaching agreement where they can on (1) scope and source questions; (2) practical questions like form of production and the mechanics of privilege review; and (3) preservation obligations. To be effective, many of these agreements will need to be reached early in the case. And, of course, the parties will need to make good choices. The only way the parties can make good choices early in the case is by making the even earlier effort to learn what they need to know about the capacities of their clients and the likely needs of their cases.


80. In truth, this concern is neither entirely new nor unique to e-discovery. Magistrate Judge Brazil had made essentially the identical observation when discussing traditional discovery in the 1980s. See In re Convergent Technologies Securities Litig., 108 F.R.D. 328, 331 (N.D. Cal. 1985) ("The whole system of Civil adjudication would be ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions.").
But there are competing considerations. First among them is cost. It probably goes without saying that lawyers will spend many hours engaging in the range of activities contemplated by the Advisory Committee Note to Rule 26(f) and recommended by the Sedona Conference. Beyond paying their lawyers for this time, the parties will also incur internal costs in the form of the time and effort spent by their own employees to assist the lawyers in this process. It is no answer to say that those costs would have to be incurred at some point because that’s not necessarily true. Most cases settle, and a large percentage of them settle early in the case without any significant discovery activity. It is almost certain that some of the Rule 26(f) preparation parties are taking for e-discovery would not have been incurred under a less front-loaded approach because the parties would have settled before it happened.

For the cases that do not settle early, it is probably true that the early investments in discovery planning, while increasing costs up front, will pay dividends later. In 1997, the Advisory Committee invited the RAND Institute and the Federal Judicial Center to conduct empirical studies on discovery. The RAND study found that early case management – which included early discovery planning efforts – increased lawyer work hours initially, but that there was a corresponding decrease later so long as the judge actively managed the case thereafter. The FJC study was able to examine specifically the effect of both required initial disclosures and a meet-and-confer requirement. Only a small percentage of survey respondents reported that either increased the total litigation costs. As to the required initial disclosures, the majority was split

81. The view that discovery costs are too high is held by many. For example, a joint report prepared by the American College of Trial Lawyers and the Instituted for the Advancement of the American Legal System concludes that discovery costs under the existing rules structure are often “far too much” and that “[e]lectronic discovery, in particular, needs a serious overhaul.” See Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System, at 2 (March 11, 2009), available at http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4053.

82. See David Lender, Don’t Dread the Rule 26(f) Conference, N.Y. L.J. (Special Section), Feb. 19, 2008 (acknowledging that learning the client’s information system “means additional costs as well as the associated burdens on already over-taxed IT personnel”).

83. See Kakalik et al., supra note 51, at 635-36 (noting that over half of cases close within 270 days of filing and involve either no or very little discovery). See also Elizabeth G. Thornburg, Giving the “Haves” a Little More: Considering the 1998 Discovery Proposals, 52 S.M.U. L. Rev. 229, 247 (1999) (analyzing the results of studies conducted by the RAND Institute and the Federal Judicial Center).

84. The concern that rules designed to make discovery more efficient might actually cause lawyers to incur needless costs by forcing them to act too quickly can be traced back as far as the mandatory disclosure debates. See Mullenix, supra note 42, at 819 (reporting the concern of one lawyer that the local rule governing initial disclosures forced lawyers to disclose too quickly and suggesting a staged process).

85. See Kakalik et al., supra note 51, at 652-54.

more or less evenly on whether these devices reduced or had no effect on overall litigation costs. But as to meet-and-confer, a majority (54%) reported that it had no effect, though 29% thought it reduced overall litigation costs.

Intuitively, the potential savings to be captured from early investment in e-discovery would appear to be at least as great as those presented by required initial disclosures or the version of Rule 26(f) adopted in 1993. Perhaps later empirical work will be able to confirm such an effect. But one of the lessons to be drawn from the RAND study probably applies here as well – that judges must actively manage e-discovery in order to reap the benefits of forcing the lawyers to invest their time and energy up front. Of course, the savings in question are realized only in those cases that proceed to substantial discovery. In cases that are resolved early, there is no opportunity to capture the “planning dividend.” In that respect, the early planning movement might be seen as an expense transfer that increases the “ante” for all federal civil cases in an effort to hold down later expenses in the cases that proceed through the full pretrial process.

A related problem is that changes in when and how costs are incurred can alter the dynamics of settlement. After the required initial disclosure rules were first adopted in 1993, Professors Issacharoff and Loewenstein predicted, using economic modeling modified by behavioral techniques, that the required initial disclosures would increase aggregate litigation costs because the front-loading of litigation expense would hurt settlement rates. The FJC study looked at this question and found, based on attorney reports, that most lawyers thought that the initial disclosure requirement had either had no effect on settlement prospects or had increased them. Nonetheless, it is certainly worth watching to see if the substantial early investigation and planning efforts associated with e-discovery seem to be altering settlement dynamics.

Finally, the front-loading effect of e-discovery appears to be altering the non-litigation behavior of firms. Vendors of e-discovery services often urge existing or potential clients to take a “proactive” approach to e-discovery, usually by advising them to make additional investments in enterprise content

87. See id. at 563 tbl.17.
88. See id. at 570 tbl.23.
89. See, e.g., Rosenthal & Cowper, supra note 76, at 248 (“Rule 26(f) is about cooperation and working together. By coming together early, defining what is important and what is not, and working with your adversary, not against them, means less risk, less cost and more certainty.”).
90. See Kakalik et al., supra note 51, at 668, 677.
91. On the other hand, the early investment would pay off if it caused the parties to settle earlier than they otherwise would have, thereby avoiding those downstream pretrial costs altogether. For a discussion of whether early investment in fact leads to early settlement, see infra the discussion accompanying notes 92-93.
92. See Samuel Issacharoff & George Loewenstein, Unintended Consequences of Mandatory Disclosure, 73 Tex. L. Rev. 753, 778 (1995) (predicting that settlement rates would drop because people would feel invested in their suits and because the new information was more likely to cause their valuations of the merits to diverge rather than converge).
93. See Willging et al., supra note 86, at 563 tbl.17.
management systems that will structure and manage their currently unstructured and unmanaged data. The idea is that, by paying for data management now, those parties will reap e-discovery savings later. Both vendors and attorneys are urging clients to step up their “document retention” plans. The idea here is to limit the cost of searching and producing by shrinking the universe of that which needs to be searched and produced.

In the abstract, these seem like relatively benign — if not positive — consequences. But what if the promise of “proactive” e-discovery management is illusory? Is there proof that parties who pay now will save later? And as to data purging, the effects are potentially counterproductive to the firm’s business interests. The shelves of the “Business” section of bookstores are filled with volumes on Business Analytics, which is the technique of using statistical and quantitative analysis to make decisions that used to be made based on intuition or anecdote. Analytics requires data, and lots of it. I suspect that the analytics gurus would cringe to hear that lawyers and vendors are telling firms to purge much of the data that the “quant jocks” might later want to mine for competitive business insights.

For now, I don’t view any of these competing considerations as cause for alarm. By and large, the benefits of early investment seem to outweigh the costs. And, in truth, the front-loading contemplated by Rule 26(f) is still nowhere near as demanding as some more dramatic reforms might involve. In some legal systems, for example, the plaintiff must plead its evidence in the complaint. Some might say that’s real front-loading. Nonetheless, the discovery front-loading phenomenon merits more than a shrug of the shoulders. As a matter of logic, there must be some tipping point at which front-loading the discovery process causes more harm than good. We should watch carefully for signs that we are getting closer to that point, even if we do not think we have reached it yet.

II. THE ROLE OF COOPERATION IN DISCOVERY

One of the hottest issues in e-discovery today is the extent to which lawyers must or should cooperate with each other. The idea of cooperation in discovery is not a new concept. Questions about the proper role of adversarialism in

94. It seems clear that one of the byproducts of e-discovery is that firms feel an increased need to know what information they have and to try to manage it. There could be any number of nonlitigation benefits associated with acquiring that knowledge. Indeed, one of the principal legacies of e-discovery may be that it forced firms to engage in information management activities that, while designed to reduce discovery risks, in fact led to business rewards.


discovery have existed at least since the Federal Rules were adopted in 1938, have prompted significant reform proposals in the past, and were prominent during the debates about the Rule 26(a) mandatory disclosures. E-discovery, however, has brought those questions back to center stage. In 2008, for example, The Sedona Conference launched a national effort to promote cooperation in discovery, arguing that “[o]ver-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge.” 97 Similar sentiments are also starting to make their way into the case law.98

The argument for cooperation in discovery is simultaneously self-evident and dangerously vague. On one hand, one could hardly argue with the proposition that the parties should seriously and carefully consider the possible benefits of cooperation instead of mindlessly defaulting to battle mode. As an appeal to self-interest, the cooperative ideal stands on the firmest of footing. On the other hand, some have located a duty to cooperate in the Federal Rules or in the lawyer’s role as an officer of the court. The correctness of these propositions is not nearly so obvious and, in the end, likely depends on how one defines the breadth and content of the claimed duty.

A. The Call for Cooperation

Many readers will already be familiar with The Sedona Conference’s work in the field of e-discovery. Its flagship product is The Sedona Principles for e-discovery,99 a compilation of fourteen “best practice” recommendations for e-discovery that has provided invaluable guidance to practicing lawyers and that has proved influential with judges.100

In July 2008, The Sedona Conference released a document titled The Sedona Conference Cooperation Proclamation.101 With it, The Sedona Conference launched what it called “a national drive to promote open and forthright information sharing, dialogue (internal and external), training, and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”102 The animating premise of The Cooperation Proclamation is that too often lawyers act as though their duties as zealous advocates for their clients

99. See SEDONA PRINCIPLES, supra note 73. For other e-discovery-related publications produced by The Sedona Conference, see its website at www.thesedonaconference.com.
101. See THE COOPERATION PROCLAMATION, supra note 97, at 1.
102. Id.
require them to take an uncompromisingly adversarial approach in discovery. *The Cooperation Proclamation* views this as both counterproductive and, potentially, in violation of the Federal Rules of Civil Procedure. According to *The Cooperation Proclamation*, not only is cooperative discovery required by the Federal Rules, but it also best promotes the lawyer’s twin duties of loyalty to their clients and as officers of the courts.

While *The Cooperation Proclamation* is directed at lawyers, its drafters realized that the best way to get the attention of lawyers is to get the attention of judges. Judges play a critical role in discovery culture in at least two ways. First, if judges demand cooperation – or if they at least punish abusive behavior – then lawyers will adjust their practices accordingly. Second, there is some sense that lawyers take needlessly adversarial positions in discovery not because they want to but because they think their clients want or expect that type of behavior. For lawyers who want to be cooperative, a message from the bench demanding or even encouraging cooperation may give them valuable cover with their clients. Toward that end, *The Cooperation Proclamation* has sought judicial endorsements. As of January 31, 2009, it had been endorsed by forty-four federal and state judges. 103 The effort to involve judges in the campaign is also showing up in the case reporters; a number of decisions have cited *The Cooperation Proclamation* when directing the parties to cooperate going forward or when chiding them for their failure to do so in the past. 104

**B. Original Expectations and Past Efforts to Change Discovery Culture**

If parties and lawyers were to start to approach discovery as a cooperative process, they would be (perhaps unwittingly) fulfilling the vision of the original drafters. Recall that the 1938 rules lacked the court management and party communication provisions we have today. 105 They did not exist because the original drafters did not think them necessary. As one commentator explained, one of the premises of the new discovery rules was that “the lawyers would be guided by a sense of mutual self-interest in complying with the rules and that the discovery process would be self-regulating.” 106 Under this view, lawyers would

---

105. See discussion supra Part I.A.
106. Bell et al., supra note 21, at 7-8; see also John S. Beckerman, *Confronting Civil Discovery’s Fatal Flaws*, 84 MINN. L. REV. 505, 513 (2000) (“[D]iscovery in civil litigation was
rationally eschew abusive practices that, in the end, would serve only to “cost their clients both money and time.” 107 So viewed, the discovery rules would move the litigation process away from the “sporting theory of justice” because, by their operation, each party would “lay all his cards upon the table, the important consideration [then] being who has the stronger hand, not who can play the cleverer game.” 108

What the original drafters did not foresee was that discovery would then become the game. As Professor Miller put it, “the rulemakers’ expectations for a self-executing, cooperative pretrial phase have proven to be somewhat naïve.” 109 Some have even suggested that the original drafters ignored ominous warning signs about the realities of liberal, party-driven discovery. 110 Either way, “[t]he vision that adversarial tigers would behave like accommodating pussycats throughout the discovery period, saving their combative energies for trial, has not materialized.” 111

In 1978, a young professor from the University of Missouri named Wayne Brazil attempted to resurrect the cooperative ideal. In an article that would prove influential for many years, Professor Brazil argued for a major reform of discovery that would purge the adversarialism that had come to dominate the discovery process. 112 Unlike the original drafters, Professor Brazil did not think that the discovery scheme as structured could yield that result. Indeed, Professor Brazil saw the discovery rules as the cause of the problem rather than as a component of any solution, writing: “Rather than discourage ‘the sporting or game theory of justice,’ discovery has expanded both the scope and the complexity of the sport.” 113 Professor Brazil’s proposed solution was to replace party-driven discovery with a court-supervised scheme of disclosures in which the parties would be required to disclose all relevant information and in which the lawyers supervising disclosure would owe their loyalties to the court. 114

While the Advisory Committee was actively considering discovery reform at the time that Professor Brazil’s published his proposal in 1978, the proposal does
not appear to have gained traction at that time. Of course, discovery reform continued through the 1980s and into the early 1990s. In 1991, prompted by the passage of the Civil Justice Reform Act, the Advisory Committee published for comment a lengthy set of proposals that included a proposal to add required initial disclosures to Rule 26. Under the proposal, parties would be required to disclose the names of individuals “likely to have information that bears significantly on any claim or defense” and to identify documents “likely to bear significantly on any claim or defense.”

By this time, Wayne Brazil had become a federal Magistrate Judge and was a member of the Civil Rules Advisory Committee. He supported a broad disclosure rule in order, at least in part, to change the culture of adversarialism. Judge Brazil found an eager ally in this campaign in Judge William Schwarzer, who was then the Director of the Federal Judicial Center and who had written his own influential article promoting a transition to a non-adversarial disclosure-based system of discovery. The proposed Advisory Committee Note cited both of their articles. At least some of the other members of the Advisory Committee seemed to have shared the view that the required initial disclosure proposal was a positive step forward on the path towards cooperation in discovery.

The proposal generated a “storm of criticism” and faced opposition from many quarters. One of the recurring points of criticism was that “the proposed amendment conflicts with the adversary system of American jurisprudence and perhaps even with the ethical obligations of attorneys.” In part, the critics chafed against the idea that they might have to voluntarily produce information

115. In his article, Professor Brazil criticized the principal suggestion of the ABA Special Report – the proposal to narrow the scope of discovery – on the ground that it was going in precisely the wrong direction by further restricting the free flow of information that he advocated. Id. at 1334.
122. See Bell et al., supra note 21, at 28; Lasso, supra note 18, at 487; Marcus, supra note 45, at 808.
123. Bell et al., supra note 21, at 46.
that would be harmful to their clients and to their litigation positions.\textsuperscript{124} What seemed to trouble the critics even more, however, was the concern that, in order to identify the documents and the witnesses with information “likely to bear significantly” on the claims or defenses, a party (through its lawyer) would have to “stand in the shoes of the adversary” to figure out just what the other party’s case was and then assist the adversary in making that case.\textsuperscript{125} Even Justice Scalia joined in the disapproval. He dissented from the 1993 amendments, writing:

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients – on their own initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment – the new Rule would place intolerable strain upon lawyers’ ethical duty to represent their clients and not to assist the opposing side.\textsuperscript{126}

The 1993 required initial disclosure rules did take effect, but they did so only by the skin of their teeth and they only lasted in that form for seven years. A bill to scuttle them passed the House and likely would have passed the Senate, but it failed to come up for a vote before the Senate adjourned.\textsuperscript{127} Thus, while clearly unpopular in Congress, the 1993 disclosure rules took effect on December 1, 1993. They lasted in that form only until December 1, 2000, when the initial disclosure requirement was scaled back so that parties only needed to disclose the witnesses and documents they might use to support their claims or defenses.\textsuperscript{128}

The backlash to the 1993 initial disclosure proposal does not mean that the current campaign for cooperative discovery is doomed. The notion that the

\textsuperscript{124} See Thornburg, supra note 83, at 234-35 (“At bottom, the requirement of automatic disclosure seemed to [its opponents] incompatible with litigator culture, an understanding of the ‘adversary system,’ including discovery, as a process in which the only operative value is aggressive assertion of the interests of the client.”); Marcus, supra note 45, at 810 (stating that the automatic disclosure movement “certainly cuts against the grain of the adversary system as it has evolved in the discovery context”).

\textsuperscript{125} Bell et al., supra note 21, at 47; see also Linda S. Mullenix, Adversarial Justice, Professional Responsibility, and the New Federal Discovery Rules, 14 Rev. Litig. 13, 21 (1994) (discussing criticism “based on the theory that the new rules would reverse the traditional burdens on the plaintiffs and defendants and therefore force defendants to do the plaintiffs’ work for them”).


\textsuperscript{127} See Marcus, supra note 30, at 767-68; Lasso, supra note 18, at 487 n.20; see also Carl Tobias, Improving the 1988 and 1990 Judicial Improvements Acts, 46 Stan. L. Rev. 1589, 1613 (1994).

adversary system demands adversarial discovery is no more convincing today than it was in 1993. If the discovery rules require the automatic disclosure of information, then the party must disclose it, and the lawyer’s duty then is to facilitate that disclosure, not to obstruct it. More to our point, if the client chooses to go beyond the requirements of the discovery rules – such as by seeking less than it might be legally entitled to seek, or by producing more than it might be legally required to produce – then the lawyer’s ethical and professional duty is to carry out the client’s wishes. The lawyer certainly has a role in counseling the client whether it is in the client’s best interests to choose a cooperative approach. But where a client makes an informed choice to do so, the lawyer can claim no professional or ethical duty to insist on adversarialism. Nonetheless, any reform proposal that calls for a change in discovery culture must recognize that past reforms aimed at making discovery a cooperative and non-adversarial process have encountered stiff resistance, and not just from the defense bar. As illustrated in the initial disclosure debates, one recurring fear is that, in a “cooperative” system, diligent and prepared lawyers will end up doing their lazier or less capable adversaries’ work for them. Readers will probably recall Justice Jackson colorfully expressing a parallel concern in his well-known concurring opinion in Hickman v. Taylor. That was 1947, but the concern actually goes back at least as far as the original drafting debates. When Professor Sunderland submitted his initial draft of the discovery rules, it included a provision by which a party could be required to provide a list of all documents “which are known to him and are relevant to the pending cause.” The Committee rejected it after receiving numerous complaints that it would require a lawyer to prepare his adversary’s case. The other recurring obstacle, of course, is the sense among some that the adversary culture is too deeply ingrained to change. In part, that view reflects a belief that lawyers have become so accustomed to adversarial discovery that they no longer know how to act any other way. It also reflects a sense that lawyers cannot be expected to take a compartmentalized approach – cooperating in discovery while simultaneously girding for a merits battle – to a process in which many see no clear divide between the purported compartments. As Professor Miller put it almost 25 years ago, “[i]t is unrealistic to expect them to

129. See Mullenix, supra note 125, at 40 (“The argument that the new disclosure rules conflict with lawyers’ professional responsibility is baseless . . . .”).
130. See MODEL RULES OF PROF’L CONDUCT R. 3.4; see also Lasso, supra note 18, at 509-10 (discussing ethics rules prohibiting the destruction or concealment of discoverable information).
131. See MODEL RULES OF PROF’L CONDUCT R. 1.2.
132. See supra notes 122-26 and accompanying text.
133. Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring) (“Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”).
134. Subrin, supra note 14, at 727.
135. Id. at 727-28.
act in a cooperative spirit or adhere to Marquess of Queensberry rules on what has become the central battlefield of modern litigation.\footnote{Miller, \textit{supra} note 109, at 16.}

\section*{C. Exploring the Contours of Cooperation}

The current campaign for cooperation in discovery makes at least two, and possibly three, distinct claims. The first is that parties must cooperate because the Federal Rules require it. The second is that parties should cooperate because, in the age of e-discovery, the old adversarial methods are counterproductive and unsustainable. The third claim – which is often more implied than asserted – is that the lawyers who are conducting e-discovery have a duty to cooperate as officers of the court.

\subsection*{1. "Cooperation" as Required by the Federal Rules}

The strongest position that a proponent of cooperative discovery might take is to say that the Federal Rules require it. The Sedona Conference’s \textit{Cooperation Proclamation} makes this assertion explicitly.\footnote{See \textit{THE COOPERATION PROCLAMATION}, \textit{supra} note 97.} In \textit{Mancia}, Judge Grimm reaches this conclusion as well.\footnote{Mancia v. Mayflower Textile Services Co., 253 F.R.D. 354 (D. Md. 2008).} Whether the Federal Rules really do require cooperation is a question that needs careful examination, however, and the answer to that question largely depends on what one means by the term cooperation.

It is certainly true that the Federal Rules often supply frameworks to facilitate cooperative behavior. Rule 29, for example, expressly allows the parties to enter into stipulations about discovery procedure.\footnote{FED. R. CIV. P. 29.} Rule 26(d) also establishes a type of framework for cooperation. It directly permits the parties to cooperate by entering into stipulations regarding early discovery.\footnote{FED. R. CIV. P. 26(d)(1).} But an even more important manifestation of the cooperative ideal is buried in Rule 26(d)’s approach to discovery scheduling. In 1970, Rule 26(d) was amended to eliminate the complex “priority” rules that the courts had developed.\footnote{See FED. R. CIV. P. 26(d) advisory committee’s note (1970) (“The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court’s power to establish priority by an order issued in a particular case.”); see generally 8 CHARLES A. WRIGHT ET AL., \textit{FEDERAL PRACTICE & PROCEDURE} §§ 2045-2046 (2d ed. 1994).} Instead, there would be no fixed priorities or sequences in discovery, and it was made explicit that the pendency of one party’s discovery did not preclude any other party from taking discovery at the same time.\footnote{FED. R. CIV. P. 26(d)(2).} In short, the parties were left to work out the timing and sequence between themselves, subject to judicial
intervention if needed. The Advisory Committee was banking on the parties realizing that it was in their interests to cooperate lest they proceed down the path of mutually-assured destruction.\textsuperscript{143}

Another way in which the discovery rules foster cooperation is by requiring \textit{communication}. The most prominent instance is Rule 26(f), which requires the parties (1) to confer about discovery; and (2) to “attempt\textsuperscript{[\textit{\textup{[}}}] in good faith to agree” on a proposed discovery plan.\textsuperscript{144} In the context of discovery motions, Rule 26(c)(1), Rule 37(a)(1), and Rule 37(d)(1)(B) require the moving party to certify that it has “in good faith conferred or attempted to confer” with the other affected parties in an effort to resolve the dispute without court action.\textsuperscript{145} The failure to follow these directives exposes a party to various sanctions.\textsuperscript{146}

While none of these rules explicitly require cooperation,\textsuperscript{147} one might attempt to infer a duty to cooperate from either the obligation to communicate or the obligation to attempt in good faith to reach agreement on discovery issues. The correctness of that inference, however, then seems to turn on the definition of cooperation. If cooperation simply means to formulate and state defensible positions – but not necessarily to show any willingness to budge from those positions – then one can safely say that these discovery rules imply a duty to cooperate. But under that view, any cooperation required by Rule 26(f) would not appear to add anything beyond the general duty not to engage in abusive discovery. Rather, from that vantage point, Rule 26(f) would look to operate much like Rule 26(d) or Rule 29 – as a platform that \textit{encourages} the parties to reach agreement on potential discovery problems and seeks to \textit{facilitate} such agreements, but does not require them. On the other hand, if the meaning of cooperation is expanded to include a willingness to move off of defensible

\begin{footnotesize}
\begin{enumerate}
\item See \texttt{Fed. R. CIV. P. 26(d) advisory committee's note (1970)} ("Once it is clear to lawyers that they bargain on equal footing, they are usually able to arrange for an orderly succession of depositions without judicial intervention.").
\item \texttt{Fed. R. CIV. P. 26(f) & advisory committee's note (1993)} ("The litigants are expected to attempt in good faith to agree on the contents of the proposed discovery plan.") (emphasis added).
\item \texttt{Fed. R. CIV. P. 26(c)(1), 37(a)(1), 37(d)(1)(B)}.
\item See \texttt{Fed. R. CIV. P. 37(f) (sanctions for failing to participate in good faith in developing and submitting a proposed discovery plan per Rule 26(f)); Fed. R. CIV. P. 37(a)(5) (setting forth consequences for failing to attempt in good faith to resolve the matter) (also incorporated by Rule 26(c)(3) to motions for protective order).}
\item Some districts have adopted Local Rules that explicitly reference cooperation. See, e.g., Default Standard for Discovery of Electronic Documents, D. Del. ("It is expected that the parties to a case will cooperatively reach agreement on how to conduct e-discovery."); Default Standard for Discovery of Electronically Stored Information, N.D. Ohio ("The court expects the parties to cooperatively reach agreement on how to conduct e-discovery."); Administrative Order No. 174, Default Standard for Discovery of Electronically Stored Information, M.D. Tenn. ("The court expects the parties to cooperatively reach agreement on how to conduct e-discovery."). The discussion that follows regarding the meaning of “cooperation” is equally applicable to these Local Rules.
\end{enumerate}
\end{footnotesize}
positions – to *compromise* – in an effort to reach agreement, then it is not at all clear that this is what Rule 26(f), Rule 26(c), or Rule 37(a) actually demand.

Apart from the fact that the rules do not actually use the term “cooperate,” the drafting history of Rule 26(f) may also suggest caution about inferring a duty to cooperate from the duties to communicate and to attempt in good faith to reach agreement. When the Advisory Committee first proposed Rule 26(f) in 1978, it included language there and in Rule 37(e) authorizing sanctions against a party for the failure “without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.”148 After the public comment period, that language was deleted in light of objections that it was too broad.149 In its place, the Advisory Committee added what it considered to be a lesser duty – “to participate in good faith” when another party proposes the development of a discovery plan.150

Another possible wellspring for a duty to cooperate in discovery comes from the signing requirement under Rule 26(g). Under Rule 26(g), a lawyer who signs a discovery request, response, or objection certifies to the best of his or her knowledge, information, and belief formed after a reasonable inquiry that the request, response, or objection is (1) consistent with the Federal Rules and nonfrivolous; (2) not interposed for an improper purpose; and (3) not unreasonable or unduly burdensome in light of the needs of the case and the stakes involved.151 The obvious effect of Rule 26(g) is to incorporate Rule 11-type standards into the discovery process as appropriate.152 Less obviously, Rule 26(g) takes the proportionality concept from Rule 26(b)(2) and converts it into a direct duty on the lawyers. In the aggregate, “Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.”153

Rule 26(g) certainly supplies sanctioning authority in the event a party does something prohibited by the discovery rules. But does it also require cooperation? According to Judge Grimm, it does for this reason:

> It cannot seriously be disputed that compliance with the ‘spirit and purposes’ of these discovery rules requires cooperation by counsel to

---


151. *Fed. R. Civ. P. 26(g)(1).*


identify and fulfill legitimate discovery needs, yet avoid seeking
discovery the cost and burden of which is disproportionately large to
what is at stake in the litigation. Counsel cannot ‘behave responsively
[sic]’ during discovery unless they do both, which requires cooperation
rather than contrariety, communication rather than confrontation.\textsuperscript{154}

If one parses that statement, however, it becomes clear that – here too –
whether Rule 26(g) requires cooperation depends entirely on what one means by
that term. At various places in the opinion, Judge Grimm directs his focus at the
lawyer’s duty to hew to the express requirements of the discovery rules. In one
passage, for example, Judge Grimm reminds that:

\begin{quote}
Rule 26(g) charges those responsible for the success or failure of
pretrial discovery – the trial judge and the lawyers for the adverse
parties – with approaching the process properly: discovery must be
initiated and responded to responsibly, in accordance with the letter and
spirit of the discovery rules, to achieve a proper purpose (i.e., not to
harass, unnecessarily delay, or impose needless expense), and be
proportional to what is at issue in the litigation, and if it is not, the
judge is expected to impose appropriate sanctions.”\textsuperscript{155}
\end{quote}

Later, when speaking of the lawyer’s “duty of loyalty to the ‘procedures and
institutions’ the adversary system is intended to serve,” Judge Grimm again takes
aim at conduct that would constitute various forms of discovery abuse, including
“excessive discovery,” “boilerplate objections,” “evasive or incomplete”
responses, and “tactical” delay.\textsuperscript{156}

If cooperation is defined by adherence to the minimum requirements of the
discovery rules, then one certainly can read Rule 26(g) to require cooperation.
What is less clear is whether or how Rule 26(g) would require the parties to go
beyond that and work together either (1) to determine the boundaries of
permissible discovery in any particular case; or (2) to agree on a course of
conduct within those boundaries. In other words, does Rule 26(g) require
anything other than that the parties not stake out indefensible positions (with
proportionality factoring into defensibility)? As a comparison, consider the
expense-shifting provisions of Rule 37. While Rule 37(a) nominally requires
expense-shifting against the party who “loses” in a motion to compel, the rule
goes on to provide that the court must not shift expenses if the losing party’s
position “was substantially justified.”\textsuperscript{157} From that vantage point, it would seem

\begin{footnotes}
(the "sic" refers to the possibility that “responsively” was inadvertently substituted for the intended
term “responsibly”).
\item[155] Id. at 360.
\item[156] Id. at 362. See also In re Convergent Technologies Securities Litig., 108 F.R.D. 328, 331-32
(N.D. Cal. 1985) (expressing the duties under Rule 26(b) and (g) in terms of requiring good
faith and common sense to determine whether a discovery request or response is proper).
\end{footnotes}
that the parties can have greatly diverging views about discovery – and insist on standing on those views to the point of requiring court intervention – without either of them necessarily having acted unreasonably or otherwise having engaged in abusive discovery.

At a different point in the opinion, Judge Grimm addresses the argument – made familiar during the mandatory disclosure debates of the 1990s – that lawyers cannot cooperate and still be zealous advocates. In refuting that argument, Judge Grimm explains: “However central the adversary system is to our way of formal dispute resolution, there is nothing inherent in it that precludes cooperation between the parties and their attorneys during the litigation process to achieve orderly and cost effective discovery of the competing facts on which the system depends.” He is clearly right. But the point he makes is not that the Federal Rules require cooperation, but rather that the ethics and professional rules do not prohibit it.

2. Cooperation as an Act of Self-Interest

Taking as our starting point that parties may choose to cooperate in e-discovery, the question then becomes why a party would make that choice. In this section, I explore the idea that parties might choose a cooperative model out of self-interest.

First, the idea that parties might benefit by cooperating in discovery is neither new nor unique to e-discovery. If we step back from e-discovery for a moment, we can identify many areas where parties have been cooperating in discovery out of self-interest. When parties choose to enter into discovery stipulations under Rule 29, they presumably are doing so out of self-interest. Certainly nobody is forcing them to do so. When parties work out the logistics of discovery under Rule 26, they presumably are doing so out of self-interest. In that context, cooperation reflects the hope that courtesy will be returned with courtesy coupled with the realization that each side can inflict substantial pain on the other in the absence of courtesy and cooperation.

To the extent the 2006 e-discovery amendments can be read as a call for cooperation, it is an appeal to the parties’ self-interest. The Advisory Committee Notes identify any number of ways that the parties might be able to reduce cost and delay by discussing issues and working things out between themselves,

158. Mancia, 253 F.R.D. at 361 (emphasis added).
159. One might also point to the well-established practice of lawyers “opting out” of full expert discovery by agreeing not to seek drafts or to inquire into certain types of attorney-expert communications. See REPORT OF THE CIVIL RULES ADVISORY COMM. 4 (May 9, 2008 as supplemented June 30, 2008) (“Many outstanding lawyers have told the Committee that they routinely stipulate out of discovery of draft reports and attorney-expert communications.”), available at http://www.uscourts.gov/rules/Reports/CV_Report.pdf. Experienced lawyers have learned that nobody wins that game, and therefore forego playing it out of mutual self-interest.
including the following: the topics or time periods for discovery;\(^\text{160}\) the sources to search (including whether to search sources that are not reasonably accessible);\(^\text{161}\) the form of production (including whether to produce in a form that includes metadata);\(^\text{162}\) preservation issues;\(^\text{163}\) and the possibility of agreeing to special protocols for privilege review.\(^\text{164}\) The pervasive theme is that everyone involved – including the parties, not just the court – will be better off if the parties can reduce the number and complexity of disputes over e-discovery.

In my view, The Cooperation Proclamation is also best understood as an appeal to self-interest. It is true that The Cooperation Proclamation states that the Federal Rules require cooperation. It is also true that The Cooperation Proclamation at least suggests – if somewhat obliquely – that the lawyers have a duty to cooperate as officers of the court. But the dominant theme of The Cooperation Proclamation is that lawyers disserve the long-term, holistic interests of their clients when they mindlessly default to adversarial tactics. The essence of The Cooperation Proclamation may be found in this paragraph:

> Lawyers preparing cases for trial need to focus on the full cost of their efforts – temporal, monetary, and human. . . . Over-contentious discovery is a cost that has outstripped any advantage in the face of ESI and the data deluge. It is not in anyone’s interest to waste resources on unnecessary disputes, and the legal system is strained by “gamesmanship” or “hiding the ball,” to no practical effect.\(^\text{165}\)

Thus, The Cooperation Proclamation describes itself not as “utopian” but as “an exercise in economy and logic.”\(^\text{166}\) In other words, lawyers who really think about the costs and benefits of not cooperating will realize that they are better off cooperating.

If one reading these passages has an eerie feeling that the drafters of The Cooperation Proclamation are channeling the sentiments of the drafters of the original Federal Rules, it would not be unwarranted. There is no small

---

\(^{160}\) See \textit{Fed. R. Civ. P.} 26(f) advisory committee’s note (2006) (“[T]he parties may specify the topics for such discovery and the time period for which discovery will be sought.”).

\(^{161}\) See \textit{Fed. R. Civ. P.} 26(b)(2), 26(f) advisory committee’s note (2006) (“They may identify the various sources of such information within a party’s control that should be searched for electronically stored information.”).

\(^{162}\) \textit{Fed. R. Civ. P.} 26(f) advisory committee’s note (2006) (“Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.”).

\(^{163}\) See \textit{Fed. R. Civ. P.} 26(f) advisory committee’s note (2006) (“Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan.”).

\(^{164}\) \textit{Fed. R. Civ. P.} 26(f) (“Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver.”); \textit{see also} \textit{Fed. R. Civ. P.} 16 advisory committee’s note (2006) (noting that including privilege review protocols in the case-management order “may be helpful in avoiding delay and excessive cost in discovery”).

\(^{165}\) \textit{The Cooperation Proclamation, supra} note 97, at 1.

\(^{166}\) \textit{Id.}
resemblance. And if one were then to get a sinking feeling that the cause, however noble, is in fact utopian given the results of the last 70 years, that too would be understandable. Why would anyone expect lawyers to start viewing cooperation as being in their self-interest now when they seem to have taken the opposite view for so long?

One of the greatest challenges for the advocates of cooperation will be to persuade lawyers that they actually will benefit from cooperation. As discussed above, both clients and lawyers are free to take a cooperative approach to discovery if that is the client’s wish. Historically, however, many lawyers have viewed themselves “as both ethically and professionally bound to take advantage of whatever procedural opportunities are available to them.” In cases where a cooperative approach seems risky, or where the benefits are not obvious and certain, it seems likely that lawyers will be strongly tempted to default to what they see as the safety of “zealous advocacy.”

Other practical factors will stand in the way of cooperation. For one thing, lawyers can make a lot of money by churning discovery. If one of the premises of the campaign for cooperation is to reduce expense, then one of the expenses on the cutting table will be attorneys’ fees. Will lawyers opt for strategies that cut their fees? Second, adversarialism can be quite effective. It is hard to imagine that lawyers who have – at least in their minds – profited from adversarial discovery will suddenly and voluntarily be willing to forego those tactics.

Finally, lawyers who believe in the benefits of mutual cooperation must find adversaries who share that view and behave accordingly. Game theorists have closely studied cooperative discovery as an application of the Prisoner’s Dilemma. Those studies have attempted to explain why lawyers continue to “defect” into non-cooperative behavior even though modeling and simulation both lead to the conclusion that mutual cooperation is a superior strategy.

167. See supra notes 16-23 and accompanying text.
168. See Bell et al., supra note 21, at 12.
169. See id. at 13.
170. See Beckerman, supra note 106, at 579-85.
171. See, e.g., Ronald J. Gilson & Robert H. Mnookin, Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation, 94 COLUM. L. REV. 509 (1994); John K. Setear, The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse, 69 B.U. L. REV. 569 (1989). While the Prisoner’s Dilemma itself deals with a scenario in which prisoners independently must decide whether to stay silent or to squeal on their confederate, as a model it is generically used to describe any game in which “two parties acting individually wind up with an outcome worse for both of then than the outcome that they could obtain through cooperation.” Id. at 578.
172. One possible area of inquiry is into whether e-discovery has changed the “payoff schedule” associated with the different strategies. In their study, Gilson & Mnookin considered whether commercial litigation actually presented a Prisoner’s Dilemma – where mutual cooperation has a bigger payoff than mutual defection – or whether mutual defection was in fact the optimal strategy in that situation. Gilson & Mnookin, supra note 171, at 535. This may be one of the ways in which e-discovery “changes the game.” In other words, when The Cooperation Proclamation
Thus, a part of the campaign for cooperation likely needs to be to show how clients and lawyers can signal their interest in cooperation without setting themselves up for exploitation.

At this point, it should be apparent that the current incentive structure for adversarial discovery depends heavily on what clients and judges will tolerate. Clients that come to believe in the long-term benefits of cooperative discovery will not retain lawyers who feel ethically or professionally bound to try to take every procedural advantage available. One would expect the same fate to befall lawyers who deliberately fight over everything in order to run up their legal fees. And despite whatever questions might exist about the authority of judges to order lawyers to “cooperate,” judges certainly have the power – if not the duty – to take the profit out of abusive discovery tactics by punishing the lawyers who engage in them. To take it a step further, judges could incentivize cooperation by rewarding those who in good faith seek cooperation, even if those overtures do not bear fruit. For example, imagine a discovery dispute where the moving party seeks sanctions on the grounds that the other side failed to locate and produce ESI and that the failure was the result of an unreasonable search process. Further assume, though, that the producing party had sought cooperation – e.g., by trying to develop an agreed set of search terms or an agreed set of records to search – but had been rebuffed by the party seeking discovery. In that case, the fact that the producing party had attempted to work with opposing counsel to establish a search process would seem very relevant – though not dispositive – to determining whether the producing party had acted reasonably, and might justify giving the would-be-cooperator the benefit of the doubt if the issue of reasonableness was a close call.

In the end, then, the campaign for cooperation may be just as much a campaign to win over the hearts and minds of clients and judges as it is a campaign directed at lawyers. The irony of this observation is that, here too, it seems that little of discovery reform is ever truly new. The RAND study reached a similar set of conclusions over a decade ago when analyzing the problem of discovery abuse in the traditional discovery context:

asserts that contentiousness is a “cost that has outstripped any advantage in the face of ESI and the data deluge,” it may in fact be recognizing that what e-discovery has done is change the “payoff schedules” associated with mutual cooperation and mutual defection.

173. Cf. Gilson & Mnookin, supra note 171, at 525 (arguing that clients should be willing to pay a premium for “cooperative” lawyers in order to reap the benefits of cooperative strategies).

174. See supra notes 137-58 and accompanying text.

If attorneys engage in excessive discovery because they obtain lucrative fees from this practice, it might be more effective for clients to institute controls on fees . . . than to include new restrictions on the amount of discovery into the Rules. Alternatively, if attorneys engage in overly aggressive discovery because they believe that is what their clients expect of them, perhaps those clients need to be educated as to the relationship between what they expect of their counsel and litigation costs. If the local legal culture sometimes includes the use of overly aggressive discovery for strategic purposes of imposing costs and delay on opposing parties, which may sometimes drive inappropriate settlements or be a problem for poorer parties, perhaps the local judiciary needs to become involved more actively in managing discovery and signaling displeasure with inappropriate discovery behavior by lawyers and parties.\footnote{176}

At this point, it is far too soon to say whether the run of lawyers or clients will come to see cooperation as a preferred approach that maximizes their self-interest. If one looks at what lawyers are saying so far about how to approach the new, expanded Rule 26(f) conference, the signals are mixed. Some comments do in fact suggest a culture change. One lawyer made this suggestion: “Rule 26(f) is about cooperation and working together. By coming together early, defining what is important and what is not, and working with your adversary, not against them, means less risk, less cost and more certainty.”\footnote{177} Another lawyer wrote, “The amended rules ultimately demand a dramatic shift in the culture of discovery from all-out warfare to greater collaboration.”\footnote{178}

Other comments, though, seem to focus less on securing the joint benefits of cooperation and more on using the Rule 26(f) process as yet another means for gaining a competitive advantage. For example, one lawyer-commentator justified the time and expense needed to prepare for the post-2006 Rule 26(f) conference on the grounds that doing so will provide “ammunition to constrain demands made by the other side.”\footnote{179} Later on, that lawyer characterized the post-2006 Rule 26(f) conference and the resulting Rule 16 scheduling conference as “the battleground where the case is shaped.”\footnote{180} If lawyers come to view “cooperation” as yet another form of battle in which the goal is to extract concessions out of their adversaries while clinging to the most extreme positions

\footnote{176} Kakalik et al., supra note 51, at 633.  
\footnote{177} Rosenthal & Cowper, supra note 76, at 248 (extensively discussing how the parties can agree on scope issues for both preservation and production, format issues, and privilege review procedures); see also Moze Cowper & John Rosenthal, Not Your Mother’s Rule 26(f) Conference Anymore, 8 SED. CONF. J. 261 (Fall 2007).  
\footnote{179} Aron U. Raskas, Commentary: Rule 26(f): Meet and Confer, THE DAILY RECORD (Baltimore), Nov. 13, 2006; see also Lender, supra note 82 (acknowledging that an attorney could seek limits on preparation time, individuals/custodians, and terms to be searched).  
\footnote{180} Raskas, supra note 179.
they can muster for themselves, then the campaign for cooperation is likely to be short and disappointing.  

3. A Duty to the System: A Duty to Sacrifice?

So far, we have looked at two possible sources of a “duty” to cooperate in discovery: (1) that the Federal Rules require it;\(^ {182}\) and (2) that the Federal Rules allow it and parties should choose to cooperate in order to best serve their clients.\(^ {183}\) In this section, we look at a third possible source: the idea that a lawyer has a duty to cooperate in discovery because the lawyer is an officer of the court and therefore has a duty to the legal system.

In examining this idea, we first must be clear about what we have already established in the discussion of the other duties. First, this version of a duty to cooperate necessarily addresses behavior that is not required by the Federal Rules. Lawyers and their clients already are required to follow the Federal Rules; we don’t need a “duty to the system” for that. Second, this version of a duty to cooperate necessarily addresses behavior that the lawyer does not think is in the client’s best interest. If cooperation is in the client’s best interest, then the lawyer should cooperate to serve the client, so we don’t need a “duty to the system” for that either. What we are talking about then, is whether lawyers have a duty to cooperate in ways that the Federal Rules do not require and that do not appear to benefit the client. Phrased from the other direction: is a lawyer ever required – as an officer of the court – to sacrifice his client’s interests in order to advance the interests of the legal system?

When the claimed sources of the duty to cooperate are disaggregated and put under the microscope, it is not clear to me that anyone actually is arguing that the lawyer’s “duty to the system” gives rise to a new, separate, and freestanding duty to cooperate. \textit{The Cooperation Proclamation}, for example, states that lawyers have “twin duties of loyalty” to their clients and to the profession such that “[t]heir combined duty is to strive in the best interests of their clients to achieve the best results at a reasonable cost, with integrity and candor as officers of the court.”\(^ {184}\) This certainly supports the idea that parties should follow the rules and consider cooperating in order to better serve their clients, but I don’t think it says that lawyers should cooperate contrary to their clients’ interests or wishes. Later on, \textit{The Cooperation Proclamation} describes “over-contentious discovery” as a “cost that has outstripped any advantage” such that the transition from adversarialism to cooperation is “an exercise in economy and logic.”\(^ {185}\) The

\(^{181}\) Cf. Setear, \textit{supra} note 171, at 599 (explaining how parties might attempt to capture early gains by non-cooperative behavior if they think they can make a “quick killing” that exceeds the discounted future benefits of cooperation).

\(^{182}\) See \textit{supra} Part II.C.1.

\(^{183}\) See \textit{supra} Part II.C.2.

\(^{184}\) See \textit{THE COOPERATION PROCLAMATION, supra} note 97, at 1.

\(^{185}\) Id.
consistent theme is not that lawyers should sacrifice their clients’ interest for the sake of the system, but that lawyers and clients should recognize that cooperation is in fact in their best interest.

Similarly, in *Mancia*, Judge Grimm quoted at length from Professor Fuller about the intersection of the lawyer’s duty of client advocacy with the lawyer’s duty of loyalty to the justice system. The quoted passage characterizes lawyers as trustees to the integrity of self-government and warns that advocacy that “misleads, distorts and obfuscates” hinders the process and imposes a “ruinous” cost to the system. Following up on this notion, Judge Grimm condemns a variety of abusive discovery practices – e.g., excessive discovery, evasion, and delay tactics – and cites to Rules 26(c)(1), 26(f), 26(g) and 37(a)(1) and to various professional ethics standards. There is no doubt that the cited materials and Professor Fuller’s views support a more cooperative vision, but there is little to suggest that they support sacrificing the client’s interest for the sake of the system.

What remains of the “duty to the system” rationale for cooperation, then, is not a clear theory but an amorphous, undefined, and arguably even un-invoked suggestion. This is not to say that lawyers, as officers of the court, are free to be as contentious and uncooperative as they wish. Rather, it is to say that the duties that lawyers owe as officers of the court most likely overlap – if not flow from – their duties under the Rules and to their clients.

D. The Big Picture of Cooperation

At this point, readers might conclude that I oppose the idea of cooperative discovery. Not so. If anything, I am a staunch proponent of it. Indeed, because I fully agree with what I view to be the principal tenets of *The Cooperation Proclamation*, I have participated in the campaign by soliciting judicial endorsements in Oklahoma.

What I think is critical, however, is that the campaign for cooperation be clear about what we mean by cooperation and why parties should cooperate. Cooperation surely means more than just following the specific directives of the Federal Rules, whether they are couched in terms of affirmative duties like the duty to communicate or negative duties like the duty to refrain from abusive practices. But I do not think that cooperation means that a lawyer must relinquish a legitimate position that serves the client’s interest in order to advance the good of the system. In sum, the campaign for cooperation, properly understood, urges parties and their lawyers to do more than just be willing to talk

---

187. *Id*.
188. *Id.* at 362 nn.5-6.
and to forego abusive practices.\textsuperscript{190} It urges them to seek out new ways to work together, and it urges them to do so not in spite of their interests but in furtherance of them.\textsuperscript{191}

The message of the campaign for cooperation is not that a party-driven discovery process is bad, nor is it that it is always wrong or counterproductive for lawyers to fight over discovery. The message is that lawyers need to rethink what they’re fighting over and realize that, in many instances, it is in everyone’s best interest to cooperate rather than fight. By itself, that is a profound and critical message. If the only thing that The Cooperation Proclamation and related efforts achieve is to get lawyers to “stop and think” about whether a cooperative approach – either generally or on a task-specific basis – would serve their client’s interest better than fighting, then the campaign for cooperation in discovery will, in my view, turn out to have been a smashing success.

III. THE LAWYER’S DUTY TO OVERSEE SEARCH AND PRODUCTION

My final observation relates to the potential impact of e-discovery on the lawyer’s role in preserving, searching for, and producing documents. It is fundamental that the duty to provide information and documents runs to the parties themselves.\textsuperscript{192} Moreover, we typically leave it to the parties to undertake their own efforts to fulfill the obligations to preserve, search, and produce.\textsuperscript{193} Of course, lawyers are part of that process. Most clients will look to their lawyers for guidance on how to fulfill their discovery obligations. And lawyers are certainly subject to various sanctions when their clients fail to discharge various discovery duties.\textsuperscript{194}

The questions I want to explore here are these: do lawyers have a direct duty to participate in the process of preserving, searching for, and producing documents? If so, where does that duty come from, and what does it require? Finally, has that duty changed – either in its content or its application – as a result of e-discovery?

\textsuperscript{190} See The Cooperation Proclamation, supra note 97, at 1.
\textsuperscript{191} See id.
\textsuperscript{192} See infra text accompanying note 196.
\textsuperscript{193} See, e.g., In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (noting that absent special circumstances, parties are entitled to search their own files for responsive materials); Fed. R. Civ. P. 34 advisory committee’s note (2006) (“The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances.”).
\textsuperscript{194} See Fed. R. Civ. P. 37(b)(2)(C) (providing that when a party fails to comply with a court order regarding discovery, the court may impose expenses on “the disobedient party, the attorney advising that party, or both”).
A. Discovery Responsibilities Under the Federal Rules

1. The Party’s Duty to Respond

In the American legal system, the parties are responsible for responding to discovery. In practice, the lawyers typically dominate the process. I suspect that few lawyers, for example, let their clients draft their own interrogatory answers. I suspect that even fewer would let their clients produce documents that the lawyer had not screened first. If nothing else, lawyer involvement is needed for the lawyer to make timely objections as to relevance, burden, privilege, work-product protection and the like. But it is important to keep in mind that the discovery requests are directed to the parties, not their lawyers. It is the parties who have the duty of responding to discovery.

2. Rule 26(g) and the Lawyer’s Duty to Certify

1983 was a big year for rule changes. I have already discussed the significant amendments to Rule 16 and Rule 26(b). Ironically, those amendments may not have been seen as the biggest developments that year. Rather, that label might have gone to the changes to Rule 11. Responding to concerns about the increase in abusive litigation tactics, Rule 11 was significantly revised and expanded. Key revisions more clearly defined the scope of the lawyer’s pre-filing inquiry and made sanctions mandatory when violations occurred.

As a companion to the Rule 11 changes, Rule 26 was amended to include a new subsection (g). New Rule 26(g) imposed a signing requirement in discovery that paralleled the signing requirement under Rule 11. It required lawyers to sign all discovery requests, responses, and objections. By signing,

195. See Fed. R. Civ. P. 33(b)(1) (interrogatories must be answered by the party); Fed. R. Civ. P. 34(b)(2) (the party to whom a document request is directed must respond to it); Fed. R. Civ. P. 36(a) (the party must respond to requests for admission).
196. See supra notes 24-55 and accompanying text.
200. See Fed. R. Civ. P. 26(g) advisory committee’s note (1983) (“Rule 26(g), which parallels the amendments to Rule 11, requires an attorney or unrepresented party to sign each discovery request, response, or objection.”).
the lawyer certified the legitimacy of the request, response, or objection. Mandatory sanctions would follow an unsupported certification.  

Rule 26(g) took the “attorney responsibility” theme of Rule 11 and applied it to the perceived problems in discovery. The problem of over-discovery would be addressed by requiring lawyers to certify that their discovery requests were not made for an improper purpose (such as to harass or needlessly increase the cost of litigation) and were not unreasonable or unduly burdensome given the needs of the case. The problem of junk responses would be addressed by requiring lawyers to certify that their responses, including objections, were formed after a reasonable inquiry, consistent with the rules, and warranted by the law. Rule 26(g) blends in all of the cost-containment and control themes that motivated the 1983 amendments to Rules 16 and 26(b) and attempts to operationalize them through a Rule 11-like scheme of certifications and sanctions.  

If the principal focus of Rule 26(g) was on curbing lawyer misbehavior, it also reached party misbehavior, but it did so indirectly. That is to say, Rule 26(g) did not impose any additional signing or certification requirements directly on represented parties. But Rule 26(g) did make lawyers responsible for the process by which their clients gathered the information and documents that formed the basis for their discovery responses. Specifically, Rule 26(g) now squarely placed on the lawyer a duty to consider whether the party’s processes for gathering the information or documents that then comprised the party’s response were sufficient. The Advisory Committee Note put the matter this way:  

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client’s factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all of the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer’s certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.  

203. See Marcus, supra note 152, at 364.  
204. See Section of Litigation, Am. Bar Ass’n, Second Report of the Special Committee for the Study of Discovery Abuse, 92 F.R.D. 137, 142-43 (1980) (“[B]y imposing an obligation upon the attorney invoking a discovery procedure, the rule affirmatively emphasizes the need for a professional judgment involving more than mere relevance.”).  
When Rule 26 was amended in 1993 to include mandatory initial disclosure provisions, Rule 26(g) was amended to extend the signing duty to those as well. 209

For twenty years, judges and lawyers alike paid little attention to Rule 26(g). 210 In particular, few cases addressed the contours of the lawyer’s duty to certify his or her client’s discovery responses. But there were a few notable cases that shed light on exactly what lawyers could and could not do when entrusting their clients to gather the requested information and documents.

The leading early case on the lawyer’s duty to certify under Rule 26(g) is *National Association of Radiation Survivors v. Turnage.* 211 In *Turnage*, the plaintiffs had requested a wide range of documents from the Veterans Administration. 212 The V.A.’s process for responding was to send copies of the document requests to the heads of particular departments and leave it to the department heads to interpret the request and prepare a response. 213 “The lawyer in charge of this process gave no instructions to the department heads and simply accepted whatever response came back without any effort to verify the sufficiency of the response.” 214 In the face of evidence that large amounts of responsive materials were either missed or destroyed in the interim, the court concluded that the lawyer had violated Rule 26(g) by failing to conduct a sufficient inquiry before certifying the V.A.’s discovery responses. 215

Another leading case, decided more recently, is *Metropolitan Opera Association, Inc. v. Local 100.* 216 That case involved a lawsuit brought by the Metropolitan Opera (“the Met”) against a union for unlawfully involving the Met in an election dispute the union had with the Met’s food service provider. 217 The Met served document requests seeking a wide range of materials concerning the union’s activities, particularly insofar as they involved communications about the Met or directed at the Met’s patrons or donors. 218 The union’s lawyer forwarded these discovery requests to union officials, who were not lawyers, without any instructions and without any meaningful follow up. 219 When the union produced very few documents in response, the Met’s lawyers repeatedly asked about the completeness of the productions and even identified documents

---

209. See Fed. R. Civ. P. 26(g) & advisory committee’s note (1993) (“Paragraph (1) is added to require signatures on disclosures.”).
210. Cf. Wright et al., supra note 141, at § 2052 (noting that while Rule 11 has been often invoked “Rule 26(g) has not been much used”).
212. Id. at 545-46.
213. Id. at 552.
214. Id.
215. Id. at 555-56 (also finding the client liable for discovery sanctions).
217. Id. at 184.
218. Id. at 184-85.
219. Id. at 222.
that they knew existed but for which there had been no production. In reply, rather than take any steps to determine whether the union had in fact performed a proper search, the union’s lawyer ridiculed the inquiries and repeated his assurances that the productions were complete.

The court found that the union’s lawyer had violated Rule 26(g) by certifying the union’s responses “without any real reflection or concern for [his] obligations under the rules governing discovery and, in the absence of an adequate search for responsive documents, without a reasonable basis.” The union’s lawyer attempted to avoid sanctions by arguing that he was entitled to rely on his client to perform the search and that Rule 26(g) did not require him to “personally supervise every step of the discovery process.” The court made short shrift of that argument:

While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects, the rule expressly requires counsel’s responses to be made upon reasonable inquiry under the circumstances. Here, there is no doubt whatsoever that counsel failed to comply with that standard.

Roughly stated, the case law yields three main principles. First, while the lawyer can leave the execution of the search and collection process to the client, the lawyer must supply some guidance to the client about what to search for and how far that duty extends. Second, the certifying lawyer ultimately must make a reasonable effort – with reasonableness depending on the circumstances of the case – to ensure that the client has provided all of the responsive documents. And third, the lawyer may not certify a response in reliance on her client’s search and collection efforts in situations where the lawyer knows or has good reason to suspect that the client’s response was insufficient.

220. Id. at 223.
221. Id. at 222-23.
223. Id. at 222.
224. Id.
225. See id. at 222; Tarlton v. Cumberland County Corr. Facility, 192 F.R.D. 165, 170 (D.N.J. 2000) (“Counsel had a duty to explain to their client what types of information would be relevant and responsive to discovery requests and ask how and where relevant documents may be maintained.”).
B. The Impact of E-Discovery

Has e-discovery altered these duties? If the question is whether any of the 2006 e-discovery amendments explicitly altered these duties, the answer is easy: no. Rule 26(g) was not amended in 2006, and none of the amendments that were made in 2006 specifically addressed the lawyer’s duty to oversee or monitor a client’s conduct in preserving, searching for, or producing responsive materials. But since the advent of e-discovery, there has been a noticeable uptick in cases addressing the lawyer’s duty to oversee his or her client’s discovery processes. This section looks at three of the most prominent of those cases.

1. Zubulake V

The first case to specifically address the lawyer’s duty to oversee the client’s preservation and production of ESI was Judge Schiendlin’s fifth opinion in the Zubulake saga. The specific issue in Zubulake V was whether to impose sanctions against UBS or UBS’s lawyers for e-mails that had been either lost or belatedly produced. These failings resulted from three defects in UBS’s preservation and search process. First, UBS failed to request and inspect the active files of at least two key employees. Second, while UBS implemented a litigation hold, many emails were nonetheless deleted from UBS’s active email files (though most of them were later recovered from backup tapes). Third, several backup tapes were lost.

Judge Schiendlin wrote that “[c]ounsel must oversee compliance with the litigation hold, monitoring the party’s efforts to retain and produce the relevant documents.” The first component of this duty is to “make certain that all sources of potentially relevant information are identified and placed ‘on hold.’” The lawyer does not meet this duty simply by issuing a litigation hold and expecting that the party will retain and produce all relevant information. Rather, “[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.” “To do this, counsel must become fully familiar with her client’s document retention policies, as well as the client’s data retention architecture.” In addition, counsel must interview all of the key employees to determine whether all possible sources of

F.R.D. 204, 210 (N.D. Ind. 1990) (ordering lawyer to “recertify” the response in light of minuscule production and client’s own statements about the ad hoc nature of their search).
229. Id. at 424.
230. Id. at 426.
231. Id.
232. Id.
233. Id.
234. Id.
235. Id.
236. Id.
237. Id.
information have been inspected. Alternatively, counsel might take a more creative approach, such as by running a system-wide search of a broad list of key words and then retaining those documents for later review.

Then, counsel has a continuing duty to ensure preservation. Counsel should periodically re-issue the litigation hold so that new employees are aware of it and to keep it fresh in the minds of all employees. In addition, counsel should periodically contact the key employees to specifically remind them that the litigation hold is still in place.

As applied, Judge Schiendlin found that, while UBS’s lawyers “came very close” to fulfilling their duties, “counsel failed to properly oversee UBS in a number of important ways, both in terms of its duty to locate relevant information and its duty to preserve and timely produce that information.” Specifically, counsel failed to communicate the litigation hold to at least one key employee, failed to ask another key employee for her files, and failed to protect relevant backup tapes.


The next major opinion addressing the lawyer’s role in overseeing client preservation and production efforts is Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc. In this case, the defendant Land O’Lakes was accused of various discovery violations, one of which was the failure to preserve and produce various documents. Like UBS in Zubulake V, Land O’Lakes did take some steps to meet those obligations: it issued a litigation hold and it instructed the relevant employees to search their paper and electronic files for responsive documents. But the process was not perfect: Land O’Lakes left it to the non-lawyer employees to make their judgments about what was “related to the litigation,” accepted whatever the employees supplied without any control checking, did not review back-up tapes, failed to preserve or inspect computer files of departed employees, and failed to contact former employees.

The plaintiff sought sanctions, relying heavily on Zubulake V. In particular, the plaintiff appears to have made a list of each of the “duties” listed

---

238. Id.
239. Zubulake V, 229 F.R.D. at 432.
240. Id. at 433-34.
241. Id.
242. Id. at 435.
243. Id. While Judge Schiendlin imposed sanctions against UBS, including issuing an adverse inference instruction, it does not appear that she imposed sanctions against UBS’s in-house or outside counsel for their failings. See id. at 439-40 (itemizing sanctions).
245. Id. at 616.
246. Id. at 624.
247. Id. at 624-25.
248. Id. at 617-18.
in *Zubulake V* and then attempted to show how Land O’Lakes had not lived up to those duties.\(^{249}\) The results were mixed.

On one hand, the court rejected the idea that *Zubulake V* established a list of actions that were mandatory in each case. In particular, the court rejected the idea that there was any one way to implement a litigation hold, instead citing *The Sedona Principles* for the proposition that the parties are in the best position to determine the specifics in light of their own systems and capabilities.\(^{250}\) Nonetheless, the court did find fault with counsel’s behavior. And here, the court specifically analyzed counsel’s duties in reference to Rule 26(g).\(^{251}\) While recognizing that parties are responsible for responding to discovery requests, the court added that “counsel cannot turn a blind eye to a procedure that he or she should realize will adversely impact that search.”\(^{252}\) It was not enough, according to the court, to announce a litigation hold and then delegate the collection of documents to employees without any effort to verify the completeness of the production.\(^{253}\) Had counsel followed up on the preservation and search process, for example, he would have realized that Land O’Lakes’ practice of wiping the hard drives of departing employees was destroying potentially relevant evidence for which there was no other source.\(^{254}\) Moreover, because counsel was not involved in the preservation or search processes, there was no way that he could claim, as he had, that Land O’Lakes had “made every effort to produce all documentation and provide all relevant information.”\(^{255}\)

3. **Qualcomm Inc. v. Broadcom Corp.**

The final case is one that has received almost as much attention in lawyer circles as the *Zubulake* cases – *Qualcomm Inc. v. Broadcom Corporation*.\(^{256}\) The final chapters of this saga have not yet been written. The ruling that grabbed national headlines (at least in the legal media\(^{257}\)) has been partly vacated; in particular for our purposes, the issues associated with outside counsel’s discovery oversight duties are back before the magistrate judge for further

\(^{249}\) Id. at 625.

\(^{250}\) *Cache La Poudre Feeds LLC*, 244 F.R.D. at 628.

\(^{251}\) Id.

\(^{252}\) Id. at 629.

\(^{253}\) Id. at 630.

\(^{254}\) Id.

\(^{255}\) Id. at 629.


proceedings. What was said in that initial ruling, however, is well worth considering here.

Accepting as true the facts as stated in Magistrate Judge Major’s opinion, the case is relatively simple for our purposes. Qualcomm had sued Broadcom for patent infringement. The critical issue in the case was whether Qualcomm had participated in a public process that created a video coding standard. If it had, then it could not prevail. In response to discovery requests directed towards that issue, Qualcomm through its interrogatory responses denied being involved in the standard-setting process during the relevant time period and, while it agreed to produce any such documents, then asserted that there were none to produce. Qualcomm’s lawyer signed the responses. Later on, it was revealed that Qualcomm had in fact participated in the standard-setting process and possessed over 46,000 documents responsive to that issue.

Needless to say, Qualcomm was hit with heavy sanctions. In addition, Magistrate Judge Major imposed sanctions on Qualcomm’s lawyers. While Judge Major did not rely on Rule 26(g) as a basis for sanctioning all of the lawyers who engaged in culpable conduct, she made it a focal point of her analysis, quoting at length from the discussion of the certification requirement in the 1983 Advisory Committee Note. Focusing on the theme of good faith compliance and the lawyer’s oversight responsibility, Judge Major added this observation:

The Committee’s concerns are heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client’s custody and control. For the current “good faith” discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.

Judge Major concluded that, while there was no direct evidence that the lawyers knew of all of these documents, they ignored obvious warning signs and

260. Id. at *2.
261. Id.
262. Id. at *6.
263. Id. at *17-19. Qualcomm did not appeal the sanctions issued against it. Qualcomm, Inc., 2008 WL 638108, at *1.
265. The court relied heavily on Rule 26(g), but ultimately predicated the sanctions on a wider range of sanctioning authority due to the fact that only one of the attorneys had actually signed the discovery responses in question. Id. at *13 n.9.
266. Id. at *7.
267. Id. at *9.
accepted their client’s “incredible assertions regarding the adequacy of the document search and witness investigation.” More specifically, Judge Major found as follows:

[O]ne or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage Qualcomm employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit.

In other words, from a Rule 26(g) perspective, this was a case where it was patently unreasonable to accept the client’s assurances that it had carefully and conscientiously searched its records and found nothing.

C. A View Forward

What lessons can be drawn from these cases? Here too, my remarks are offered more in the spirit of observation than conclusion or prescription.

None of the outcomes in the cases discussed above gives me great cause for concern. If Qualcomm’s lawyers did what Judge Major thought they did, then they quite blatantly violated Rule 26(g) and they deserved to be sanctioned. Just as lawyers may not cavalierly accept and repeat everything their clients say about the facts in the face of serious cause for doubt, neither may they blithely accept and certify a client’s assertions about discovery in the face of similar doubt. The failings of UBS’s lawyers and Land O’Lakes’ lawyers were far less severe, to be sure. But there were defects in what they did, and in any event it does not appear that any of those lawyers (as opposed to the clients) were actually sanctioned.

What does make me nervous, though, is some of the language in those cases, particularly Zubulake V. Is it really true that, in order to certify a client’s discovery response under Rule 26(g), the lawyer “must become fully familiar with her client’s document retention policies [and] data retention architecture”? Is the lawyer really under an obligation to personally speak with the client’s information technology personnel and the “key players” in the

268. Id. at *12.
269. Id. at *13.
litigation? Rule 26(g) requires the lawyer to make a “reasonable inquiry” before certifying a client’s response, and the Advisory Committee Note elaborates on that concept by saying that “the attorney may rely on assertions by the client . . . as long as that reliance is appropriate under the circumstances.” Are we prepared to say that there is something inherently different about e-discovery that makes it per se unreasonable to ever rely on a client’s assertions that it fully understands its own information architecture, that it is looking in all of the right places, and that it has contacted and provided meaningful guidance to all of the key players?

There are also obvious questions of degree. As a matter of good practice, I fully subscribe to the idea that the lawyers who certify discovery responses generally should not just turn to their clients and say, “You did get all this, right?” But the question then becomes how much more inquiry is needed for the inquiry to be reasonable under the circumstances? There is very good reason to tie the inquiry test to the particular circumstances of the case. For some clients, a little bit of guidance coupled with a little bit of follow up might be enough. For others, there may be good reason for the lawyer to take a very hands-on approach.

The reasonableness of outside counsel’s conduct also should take into account other people who might be part of the discovery team. The level of personal involvement required by outside counsel might well depend on whether the client had an in-house legal department, the level of support, involvement, and expertise that the in-house lawyers can provide, and past experience working with that in-house department in discovery. And what about in cases where a vendor has been hired to assist with e-discovery? Would it be enough to rely on the vendor’s assurances? Would we require that the signing lawyer personally instruct and oversee the vendor’s actions? Here too, it would seem that the circumstances would matter very much.

Going forward, courts will need to be sensitive to the implications of their Rule 26(g) rulings. On the one hand, there is an important message to be sent – lawyers are ultimately responsible for ensuring that their clients implement sound preservation, search, and production processes. On the other hand, there is a real danger of interjecting the highest-cost providers – the lawyers – into aspects of the process where they might not always be needed. Materials like the recent report issued by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System serve as important

reminders that judges and rulemakers alike must be sure to include cost considerations in the balance when defining discovery obligations.275

The battlefield where this balance will play out is going to be sanctions motions where judges are asked to find that lawyers acted unreasonably in overseeing their clients’ preservation and production processes. Arguments will be made that the certifying lawyer should have done more to ensure that the client preserved everything that needed to be preserved, searched in all the right ways in all the right places, and produced all of the responsive materials. As with any question that asks judges to determine reasonableness after the fact, judges will need to be careful not to be too critical in hindsight.276 Ultimately, lawyers will do what judges say they must do. The message that judges send will determine whether lawyers come to view themselves as partners in the process, monitors, or babysitters.

IV. CONCLUSION

As we all live through the e-discovery evolution (not revolution), it is important to pay attention not just to what e-discovery demands in a technical sense, but also to how it is influencing the practice of law. From the perspective of the lawyer’s role in discovery, it would appear that e-discovery has already had two significant effects and might have yet a third.

There can be little doubt that e-discovery has continued the process of front-loading discovery preparation and planning. In one sense, e-discovery completes a process begun in 1993 with the advent of the required initial disclosures. Lawyers must now make heavy investments in their cases at a very early stage of the litigation.

There can also be little doubt that e-discovery has rekindled a desire for cooperation. If the 2006 e-discovery amendments have a theme, it is that neither rules nor judges can solve the qualitative and quantitative problems posed by a world where a seemingly endless amount of information is stored in ever more creative and complicated ways. To prevent the system from collapsing of its own weight, lawyers must fight less and cooperate more. Private reform movements like the campaign to promote The Cooperation Proclamation will test whether the lofty ideals they represent are in fact beneficial strategies or empty platitudes.

275. See Final Report, supra note 81. By making this observation, I do not mean either to endorse the full contents of the Final Report or to say that cost considerations are dispositive. I mean only to point out that cost considerations do matter – a point I believe to be noncontroversial and enshrined in the Rule 26(b)(2) proportionality provision – and to make explicit the linkage between cost and the extent to which lawyers become personally involved in the preservation, search, and production processes.

Finally, e-discovery has prompted a new look – through the lens of the certification requirement under Rule 26(g) – at the lawyer’s role in overseeing the client’s preservation and production processes. At this point, it is far too soon to say exactly what effect e-discovery will have on the lawyer’s role. There is at least the potential, however, for Rule 26(g) to evolve in a way that makes the lawyer – rather than the client – the focal point of the preservation and search process.
COST-SHIFTING IN ESI DISCOVERY DISPUTES: A FIVE FACTOR TEST TO PROMOTE CONSISTENCY AND SET PARTY EXPECTATIONS

Robert E. Altman* & Benjamin Lewis**

I. INTRODUCTION

Historically, before the dawn of the electronic age, parties were expected to bear the costs of production associated with a discovery request. Because non-electronic data is relatively easy and inexpensive to duplicate, the traditional rule caused relatively little controversy during litigation. However, electronic discovery is extremely costly because it frequently requires restoration and even re-creation of electronic databases from back-up tapes, archives, and computer hard drives. The high cost of producing this electronically stored information (“ESI”), causes significant controversy over what parties are required to produce and who is expected to pay for the production.

Disputes over ESI production may often “make or break” a plaintiff’s case. This is true because it is not uncommon for ESI production costs to exceed the amount in controversy. To illustrate the staggering volume of ESI often requested, a CD-ROM’s storage capacity is 650 megabytes, the equivalent of 325,000 typewritten pages; computer networks, on the other hand, create backup data measured in terabytes. A terabyte represents 1,000,000 megabytes, which is the equivalent of 500 billion typewritten pages. Undoubtedly, document requests which call for the wholesale production of millions, if not billions of typewritten pages, stored on hard-drives, backup disks, computers and/or servers, represent potential “undue burden and expense” for all parties involved. Therefore, courts are increasingly asked to set “conditions for discovery.” Understandably, producing parties often request that courts shift the cost of production to requesting parties under an argument that a production request represents “undue burden or expense.”

Presently, courts differ on what test, or standard, best determines “undue burden or expense,” Federal Rule of Civil Procedure 26(b)(2)(B)’s pre-requisite

* Robert E. Altman, III is a 2010 J.D. Candidate at Salmon P. Chase College of Law, Northern Kentucky University. Mr. Altman earned his B.S. in Business, cum laude, from Miami University.

** Benjamin Lewis is a 2009 J.D. Candidate at Salmon P. Chase College of Law, Northern Kentucky University. Mr. Lewis earned his B.S. in Finance, cum laude, from the University of Louisville.

3. Id.
to any cost-shifting order. Because of a lack of controlling authority on the issue, several unpredictable and subjective tests have evolved. While Rule 26 was amended in 2006 to provide more guidance on the issue, it did not clearly establish a new, comprehensive test for resolving cost-shifting disputes. This article reviews the competing cost-shifting factors in order to separate the “Necessary Factors” from the “Unnecessary Factors.” Ultimately, Part II of this article examines the costs associated with ESI production, the impetus for cost-shifting requests, prerequisites to cost-shifting, and the competing standards for evaluating a cost-shifting request.

Part III of the article compiles both overlapping and exclusive factors of the several cost-shifting standards, establishes which factors are necessary and unnecessary, and sets forth the proper manner for courts and parties to evaluate the Necessary Factors to any cost-shifting determination. Furthermore, Part III sets forth additional issues courts should consider when making cost-shifting determinations, such as the necessity of sampling and which costs are eligible for cost-shifting. Part IV concludes by asserting that courts should adopt the five Necessary Factors as the exclusive test for making cost-shifting determinations, in order to promote consistency and properly set party expectations.

II. BACKGROUND

A. High Costs And Increasing Frequency Of ESI Requests As An Impetus For Cost-Shifting.

While discovery of documents is not new to litigation, many courts struggle to manage the controversies surrounding ESI. ESI is considerably more complex and more expensive than traditional paper discovery and has only recently entered the realm of discovery and document requests. Concededly, some costs are reduced through enhanced search capabilities inherent in some ESI. However, because technology constantly changes, issues of “legacy data” and outdated software keep ESI production, and particularly its high cost, at the forefront of litigation controversies.


5. For convenience, factors considered to be necessary shall hereinafter be referred to as the “Necessary Factors.” See discussion infra Section III(c): The Necessary Factors And Their Application.


1. ESI Production Costs Are Often Exponentially Higher Than Paper Production Costs.

Although discovery is always potentially costly, electronic discovery is significantly more expensive than paper discovery. Electronic discovery is “qualitatively and quantitatively” different from traditional paper discovery. Unlike paper documents which are relatively cheap to preserve, merely taking up physical space, preservation of electronic information is generally expensive (in a usable format, i.e. not in storage on a back-up tape). Also, unlike paper documents which can be shredded and permanently deleted, digital data is nearly impossible to delete. ESI is frequently stored in back-up systems when deleted and can therefore be retrieved and recreated by digital forensic experts. Thus, one primary reason for the high costs of electronic discovery is simply the large volume of ESI.

As a result of extremely large volumes of ESI, production of such is both time consuming and expensive. A Federal Court in Medtronic v. Michelson recently discussed particular procedures required to produce ESI, and noted that if backup tapes are involved, additional procedures are required as well.
Medtronic court determined that, “the cost of restoring, de-duplicating, and designing and conducting a search of all 996 backup tapes reasonably could be in the range of several million [dollars],” which “does not include the costs of privilege review and actual production.”\(^\text{15}\) The absence of privilege review costs from this estimate is significant because of the high costs associated with reviews for privileged or confidential ESI. Medtronic estimated its privilege review costs between $16.5 million and $70 million.\(^\text{16}\) Another example illustrating the potential expense of electronic discovery is seen in Rowe Entertainment, where an expansive document request was made which targeted emails on backup tapes of four separate defendants.\(^\text{17}\) William Morris, one of the named defendants, obtained an estimate that it would cost almost $9,750,000.00 if the emails from all of the back-up tapes were produced.\(^\text{18}\) The plaintiff’s elected to request a sampling of eight back-up sessions, which reduced this estimate to about $400,000.00, of which $7,864.00 was for cataloguing, $8,960.00 was for restoration, and $379,120.00 was for processing.\(^\text{19}\) Thus, the time consuming and expensive nature of ESI production presents courts with frequent cost-shifting requests.

2. Component Costs That Comprise ESI Production Burdens

Although courts generally agree that electronic discovery can be unduly burdensome and expensive, many courts disagree on which specific costs are subject to cost-shifting in ESI discovery disputes. Privilege review, in-house information technology (“IT”) costs, format conversion, backup tape retrieval and restoration, expert assistance, printing costs, and actual production are all examples of costs associated with the production of ESI.\(^\text{20}\) Due to the large expense associated with many of these items, cost-shifting is often rather contentious.

One of the most controversial expenses is the cost associated with a privilege or confidential review of the discoverable materials requested. Because of the

\[\text{produced in electronic or printed form, and (5) actual production. If, however, the information is contained on backup tapes, a preliminary step must be performed. All data on each backup tape must be restored from the backup tape format to a format that a standard computer can read. In the case of a large volume of data on multiple tapes like this case presents, the restored files from each tape must be compared to the restored files from every other tape and duplicate files eliminated. The restored files that are not duplicates must be converted to a common format so that a search program may seek information within them. The de-duplication and conversion are required so that large volumes of data in different formats may be searched in a reasonable time.}^{\text{15}} \]

\[\text{15. Id. at 558.}\]
\[\text{16. Id. at 557-58.}\]
\[\text{17. Rowe, 205 F.R.D. at 424-25.}\]
\[\text{18. Id. at 425.}\]
\[\text{19. Id.}\]
high cost associated with a privilege review, parties often seek an order to shift the expense. As stated previously, this expense can cost a company millions of dollars. Thus, courts are often forced to make a determination on whether or not the expense can be shifted. In Rowe, the court held, in consideration of which costs can be shifted, that the producing party “shall continue to be responsible for the expense of any review for privileged or confidential material.” While this is not an established rule, other courts held that privilege review expenses are borne by the producing party.

Traditionally, courts give significant consideration to costs associated with the restoration, retrieval, format conversion, and searching of ESI. Although searching ESI for requested information is typically associated with production, some courts consider the “searching” function inherent to ESI itself, and will shift search costs to the requesting party. Other courts specifically separate costs inherent to ESI from standard production costs and only shift costs associated with the restoration, retrieval, format conversion, and privilege review of ESI. Making the issue of cost-shifting significantly more complex, courts typically consider whether the information is “accessible” or “non-accessible” when making a cost-shifting determination. Thus, the issue of “what” can be shifted is a difficult determination on its own, and it is made substantially more difficult by considering “when” shifting such costs is appropriate.

B. When Is A Cost-Shifting Analysis Appropriate?

Courts disagree on when cost-shifting is appropriate. The Supreme Court intimated the general rule in Oppenheimer Fund, Inc. v. Sanders that “the presumption is that the responding party must bear the expense of complying with discovery requests.” Yet, large ESI production requests often result in the invocation of Federal Rule of Civil Procedure 26 in motions for protection from “undue burden or expense” in discovery disputes. Federal Rule of Civil Procedure 26(b)(2)(B) generally permits a producing party to withhold the

22. Rowe, 205 F.R.D. at 433.
24. See generally id. at 550; Thompson, 219 F.R.D. at 93; Zubulake I, 217 F.R.D. at 309; Rowe, 205 F.R.D. at 421.
25. See Rowe, 205 F.R.D. at 433.
27. See discussion infra Section II(b): When is a Cost-Shifting Analysis Appropriate.
30. See generally Zubulake I, 217 F.R.D. at 317-20 (discussing utilization of cost-shifting as a lever to balance ESI disputes over relatively “inaccessible” data).
production of any information which is “not reasonably accessible because of undue burden or cost[,]” absent a showing of good-cause by the requesting party. The 2006 Advisory Committee Notes to Rule 26 indicate that any “good-cause inquiry . . . [is] coupled with the authority to set conditions for discovery.” Such conditions may include “payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.” The Advisory Committee Notes further indicate that cost-shifting is only available for undue burdens resulting from the production of data not reasonably accessible. However, considerable confusion still surrounds whether or not courts may grant cost-shifting requests predicated solely upon the undue burden of high costs associated with the retrieval and production of accessible data.

The Zubulake v. UBS Warburg LLC court followed the text of Rule 26 and determined that cost-shifting is only appropriate “when electronic discovery imposes an ‘undue burden or expense’ on the responding party.” Enumerating what constituted an “undue burden,” the Zubulake court determined that such a finding turns “primarily on whether [ESI] is kept in an accessible or inaccessible format.” ESI is “inaccessible” when it is either erased, fragmented or damaged (presumably stored anywhere), or stored solely on backup tapes (generally retained for disaster recovery). Accordingly, the Zubulake I court determined it inappropriate to consider cost-shifting in the retrieval and production of e-mails stored on reasonably accessible “optical disks.” Nevertheless, Zubulake I, like Federal Rule of Civil Procedure 26, appears to leave the door open to consideration of cost-shifting in cases where the prerequisite undue burden results solely from high production costs associated with both accessible and inaccessible data.

In contrast to Zubulake I, The Second Edition of the Sedona Principles takes the position that undue burden, the prerequisite to cost-shifting under Rule 26, does not turn only on the accessibility of ESI. Specifically, Comment A to Sedona Principle 13 expressly states that “[t]he factors for cost-shifting for the production of burdensome electronically stored information (whether reasonably available or accessible or not) should include . . . [a list of factors similar to Zubulake I factors].” The preceding Sedona Principle comment makes clear

33. Id.
34. Zubulake I, 217 F.R.D. at 318 (quoting Fed. R. Civ. P. 26(c)(1)).
35. Id.
36. The terms “inaccessible” and “relatively inaccessible” from Zubulake I appear to correspond directly to the phrase “not reasonably accessible” as used in Fed. R. Civ. P. 26(b)(2)(B).
38. Id. at 324.
that cost-shifting should be considered prior to any finding that the ESI sought is “not reasonably accessible.”

Federal courts often entertain cost-shifting motions for the production of accessible ESI when production costs alone present an “undue burden.” Specifically, in *PSEG Power N.Y., Inc. v. Alberici Constructors, Inc.*, the court fully entertained a cost-shifting motion asserting undue burden predicated solely on the high cost of producing 3,000 accessible e-mails. In another post-*Zubulake* case, the *Multitechnology Services, L.P. v. Verizon Southwest* court rejected *Zubulake I* and determined that Federal Rule of Civil Procedure 26 posed no bar to an order requiring parties to share costs of only $60,000.00 in the production of accessible data. Nevertheless, it is yet to be seen whether courts will tow a strict line following *Zubulake I* and condition all cost-shifting motions upon an initial finding that the ESI sought be “not reasonably accessible.” Yet, this author submits that such a condition is wholly inappropriate in light of Federal Rule of Civil Procedure 26’s express allowance of discovery conditions for “undue burden or cost.” Put another way, Rule 26 contains no “accessibility” threshold before a cost-shifting determination.

C. Competing Cost-Shifting Standards Of Review

1. *McPeek v. Ashcroft*: Marginal Utility Analysis

The first case to face the issue of cost-shifting for ESI production, which actually established a test for determining if and when to shift those costs, was *McPeek v. Ashcroft*. In *McPeek*, the plaintiff requested his employer’s back-up system be searched for evidence of retaliation, which the defendant asserted would be overly expensive. The court considered two bright-line rules which existed at the time, and the flaws associated with each, before determining that a new test was required. After considering the two extremes, that the producing

---

40. Id. at 205.
46. Id. at 32.
47. Id. at 33-34 (the first bright-line rule considered was the line of cases which held that producing backup tapes is a foreseeable cost of doing business in the electronic age, citing *In re Brand Name Prescription Drugs Antitrust Litigation*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *3 (N.D. Ill. 1995). However, the court viewed this rule as inherently flawed because it encourages businesses, and, in this instance, government agencies, to not maintain backup records,
or requesting party should bear all of the expense, the court determined that a “fairest approach” would be a “marginal utility” analysis.\(^{48}\) Under this analysis, “the more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [producing party] search at its own expense,” and “the less likely it is, the more unjust it would be to make the [producing party] search at its own expense;” as the court explained “the difference is ‘at the margin.’”\(^{49}\)

However, the McPeek court cautioned that while this test would result in a fairer result, “ordering the producing party to restore backup tapes upon a showing of likelihood that they will contain relevant information in every case gives the plaintiff a gigantic club with which to beat his opponent into settlement.”\(^{50}\) In an effort to eliminate this concern without establishing a more detailed test, and in light of the lack of precedent, the court held that a “test run” or sampling procedure should be utilized.\(^{51}\) Thus, the court established that a determination of cost-shifting required a flexible test balancing the burden and benefit associated with such a document production, which is limited by a test run or sampling procedure.

2. **Rowe Entertainment** Eight Factor Test

Although McPeek v. Ashcroft established the principle that cost-shifting might be appropriate in certain circumstances, Rowe Entertainment, Inc. v. William Morris Agency, Inc. is the first definitive case to establish an elaborate cost-shifting test and engage in a burden shifting analysis.\(^{52}\) In Rowe, the plaintiffs, concert promoters, contended that the four defendants (William Morris Agency, Monterey Peninsula Artists, Creative Artist Agency, and SFX and QBQ) used discriminatory and anti-competitive practices to freeze them out of the market of promoting events with white bands. Plaintiffs made thirty-five sweeping document requests, which included numerous backup tapes from the several defendants.\(^{53}\) The defendants each submitted a motion to defeat the

---

\(^{48}\) *Id.* at 34.

\(^{49}\) *Id.*

\(^{50}\) *Id.*

\(^{51}\) *McPeek*, 202 F.R.D. at 34.


\(^{53}\) *Id.* at 423-24 (three examples of these document requests were provided: (1) “all documents concerning any communication between any defendants relating to the selection of concert promoters and bids to promote concerts; (2) all documents concerning the selection of concert promoters, and the solicitation, and bidding process relating to concert promotions; and (3)
document requests or to make the plaintiffs bear the production expense because the costs associated with such a broad request presented potential “undue burden.” In addition to requiring the plaintiffs to narrow their requests to an initial test run or sampling, the court determined that “the expense of locating and extracting responsive e-mails is substantial,” and justified considering which, if any, expenses should be shifted to the plaintiffs.

Because bright-line rules were inadequate for performing an equitable cost-shifting analysis, the court composed a new eight-factor test which it used to balance multiple considerations and make a cost-shifting determination. The test consisted of the following factors:

(1) The specificity of the discovery requests;
(2) The likelihood of discovering critical information;
(3) The availability of such information from other sources;
(4) The purposes for which the responding party maintains the requested data;
(5) The relative benefit to the parties of obtaining the information;
(6) The total cost associated with production;
(7) The relative ability of each party to control costs and its incentive to do so; and
(8) The resources available to each party.

After establishing the factors for consideration, and that each factor was to be given equal weight, the court explained the relevant considerations and rules for each of the eight factors. First, the “less specific the requesting party’s discovery demands, the more appropriate it is to shift the costs of production.” The rationale being that if a party intentionally requests “expansive rather than targeted discovery,” unnecessarily increasing the cost of litigation, then that party should bear the expense of such production. The court determined that while the test run rule from McPeek attempted to limit the cost of production, by including specificity of requests as a factor in cost-shifting, it was more likely to cause parties to actually limit the scope of discovery out of fear of having the

---

54. Id. at 424-26 (although calculation of costs are often disputed by parties, the parties in this particular instance alleged that the cost, without narrowing or sampling, would be as follows: WMA $9,750,000 not including privilege review, MPA between $43,110 and $84,060 not including privilege review estimated at $247,000, CAA $395,000 not including privilege review estimated at $120,000, and SFX/QBQ $403,000).
55. Id. at 428-29.
56. Id. at 429.
57. Id.
58. Rowe, 205 F.R.D. at 429 (citing In re General Instrument Corp. Securities Litigation, No. 96 C 1129, 1999 WL 1072607, at *6 (N.D.Ill. Nov. 18, 1999)).
59. Id. at 430.
cost shifted to them. 60 Second, the court implemented the marginal utility analysis used by the McPeek court. Specifically, the court stated as follows:

[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the responding party search at its own expense. The less likely it is, the more unjust it would be to make that party search at its own expense. 61

Third, as supported by case precedent, if a party has already produced the information in one format (i.e. hard copy), it is not required to bear the expense of producing the same information in another format (i.e. electronically). 62

Fourth, a determination as to whether sought-after ESI is retained for use in the ordinary course of business or for storage purposes must be made. 63 The general rule is that “information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms.”64 Thus, if a party uses the information in the ordinary course of business or for business purposes, it is required to produce such information in a discovery request. 65 However, if a party retains the information merely because it neglected to discard it or it serves “no current business purpose,” then a party should not be required to bear the expense of producing it. 66 The court explained that a party would not be required to “sort through its trash” to recreate paper documents and, as such, should not be required to pay the cost of “retrieving deleted e-mails” off of backup tapes. 67 Fifth, courts must make a determination as to whether or not producing the information benefits the producing party. 68 If the exclusive benefit of production lies with the requesting party, then cost shifting is generally appropriate; however, if the producing party benefits from the production, then cost shifting is less appropriate. 69 Sixth, the court explained that the total cost of the production is also significant in that if it is “not substantial,” then the producing party will typically bear the expense. 70 Seventh, courts must make a determination as to which party is best able to control the costs of discovery. 71 Accordingly, whichever party has the most control should bear the expense associated with producing the requested

60. Id. at 432.
61. Id. at 430.
63. Id. at 430-31.
65. Id. at 431.
66. Id.
67. Id.
68. Id.
69. See id.
70. Rowe, 205 F.R.D. at 431.
71. Id. at 431-32.
Finally, courts must consider which party is most capable of bearing the costs of discovery. If one party has significantly more resources and can more easily bear the expense associated with the document production, then, according to the Rowe court, that party should bear the expense.

Thus, the Rowe court established the first flexible balancing test for determining whether or not cost-shifting is appropriate. It is important to understand that the factors are not an all-or-nothing test. In fact, in Rowe, the court found factors 1, 2, 4, 5, 6, and 7 all supported requiring the requesting party to bear the expense, while factor 3 supported requiring the producing party to bear the expense, and factor 8 to be neutral on the matter. Accordingly, the court determined that the factors weighed in favor of shifting the expense to the plaintiffs (requesting party). In short, the test was intended to produce equitable results from the balancing of multiple factors and considerations.

3. Zubulake Seven Factor Test

The decision in Zubulake v. UBS Warburg LLC is often regarded as “the seminal reference on the issue [of cost-shifting].” In Zubulake, District Court Judge Scheindlin of the Southern District of New York considered plaintiff Laura Zubulake’s motion to compel production of e-mails stored on a combination of ninety-four backup tapes and optical discs. Defendant UBS contended that production of the e-mails was an “undue burden” and need not be produced under the proportionality standard of Federal Rule of Civil Procedure 26(b)(2). UBS cited the cost of e-mail production at $175,000.00.

The Zubulake court determined that “whether production of [electronic] documents is unduly burdensome or expensive turns primarily on whether it is kept in an accessible or inaccessible format (a distinction that corresponds closely to the expense of production).” The court further held that it is wholly inappropriate to consider cost-shifting for the production of accessible ESI. Building upon that premise, the Zubulake court set forth a spectrum of ESI

---

72. See id.
73. Id. at 432.
74. See id.
75. Id. at 429-32.
76. Rowe, 205 F.R.D. at 433.
79. Id. at 317.
80. Id. at 312.
81. Id. at 318.
82. Id. at 320.
storage categories ranging from most accessible to least accessible. According to the Zubulake court, ESI storage spans the following five categories: (1) Active, online data; (2) Near-line data; (3) Offline storage/archives; (4) Backup tapes; and (5) Erased, fragmented or damaged data. Of the five ESI storage categories, the first three (active, online data, near-line data and offline storage/archives) are all traditionally accessible without undue burden or cost. Because a portion of the e-mails which plaintiff Zubulake sought were stored on optical discs, the court considered such ESI an accessible, offline storage/archive. Accordingly, the Zubulake court found e-mails stored on optical discs were not eligible for cost-shifting and ordered UBS to produce all requested emails stored on the optical discs.

Nevertheless, the Zubulake court then considered whether or not cost-shifting was appropriate for relatively inaccessible e-mails stored amongst ninety-four backup tapes. In its cost-shifting analysis, the Zubulake court determined that the eight factor test from Rowe Entertainment, Inc. v. Williams Morris Agency, Inc. required modification as it “generally favor[ed] cost-shifting.” The Zubulake court made at least five changes to the Rowe cost-shifting analysis. First, the Zubulake court modified the sixth Rowe factor of “total cost associated with production” by changing it to the “total cost of production, compared to the amount in controversy.” Second, the Zubulake court combined Rowe’s first and second factors into: “the extent to which the request is specifically tailored to discover relevant information.” Third, the Zubulake court removed Rowe’s fourth factor, “the purposes for which the responding party maintains the requested data,” because it was “typically unimportant.” The resulting Zubulake cost-shifting factors are as follows:

(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;

83. Id. at 318-20.
85. Id. at 319-20.
86. Id. at 320.
87. Id. at 324.
88. Id. at 320.
89. Id.
91. Id. at 321.
92. Id.
93. Id.
(6) The importance of the issues at stake in the litigation; and
7) The relative benefits to the parties of obtaining the information. 94

Fourth, the Zubulake court “weighted” the importance of the factors from greatest to least in order to place an appropriate amount of consideration upon the “most important” factors. 95 This change was further made to avoid a “mechanistic application of the [resulting] test.” 96

Finally, the Zubulake court opined that a “factual basis is required to support [any cost-shifting] analysis.” 97 Specifically, the Zubulake opinion allowed the plaintiff to “sample” a portion 98 of relatively inaccessible data on backup tapes to best estimate both the volume of relevant evidence available and its cost of retrieval. 99 The court reasoned that such a sampling was necessary so that “the entire cost-shifting analysis can be grounded in fact rather than guesswork.” 100

After plaintiff Zubulake was able to sample a portion of the inaccessible data sought, the court revisited its holding in Zubulake I a mere nine weeks later to apply its new cost-shifting analysis to facts developed during the sampling period. 101 Ultimately, the court shifted twenty-five percent of the $166,000.00 retrieval and production cost to plaintiff Zubulake. 102 The court, in Zubulake III, went on to consider which costs would be shifted. 103 The court determined that only the costs of restoration of inaccessible ESI and searching for the requested ESI should be shifted. 104 According to the Zubulake III court, “the responding party should always bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.” 105 This is true because the producing party has exclusive control of the privilege review cost and review protocol. 106

It is still unclear whether the Rowe or Zubulake multi-factor test will prevail. Furthermore, it is uncertain whether sampling of inaccessible ESI is a prerequisite to court ordered cost-shifting.

94. Id. at 322.
95. Id. at 323.
97. Id.
98. Id. at 324 (the plaintiff in Zubulake was initially permitted to select and sample five of the ninety-four requested backup tapes at defendant’s expense).
99. Id.
100. Id.
102. Id. at 289.
103. Id. at 289-90.
104. Id. at 291.
105. Id. at 290.
106. Id.
4. Wiginton Test

At dispute in Wiginton v. CB Richard Ellis, Inc. was whether or not the plaintiff-requesting party would bear restoration, search, and production costs associated with ESI on ninety-four backup tapes.107 The estimated cost of restoring, searching, and producing the ESI in question was estimated between $183,500.00 and $249,000.00.108 Ultimately, the Wiginton court, considering the seven Zubulake cost-shifting factors, modified the factors by “adding a factor that consider[ed] the importance of the requested discovery in resolving the issues at stake in the litigation.”109 The eighth factor added was “the importance of the requested discovery in resolving the issues at stake in the litigation.”110 This factor was added because it was “a factor explicitly set forth in Rule 26(b)(2)(iii).”111

Applying its new set of cost-shifting factors, the Wiginton court ordered the plaintiff-requesting party to absorb twenty-five percent of the restoration, search, and production cost.112 The Wiginton court did not weigh-in on the Zubulake I position that “inaccessibility” was a threshold finding before entertaining any cost-shifting motion.113 However, the Wiginton court did follow Zubulake III in holding that printing costs and attorney privilege review costs were never eligible for cost-shifting.114 With respect to “sampling,” the Wiginton parties, like those in Zubulake I, also conducted and benefited from a “sampling” of the inaccessible ESI before the court fully entertained the requesting party’s motion to compel and the producing party’s cost-shifting motion.115 Finally, the Wiginton court observed the Zubulake holding that “weighted” the list of factors in order of greatest importance to least importance.116 Despite the addition of an eighth factor to the Zubulake analysis, the Wiginton decision had little impact on the principles set forth in Zubulake v. UBS Warburg, LLC.


In Multitechnology Services, L.P. v. Verizon Southwest, the Northern District of Texas considered applying the Zubulake cost-shifting factors to resolve a dispute over which party would bear the costs of searching and producing

---

108. Id. at 575.
109. Id. at 572-73.
110. Id. at 576.
111. Id.
112. Id. at 577.
113. See Wiginton, 229 F.R.D. at 572.
114. Id. at 577.
115. Id. at 569.
116. Id. at 572.
accessible customer data located on Verizon servers. The costs at stake were a mere $60,000.00. Nevertheless, the court rejected Zubulake I and considered cost-shifting despite the fact that all ESI sought was accessible. The Multitechnology court rejected the Zubulake factors and determined that the costs of searching and producing the data constituted an “undue burden or cost.” Accordingly, the court determined that cost-shifting was appropriate and ordered the parties to evenly split the costs of retrieval and production.

Most notably, the Multitechnology court further held that the parties were to “classify the expense [of ESI retrieval and production] as court costs that [could] be recovered by the prevailing party upon conclusion of [the] action.” While this proposition is an interesting one, ultimately no subsequent cases have adopted the Multitechnology position whereby the losing party automatically pays for ESI retrieval, searching and/or production.

6. Federal Rule Of Civil Procedure 26’s Proportionality Rule

i. Pre-2006 Amendments

While many courts have followed the multi-factor tests set forth by Rowe, Zubulake, and Wiginton, some courts have rejected such tests; holding that the proportionality standard found in Federal Rule of Civil Procedure 26(b)(2) is “all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records.” One such case was Thompson, where the court explained that Rule 26(b)(2)’s balancing factors are all courts need to reach a fair result regarding the discovery of ESI. The court found that the proportionality standard consisted of four factors:

1. Whether the discovery sought is unreasonably cumulative or duplicative;
2. Whether the information sought is obtainable from some other more convenient, less burdensome or inexpensive source;
3. Whether the party seeking the information already has had adequate opportunity to obtain the information; and
4. Whether the burden or expense of the proposed discovery outweighs its likely benefit (this considers: the needs of the case, the amount in

---

118. Id. at *2.
119. Id. at *1.
120. Id. at *1-2.
121. Id. at *2.
122. Id.
124. Id.
controversy, the resources of the parties, the importance of the issues at stake in the litigation, and of the discovery sought, to the resolution of the issues). 125

The court noted that in order to evaluate these factors, the complaining party, facing discovery requests, is required to produce a “particularization of the facts” to support its contention that the requested discovery is unduly burdensome or expensive.126 Unfortunately in this particular case, the court never reached the point of analyzing the individual factors of the test, because the defendants failed to make a particularized showing of the evidentiary facts supporting a challenge of unfair burden or expense.127 However, this does not deter from the fact that the Federal Rules of Civil Procedure adopt the proportionality standard for resolving cost-shifting motions under Rule 26(b)(2), now Rule 26(b)(2)(C), as recognized in Thompson. 128

ii. The December 1, 2006 Federal Civil Rule Amendments

On December 1, 2006, several amendments to the Federal Rules of Civil Procedure went into effect after being approved by the U.S. Supreme Court and Congress.129 One of the primary drivers behind the 2006 rule amendments was the need for the rules to directly address the discovery of ESI.130 Among the rules amended was Rule 26(b)(2).131 According to the Advisory Committee Notes, “the amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.”132

The most notable amendment to Rule 26(b) was the addition of Rule 26(b)(2)(B).133 Rule 26(b)(2)(B) is designed to regulate discovery of information which is not readably accessible.134 The new rule establishes the procedure parties must use to discover ESI that is not “reasonably accessible,” by stating:

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue

125. Id.
126. Id.
127. Id. at 99.
130. Id.
131. See generally id. at 6-12.
133. See Rothstein et al., supra note 129, at 8-12.
134. Fed. R. Civ. P. 26(b) advisory committee note.
burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.135

Although this new rule is independent of the tests used by the several courts, it is clear that the Advisory Committee took the difficulties faced in cases like Zubulake into consideration when drafting the new amendment.

Also, after December 1, 2006, Rule 26(b)(2), also known as the “proportionality test” used in Thompson,136 became Rule 26(b)(2)(C).137 However, the most significant change regarding Rule 26(b)(2) is the discourse it received from the Advisory Committee when it was changed to 26(b)(2)(C).138 The Committee suggested that, when deciding “whether to require a responding party to search for and produce information that is not reasonably accessible,” courts should evaluate the following factors:

1. The specificity of the discovery request;
2. The quantity of information available from other and more easily accessed sources;
3. The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;
4. The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
5. Predictions as to the importance and usefulness of the further information;
6. The importance of the issues at stake in the litigation; and
7. The parties’ resources.139

It is important to recognize that these factors do not actually appear in the text of Rule 26(b).140 However, these factors closely resemble the various tests proposed in Rowe, Zubulake, and Wiginton. Noticeably tracing the several tests, the Advisory Committee apparently regards the factors of each as dependable methods for resolving cost-shifting disputes. Thus, while the establishment of a procedure for discovering inaccessible data in Rule 26(b)(2)(B) is significant, the Advisory Committee’s recognition that cost-shifting is appropriate, and recommendation of factors that courts should consider, is possibly far more important in the context of litigation.

136. See discussion supra section II(c)(vi)(1) concerning pre-2006 Amendments.
139. Fed. R. Civ. P. 26(b) advisory committee note.
7. ABA 2004 Civil Discovery Standards

The American Bar Association ("ABA") promulgated sixteen factors for court consideration in resolving cost-shifting motions premised upon the retrieval and production of ESI. Specifically, the ABA lists the following factors:

(1) The burden and expense of the discovery, considering among other factors the total cost of production in absolute terms and as compared to the amount in controversy;
(2) The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources;
(3) The complexity of the case and the importance of the issues;
(4) The need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of the privileged or protected information despite reasonable diligence on the part of the producing party;
(5) The need to protect trade secrets, and proprietary or confidential information;
(6) Whether the information or the software needed to access it is proprietary or constitutes confidential business information;
(7) The breadth of the discovery request;
(8) Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data;
(9) The extent to which production would disrupt the normal operations and processing routines of the responding party;
(10) Whether the requesting party has offered to pay some or all of the discovery expenses;
(11) The relative ability of each party to control costs and its incentive to do so;
(12) The resources of each party as compared to the total cost of production;
(13) Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information;
(14) Whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies to electronic format;
(15) Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason; and
(16) Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the
responding party was aware that litigation was probable and, if so, the responding party’s state of mind in doing so.141

Unfortunately, analysis of the ABA’s cost-shifting factors is necessarily limited because no state or federal court cites the factors as persuasive authority. While some of the ABA factors mirror those set forth in Rowe, Zubulake and/or Wiginton, others are ripe for consideration in cost-shifting motions. Therefore, this article analyzes the ABA factors, as some are particularly applicable to especially nuanced cost-shifting determinations.

8. Factor Comparison Chart

As demonstrated hereto, cost-shifting motions face a cluttered landscape of factors upon which considerable judicial disagreement abounds. Accordingly, the chart attached as “Appendix A” may provide valuable assistance in parsing the differences.

III. ANALYSIS

A. The Overlapping Factors

The existence of multiple competing standards for determining whether or not cost-shifting of e-discovery costs is appropriate, as discussed in Section II,142 places courts in the difficult situation of choosing one standard over another. However, determining which standard to use or which factors to adopt is easier after consideration of the similarities between the several standards.143 This is true even though not all of the standards, such as the ABA cost-shifting standard, are widely cited.144

To demonstrate the similarities between the several cost-shifting standards, it is important to note that many factors are shared amongst the standards. First, the “marginal utility analysis” factor under McPeek v. Ashcroft, which considers the likelihood that the discovery sought contains information relevant to a claim or defense,145 is integrated into each of the remaining standards.146 In other words, the “marginal utility analysis” is the foundation upon which the competing standards build. Second, “the availability of the information from

142. See discussion supra Section II(c): Competing Cost-Shifting Standards of Review.
143. See Factor Comparison Chart at A-1.
144. See discussion supra Section II(c)(vii); ABA 2004 Civil Discovery Standards.
146. See Factor Comparison Chart at A-1 (this factor is incorporated into the Rowe standard as factors 1 and 2, the Zubulake standard as factor 1, the Wiginton standard as factor 1, the Rule 26(b)(2)(C) proportionality standard as factor 1, the Advisory Committee’s Notes to Rule 26(b)(2) standard as factor 1, and the ABA Civil Discovery standard as factors 7 and 8).
other sources,” referring typically to more convenient or affordable sources, is also shared by each competing standard.\(^{147}\) Third, “the resources available to each party” is also considered in some manner by each of the standards.\(^{148}\) Lastly, “the [discovery’s] benefit to the parties” is a factor in each standard.\(^{149}\) Thus, there are four factors which are shared amongst the six multi-factor standards.

While it is true that the remaining factors are not uniformly considered, many of the remaining factors are considered by a majority of the standards. First, the burden and expense associated with the production is considered by each standard except the Advisory Committee Notes to Rule 26(b)(2).\(^{150}\) Similarly, “the importance of the issues at stake in the litigation” is considered by every standard except the Rowe standard.\(^{151}\) Lastly, “the relative ability of each party to control costs and its incentive to do so” is considered by each of the standards except Rule 26(b)(2)’s proportionality standard and the accompanying Advisory Committee Notes.\(^{152}\) Therefore, three of the available factors are considered by a majority of the standards.

Finally, there are two factors which are shared by at least two of the standards. First, “the purpose for which the responding party maintains the data and how it is maintained” is considered by both the Rowe and ABA Civil Discovery standards.\(^{153}\) Second, “the importance of the requested discovery in resolving the issues at stake” is considered by the Wiginton standard and Rule

\(^{147}\) See id. (this factor is incorporated into the Rowe standard as factor 3, the Zubulake standard as factor 2, the Wiginton standard as factor 2, the Rule 26(b)(2)(C) proportionality standard as factor 2, the Advisory Committee’s Notes to Rule 26(b)(2) standard as factors 2 and 4, and the ABA Civil Discovery standard as factor 2).

\(^{148}\) See id. (this factor is incorporated into the Rowe standard as factor 8, the Zubulake standard as factor 4, the Wiginton standard as factor 4, the Rule 26(b)(2)(C) proportionality standard as factor 4, the Advisory Committee’s Notes to Rule 26(b)(2) standard as factor 7, and the ABA Civil Discovery standard as factor 12).

\(^{149}\) See id. (this factor is incorporated into the Rowe standard as factor 5, the Zubulake standard as factor 7, the Wiginton standard as factor 8, the Rule 26(b)(2)(C) proportionality standard as factor 4, the Advisory Committee’s Notes to Rule 26(b)(2) standard as factor 5, and the ABA Civil Discovery standard as factor 2).

\(^{150}\) See id. (this factor is incorporated into the Rowe standard as factor 6, the Zubulake standard as factor 3, the Wiginton standard as factor 3, the Rule 26(b)(2)(C) proportionality standard as factor 4, and the ABA Civil Discovery Standard as factor 1).

\(^{151}\) See id. (this factor is incorporated into the Zubulake standard as factor 6, the Wiginton standard as factor 6, the Rule 26(b)(2)(C) proportionality standard as factor 4, the Advisory Committee’s Notes to Rule 26(b)(2) standard as factor 6, and the ABA Civil Discovery standard as factor 3).

\(^{152}\) See Factor Comparison Chart at A-1 (this factor is incorporated into the Rowe standard as factor 7, the Zubulake standard as factor 5, the Wiginton standard as factor 5, and the ABA Civil Discovery standard as factor 11).

\(^{153}\) See id. (this factor is incorporated into the Rowe standard as factor 4, and the ABA Civil Discovery standard as factor 15).
26(b)(2)’s proportionality standard. Thus, even the less accepted factors are still shared by multiple competing standards.

After analyzing the similarities between the multiple standards, it is obvious that many of the factors are commonly shared. This realization lends itself to the conclusion that there are multiple factors which typically should be included in any cost-shifting determination. Therefore, it is possible to combine the multiple standards into one comprehensive standard for consistent and efficient application in both federal and state courts. A single cost-shifting standard is necessary to promote consistency and properly establish party expectations.

B. The Exclusive Factors

Like the consideration of factors overlapping the several cost-shifting standards, evaluation of factors not considered by multiple standards is also valuable to this discussion. There are a total of ten factors which are “Exclusive” to one standard or another. Specifically, the ABA Civil Discovery Standards sets forth eight Exclusive cost-shifting factors for consideration. Federal Rule of Civil Procedure 26(b)(2)(C)(ii) sets forth one Exclusive cost-shifting factor for consideration. Finally, the Advisory Committee’s Note to Federal Rule of Civil Procedure 26(b)(2) sets forth one Exclusive cost-shifting factor for consideration.

The ABA Civil Discovery Standards set forth the following eight Exclusive cost-shifting factors for consideration in any cost-shifting motion:

(1) The need to protect trade secrets, and proprietary or confidential information;
(2) Whether the information or the software needed to access it is proprietary or constitutes confidential business information;
(3) The extent to which production would disrupt the normal operations and processing routines of the responding party;
(4) Whether the requesting party has offered to pay some or all of the discovery expenses;
(5) The need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of the privileged

154. See id. (This factor is incorporated into the Wiginton standard as factor 7, and the Rule 26(b)(2)(C) proportionality standard as factor 4).
155. From this point forward, factors exclusive to any cost-shifting test are referred to collectively as “Exclusive Factors.”
156. ABA CIVIL DISCOVERY STANDARDS, Standard 29(b)(iv) (2004).
or protected information despite reasonable diligence on the part of the
producing party;162
(6) Whether responding to the request would impose the burden or
expense of converting electronic information into hard copies, or
converting hard copies to electronic format;163
(7) Whether the responding party has deleted, discarded or erased
electronic information after litigation was commenced or after the
responding party was aware that litigation was probable and, if so, the
responding party’s state of mind in doing so;164 and
(8) Whether responding to the request would impose the burden or
expense of acquiring or creating software to retrieve potentially
responsive electronic data or otherwise require the responding party to
render inaccessible electronic information accessible, where the
responding party would not do so in the ordinary course of its day-to-
day use of the information.165

Federal Rule of Civil Procedure 26(b)(2)(C)(ii) requires evaluation of
“[w]hether the party seeking discovery has had ample opportunity to obtain
the information by discovery in the action.”166 Lastly, the Advisory Committee Note
to Federal Rule of Civil Procedure 26(b)(2) advocates for consideration of “[t]he
failure [of the producing party] to produce relevant information that seems likely
to have existed but is no longer available on more easily accessed sources.”167

Ultimately, none of the ten Exclusive Factors are necessary to proper
evaluation of a cost-shifting motion. Generally speaking, most of the Exclusive
Factors do not bear directly upon whether or not a discovery request presents an
“undue burden.” Furthermore, many of the Exclusive Factors bear more upon
whether or not sanctions should be imposed for discovery abuses, as opposed to
the relevant “undue burden” determination. Nevertheless, the merits of each
Exclusive Factor are fully discussed below.168

C. The Necessary Factors And Their Application

The various cost-shifting standards contain similar, as well as distinguishing
factors. Therefore, it is necessary to consider which factors are essential to a
cost-shifting determination and which are not.169 By analyzing which factors are
necessary and which are not, it is possible to combine the multiple standards into
one comprehensive standard. The following analysis is intended to set forth a

167. F ED. R. CIV. P. 26(b)(2) advisory committee note.
168. See discussion infra Section III(d): Unnecessary Factors for a Cost-Shifting Determination.
169. See discussion supra Section III(a)-(b): The Overlapping Factors and The Exclusive Factors.
new, comprehensive standard designed to refine the current six standards\textsuperscript{170} and provide an alternative best promoting litigation consistency.

There are five “Necessary Factors”\textsuperscript{171} that courts should consider when making a cost-shifting determination. The first factor courts should consider is, “the extent to which the request is specifically tailored to discover relevant information.”\textsuperscript{172} Absent this factor, parties are tempted to submit numerous, broad search terms, thereby placing certain “undue burden” on the producing party. By examining the “specificity” of a discovery request, parties are encouraged to limit the scope of the request out of fear of having to bear the costs of production.\textsuperscript{173} To determine specificity, a court should look to whether or not the requesting party provided: (1) targeted search terms, (2) limiting date ranges, and (3) preferred production format with each discovery request.

The second factor courts should consider is “the availability of such information from other sources.”\textsuperscript{174} Absent this factor, requesting parties are free to place an undue burden on opponents by requesting information from inaccessible locations, despite its existence in a more accessible and affordable location and format. For example, if a party has already produced the information in one format (i.e. hard copy), it is not required to bear the expense of producing the same information in another format (i.e. electronically).\textsuperscript{175} Thus, the court must make a determination of the several locations from which the information is available and if the party has already produced the requested information.

The third factor courts should consider is “the total cost of production, compared to the amount in controversy.”\textsuperscript{176} This factor is a helpful gauge for courts to determine the specificity of the discovery requests. If the cost of production is greater than the amount in controversy, then the discovery request is likely an undue burden. Thus, any time the cost of production exceeds the amount in controversy, the requesting party should probably bear the cost of production.

The fourth factor courts should consider is “the importance of the requested discovery in resolving the issues at stake in the litigation.”\textsuperscript{177} As an initial matter, this rule is important because it is a factor under the proportionality standard.

\textsuperscript{170} See discussion supra Section II(c): Competing Cost-Shifting Standards of Review.
\textsuperscript{171} From this point forward, the authors of this article will make reference to those factors considered necessary as the “Necessary Factors.”
\textsuperscript{174} See id.; Zubulake I, 217 F.R.D. at 322; Wiginton, 229 F.R.D. at 573.
\textsuperscript{176} See Zubulake I, 217 F.R.D. at 322; Wiginton, 229 F.R.D. at 573.
\textsuperscript{177} See Wiginton, 229 F.R.D. at 573; see generally FED. R. CIV. P. 26(b)(2)(C) (the Proportionality standard).
under Rule 26(b)(2)(C). This factor is also supported by the notion that parties should not force opponents to produce duplicative sets of information because duplicative items will not aid in resolving the litigation. Absent this factor, parties would likely request large volumes of ESI, with little or no probative value to their claims, in an effort to unduly burden their opponents. Ultimately, this factor encourages parties to draft targeted, relevant discovery requests. Therefore, if the discovery requested is irrelevant to solving the issues at stake in the litigation, then cost-shifting is much more appropriate.

The fifth and final factor courts should consider is "the importance of the issues at stake in the litigation." As stated by Wiginton, this factor "will only rarely come into play" when making a cost-shifting determination. In practice, it is rarely used by courts in making a cost-shifting determination. However, it may prove valuable to parties seeking to vindicate not only their interests, but those interests shared by the general public as well. Accordingly, the evaluation of this factor must turn upon a party’s likelihood of success on the merits, when seeking to vindicate a public interest. Thus, if the party seeking to vindicate a public interest is requesting broad discovery, this factor may insulate them from a cost-shifting motion by a producing party. Ultimately, this factor is a valuable tool for courts to make cost-shifting determinations when all other Necessary Factors are evenly balanced.

Thus, the several standards can be combined into a comprehensive five factor test which is unambiguous and gives courts a simpler standard for making cost-shifting determinations. Again, the Necessary Factors are as follows:

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 importance of the requested discovery in resolving the issues at stake in the litigation; and
5. The importance of the issues at stake in the litigation.

Most importantly, use of this test allows courts to focus solely on the merits of the discovery request with the goal of minimizing overall discovery time and costs. Finally, this new standard promotes uniformity and predictability.

---

180. See Wiginton, 229 F.R.D. at 576 (citing Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 289 (S.D.N.Y. 2003)).
D. Unnecessary Factors for a Cost-Shifting Determination

There are several factors which should not be used by courts when making a cost-shifting determination. The first factor courts should reject is “the resources available to each party.” Justice is best served if all parties are treated equally regardless of their resources. Evaluation of this factor necessarily requires the court to make a subjective determination based solely upon their personal views of wealth distribution. Unless the courts create a strict mathematical formula which is easily applied, there is no objective application which justifies contemplating a party’s resources when determining cost-shifting. Consideration of resources only confuses the issue at hand, which is the merit of the discovery request(s).

The second factor courts should reject is “the relative ability of each party to control costs and its incentive to do so.” This factor is unnecessary because of the availability of “sampling.” Utilizing the process of sampling provides an incentive to both parties to keep costs as low as possible. This is true because a court ordered sampling procedure effectively eliminates the presumption that the producing party will bear the cost of the document request. The producing party, once faced with the cost of a sampling procedure, will perform sampling at the lowest cost possible because it bears the expense. A well documented sampling effort establishes the methods and procedures of fulfilling discovery requests for both the court and opposing parties. In other words, sampling “fixes” the necessary costs and procedures. Once the costs are fixed, this factor is a non issue, as after sampling there are no more costs to control.

The third factor the courts should reject is “the relative benefits to the parties of obtaining the information.” Use of this factor may unnecessarily consider benefits to a party which are irrelevant to disposing the claims or defenses which are before the court. The more appropriate factor is “whether the requested discovery will assist in resolving the issues at stake in the litigation,” which is accounted for in the authors’ proposed test. More specifically, additional discovery may initiate further claims by a plaintiff. Such a benefit to that party must be irrelevant to a cost-shifting determination by a court. The purpose of discovery is not to merely benefit the parties, but to resolve the underlying claims/defenses and avoid additional litigation.

The fourth factor courts should reject is “the purpose for which the responding party maintains the requested data.” This factor creates an unintended loophole to Rule 26(b)(2)(B) for the producing party to avoid a

---

184. Rowe, 205 F.R.D. at 431; Zubulake I, 217 F.R.D. at 322; Wiginton, 229 F.R.D. at 573.
185. See discussion supra Section III(c): The Necessary Factors And Their Application.
186. See Rowe, 205 F.R.D. at 429.
discovery request. Rule 26(b)(1) allows a court to order the production of any information "reasonably calculated to lead to the discovery of admissible evidence." Thus, the discoverability of information is unrelated to a party's reason for retaining the information. Similarly, "undue burden or cost" is a threshold issue to any court order imposing cost-shifting. Again, a party's reason for retaining sought-after information is irrelevant to a determination of undue burden. Therefore, the purpose of retaining information bears no relation to either discoverability of the ESI or an undue burden determination, and as such, is unnecessary to cost-shifting determinations.

The fifth factor courts should reject is "the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources." This factor relates solely to a determination of whether or not sanctions should be imposed. As such, it is unrelated to cost-shifting and should not be considered. Furthermore, if the information sought is no longer available, then there are no expenses associated with the production of the requested information for a court to shift.

The sixth factor courts should reject is "whether the party seeking the information already has had adequate opportunity to obtain the information." This factor is nonsensical because cost-shifting should not turn on the time frame in which a party makes a discovery request. The burden of production does not necessarily increase or decrease throughout the progression of litigation. However, if a party seeks production of ESI, as opposed to paper production of identical information, then this factor is encompassed by factor two of the test proposed herein, which considers "the availability of such information from other sources."

The remaining factors, those enumerated within the ABA's Civil Discovery Standards, but not adopted by any of the other cost-shifting standards, should also be rejected by courts during a cost-shifting determination. The seventh factor the courts should reject is "the need to protect trade secrets, and proprietary or confidential information." The eighth factor the courts should reject is "the need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of the privileged or protected information despite reasonable diligence on the part of the producing party."

Because these two factors both refer to information which a party should filter

192. See discussion supra Section III(c): The Necessary Factors And Their Application.
out during a privilege review, the rationale for rejecting them is effectively the same. Further, because courts emphatically hold that cost-shifting is unavailable for expenses associated with confidential or privilege reviews, use of these two factors contradicts the clear intent of the several courts. Finally, protection of confidential or privileged information is not a cost-shifting consideration, but rather a concern which is best resolved via protective order.

The ninth factor the courts should reject is “whether the information or the software needed to access it is proprietary or constitutes confidential business information.” Similar to the seventh and eighth factors, this factor deals with confidentiality and is best resolved through the use of a protective order. Further, the use of confidential software does not necessarily cause additional production costs. Thus, the confidential nature of computer software should not be considered in a cost-shifting determination.

The tenth factor the courts should reject is “the extent to which production would disrupt the normal operations and processing routines of the responding party.” By its very nature, litigation already disrupts the normal operations of a party, and discovery is an expected aspect of litigation. Furthermore, it is unreasonable to expect courts to investigate the normal operations and processing routines of a responding party unless such is already at issue in the litigation. Thus, disruption of normal operations is a foreseeable expectation of litigation that is unrelated to the specific expense of producing ESI. Accordingly, this factor need not be considered in a cost-shifting motion as it only confuses any determination of “undue burden or expense.”

The eleventh factor the courts should reject is “whether the requesting party has offered to pay some or all of the discovery expenses.” If the requesting party offers to pay the production costs, then there is no issue to be decided in a cost-shifting motion. Notably, courts must not allow parties to “purchase” irrelevant discovery for purposes other than discovering information related to their claims or defenses. Accordingly, this factor need not be considered in a cost-shifting determination.

The twelfth factor the courts should reject is “whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable and, if so, the responding party’s state of mind in doing so.” Similar to other unnecessary factors, this factor relates solely to a determination of whether or not sanctions should be imposed. As such, it is unrelated to cost-shifting and

should not be considered. Furthermore, if a party destroyed information, then there are no expenses associated with the production of the information for a court to shift.

The remaining two factors courts should reject are similar in that they contemplate expenses related to solely electronic discovery. The thirteenth factor that should be rejected is:

[whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information.]

The fourteenth and final factor that should be rejected is “whether responding to the request would impose the burden or expense of converting electronic information into hard copies, or converting hard copies to electronic format.” Both of the preceding factors bear solely upon cost of production. The third Necessary Factor, “the total cost of production, compared to the amount in controversy,” already contemplates all production costs. Therefore, as factors thirteen and fourteen further contemplate production costs, they are redundant and unnecessary.

E. Additional Cost-Shifting Considerations

1. Importance Of Weighting The Five Necessary Factors

Unlike men, the five Necessary Factors are not created equal. To offset this inherent weakness, a “weighted” consideration of cost-shifting factors was first proposed by Judge Scheindlin in Zubulake I. As the Zubulake I court recognized, resolution of a cost-shifting motion turns upon whether or not a discovery request presents an “undue burden or expense.” A proper finding of “undue burden or expense” rests upon great deference to some factors, and little deference to others. In other words, “undue burden or expense” does not depend solely upon a comparison of how many factors are answered in the affirmative versus how many are resolved in the negative. In accordance with Judge Scheindlin’s concern in Zubulake I, absent a proper weighting of the

203. See discussion supra section III(c): The Necessary Factors And Their Application.
206. See id.
207. See id.
necessary cost-shifting factors set forth herein, the five necessary factors are vulnerable to a “mechanistic” application. Failure to properly weight the five necessary cost-shifting factors, results in unpredictable, subjective determinations of “undue burden or expense.”

As set forth hereto, the necessary five factors, in their respective order of importance, are as follows:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The importance of the requested discovery in resolving the issues at stake in the litigation;
3. The total cost of production, compared to the amount in controversy;
4. The availability of such information from other sources; and
5. The importance of the issues at stake in the litigation.

Factors four and five, “importance of issues at stake in the litigation” and “availability of information from other sources,” are not as important as considering a discovery request’s value in resolving litigation, as compared to its cost. The most important of the cost-shifting factors are those which consider “the extent to which the request is specifically tailored to discover relevant information” and “the importance of the requested discovery in resolving the issues at stake in the litigation.” Both merit substantial consideration as they bear directly upon the sheer volume of ESI sought and its corresponding value, measured by its potential for resolving the litigation.

Once the requested ESI’s incremental value in solving litigation is determined, a cost-benefit analysis must be performed to determine whether or not discovery should even proceed. Undue burden, the pre-requisite to any cost-shifting order, is undoubtedly a function of the volume of information to be produced and its ultimate cost. Furthermore, an accurate cost-benefit analysis may often force parties to settle rather than proceed with discovery. For these reasons alone, factor three’s cost-benefit analysis is more important than factors four and five. Moreover, a cost-shifting standard which encourages extrajudicial dispute resolution is a valuable tool for clearing busy civil dockets. In sum, a finding of “undue burden” is most readily found among the first three factors. As such, they must be given the greatest consideration in any cost-shifting dispute.

2. The Necessity Of Sampling

Sampling is a court ordered process whereby the producing party is ordered to perform a “test” production run upon a small sample of requested ESI. 208

Sampling is necessary in resolving a cost-shifting motion for two important reasons. First, sampling provides the court concrete cost figures upon which to rely in calculating the entire cost of producing requested ESI. Unfortunately, most cost-shifting motions are initially entertained pre-production. Therefore, the actual cost of producing the requested ESI is rarely known pre-production. Expert estimates of ESI production costs often vary considerably. In order for a court to properly determine “undue burden or expense,” undoubtedly the expense must be known. As opposed to choosing among the opposing experts or splitting the estimated cost difference, courts may require the producing party to produce a small sample of the requested ESI. From a well documented sampling effort, a court may easily extrapolate the total cost of producing the requested ESI. Thus, sampling allows a court to best evaluate the expense upon the producing party when determining whether “undue burden” exists.

Second, sampling is important to determine the actual specificity of a discovery request. Large ESI production efforts which yield very small percentages of relevant evidence may be the result of poorly drafted search terms and/or discovery requests. The production of large percentages of irrelevant data bears directly upon whether an undue burden exists. Because Federal Rule of Civil Procedure 26 specifically requires a finding of “undue burden or expense” before an order shifting discovery costs is issued, courts must take care in evaluating a discovery request’s corresponding burden and expenses. Utilizing the five necessary cost-shifting factors set forth herein, to determine undue burden and expense, necessarily requires information bearing upon a discovery request’s “yield” of relevant evidence and expense. Accordingly,


210. See generally Zubulake I, 217 F.R.D. at 309 (entertaining initial cost-shifting motion prior to any significant ESI production).

211. See Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 570 (N.D. Ill. 2004) (sampling results caused revision of expert’s estimated ESI production cost from between $46,000 and $61,000 to $249,000).

212. This is true because all cost-shifting tests consider, in one way or another, the total cost of production in determining whether “undue burden or expense” exists.

213. See Zubulake I, 217 F.R.D. at 324 (ordering the producing party to produce ESI from five of ninety-four backup tapes in order to generate an accurate sample).

214. See Semsroth v. City of Wichita, 239 F.R.D. 630, 641 n.21 (D. Kan. 2006) (noting that a “sample run” of discovery benefits the court in determining the likelihood that further discovery will disclose important and relevant information).

215. Zubulake v. UBS Warburg LLC (Zubulake III), 216 F.R.D. 280, 285 (S.D.N.Y. 2003) (utilizing sampling results to determine whether or not discovery request was “specifically tailored to discover relevant information”).

216. See id.

217. See discussion supra section III(e)(i): Necessary Factor 1 (requiring an evaluation of the “specificity” of the discovery request (in discovering relevant evidence)).

218. See discussion supra section III(e)(i): Necessary Factor 3 (evaluating the total cost of production of sought after ESI).
courts are best served if parties first document the time, evidentiary “yield,” and expense of a sample production run before a cost shifting motion is ruled upon.

3. Cost-Shifting Must Be Considered Irrespective Of Accessibility

Federal Rule of Civil Procedure 26(b)(2)(B) permits courts to “specify conditions [upon] discovery” if the discovery is “not reasonably accessible because of undue burden or cost.” Importantly, Rule 26(b)(2)(B) and its Advisory Committee Notes impose no fixed “accessibility” threshold or prerequisite to a finding of “undue burden or expense.” Nevertheless, some courts impose an “inaccessibility” prerequisite prior to entertaining any cost-shifting motion. Notably, some courts require that, prior to consideration of any cost-shifting motion, the producing party demonstrate that requested ESI is “inaccessible” because it is stored on either “backup tapes” or “erased, fragmented or damaged data.”

The weakness of Zubulake I’s hard and fast rule is that it does not account for advances in technology. Technological advances quickly reduce once “unduly burdensome or expensive” tasks to brief, routine, and inexpensive. Determining backup tapes and erased, fragmented, or damaged data to be per se “inaccessible” assumes that our technological capabilities are fixed. In reality, courts cannot determine what represents “unduly burdensome and expensive” based upon an assumption that technology is constant. Because technological capabilities change, ESI stored on backup tapes or erased, fragmented, or damaged ESI is not permanently “inaccessible.” Nor do such storage mediums permanently represent an “undue burden or expense.” Therefore, determinations of “inaccessibility” correspond more with “undue burden or expense” determinations than evaluations of particular storage methods. Moreover, the Advisory Committee Notes to Rule 26 suggest that courts evaluate “undue burden or expense” from a list of objective factors. Accordingly, cost-shifting evaluations should turn not upon ESI storage methods and ever-advancing technological capabilities, but objective factors bearing solely upon “undue burden or expense” to the producing party.

222. See id. at 319-20 (determining that backup tapes and erased, fragmented or damaged data are all “inaccessible”).
4. Only Privilege Review Costs Are Ineligible For Cost-Shifting

i. Confidential and Privilege Review As An Ineligible Cost

Although many courts disagree over what costs are available for cost-shifting, only those associated with confidential or privilege reviews are consistently excluded by courts during cost-shifting determinations. The Rowe court expressed this sentiment by stating that a producing party “shall continue to be responsible for the expense of any review for privileged or confidential material.” Because a confidential or privilege review is unnecessary to satisfy a document request, it is the only cost which should be ineligible for cost-shifting.

There are a number of reasons why confidential or privilege review costs should be ineligible for cost-shifting. First, a confidential or privilege review can cost hundreds of thousands of dollars and in some situations as much as several million. This extremely large expense has the potential to distort the actual costs of satisfying an ESI discovery request. Second, if parties were permitted to submit confidential and privilege review costs for a cost-shifting determination, all parties would submit such a request due to the extremely high expense associated with the review. Allowing this could potentially allow responding parties to increase the cost of an ESI discovery production to the point that it would deter the requesting party from making necessary document requests. This situation would force the courts to engage in evaluations of the parties’ privilege review costs to ensure that such costs were reasonably calculated and were reasonably accrued by the producing party. Forcing the courts to make such a determination would further hinder the judicial process. Thus, allowing confidential or privilege review costs to be calculated into a cost-shifting determination would both significantly skew the actual expense of complying with an ESI discovery request and cause a significant hindrance in resolving litigation by further complicating the cost-shifting determination.

224. See discussion supra section II(a)(ii): Component Costs That Comprise ESI Production Burdens.
226. Rowe, 205 F.R.D. at 433.
227. Id. at 426 (where one of the named defendants estimated privilege review cost at $120,000); Medtronic, 229 F.R.D. at 558 (estimating the cost of privilege review between $16.5 and $70 million).
ii. Costs Eligible For Cost-Shifting

While confidential and privilege review costs are not available for cost-shifting, there are a number of costs which are, and should be, calculated into a cost-shifting motion. As stated earlier, these costs should be available for cost-shifting irrespective of whether the ESI sought is accessible or inaccessible. The following costs have been, and should be, considered for cost shifting:

1. Restoration and Retrieval Costs;
2. Searching Requested Terms and In-House IT Costs;
3. New Software Costs;
4. Translation Costs;
5. Expert Fees;
6. Format Conversion (Native Format, PDF, and TIFF); and
7. Actual Production.

228. See discussion supra Section III(e)(iv)(1): Confidential And Privilege Review As An Ineligible Cost; see also discussion supra Section II(a)(ii): Component Costs That Comprise ESI Production Burdens.
229. See discussion supra Section III(e)(iii): Cost-Shifting Must Be Considered Irrespective of Accessibility.
230. See Zubulake III, 216 F.R.D. at 290; Wiginton v. CB Richard Ellis, Inc., 229 F.R.D. 568, 577 (N.D. Ill. 2004); Medtronic, 229 F.R.D. at 557-58; Rowe, 205 F.R.D. at 432-33; ROTHSTEIN ET AL., supra note 129, at 26 (defining “restore” as “to transfer data from a backup or archival storage system (e.g. tapes) to an online system. Restoration of archival data may require not only data restoration but also replication of the original hardware and software operating environment.”).
231. See Zubulake III, 216 F.R.D. at 290 (stating that “search costs should also be shifted because they are so intertwined with the restoration process”); see also Rowe, 205 F.R.D. at 433; Wiginton, 229 F.R.D. at 577; Medtronic, 229 F.R.D. at 554.
232. See Medtronic, 229 F.R.D. at 552 (considering costs associated with “designing and applying a search program” as a part of producing ESI); see also Portis v. City of Chicago, No. 02 C 3139, 2004 WL 2812084, at *2-3 (N.D. Ill. 2004) (the court considered those costs associated with creating a database as subject to cost-shifting and split the costs evenly between the parties. The court also stated that the cost associated with producing the database is measured by the rate at which the producing party’s employees “bill” at, not the their “hourly” pay rate because basing it on the employees’ billing rate “levels the playing field.” (citing Missouri v. Jenkins, 491 U.S. 274, 287-89 (1989))).
233. Toshiba America Electronic Components, Inc. v. Superior Court, 124 Cal. App. 4th 762, 772 (holding that an order to produce all documents contained in tapes without requiring the requesting party to pay any of the expense involved in “translating” the tapes into a usable form, “is an abuse of discretion absent a finding that translation is not necessary”). See also John C. McMeekin II & Thao T. Pham, The Age of E-Discovery: Practice Pointers for Presenting and Producing Electronic Documents, 37 BRIEF 54, 63 (Summer 2008) (“The producing party will not be required to bear the burden of translating documents from one language to another[,]” and “If the producing party is required to undertake special technical efforts to produce electronic data, the cost to produce the data should be shifted to the requesting party.”).
235. See Medtronic, 229 F.R.D. at 552 (stating that all data on each backup tape must be restored from the backup tape format to a format that a standard computer can read). See also Rowe, 205 F.R.D. at 433.
236. See id. at 552 (considering costs associated with “actual production” as a part of producing ESI).
However, this is not intended to be an exhaustive list because only privilege review costs should be ineligible for cost-shifting.\textsuperscript{237} Although not specifically establishing the proposition set forth herein, the \textit{Rowe} court stated that the requesting party “shall bear the costs of production . . . in accordance with the protocol outlined” by the court, and only held the producing party accountable for the expense of a confidential or privilege review.\textsuperscript{238} Thus, as originally alluded to in \textit{Rowe}, all costs related to the production of ESI, pursuant to a discovery request, should be available for cost-shifting.

5. Necessity of Claw-Back Provisions and/or Quick Peek Agreements

As a result of the fact that confidential and privilege review costs are not available for cost shifting,\textsuperscript{239} it is necessary to provide measures to prevent the requesting party from using inadvertently disclosed materials in court. Although Federal Rule of Civil Procedure 26(b)(5)(B) establishes the procedure for requesting the return of inadvertently disclosed privileged or protected information as a result of a discovery production, Rule 26(b)(5)(B) does not address the issue of waiver.\textsuperscript{240} Thus, the Federal Rules are of little help in preventing a requesting party from using inadvertently disclosed privileged materials against the producing party in court. While no measure is completely effective in protecting inadvertent disclosures, two measures, which are at least moderately effective, are “claw-back” agreements and what are commonly known as “quick-peek” agreements.\textsuperscript{241}

Claw-back agreements are entered into by the parties before the production of the requested materials.\textsuperscript{242} These agreements stipulate to a procedure for the

\begin{footnotesize}
\begin{enumerate}
\item See discussion \textit{supra} Section III(e)(iv)(1): Confidential And Privilege Review As An Ineligible Cost; \textit{see also} discussion \textit{supra} Section II(a)(ii): Component Costs That Comprise ESI Production Burdens.
\item \textit{Rowe}, 205 F.R.D. at 433.
\item See discussion \textit{supra} Section III(e)(iv)(1): Confidential And Privilege Review As An Ineligible Cost; \textit{see also} discussion \textit{supra} Section II(a)(ii): Component Costs That Comprise ESI Production Burdens.
\item \textsc{Fed. R. Civ. P.} 26(b)(5)(B) (“If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has [and] must not use or disclose the information until the claim is resolved [and] must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.”). \textit{See also} Jessica DeBono, \textit{Preventing And Reducing Costs And Burdens Associated With E-Discovery}, 59 MERCER L. REV. 963, 973-74 (2008).
\item See \textsc{Rothstein et al.}, \textit{supra} note 129, at 14-16. \textit{See also} DeBono, \textit{supra} note 240, at 974.
\item See \textsc{Rothstein et al.}, \textit{supra} note 129, at 14-15.
\end{enumerate}
\end{footnotesize}
Typically, before entering into such agreements, the producing party performs a confidential or privilege review. Under claw-back agreements, inadvertent disclosure of confidential or privileged information does not constitute a waiver of privilege.

Alternatively, under quick-peek agreements, the responding party produces the requested material without performing a confidential or privilege review. The requesting party reviews the material and designates the specific documents it would like produced using Rule 34. The producing party performs a confidential and privilege review of documents specifically requested and withholds any confidential or privileged material. Any inadvertent disclosure is also not considered to be a waiver under quick-peek agreements.

Despite the fact that claw-back and quick-peek agreements are not completely effective, both are necessary to alleviate the concern that inadvertent production of confidential ESI will lead to a waiver of attorney-client privilege and work product protection. Agreements about confidential, privileged, or work-product protection should be reached by the parties typically at the Rule 26(f) conference before the requesting party makes a discovery request. Therefore, because confidential and privilege review costs are not available for cost-shifting, parties should enter into either “quick-peek” or “claw-back” agreements during the initial Rule 26(f) conference, and as a matter of justice and fairness, courts should enforce these agreements.

IV. CONCLUSION

Ultimately, when faced with a cost-shifting motion, courts need not determine whether or not the discovery sought is “inaccessible.” Pursuant to Federal Rule of Civil Procedure 26, courts need only first determine whether or not the requested discovery presents an “undue burden or expense.” To properly
do so, parties should first document a “sample” of the requested discovery so that courts may extrapolate the total cost, effort, and value of production. Using accurate sampling results, courts may properly evaluate all five Necessary Factors to determine whether the requested discovery poses a potential “undue burden or expense” on the producing party. Finally, while courts need not shift costs of privilege reviews, parties must still protect confidential and privileged information through the use of Quick-peek and Claw-Back agreements. It is important that each step described herein is carefully considered by courts and parties to cost-shifting disputes. Ultimately, consistent court administration of discovery disputes will properly establish party expectations and minimize discovery costs.

**APPENDIX A**

<table>
<thead>
<tr>
<th>OLDEST</th>
<th>→</th>
<th>NEATEST</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Likelihood that the discovery sought contains information relevant to a claim or defense.</strong></td>
<td><strong>The specificity of the discovery requests:</strong></td>
<td><strong>The breadth of the discovery request;</strong></td>
</tr>
<tr>
<td>McPeek v. Ashcroft</td>
<td>Rowe</td>
<td>Zubulake I Weighted</td>
</tr>
<tr>
<td>Whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data;</td>
<td>The extent to which the request is specifically tailored to discover relevant information;</td>
<td>The extent to which the request is specifically tailored to discover relevant information;</td>
</tr>
</tbody>
</table>

*(Keyed to Zubulake I due to factors being weighted in Zubulake I).*

<p>| Black = Overlapping Factor | Bold = Overlaps Multiple Factors | Italics = Exclusive Factor |</p>
<table>
<thead>
<tr>
<th>The availability of such information from other sources;</th>
<th>The availability of such information from other sources;</th>
<th>The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources;</th>
<th>Whether the discovery sought can be obtained from other source that is more convenient, less burdensome, or less expensive;</th>
</tr>
</thead>
<tbody>
<tr>
<td>The total cost associated with production;</td>
<td>The total cost of production, compared to the amount in controversy;</td>
<td>The burden and expense of the discovery, considering among other factors the total cost of production in absolute terms and as compared to the amount in controversy;</td>
<td>The burden or expense of the proposed discovery [as compared to] the amount in controversy;</td>
</tr>
<tr>
<td>The resources available to each party;</td>
<td>The total cost of production, compared to the resources available to each party;</td>
<td>The resources of each party as compared to the total cost of production;</td>
<td>The burden or expense of the proposed discovery [as compared to] the parties' resources;</td>
</tr>
<tr>
<td>The relative ability of each party to control costs and its incentive to do so;</td>
<td>The relative ability of each party to control costs and its incentive to do so;</td>
<td>The relative ability of each party to control costs and its incentive to do so;</td>
<td></td>
</tr>
</tbody>
</table>

The quantity of information available from other and more easily accessible sources; The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
<table>
<thead>
<tr>
<th>The importance of the issues at stake in the litigation;</th>
<th>The importance of the issues at stake in the litigation;</th>
<th>The complexity of the case and the importance of the issues;</th>
<th>The importance of issues at stake in the action;</th>
<th>The importance of the issues at stake in the litigation;</th>
</tr>
</thead>
<tbody>
<tr>
<td>The relative benefit to the parties of obtaining the information;</td>
<td>The relative benefits to the parties of obtaining the information.</td>
<td>The relative benefits to the parties of obtaining the information;</td>
<td>The need for the discovery, including the benefit to the requesting party and the availability of the information from other sources;</td>
<td>Predictions as to the importance and usefulness of the further information;</td>
</tr>
<tr>
<td>The purposes for which the responding party maintains the requested data;</td>
<td>Whether the responding party stores electronic information in a manner that is designed to make discovery impracticable or needlessly costly or burdensome in pending or future litigation, and not justified by any legitimate personal, business, or other non-litigation related reason; and</td>
<td>The importance of the requested discovery in resolving the issues at stake in</td>
<td>The importance of the discovery in resolving the issues;</td>
<td></td>
</tr>
<tr>
<td>The need to protect trade secrets, and proprietary or confidential information;</td>
<td>Whether the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;</td>
<td>The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
<td>---------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Whether the information or the software needed to access it is proprietary or constitutes confidential business information;</td>
<td>The extent to which production would disrupt the normal operations and processing routines of the responding party;</td>
<td>Whether the requesting party has offered to pay some or all of the discovery expenses;</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The need to protect the attorney-client privilege or attorney work product, including the burden and expense of a privilege review by the producing party and the risk of inadvertent disclosure of the privileged or protected information despite reasonable diligence on the part of the producing party;
Whether responding to the request would impose the burden or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information;
Whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable and, if so, the responding party’s state of mind in doing so
THE ETHICAL DILEMMA OF SCRUBBING METADATA:
THE PATHWAY TO A BETTER APPROACH

Emily N. Litzinger *

I. INTRODUCTION

Imagine, you are an attorney in the process of an ongoing litigation and you receive a request from opposing counsel for a Microsoft Excel spreadsheet that contains the formulae, which your client company uses for Human Resource purposes, to determine who will be fired.1 If opposing counsel discovers the formulae it could be damaging for your client and your case.2 However, at the same time you are ethically required to disclose the document in the form that the requesting party designates.3 Is it ethical for you to scrub4 the formulae out of the document? Or can you convert it to a PDF or TIFF5 file, making the formulae unavailable to the opposing counsel?

As the scope of technology rapidly expands, many procedural issues puzzle attorneys and courts alike. Some of these uncertainties have been answered by the Supreme Court, as a result of the promulgation of new rules in the Federal Rules of Civil Procedure governing electronic discovery. However, the litigation world is still spinning in an effort to adjust to the new requirements of the electronic discovery rules. In particular, attorneys have been struggling with the scope and depth of the requirements of the new rules, leaving attorneys unclear of what to expect when litigation involves electronic discovery. Specifically, there is vagueness surrounding the controversial issue of the discoverability of metadata of documents and its applicability to the Federal Rules of Civil Procedure. As a result of inconsistencies in the application of Federal Rule of

* Emily N. Litzinger is a J.D. candidate for 2010 at the Salmon P. Chase College of Law, Northern Kentucky University. She earned a B.A. in Political Science and Spanish summa cum laude from the University of Kentucky in May 2006. The author would like to give special thanks to her husband for all his love and encouragement.

2. Id.
3. FED. R. CIV. P. 34(b)(1)(C), in FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 192 (Thomson West 2008) (stating that a party “may specify the form or forms in which electronically stored information is to be produced”).
4. See generally Richard N. Lettieri, What is Metadata Scrubbing, and is it Good for Business?, EXECUTIVE COUNSEL, July-Aug. 2006, at 57, 59 (“Metadata scrubbing software allows a company to set guidelines for which metadata fields can leave the company, thus preventing access to proprietary information…that may compromise corporate positions.”).
5. See generally Jima Anne Kato, The Brave New World of Electronic Discovery and Document Management, 49 ORANGE COUNTY LAWYER MAGAZINE 6, 10 (Mar. 2007) (describing forms of production, TIFF files are Tagged Image File Format which are static images that cannot be altered. Generally, this format gives the producing party greater control over what metadata fields are being produced and what information is being exposed).
Civil Procedure 34, many attorneys continue to struggle with the ethics of scrubbing metadata from discovery documents. Generally, attorneys strive to protect their client’s interest, but also want to avoid sanctions for violating the Federal Rules of Civil Procedure.

This article argues for a better approach to the application of Federal Rule of Civil Procedure 34 to accommodate for the discrepancies in its application among courts, as well as compliance with the procedural requirements. In Part III, this article will closely examine the differences in the contrary holdings in recent court decisions and the depth of the discrepancies. First, this article will discuss the effect of shifting the burden to request for the inclusion or exclusion of metadata. Second, this article will examine the differences in the courts’ definition of a “reasonably usable” form. Third, this article will suggest appropriate instances in which scrubbing metadata will be feasible based on the recent court holdings. Finally, in Part IV, this article will analyze the useful and problematic aspects of recent holdings and argue for a better approach of the application of Rule 34 to the production of metadata.

II. BACKGROUND

A. E-Discovery Changes in Federal Rules of Civil Procedure

As a result of the emergence of electronic discovery, which has affected litigation across the United States, the Supreme Court promulgated new Rules of Civil Procedure for all federal courts to follow in an attempt to address the issues surrounding electronic discovery.\(^6\) On December 1, 2006, these newly established rules were put into effect by means of Rules 16, 26, 33, 34, 37, and 45.\(^7\) The significant changes in electronic discovery are reflected primarily in Rule 26, Rule 34, and Rule 37.

Rule 26 generally outlines the provisions governing discovery as well as the scope and limits of discovery.\(^8\) Rule 26 contains specific directions to attorneys regarding the discussion of any issue relating to preserving discoverable information and the duties surrounding the preservation of electronic information.\(^9\) Rule 34 includes alterations surrounding the rules governing the production of electronically stored information, ultimately allowing electronically stored information, including recordings, images, and data compilation stored in any medium, to be accessible in the discovery process.\(^10\) Additionally, Rule 34 outlines the procedure by which electronic information

\(^{6}\) See Ralph C. Losey, E-DISCOVERY CURRENT TRENDS AND CASES 2 (2008).
\(^{7}\) Id. at 77-78.
\(^{10}\) Id. at 13-16.
can be requested, allowing the opposing party to request a specific form in which it wants the electronically stored information, which includes Microsoft Word format, PDF, or TIFF.\textsuperscript{11}

In response to the above modifications, the Supreme Court created consequences for failure to comply with the new rules in Rule 37, which outline the sanctions for failure to make disclosures and cooperate in discovery.\textsuperscript{12} Rule 37 states that, “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”\textsuperscript{13} Therefore, by maintaining electronic discovery in good faith, sanctions will not be imposed, accounting for the Advisory Committee’s concern with inappropriate use of sanctions where a litigant or her counsel might be powerless to stop spoliation of evidence.\textsuperscript{14}

The most pertinent changes relevant to this article are those surrounding embedded metadata reflected in Rule 34(b)(2)(E)(i), which specifically state that, “[a] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request[.]”\textsuperscript{15} The rule requires the responding party to identify the form in which it intends to produce the information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies.\textsuperscript{16} The rule also provides that, in absence of a party agreement or court order, the responding party must produce electronically stored information either in a form or forms which it is ordinarily maintained or in a form or forms that are reasonably usable.\textsuperscript{17} The application of the above named revision has left a slight uncertainty regarding the discoverability of metadata and the definition of “reasonably usable” form.

\textbf{B. What is Metadata?}

“Metadata literally means ‘data about data,’” and is defined as information about a particular data set or document that describes how, when and by whom it was collected, created, accessed, modified and how it is formatted.\textsuperscript{18} Some metadata can be seen easily by users, such as file dates and file sizes, while other metadata can be hidden or embedded, such as deleted comments or references to

\begin{itemize}
\item \textsuperscript{11} Id.
\item \textsuperscript{12} FED. R. CIV. P. 37, supra note 3, at 201-03.
\item \textsuperscript{13} FED. R. CIV. P. 37(e), supra note 3, at 203.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} FED. R. CIV. P. 34(b)(2)(E)(i), supra note 3, at 192.
\item \textsuperscript{16} Barbara J. Roth, Ronald J. Hedges, & Elizabeth C. Wiggins, Managing Discovery of Electronic Information: A Pocket Guide for Judges, FED. JUD. CENTER 13-14 (2007).
\item \textsuperscript{17} Id.
\item \textsuperscript{18} LOSEY, supra note 6, at 157.
\end{itemize}
prior drafts. Metadata is generally not reproduced in full form when a document is in printed format. For example, in an email document there is information regarding the author, creation date, attachment, and identities of all recipients, including blind copy recipients.

This information that is not easily seen by users is called “embedded” information and courts often refer to such information as metadata. However, “embedded” information is not true metadata, because it is information within a file, rather than information about data. This “embedded” information is not visible without a command, and often, there is software by which one can instruct a program to reveal the hidden information, which is referred to as “mining.” An example of embedded metadata would be the “Comments” feature in a Word document through which comments can be inserted in the document but remain invisible until you use the command to view the comments. Another pertinent example is the formulae a user creates in an Excel or spreadsheet document; the math used in the formulae is embedded in the file itself.

As a result of possible confidential information being embedded in a file, many attorneys have turned to methods to clean, or “scrub,” documents of embedded, hidden data. However, if a document is subject to discovery there is concern with the format in which the document must be produced. As stated above, the amended Federal Rule of Civil Procedure 34(b) permits a requesting party to specify the format in which it would like electronically stored information to be produced. Accordingly, the issue arises concerning the application of Rule 34 to metadata and whether it is ethical to scrub documents prior to disclosure.

C. Application of Rule 34

The applicability of Rule 34 to embedded metadata has been mixed among the courts as to whether the Rule 34 encompasses the production of metadata and

20. Id. at 189.
21. See LOSEY, supra note 6, at 157-58.
22. Id. at 158.
23. Id.
24. Id.
25. Id.
26. Id.
27. See Lettieri, supra note 4, at 59.
29. Id.
30. Id.
the form that is required. In Williams v. Sprint/United Management Co., terminated employees brought a class action against their employer. In the process of discovery, the requesting party asked for Excel spreadsheets with all metadata intact including the embedded formulae. This court held that under “emerging standards of electronic discovery,” metadata ordinarily visible to users of Excel spreadsheets “should presumptively be treated as part of the ‘document’ and should thus be discoverable.”

In the process of reviewing the case, the court examined the Sedona Principles for Electronic Discovery Document Production, primarily Rule 12, which provides that “unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.” The Sedona Principle commentary also set forth an important caveat that “[o]f course, if the producing party knows or should reasonably know that particular metadata is relevant to the dispute, it should be produced.” The court accepted Sedona Principle 12 and the commentary concerning the important part of the “emerging standard,” but the court held that the defendant should have known that the requested spreadsheet was material to the litigation.

Ultimately, the court held that the producing party should generate the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that it should not be produced, or the producing party requests a protective order. The court asserted that metadata is an inherent part of an electronic document, and its removal ordinarily requires an affirmative act to alter it.

On the other end of the spectrum, the United States District Court of Delaware in Wyeth v. Impax Laboratories, Inc. reached the opposite conclusion of Williams and disallowed the production of native format. This court refused to require metadata production. The court relied primarily on the requesting party’s failure to ask for metadata prior to production as well as the jurisdiction’s local rules that make TIFF and JPEG the default format of production. Thus, the court applied Rule 34(b) limiting production requirements to one format.

Further, the Wyeth court noted that the defendant complied with the rules of

---

32. Id. at 652.
34. See Losey, supra note 6, at 159.
35. Williams, 230 F.R.D. at 653.
36. Id. at 652.
37. Id.
39. Id. at 171.
40. Id.
41. Id.
production, as it was not foreseeable to produce the requested metadata and the plaintiff failed to demonstrate a particular need for the metadata production.\(^{42}\)

Moreover, the court in *Kentucky Speedway v. NASCAR* explicitly rejected *Williams v. Sprint/United Management Co.*\(^{43}\) In this antitrust case against NASCAR, the defendant had already spent over $3 million in five months responding to e-discovery requests.\(^{44}\) The plaintiff requested the production of metadata, which had been previously produced.\(^{45}\) This court rejected *Williams*, holding that, “[i]n the rapidly evolving world of electronic discovery, the holding of the *Williams* case is not persuasive.”\(^{46}\) The court disagreed with the *Williams* court conclusion that a producing party should be required to produce a document with metadata intact unless it timely objects, agrees to not product it, or requests a protective order.\(^{47}\) The court came to the conclusion that in this specific case, the request from the plaintiff was too late and that the production would be far too burdensome on the defendant.\(^{48}\) The effect of this decision is that when metadata production will create a substantial burden on the producing party, the requesting party will have to provide good cause.\(^{49}\) The court rejected the holding in *Williams* and ultimately created the effect of shifting the burden of production of metadata. As opposed to requiring the producing party to show an undue burden or object to the production as in *Williams*, this court shifted the burden to the requesting party to show good cause.\(^{50}\) The importance of this decision is the requisite for a balancing test between the parties and added a dimension of the debatable feasibility of redacting privileged materials of a native file.\(^{51}\)

However, in the latest decision regarding the production of metadata, *In re Payment Card Interchange Fee*, the court’s decision is a combination of the cases above. This case is similar to the facts of *Kentucky Speedway*, in which defendants sought the production of metadata for documents which had previously been produced without metadata.\(^{52}\) The court in *In re Payment Card Interchange Fee* held that that the defendants waited too long to complain of the metadata-stripped production and ultimately this implied a waiver.\(^{53}\) The effect of this case is that in order to obtain metadata, a party needs to request it in the

\(^{42}\) *Id.*


\(^{44}\) *Id.* at *15.

\(^{45}\) *Id.* at *22.

\(^{46}\) *Id.*

\(^{47}\) *Id.* (citing *Williams v. Sprint*, 230 F.R.D. 640, 646 (D. Kan. 2005)).

\(^{48}\) *Id.* at *23.

\(^{49}\) *Kentucky Speedway*, 2006 U.S. Dist. LEXIS 92028, at *23.

\(^{50}\) See Losey, supra note 6, at 164.

\(^{51}\) *Id.*


\(^{53}\) *Id.* at *12-14.
beginning of the discovery process and, if it later receives a stripped production, then immediately object.54 The holding of this case follows Williams to a certain extent by ordering future production by the plaintiff to include metadata.55 Yet, the court relies primarily on the 2006 amendment to Rule 34(b) which states that a party responding to discovery request may elect to produce a “reasonably usable form” of electronic data rather than produce information as kept in the ordinary course of business.56 However, the “reasonably usable form” of data should not be produced in a form that removes or significantly degrades this feature.57 This new case supports the proposition that the emerging standard requires metadata production when requested and not objected to, but emphasizes the need for early clear requests and prompt objections when metadata is not produced.58

As a result of the unclear application of this “emerging standard,” there is a dilemma of how to safeguard one’s confidential information in the form of embedded metadata and continue to comply with Rule 34. Below this article will analyze the above cases and apply a better approach to the application of Rule 34.

III. THE DILEMMA

As an “emerging standard” in a prevailing area of law, it is inevitable that there will be inconsistencies in the application of Rule 34. In this instance, the discrepancies primarily fall within the application of Rule 34 regarding the form of production in which electronic discovery should be disclosed. In the landmark Williams case, a Kansas United States District Court held that the burden of producing electronic discovery with metadata intact was placed on the producing party.59 This court allowed the producing party to avoid producing metadata only in situations when the producing party timely objects, the parties agree to the non-production of metadata, or if the producing party requests a protective order for confidential information.60 In its reasoning, the Williams court defined a “reasonably usable” form as one in which metadata was intact because the removal required an affirmative action.61 As such, the court’s decision leaves limited instances in which a producing party can scrub or redact metadata from electronic documents subject to discovery.

54. See Losey, supra note 6, at 165.
58. See Losey, supra note 6, at 166.
60. Id.
61. Id.
However, a Kentucky United States District Court a year later in *Kentucky Speedway* explicitly disagreed with the court in *Williams* and placed the burden of the production of metadata on the requesting party. In this case, the court held that “in most cases and for most documents, metadata does not provide relevant information.” Relying on this principle, the requesting party holds the burden of asking for metadata and must prove good cause for a particularized need.

Moreover, the decision in *Wyeth* contradicts the holding in *Williams* because the court disagreed with its definition of a “reasonably usable” form. In this case, a United States District Court in Delaware held that a reasonably usable form was not necessarily one with metadata intact. A PDF form without metadata intact was adequate to meet the requirements of “reasonably usable” as delineated in the Federal Rules of Civil Procedure. Therefore, the court created the feasibility of safely scrubbing metadata from electronic documents.

As a result of these inconsistencies, a dilemma has developed concerning the form of production in which attorneys should produce electronic documents subject to discovery. How can an attorney comply with the Federal Rules of Civil Procedure, but also protect their client’s interests? When is it feasible to scrub electronic documents, which are subject to discovery? These questions have very unclear and contradictory answers, as evidenced in the courts’ applications of Rule 34. According to the strict holding in *Williams*, scrubbing metadata takes an affirmative step and would not be in compliance with the Federal Rules of Civil Procedure. However, in *Wyeth* and *Kentucky Speedway*, the courts introduce a feasibility of redacting or scrubbing metadata from electronic documents because they place the burden on the requesting party to ask for relevant metadata. Where does the attorney draw the line between the ethics of complying with the standards and protecting his client’s interest in litigation?

The form of production variations pivot on the shifting of the production burden by the courts, the unclear definition of a “reasonably usable” form and the vague understanding of when scrubbing is feasible. Each of these inconsistencies will be examined in turn to develop a better approach to the application of Rule 34.

63. Id. at *24.
64. Id.
66. Id.
A. The Effect of Burden Shifting

Whose responsibility is it to ensure metadata is produced, the producing party or the requesting party? This is an issue in which the courts have yet to develop a bright line test in the application of this "emerging standard."

In Williams, the court held that in order for a producing party to avoid generating metadata, which could possibly contain privileged information, the party has three options. The party has to timely object to the production of the metadata, the party has to obtain an agreement with the opposing counsel to the non-production of the metadata, or the party has to request a protective order from the court.\(^{69}\) This court reasoned that the burden to object to the disclosure of metadata was appropriately placed on the party ordered to produce its electronic documents as they are ordinarily maintained.\(^{70}\) This logic was based on the reality that the producing party already has access to the metadata and is in the best position to determine whether it is privileged information that could be objectionable.\(^{71}\) This United States District Court reiterated that placing the burden on the producing party is further supported by the fact that metadata is an inherent part of an electronic document and its removal ordinarily requires affirmative acts by the producing party that alters the electronic document.\(^{72}\)

However, the court in Kentucky Speedway explicitly disagreed with the reasoning of the court in Williams regarding who should bear the burden of metadata production. One judge in Kentucky Speedway stated, "I respectfully disagree with [Williams] conclusion that a producing party 'should produce the electronic documents with their metadata intact, unless the party timely objects . . . the parties agree that the metadata should not be produced, or the production party requests a protective order.'"\(^{73}\) The court in Kentucky Speedway argued that the parties in the case had no prior agreement that the electronic files would be produced in any particular format.\(^{74}\) The court held, pursuant to the facts of the case, that when the requesting party sought the metadata for a specific document or documents, the party should identify that document or documents by reasonable identifying features.\(^{75}\)

The key logic behind the court shifting the burden of soliciting the production of metadata to the requesting party was partially due to the unique facts of the case. Specifically, the plaintiff did not request the metadata until the defendant was seven months into discovery and had spent well over $3 million

\(^{69}\) Williams, 230 F.R.D. at 652.
\(^{70}\) Id.
\(^{71}\) Id.
\(^{72}\) Id.
\(^{73}\) Kentucky Speedway, 2006 U.S. Dist. LEXIS 92028, at *22.
\(^{74}\) Id. at *23; see also Fed. R. Civ. P. 34(b)(2)(E)(iii), supra note 3, at 192 ("A party need not produce the same electronically stored information in more than one form.").
\(^{75}\) Kentucky Speedway, 2006 U.S. Dist. LEXIS 92028, at *24-25.
dollars. Additionally, the burden shift was a result of the court’s sentiment that the request for production of all the metadata of all electronic documents would be unduly burdensome. The court reasoned that by having the requesting party ask for the metadata of a specific document or documents, it would be more likely to generate relevant information rather than being an inefficient burden for the producing party. The effect of the Kentucky Speedway holding is that whenever metadata production will create a substantial burden on the producing party, the requesting party will have to provide good cause for the metadata production along with details of the specific document or documents in which it is requesting.

Moreover, in In re Payment Card Interchange Fee the court held that the requesting party waited too long to complain about metadata-stripped production, which implied a waiver. The court stated that, in order to obtain metadata, a party must ask specifically for it and in the event that the production is scrubbed of the metadata that a party requested, the party should immediately object. Thus, the court implied that the burden is placed on the requesting party to ensure it obtains the metadata it requested.

As a result of the incompatible holdings, there is a vagueness of which party holds the burden of objecting to the production of metadata or requesting the production of metadata in electronic documents. It appears from the theses judgments that if a requesting party can show a relevant need to the metadata of electronic documents it may be possible to compel the production of metadata despite the possible burden on the producing party. The application of who holds the burden should be determined in a balancing test between the relevancy of the metadata and the burden on the producing party.

B. What is a “Reasonably Usable” Form?

According to Federal Rules of Civil Procedure 34(b)(2)(E)(ii) “[i]f a requesting party does not specify a form for producing electronically stored information, a party must produce it in . . . a reasonably usable form or forms [.]” What is a “reasonably usable” form? This is an issue that courts have yet to consistently define in their application of Rule 34(b)(2)(E)(ii). In In re Payment Card Interchange Fee, a United States District Court in New York interpreted the Federal Rules of Civil Procedure exactingly, holding that a producing party

---

76. Id. at *14-15.
77. Id. at *25.
78. Id.
79. Id. at *23-24.
81. See Losey, supra note 6, at 166.
82. Id.
did not comply with the Federal Rule of Civil Procedure when it failed to supply metadata in a requested electronic document. The court reasoned that a party may elect to produce a “reasonably usable” form of electronic data rather than the information as kept in the ordinary course of business. However, this “reasonably usable” form should not be produced in a form that removes or significantly degrades this feature. Accordingly, the inference from this judgment is that the court’s definition of a “reasonably usable” form is one in which metadata is intact, as removing it would likely degrade the feature.

Further, the court in Williams defined the “reasonably usable” form as electronic documents with metadata intact. It explained that metadata is an inherent part of electronic documents and its removal ordinarily requires an affirmative act by the producing party to alter the electronic document. The court relied on the fact that the usual course of business is to keep files in their native format, which includes metadata. Typically, documents are used with metadata intact, such as documents created in Microsoft Word and Excel files, and all files by definition include all metadata. As such, this court implies that the definition of a “reasonably usable” form is one in which metadata is intact as it would have been when originally created.

However, in contrast, the court in Wyeth disagreed with the Williams definition of “reasonably usable” form in its holding that the form of production is reasonable based on the stipulation of the requesting party. In Wyeth, the parties had no previous agreement of the form of the electronic documents and the producing party provided a “reasonably usable” form of electronic documents. Even though the default guidelines in Rule 34(b)(2)(E)(ii) refer to a “reasonably usable form” the Wyeth court found that the “reasonably usable” form could be a document in which metadata was not intact. The court reasoned that the local rules in this district provided TIFF and JPEG as the default form of production. The court ascertained that “reasonably usable” form does not have to provide metadata. The court stated that if the requesting

85. Id. (citing Fed. R. CIV. P. 34(b), 2006 Amendment, Advisory Committee’s Note, supra note 3, at 194-95).
86. Id.
88. Id. See, e.g., Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., No. 04 C 3109, 2006 WL 665005, at *2 (N.D. Ill. Mar. 8, 2006) (stating that by producing electronic documents without metadata intact the defendant had “altered the format and characteristics of the electronic media by converting it into TIFF format—essentially creating new documents . . . ”).
89. Id.
90. See LOSEY, supra note 6, at 160.
94. Id.
95. Id.
party sought the metadata of a document or documents it should request a
specific form in which it can view the appropriate metadata. Therefore, this
court contradicts the decisions of the previous cases because it defines a
“reasonably usable” form as an electronic document without metadata intact.

Since courts cannot adequately define a consistent meaning of a “reasonably
usable” form, attorneys hesitate in deciding whether they can scrub their
electronic documents of metadata. An implication from the rules defined in the
above-scrutinized cases is that it would be more reliable to err on the side of
cautions and produce electronic documents in an unaltered form that is consistent
to the form in which it was created. However, as a result of the vagueness of the
standard, it is feasible for a producing party to disclose an electronic document
without metadata intact if it relies on the local rules or the agreement with
opposing counsel regarding the form of production.

C. The Feasibility of Scrubbing Metadata

Due to the ambiguity in the courts’ judgments, there is no consistent
definition of a “reasonably usable” form. As such, many attorneys are puzzled
as to whether they can scrub metadata from electronic documents and remain in
compliance with the Federal Rules of Civil Procedure. Although the Federal
Rules of Civil Procedure allow for the exemption of privileged or confidential
information, there are more often instances when the metadata an attorney seeks
to protect is not necessarily “privileged” according to the Federal Rules of Civil
Procedure standard. The proper approach remains unclear as to what actions to
take in situations where the metadata of an electronic document is not shielded
from disclosure by a protective order; yet the attorney would like to shield this
information from opposing counsel in order to avoid negatively affecting his
client’s case. The cases below offer an analysis of the instances based on the
common law application of Rule 34 where scrubbing metadata from an
electronic document may be feasible.

According to the court in Kentucky Speedway, production of metadata
without a specific request or a relevant need can be burdensome to the producing
party; as such, this implies a feasibility of scrubbing metadata that is not relevant

96. Id.
97. Id.; see Lisa Spinelli and Ghillaine A. Reid, Production Format and The New Federal
Rules Counsel Must Address Native File Production at the Outset of the Case, 185 N.J.L.J. 1137
(2006) (arguing that the alternative default of the option of producing electronically stored
information in ‘reasonably usable’ form includes TIFF and PDF. There is no reason to believe that
federal courts will interpret rule 34 to preclude TIFF or PDF).
98. See Fed. R. Civ. P. 26(b)(3)(A), supra note 3, at 145 (stating that materials that are created
in anticipation of litigation may not be discoverable).
99. Fed. R. Civ. P. 26(c)(1), supra note 3, at 146 (“A party from whom discovery is sought
may move for a protective order in the court where the action is pending. . . . The court may issue,
for good cause, an order for good cause to protect the party from annoyance, embarrassment,
oppression, or undue burden or expense . . . ”).
to the current litigation.\textsuperscript{100} If the requesting party has not asked for the metadata of a specific document or documents and the privileged information within the document is not relevant to the dispute, then it would be feasible to scrub the document without being sanctioned.\textsuperscript{101}

However, in Williams, the court defined conservatively that there were few if any instances in which a producing party could affirmatively scrub or alter metadata from electronic documents subject to discovery, because metadata is an inherent part of an electronic document.\textsuperscript{102} This strict adherence to the non-removal of metadata leaves a producing party with little alternative in choosing whether to scrub metadata from electronic documents or produce possibly damaging information to the opposing counsel. According to the Williams court, the only alternative is to attempt to strike an agreement with opposing counsel or vie for a protective order from the court.\textsuperscript{103}

Moreover, in In re Payment Card Interchange Fee, the court was more lax in its interpretation of the instances in which metadata may be scrubbed from electronic documents. The court held that, for prospective discovery, the production of electronic documents should be in a form that does not remove or significantly degrade the electronic document.\textsuperscript{104} It can be inferred from this holding that, although there remain few situations when a producing party can scrub an electronic document of metadata, it is still feasible to scrubbing in a manner that it does not degrade the document. Accordingly, in a situation in which the metadata is not relevant to the litigation, one could remove this information and it would not per se “significantly degrade” the electronic document.\textsuperscript{105}

Therefore, the situation surrounding the feasibility of scrubbing metadata from electronic documents subject to discovery remains vague. In one instance, it is feasible to redact information from the electronic document when it lacks relevance to the current litigation.\textsuperscript{106} While on the other end of the spectrum, scrubbing would violate what is defined as a “reasonably usable” form because scrubbing would involve taking an affirmative step changing the form it was originally created.\textsuperscript{107}

\textsuperscript{101} Id.
\textsuperscript{103} Id.
\textsuperscript{105} Id.
\textsuperscript{107} Williams, 230 F.R.D. at 652.
IV. THE PATH TO A BETTER APPROACH

Because of the perplexity surrounding the production of metadata, a better approach balancing the margins demonstrated in Williams and Kentucky Speedway is necessary. As such, this article will analyze the contributions and the problems created by these margins and develop a better approach to the application of Rule 34.

A. The Williams Approach

The decision in Williams was a landmark decision because, at the time of the ruling, few courts had dealt with electronic discovery issues and the district court of Kansas had very little precedent available to rely upon. Accordingly, the court relied on its own analysis that ultimately bears useful logic surrounding the application of Rule 34. However, in the same right, the holding has created problematic conditions because it conservatively applied the Federal Rules of Civil Procedure to the rapidly changing standard in electronic discovery.

The Williams court established that the burden of requesting the non-production of metadata is appropriately placed on the producing party. The court stated that this party would be in a better position to object to the disclosure of the metadata because it already had access to the information and would have the requisite knowledge of whether the metadata was privileged information. The court reasoned the burden shift to the producing party was rooted in the theories surrounding the development of discovery. The underlying analysis stemmed from the idea that the discovery process was intended to allow both parties to adequately prepare for litigation.

If the burden of requesting electronic documents with metadata intact is placed on the requesting party, then the requesting party will be placed in an unequal position than that of the producing party. The requesting party lacks the knowledge and specificity of the metadata within the other party’s electronic documents. The purpose of the discovery phase of any litigation is to gain more information surrounding the facts of the case. If the requesting party is required to solicit with specificity all electronic documents it requires for

109. Id. at 226-27.
111. Id.
112. See generally Developments in the Law—Discovery, 74 HARV. L. REV. 940, 945 (1961) (stating that the purpose served by discovery is disclosure of all relevant evidence which will prevent unfair surprise at trial and reduce the number of judgments which do not reflect the actual state of facts).
113. Id.
litigation, the requesting party will likely lack the substantial knowledge to adequately request the necessary electronic documents and prepare for litigation.

However, this burden shifting also creates a problem because it establishes an unnecessary burden on the producing party of preserving and producing electronic documents with metadata intact, even if that metadata is irrelevant.114 The court’s logic in Williams is useful because it correctly reasons that the producing party will likely have more knowledge regarding the content of its electronic discovery.115 Yet, the court is unsuccessful in developing a lasting expansion of a standard in electronic discovery because it failed to place limits on the scope of metadata that should be provided.116 The court did not take into the account the unreasonable burden it placed on the producing party, requiring them to produce all metadata.117 This is clearly evidenced by the court’s ruling that removing metadata from a document takes an affirmative action that would be a violation according to its definition of a “reasonably usable” form.118 In fact, “[r]equiring the routine production of metadata increases the usually enormous costs of electronic discovery.”119 Under this ruling, the producing party is at the financial and ethical mercy of the requesting party to produce all electronic documents with metadata intact. A producing party’s only options would be to timely object, agree with the opposing counsel for the non-disclosure of metadata, or request a protective order.120

These flaws not only discourage attorneys from experimenting with electronic discovery because of fear of being sanctioned like the defendant in Williams,121 but also make the process of electronic discovery impractical. Regardless of the court’s intentions to fairly protect both parties in the discovery process by shifting the burden, it took this reasoning to an extreme at the expense of the producing party. The Williams decision is important for the development of this emerging standard not because of its holding, but rather its logic which has helped develop potential standards in an ever-changing standard of electronic discovery.

B. The Kentucky Speedway Approach

After the uproar of the Williams holding, courts were interested in developing their own analysis in the interpretation of this ambiguous standard of law. As a result, the United States District Court in Kentucky took a strikingly

114. See Cucu, supra note 108, at 229.
116. Id.
117. Id.; see generally Fed. R. Civ. P. 26(b)(2)(B), supra note 3, at 145 (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).
118. Williams, 230 F.R.D. at 652.
120. Williams, 230 F.R.D. at 652.
121. See Cucu, supra note 108, at 229.
different approach to the application of Rule 34.\textsuperscript{122} The useful analysis from this holding is the court’s focus on the relevancy of the metadata in electronic documents.\textsuperscript{123} The court’s logic is based in the intentions of the Federal Rules of Civil Procedure restricting discovery when it unduly burdens a party.\textsuperscript{124} The court reasoned that there should be a presumption against the production of metadata\textsuperscript{125}outlining that the issue of whether metadata is relevant or should be produced is one that ordinarily should be addressed by the parties in a Rule 26(f) conference.\textsuperscript{126} The ultimate holding from this court created not only a shift of the burden to the requesting party to designate the metadata that it required for litigation, but the decision also created the theory that if metadata bears no relevancy, then the parties should be required to produce it only upon request.\textsuperscript{127} Thus, this logic creates a feasibility of scrubbing metadata to protect a client’s interest.

However, the problematic aspect of this decision is that it designated the responsibility of requesting or obtaining the metadata solely to the requesting party. Although, this basis appears to be logical because it alleviates the burden and cost for the producing party, it places an unreasonable strain on the requesting party to have the knowledge and specificity of opposing counsel’s electronic documents. This logic starkly contrasts the argument in Williams that relies on the theory that the discovery process is to gain further information regarding litigation.\textsuperscript{128} In an effort to develop consistency, this article will argue below for an approach that grasps the useful logic of the above cases and accounts for compliance with the Federal Rules of Civil Procedure.

C. A Better Approach

Because this is an emerging standard of law, there are likely to be discrepancies in its application. Both of the analyses in Williams and Kentucky Speedway offer useful logic in their applications, but also create potential problems for electronic discovery, as described above. A better approach to the application of Rule 34 regarding the form of production would be one that requires the producing party to provide only the metadata of electronic documents that is relevant to the current litigation. The burden of disclosing

\textsuperscript{123} Id. at *21-23.
\textsuperscript{124} Id.; see Fed. R. Civ. P. 26(b)(2)(B), supra note 3, at 145.
\textsuperscript{125} Kentucky Speedway, 2006 U.S. Dist. LEXIS 92028, at *23; see also THE SEDONA PRINCIPLES, supra note 19, Principal 12, Cmt. 12a, at 186 (“The extent to which metadata should be preserved and produced in a particular case will depend on the needs of the case.”).
\textsuperscript{126} Fed. R. Civ. P. 26(f)(2), supra note 3, at 147 (“The parties must consider the nature and basis of their claims and defenses . . . make or arrange for the disclosures required . . . discuss any issues about preserving discoverable information; and develop a proposed discovery plan.”).
\textsuperscript{127} Kentucky Speedway, 2006 U.S. Dist. LEXIS 92028, at *24-25.
metadata would be placed on the producing party as outlined in Williams. Yet, unlike Williams, the scope of metadata would be limited to only relevant information as necessitated in Kentucky Speedway. In this approach, the unfair advantage of a producing party has regarding knowledge of electronic documents would essentially be eliminated.

Under this approach, the producing party who has the superior knowledge of the contents of electronic documents has the duty to examine and produce only relevant metadata. This would allow the requesting party to be provided with essential and relevant metadata without overwhelming the producing party with the expense of producing all metadata. The idea of only supplying relevant metadata is also stressed in the Sedona Principles, in the notion that metadata should only be produced absent agreement of parties or court order, when it is material to resolving the dispute.129

In effect, by providing that the producing party is to disclose only relevant metadata would allow the producing party to scrub metadata from electronic documents. The potential feasibility of scrubbing of metadata would not only provide protection for attorneys who are seeking to safeguard metadata, which is privileged, but also ethically comply with the Federal Rules of Civil Procedure.

Critics to this approach would argue that the producing party would protect itself by claiming that there is no relevant metadata in the electronic documents. However, this predicament will be diminished by the discussions in Rule 26(f) conferences when the requesting party could ask for, or inquire about, metadata that may be relevant to the litigation. Additionally, the Rule 26(f) conferences would provide an opportunity for the parties to agree to produce or not produce all or part of metadata in electronic documents.

This approach is not flawless, as it relies on the parties to subjectively recognize what metadata is relevant to the litigation. However, this approach is more consistent than the bewildering approaches seen in recent court decisions, which have settled on opposite margins in their applications. This proposed application has logical reasoning that accounts for the flaws created in the strict approach in Williams, and the failures in Kentucky Speedway to consider the unfair position in which the requesting party is placed.

V. CONCLUSION

Courts continue to stand divided in the application of the form of production necessitated according to Rule 34. The inconsistent holdings create a dilemma for attorneys in the process of litigation on whether the production of metadata in electronic documents is necessary. Attorneys are unsure of when it is feasible to scrub metadata from electronic documents. On one end of the spectrum, scrubbing metadata is subject to sanctions because it changes the inherent

---

129. See THE SEDONA PRINCIPLES, supra note 19, Principal 12, at 185-203.
qualities of electronic documents.\textsuperscript{130} While on the other end, scrubbing metadata from electronic documents is feasible when it is not relevant to the litigation.\textsuperscript{131} This article argues that a better approach to the application of Rule 34 is one that shifts the burden to the producing party to supply only relevant metadata of electronic documents subject to discovery. It relieves the burden of knowing specifics of the opposing party’s metadata from the requesting party and mitigates the burden of the producing party by only disclosing relevant metadata. Courts should employ this approach as it consistently applies the useful logic from both margins created by courts’ applications and accurately complies with the Federal Rules of Civil Procedure.

\textsuperscript{130} Williams, 230 F.R.D. at 652.

\textsuperscript{131} Kentucky Speedway, 2006 U.S. Dist. LEXIS 92028, at *23-25.
THE DECISION TO COMPEL UNRESTRICTED FORENSIC IMAGING: A NOTE DISCUSSING JOHN B. V. GOETZ

Christen M. Steimle∗

I. INTRODUCTION

Evidence gathered during discovery can determine the outcome of litigation. The amended Federal Rules of Civil Procedure now recognize electronic discovery as integral to the discovery process. The computer has been compared to a filing cabinet.1 However, through forensic imaging, parties can obtain direct access to computers, which rarely occurred when information was physically stored in filing cabinets. A mirror image (i.e. forensic imaging) is defined as “an exact duplicate of the entire hard drive, and includes all the scattered clusters of the active and deleted files and the slack and free space.”2 Since the implementation of the amended rules, courts have continued to define the boundaries of the rules, and one example of this is the Sixth Circuit’s decision in John B. v. Goetz.3 Here, the court set aside the district court’s orders compelling unrestricted forensic imaging of the defendants’ computers, and therefore limited the breadth of discovery.4

This Note argues that the John B. v. Goetz case was correctly decided because unrestricted forensic imaging should rarely be compelled. In Goetz the underlying concerns of privacy and confidentiality outweighed the purported need for unrestricted imaging. Section II provides an overview of the previous and amended Federal Rules of Civil Procedure. Section III outlines the facts of the John B. v. Goetz case. Section IV analyzes the Sixth Circuit’s reasoning and discusses important factors other courts have considered when determining whether to compel forensic imaging. Section IV also provides practical tips for effectively utilizing forensic imaging while still protecting important concerns, including privacy, confidentiality, and privilege. Finally, Section V concludes this Note.

II. BACKGROUND LAW

The Federal Rules of Civil Procedure were amended in December of 2006, primarily to address the issue of electronic discovery (hereinafter the “Amended

---

4. Id. at 461.
Prior to these amendments, it was unclear as to what extent the rules applied to discovery for electronically stored information (hereinafter “ESI”), primarily because of the word “document.” As the use of computers and electronic data storage became more widespread, electronic discovery became a significant issue and the need for revision became clear. Specifically, the primary issue was whether all electronically stored information, including computer generated documents and system information were included within the scope of discovery. The uncertainty surrounding the rules and their application to electronic discovery made it difficult for attorneys and businesses alike to know what information was discoverable, how to efficiently retain data, and how to effectively prepare for litigation.

Generally, the 2006 amendments encourage both the courts and the parties to begin actively discussing the discovery process earlier in litigation. Amended Rule 16(b) states that scheduling orders can now include provisions relating to disclosure and discovery of electronic information, and also recognizes that any agreements made between parties regarding assertion of privilege after production of documents will be respected. Amended Rule 26 discusses what electronic information needs to be automatically disclosed, as well as addresses the cost of electronic discovery, allowing for the possibility of cost shifting depending on the breadth of the request and the difficulty of producing the information. The amendment to Rule 34(a) is most significant because it demonstrates that discovery includes all ESI, either manually created or computer generated. Additionally, the Amended Rules permit parties to copy data. Rule 34 allows a party to copy or photograph sections of ESI, e.g., forensic imaging. Since the Amended Rules became effective, courts have continued to define the boundaries of electronic discovery through cases such as John B. v. Goetz.

6. Id.
7. Id.
8. Id.
10. See Ronald J. Hedges, Discovery of Electronically Stored Information: Surveying the Legal Landscape 37 (BNA Books 2007).
11. Id. at 24.
12. Id. at 34-41.
III. FACTS

John B. v. Goetz is a class action lawsuit between 500,000 children, who were enrolled in the TennCare program, and the state officials responsible for the creation and administration of the TennCare program. \(^{17}\) TennCare was a “managed care system” which replaced the state’s Medicaid program. \(^{18}\) Essentially, the plaintiffs alleged that the state’s TennCare program failed to meet certain requirements of the Social Security Act, including providing services such as “medical screenings, vision, hearing, and dental.” \(^{19}\) The Social Security Act requires state programs that accept federal funding, such as TennCare, to provide these services, called Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services, to individuals under the age of twenty-one who are eligible to receive Medicaid. \(^{20}\) In response to the lawsuit and demand for compliance, the parties worked to reach a mutually agreeable plan to correct TennCare’s deficiencies, and the court issued an order for the implementation of the plan in 2000. \(^{21}\)

In late 2001, the plaintiffs moved to hold the defendants in contempt for failing to implement the agreed upon plan. \(^{22}\) The court noted that although the defendants were working to implement the plan and were well-intentioned, the fundamental inefficiencies of the TennCare program itself slowed the progress. \(^{23}\) The court delayed ruling on whether the defendants were in contempt and appointed a special master to facilitate the execution of the plan. \(^{24}\)

From the time the court appointed the special master through 2004, the parties continued to debate compliance with the 2000 orders. \(^{25}\) In October 2004, the plaintiffs again filed a motion requesting the court to hold the defendants in contempt for violation of the 2000 orders, claiming that the plan still had not been enacted. \(^{26}\) The court agreed that the plan had not been implemented and ordered the special master to develop a remedial plan to correct TennCare’s insufficiencies, which the special master did. \(^{27}\) In November of 2004, the defendants objected, claiming that the October 2004 orders and the special master’s suggested plan were the product of “ex parte communications” between

\(^{17}\) Id. at 451.

\(^{18}\) Id.

\(^{19}\) Id.

\(^{20}\) Id.

\(^{21}\) Id. at 452.

\(^{22}\) John B., 531 F.3d at 452.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.

\(^{26}\) Id.

\(^{27}\) Id.
the judge and the special master. As a result of the dispute, the orders and plan were set aside and the judge recused himself.

In February of 2006, the defendants finally claimed compliance with the 2000 orders, causing the plaintiffs to request the production of electronically stored information relating to and confirming the purported compliance. The defendants produced the requested information in hard copy format, as opposed to electronic, leading the parties to debate the required production format for electronic discovery requests. After extended debate and negotiations, the parties failed to reach an agreement, and in October of 2006, the plaintiffs filed a motion to compel discovery.

The court issued two orders in response. The first order required the defendants to provide responsive documents in electronic format. The second order required the defendants to give the court and the plaintiffs a written description of the technical specifications of the defendants’ electronic data and required the parties to create a plan for the production of additional electronic records. The defendants acknowledged that some previous discovery responses had been incomplete, which prompted the court to allow the plaintiffs to obtain assurances as to the completeness of future discovery responses. In December of 2006, an “experts only” conference was held, during which the parties outlined an electronic discovery protocol, including an agreement on keyword search terms. Unfortunately, this conference did not resolve all of the disputes surrounding electronic discovery, which continued during the next ten months.

Finally, in October of 2007, the court granted the plaintiffs’ most recently filed motion to compel discovery. The court stated that the repeated disputes stemmed from the defendants’ failure to preserve and provide electronic information. While the court recognized that it could sanction litigants for failing to preserve data in preparation of litigation, it refused to impose sanctions until the electronic discovery was completed. The court’s order granting the motion to compel provided that the plaintiffs’ technical expert would “inspect the Defendants’ computer system to assess whether any changes have been made to hinder the ESI production” and also examine the defendants’ preservation

28. John B., 531 F.3d at 452.
29. Id.
30. Id. at 453.
31. Id.
32. Id.
33. Id.
34. John B., 531 F.3d at 453.
35. Id.
36. Id.
37. Id.
38. Id. at 454.
39. Id.
40. John B., 531 F.3d at 454.
41. Id.
procedures to determine whether previous orders had been honored. As a result, the parties debated over what the scope of the original orders were, as the passage of time made proof of compliance difficult, and requested clarification as to the most current orders.

Finally, the plaintiffs asked the court to impose sanctions on the defendants for failure to comply with previous orders, and the plaintiffs also filed a motion to compel the defendants to obey the most recent discovery orders. In response, the court issued the controversial orders central to this case, which permitted the plaintiffs’ computer expert to “make forensic copies of any computer inspected to ensure the preservation of all existing electronically stored information (“ESI”).” Additionally, the court ordered a United States Marshal to accompany the computer expert to ensure compliance with the order. The defendants contended that the order was broad and intrusive and requested limitations and clarification as to the boundaries of such an order. The court clarified that the United States Marshal would maintain custody of the forensic images and further stated that the experts could make forensic images of personal as well as state-owned computers. The defendants asked for and were granted an emergency stay from these orders, and the Sixth Circuit eventually granted mandamus relief from the forensic imaging order.

IV. ANALYSIS

The Sixth Circuit recognized that the district court’s orders compelled the imaging of personal and state-owned computers, which would likely produce confidential and private data that was unrelated to the litigation. The court examined five factors to determine whether mandamus relief was proper: (1) whether the petitioning party has any other satisfactory means of attaining the requested relief; (2) whether the petitioner will be damaged or prejudiced in a way that would not be correctable on appeal if the orders were permitted to stand; (3) whether the district court’s orders are clearly erroneous as a matter of law; (4) whether the district court’s orders are an error that is often repeated or is a persistent disregard of federal rules; and (5) whether the district court’s orders raise new and important problems, or issues of law that are of first

42. Id.
43. Id. at 455.
44. Id.
45. Id.
46. John B., 531 F.3d at 455.
47. Id. at 456.
48. Id.
49. Id.
50. Id. at 457.
51. The court did not address this factor in its analysis, so it likely did not apply to the facts. There is no evidence that there were any general issues with the district court’s discovery orders. See id.
impression.\textsuperscript{52} Because the court determined that four of the five factors supported granting relief, the court approved mandamus relief and set aside the district court’s orders allowing unrestricted forensic imaging.\textsuperscript{53}

The issues that the court examined when determining whether mandamus relief was appropriate are common to many other situations in which courts analyze requests to compel forensic imaging. These issues include privacy, confidentiality, privilege, responsiveness, suggested restrictions, other preservation methods available or already attempted, and the associated costs.

This section will follow the Sixth Circuit’s reasoning in the \textit{John B. v. Goetz} decision, and it will discuss some of the facts that are unique to this case and whether their absence would change the court’s outcome. It also addresses other important factors courts have considered when determining whether to compel forensic imaging. Finally, it will examine the benefits of forensic imaging and suggest ways to utilize forensic imaging as a discovery tool while still protecting and respecting the parties’ interests.

\textbf{A. The John B. v. Goetz Court’s Analysis}

\textbf{1. Other Means Available to Obtain Relief}

Initially the court examined whether other satisfactory means were available to attain the requested relief.\textsuperscript{54} The court stated that the imaging of computers automatically raised concerns of privacy and confidentiality because by design, duplication increases the possibility of inappropriate exposure.\textsuperscript{55} Once the information is revealed, an appeal could not remedy the impact of disclosure: confidentiality cannot be restored nor privacy returned. Accordingly, the court determined that the immediate consequences resulting from compelling forensic imaging could not be corrected on appeal.\textsuperscript{56}

The court further recognized that discovery orders are usually not directly appealable because a party could force review of the order by refusing to comply and appealing if the district court decides to impose sanctions.\textsuperscript{57} However, even if the petitioning party refuses to comply, the orders also apply to individuals not party to the litigation, so the petitioning party’s refusal to comply would not

\textsuperscript{52} \textit{John B.}, 531 F.3d at 457.
\textsuperscript{53} \textit{Id.} at 457-58.
\textsuperscript{54} \textit{Id.} at 457. The court stated that mandamus relief may be used as a “means of immediate appellate review of orders compelling the disclosure of documents and information claimed to be protected from disclosure by privilege or other interests in confidentiality.” \textit{Id.} (quoting United States \textit{ex rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.}, 444 F.3d 462, 472 (6th Cir. 2006)).
\textsuperscript{55} \textit{John B.}, 531 F.3d at 457. Logically, once a copy is made, the chances of disclosure are doubled, especially considering that at least one person (the expert) will be exposed to information that he should not otherwise see.
\textsuperscript{56} \textit{Id.} at 457-58.
\textsuperscript{57} \textit{Id.} at 458; see also \textit{Dow Chem. Co. v. Taylor}, 519 F.2d 352, 354-55 (6th Cir. 1975) (explaining that discovery orders are generally not directly appealable).
prevent these individuals from obeying the orders and thus revealing the
sensitive information. The court recognized that while these alternatives may
provide relief, they were not satisfactory. Because the defendants were state
officers, they had an interest in protecting the confidential state information and
thus avoiding the imaging of any relevant computers. Accordingly, an appeal
from either sanctions or a contempt citation would be inadequate.

Although the court’s analysis is specific to the determination of mandamus
relief, based on the facts of the situation and the law, the court decided correctly.
Mandamus relief was the only way to ensure the protection of the sensitive
information. As the court correctly noted, duplication automatically presents the
opportunity for exposure of private or confidential information to parties that
should not be privy to it. This initial concern with privacy and confidential
information dominated the next section of the court’s analysis and is central to
courts examining motions to compel forensic imaging.

2. Damage or Prejudice

The court next addressed whether the party seeking to avoid the orders
would be damaged or prejudiced in a way that was not correctable on appeal if
the orders were permitted to stand. The court recognized that execution of the
orders would inherently interrupt state business to some extent. First, the
expert would have to interrupt daily tasks performed on the computer in order to
create the image, and second, the orders specified that a United States Marshal
would accompany the expert. Clearly, the act of the marshal escorting a
computer expert would likely disrupt state business, especially considering the
defendant’s hostility to both the expert and the marshal. Although the court
expressed concern with the potential interruption, this apprehension was
overshadowed by its distress with the privacy and confidentiality issues. As
discussed infra, the court recognized the petitioning party’s concern with an
appeal’s inability to correct the release of private or confidential information.
The court recognized that imaging state and personal computers would result in
the replication of both private and confidential information, and that the risk of

58. John B., 531 F.3d at 458.
59. Id.
60. Id.
61. Id.
62. Id.
63. Id.; see also Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999)
(recognizing the producing party’s concern that imaging would disrupt her business and cause
financial losses. The court addressed this concern by requiring that imaging occur according to the
producing party’s schedule).
64. John B., 531 F.3d at 458.
65. Id.
66. Id.
67. See infra Damage or Prejudice section (IV)(A)(2).
68. See generally John B. v. Goetz, 531 F.3d 448 (6th Cir. 2008).
exposure remained, even if the images were initially protected by court order.69 These two issues were paramount in the court’s analysis in determining whether the orders would cause damage or prejudice to the petitioning party.70

Many other courts have expressed concerns with these issues, as well as privilege.71 Although the facts of each case influence the court’s decision as to whether forensic imaging should be permitted, common themes appear for both the concerns raised by the petitioning parties and the court’s resolution.

a. Privacy

As the court in John B. v. Goetz noted, forensic imaging by nature implicates privacy concerns,72 which are only magnified when personal computers are included in forensic imaging orders. Privacy is an issue that has become more significant as society has become more technologically advanced.73 Technology has created many convenient solutions to everyday problems, including transportation, communication, and document creation, revision, and storage. However, technology has also produced consequences, including increased identity theft resulting from the widespread availability of personal information.74 With so much information used during online business transactions or stored on servers, hackers have more opportunities to obtain personal information.75 Due to the increased number of security breaches, consumers and legislators have demanded strict security procedures and legislation outlining various data security and notification protocols.76

Compelling unrestricted forensic imaging of personal computers implicates the concerns listed above. Many people store personal identifying information on their computer, including banking and financial information, social security

69. Id. at 458.
70. Id.
71. See, e.g., In re Ford Motor Co., 345 F.3d 1315, 1317 (11th Cir. 2003) (“The district court must protect respondent with respect to preservation of his records, confidentiality of nondiscoverable matters, and costs.”) (internal quotations omitted); Menke v. Broward County Sch. Bd., 916 So. 2d 8, 11 (Fla. Dist. Ct. App. 2005) (acknowledging “that unlimited access to anything on the computer would constitute irreparable harm, because it would expose confidential, privileged information to the opposing party”) (citing Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996)).
72. John B., 531 F.3d at 458.
73. See generally J. Howard Beales, III & Timothy J. Muris, Choice or Consequences: Protecting Privacy in Commercial Information, 75 U. Chi. L. Rev. 109 (2008) (recognizing that the internet has produced more possibilities for collecting, storing, and exchanging information, and thus has motivated an increased interest in privacy protection).
74. Id. at 123-24 (describing two types of identity theft: “new account” fraud which claims 3.23 million victims and “existing account” fraud, which occurs when the thief commits other offenses by using the victim’s identity, and affects 6.7 million people).
75. See id. at 121 (explaining that outside hackers cause 19% of all security breaches).
76. See id. at 119-20. For example, California has implemented a law that requires businesses to notify consumers whose information was compromised due to a security breach. See CAL. CIV. CODE § 1798.84(b).
numbers, and tax information. Improperly disclosed information, specifically social security numbers, can lead to identity theft because such information can be used to open new accounts. By allowing unrestricted forensic imaging of personal computers, third parties are permitted to create and store a copy of this private information completely out of the individual-owner’s control and without her consent. Although many forensic imaging experts likely have data security protocols in place, the chance of the data becoming exposed is now doubled simply because a copy exists. It seems unfair to risk exposure of this data, especially when such personal information is generally irrelevant to the litigation.

Additionally, allowing personal data to be copied is an invasion of privacy. Personal information is often stored on personal computers. Rule 26(b)(1) defines the scope of discovery as any information relevant to the claim or defense. Personal information copied simply because it is stored on the party’s computer and not because of its relevance is outside the scope of discovery. Compelling the imaging of such information amounts to an invasion of privacy, not a furtherance of the discovery process. Accordingly, the court in John B. v. Goetz correctly decided to set aside the order requiring unrestricted forensic imaging.

b. Confidentiality

The court also examined the potential exposure of confidential and proprietary information not related to the litigation. The discovery orders applied to the computers of high ranking state officials, and therefore, imaging would likely produce information relating to classified state matters. Other courts have also focused on the issue of proprietary information such as trade secrets and business information. It is important to recognize, as these courts have, that a company’s trade secrets, customer lists, and other proprietary

---

77. Beales & Muris, supra note 73, at 123-25 (discussing “new account” fraud, which is a type of identify theft).
78. The goal of forensic imaging should be to preserve discoverable information, that is, information relating to litigation. See Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any matter not privileged, that is relevant to the claim or defense of any party.”).
81. See id.
82. John B. v. Goetz, 531 F.3d 448, 460-61 (6th Cir. 2008).
83. Id. at 460.
84. See, e.g., Orrell v. Motorcarparts of Am. Inc., Civil No. 3:06DV418-R, 2007 WL 4287750, at *9 (W.D.N.C. Dec. 5, 2007) (responding to producing party’s concern regarding exposure of proprietary business information by confining the forensic imaging to certain non-business computers); Strasser v. Yalamanchi, 669 So. 2d 1142, 1144-45 (Fla. Dist. Ct. App. 1996) (recognizing the producing party’s concern that unrestricted forensic imaging, which would include imaging proprietary records including patient files, would violate patient confidentiality).
information are necessary for its survival, and as such, should be protected. Most courts have addressed this concern either by preventing unrestricted forensic imaging or by instituting a protocol to limit the imaging. Therefore, the court in John B. v. Goetz properly determined that proprietary information requires protection, and accordingly set aside the district court’s orders allowing unrestricted forensic imaging.

c. Privilege

Although privilege was not an issue in John B. v. Goetz, another significant concern during discovery is protection of attorney-client privilege. As discovery has evolved to include ESI, this issue has become even more important. Because storage space and cost requirements are minimal, more documents are being retained electronically. Traditionally, inadvertent waiver occurred when privileged documents were accidentally included with other documents sent in response to a discovery request. Inadvertent waiver occurs similarly in the production of ESI, but the problems stemming from traditional inadvertent waiver are magnified in the e-discovery context.

The number and format of documents stored causes difficulties with privilege review and production. As mentioned above, more documents are stored electronically than would be physically stored, so more information must be reviewed when responding to discovery requests. In addition to the sheer quantity of documents, information is stored in multiple forms and may need to be converted into a readable or searchable format. These characteristics of ESI make the identification of privileged documents more difficult, escalating the time required and cost of privilege review, as well as increasing the probability that a privileged document may inadvertently be produced. Accordingly,

85. See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 649-54 (D. Minn. 2002). This case involved a copyright infringement claim, and the plaintiff moved to compel forensic imaging of the defendant’s hard drive, claiming that the defendant was destroying information. Id. at 650-51. The court outlined a protocol to protect these concerns by implementing appropriate limitations such as allowing the defendant’s counsel to review the image and submitting only responsive documents. Id. at 653-54. But see Frees v. McMillan, No. 05-1979, 2007 WL 184889, at *5 (W.D. La. Jan. 22, 2007) (stating that because the disputed technology is unique and not easily understood, the requesting party must have access to the documents because his counsel would not have the necessary expertise to decipher the information).
86. John B., 531 F.3d at 461.
88. Id.
92. Id.
93. Id.
94. Id.
concern with inadvertent disclosure will motivate attorneys to spend more time and manpower reviewing documents, which ultimately increases the total costs to the client.95

The inadvertent production of privileged documents, regardless of the reason, may lead to waiver of privilege for all other privileged documents relating to that subject matter.96 Courts apply three different methods to determine whether waiver has occurred: the “strict approach,” the “lenient approach,” and the “balancing approach.”97

The courts applying the “strict approach” method will almost always determine that a waiver has occurred, reasoning that “once confidentiality is lost, it can never be restored.”98 Under the “strict approach,” should a court compel unrestricted forensic imaging of the opposing party’s computer, any privileged documents imaged would be deemed inadvertently waived, and additionally, any other documents related to the subject matter would also lose protection. The ramifications of such an order could be devastating to a case, and although this is the consequence in theory, it is unlikely that any court would enforce such harsh results.

Courts applying the “lenient approach” rarely find waiver, reasoning that attorneys are only human and thus make mistakes.99 To find that waiver occurred, these courts require evidence showing that the producing party intended to waive privilege, or did so knowingly.100 Under the “lenient approach,” compelling unrestricted forensic imaging would have almost no effect, because the production of privileged documents would be the result of an order, and establishing the required intent to waive privilege would be virtually impossible.

Courts applying the “balancing approach” weigh five factors to determine whether the actions that resulted in production should be excused and the privilege protected.101 Courts that use this technique typically examine: (1) the reasonableness of the precautions taken to prevent the disclosure; (2) the number of disclosures contained within the discovery responses; (3) the extent of the materials or information disclosed; (4) any delay in attempting to correct the disclosure; and (5) any underlying principles of justice.102 The effect of

95. Id.
96. Id. at 235-36.
98. Id. at 235 (recognizing that the First and Federal Circuits follow the “strict approach”).
99. Id. at 235-36 (acknowledging that the lenient approach is followed by the Eighth Circuit and some district courts).
100. Id. at 236.
101. Id. (recognizing that this approach is followed by district courts within the Fourth Circuit).
102. Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008). This case employed the balancing test, determining that waiver did occur because the producing party could not prove that its conduct was reasonable. Id. at 262. In this situation the only precaution taken to prevent waiver was a simple keyword search that resulted in production of 165 privileged documents. Id. at 254-60.
compelling unrestricted forensic imaging under the “balancing approach” is more uncertain. The result of this test depends heavily on the facts, but when considering that the order to compel forensic imaging is likely the result of the producing party’s failure to comply with previous requests, the test could be resolved in favor of waiver.\textsuperscript{103}

Although the court in \textit{John B. v. Goetz} did not discuss privilege concerns, many other courts have cited concern with privilege waiver as a reason for their decision either not to compel forensic imaging or to limit it.\textsuperscript{104} As one court noted, indiscriminate access to the producing party’s computer could expose privileged correspondence relating to the issues central to the litigation.\textsuperscript{105} This statement represents the concern of each court as it considers whether to compel forensic imaging, and why so many courts have correctly refused to allow unrestricted imaging either by denying a motion to compel or by outlining a protocol that provides limitations and safeguards to protect against waiver.

3. Clearly Erroneous

Next, the \textit{John B. v. Goetz} court examined the third mandamus factor and correctly determined that the district court’s orders were clearly erroneous as a matter of law.\textsuperscript{106} The court recognized that district courts usually have expansive discretion in discovery issues, but that here, orders requiring forensic imaging of all computers potentially storing responsive ESI constituted an abuse of discretion.\textsuperscript{107} The court first stated that generally, the parties have the obligation to preserve all relevant information, including ESI, whenever they become aware of it. Should parties fail

\textsuperscript{103} For example, when examining the first factor, which focuses on the reasonableness of precautions taken to avoid disclosure, a court may decide that few precautions were taken by the producing party because if the party had only responded to such requests in a timely fashion, it could have had the opportunity to conduct a thorough privilege review. The next two factors depend on the facts because they analyze the number and extent of the disclosures. The fourth factor, however, which examines the delay in attempting to rectify any disclosures could also weigh in favor of waiver depending on the judge. A judge could reason that the delay to attempt to correct waiver began when the producing party failed to timely respond to the requests, because by failing to respond the party failed to take reasonable steps such as initially reviewing for privilege. Finally, the last factor will depend on the facts of the case and the competing interests in the judge’s mind. Admittedly, the above hypothetical may be a bit extreme, but it is a possible effect of compelling unrestricted forensic imaging.

\textsuperscript{104} See, e.g., \textit{In re Ford Motor Co.}, 345 F.3d 1315, 1317 (11th Cir. 2003) (recognizing that unrestricted imaging gives the requesting party access to documents that are not discoverable, including privileged information); \textit{Thielen v. Buongiorno USA, Inc.}, No. 1:06-CV-16, 2007 WL 465680, at *2 (W.D. Mich. Feb. 8, 2007) (noting that allowing inspection of the opposing party’s computer may reveal privileged or proprietary documents).

\textsuperscript{105} \textit{Menke v. Broward County Sch. Bd.}, 916 So. 2d 8, 10 (Fla. Dist. Ct. App. 2005) (granting relief from unrestricted forensic imaging because of concerns of invasion of privacy and privilege).

\textsuperscript{106} \textit{John B. v. Goetz}, 531 F.3d 448, 458-59 (6th Cir. 2008).

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id.} at 459.
to preserve such information, courts may exercise their authority to impose appropriate sanctions.\footnote{109} The Sedona Principles suggest that courts should impose sanctions only when they find that a party had an affirmative duty to preserve information, which it failed to do, and a reasonable probability exists that the failure will prejudice the opposing party in some way.\footnote{110} The court continued, stating that it was unclear whether courts could compel unrestricted forensic imaging and production of information in order to preserve ESI, as the district court did here, and that if permitted, such practices should be used in limited circumstances.\footnote{111} The court recognized that while forensic imaging is not uncommon, courts have been cautious when requests are broad and only a tenuous connection exists between the computers and the claim.\footnote{112} The court explained that mere skepticism that the opposing party has not produced all information is not sufficient to warrant such drastic and intrusive electronic discovery methods.\footnote{113} The Sedona Principles also urge caution in using and compelling forensic imaging.\footnote{114}

The court stated that although forensic imaging is a useful and generally accepted tool, it is not always appropriate and should not be applied to all situations.\footnote{115} The court advised that when considering whether to compel imaging, courts should weigh the underlying interests of the situation with the purposes of the imaging, which the district court failed to do.\footnote{116} The court recognized that while the risks relating to disclosure of privacy, confidentiality, and privilege alone do not prohibit forensic imaging, good cause must be present to subordinate these concerns and compel the imaging.\footnote{117} The court stated that although the district court found that the defendants failed to comply with discovery orders, there was no evidence in the record to show that the defendants

\footnote{109. \textit{Id.} at 459-60. \textit{See also} \textit{Fed. R. Civ. P.} 37.}
\footnote{110. The Sedona Principles, \textit{supra} note 5, at 70 (discussing that sanctions are usually based on the party’s culpability). The Sedona Conference Working Group consists of participants who create recommendations and guidelines focused on confronting challenging legal issues. \textit{Id.} at 71. The Sedona Conference played an important role in amending the Federal Rules of Civil Procedure to address e-discovery and continues to work to define other legal areas. \textit{Id.} at 6.}
\footnote{111. \textit{John B.}, 531 F.3d at 459 (recognizing that here, the district court ordered the forensic imaging primarily for preservation purposes because of the defendant’s repeated failure to comply with the court’s orders by producing the ESI).}
\footnote{112. \textit{Id.} at 459-60; \textit{see also} Balboa Threadworks, Inc. v. Stucky, No. 05-1157-JTM-DWB, 2006 WL 763668, at *3 (D. Kan. March 24, 2006) (noting that courts are more hesitant to grant a request when it is broad).}
\footnote{113. \textit{John B.}, 531 F.3d at 460.}
\footnote{114. The Sedona Principles, \textit{supra} note 5, at 34, 47 (recognizing that imaging should only be permitted in “exceptional circumstances” and that it should always include a protocol to protect privacy, confidentiality, and privilege).}
\footnote{115. \textit{John B.}, 531 F.3d at 460.}
\footnote{116. \textit{Id.} (reiterating the issues of privacy and confidentiality implicated by the district court’s order to image both personal and state owned computers that almost certainly contain private and confidential information unrelated to the litigation).}
\footnote{117. \textit{Id.}}
intentionally destroyed data or were unwilling to produce information.\textsuperscript{118} The court then recognized that forensic imaging was not the only method available to respond to the defendant’s misconduct, for example, the court could impose monetary sanctions or order a less intrusive method of discovery.\textsuperscript{119} The court also expressed concern with the use of a United States Marshal and the forced imaging of state officials’ computers, because both measures implicated issues of federalism and comity not usually present in civil litigation, which were not proper under these facts.\textsuperscript{120} The court concluded that because other less intrusive means of preservation were available, unrestricted imaging was not appropriate.\textsuperscript{121}

The court correctly decided that good cause should be shown before forensic imaging is permitted. Courts should require an affirmative showing of substantial noncompliance or unresponsiveness before considering unrestricted forensic imaging, and even such evidence does not automatically permit unrestricted forensic imaging.\textsuperscript{122} Mere skepticism or concern should not be sufficient. Rather, specific examples of noncompliance, such as evidence that the producing party was destroying information or failing to implement preservation mechanisms, should be required before a court should consider compelling forensic imaging.\textsuperscript{123} Otherwise one party could request forensic imaging on the simple assertion that the opposing party was not responsive, which would allow parties to use forensic imaging as a “fishing expedition” in an attempt to gather information.\textsuperscript{124} Rule 34(a) allows the requesting party to inspect and copy information produced during discovery, but it does not permit unlimited, direct access to the producing party’s databases.\textsuperscript{125} If computer hard drives are analogous to filing cabinets, unrestricted forensic imaging is

\begin{footnotesize}
\begin{enumerate}
\item[118.] Id.
\item[119.] Id. at 460-61.
\item[120.] Id. at 461.
\item[121.] John B., 531 F.3d at 460-61.
\item[122.] See, e.g., Calyon v. Mizuho Secs. USA, Inc., No. 07 Civ. 02241, 2007 U.S. Dist. LEXIS 36961, at *16 (S.D.N.Y. May 18, 2007) (denying a motion to compel unrestricted forensic imaging because there was no showing that the producing party failed to produce responsive documents); Balfour Beatty Rail, Inc. v. Vaccarello, No. 3:06-cv-551-J-20MCR, 2007 WL 169628, at *3 (M.D. Fla. Jan. 18, 2007) (refusing to grant a motion to compel because there was no evidence that the producing party had not complied with discovery requests, nor did the requesting party specify what information it hoped to obtain from the hard drives); Strasser v. Yalamanchi, 669 So. 2d 1142, 1145 (Fla. Dist. Ct. App. 1996) (stating that even if the producing party was unresponsive, unrestricted forensic imaging would not be proper).
\item[123.] McCurdy Group, LLC v. Am. Biomedical Group, Inc., 9 Fed. App’x. 822, 831 (10th Cir. 2001) (refusing to permit such drastic measures as forensic imaging because of unsubstantiated concern with responsiveness).
\item[124.] Balfour Beatty Rail, Inc., 2007 WL 169628, at *3 (noting that allowing a requesting party access to the producing party’s hard drives would allow the requesting party to conduct a “fishing expedition”).
\item[125.] Fed. R. Civ. P. 34(a). See also In re Ford Motor Co., 345 F.3d 1315, 1316 (11th Cir. 2003).
\item[126.] See Menke v. Broward County Sch. Bd., 916 So. 2d 8, 10 (Fla. Dist. Ct. App. 2005).
\end{enumerate}
\end{footnotesize}
comparable to requiring the producing party to provide its entire filing cabinet to the requesting party, which is absurd. Also, because of its intrusiveness, forensic imaging should be used only as a last resort. Accordingly, based on the Sixth Circuit’s analysis and conclusion, it correctly decided that the district court’s orders were clearly erroneous as a matter of law.

4. Important Matters of Law

The court examined the fifth mandamus factor and determined that the district court’s orders impacted the important issues of electronic discovery and forensic imaging. These orders effectively granted unrestricted imaging of a party’s computers without requiring evidence of bad faith destruction of information. These orders, if allowed to stand, would significantly expand discovery and subordinate privacy, confidentiality, and privilege concerns. These orders also implicated issues of federalism and comity, and although such concerns are not typically present in civil litigation, addressing the impropriety of the orders was important. Because four of the five factors supporting mandamus relief weighed in the defendant’s favor, the court correctly granted relief and set aside the district court’s orders compelling unrestricted forensic imaging.

B. Facts Unique to John B. v. Goetz

Two facts unique to John B. v. Goetz may have affected the Sixth Circuit’s decision. First, because the defendants were state officials, unrestricted imaging would expose state proprietary information. Second, the orders required a United States Marshal to accompany the computer expert during the imaging process. While both of these facts were relevant to the court’s analysis, neither dominated the court’s decision.

First, as previously discussed, because the defendants were state officials, the computers imaged would likely contain highly confidential, state proprietary information. The court believed protecting state proprietary information was important to its decision to set aside the orders compelling unrestricted forensic imaging, but it was not the central reason. Existence of state proprietary information is analogous to the existence of business proprietary information.

127. See The Sedona Principles, supra note 5, at 47.
129. Id. (stating that use of federal law enforcement officers in this situation was improper).
130. Id.
131. Id. at 448, 461. The defendants in this case were various state officers, including the Commissioner of the Tennessee Department of Finance and Administration, the Assistant Commissioner of the Bureau of TennCare, and the Commissioner of the Tennessee Department of Children’s Services.
132. Id. at 461.
133. Id. at 460-61.
stored on company computers. Courts have repeatedly recognized the need for protection of trade secrets and other business proprietary information, and these concerns have influenced their decisions to restrict forensic imaging.\textsuperscript{134} Although the court wanted to protect state proprietary information here, courts have also protected business proprietary information in other instances,\textsuperscript{135} suggesting that the protection of any type of proprietary information is important. Accordingly, the fact that the proprietary information was related to state matters was not the only reason for the Sixth Circuit’s decision to set aside the orders.

Second, although the orders’ use of a federal law enforcement officer supported the Sixth Circuit’s decision to set aside the orders, it was not the primary reason for the court’s conclusion. The court discussed the use of federal law enforcement officers during its examination of the third factor of mandamus relief, which examined whether the district court’s orders were clearly erroneous as a matter of law.\textsuperscript{136} During this section of its analysis, the court focused on the lack of evidence supporting the need for forensic imaging, the privacy and confidentiality concerns, and the use of a United States Marshal.\textsuperscript{137} The use of a federal law enforcement officer was mentioned last and discussed only briefly. While it supported the court’s rationale and decision, the brevity of the discussion does not suggest that it was the basis for the decision. Accordingly, if the order did not require the use of a marshal, based on its discussion of the lack of evidence supporting the need to compel forensic imaging, as well as the concerns of privacy and confidentiality, the court would still have decided to set aside the orders.\textsuperscript{138}

Based on the above analysis, the absence of these unique facts would not have changed the court’s decision because neither fact was the cornerstone of the court’s analysis. These facts clearly supported the court’s conclusion, but neither was the paramount reason for the court’s decision. Therefore, the Sixth Circuit seems to have limited the breadth of discovery through its decision not to compel forensic imaging.

\textsuperscript{134} See, e.g., Orrell v. Motorcarparts of Am. Inc., 2007 WL 4287750, at *9 (W.D.N.C. Dec. 5, 2007) (responding to producing party’s concern regarding exposure of proprietary business information by confining the forensic imaging to certain non-business computers); Strasser v. Yalamanchi, 669 So. 2d 1142, 1144-45 (Fla. Dist. Ct. App. 1996) (recognizing the producing party’s concern that unrestricted forensic imaging, which would include imaging proprietary records including patient files, would violate patient confidentiality).

\textsuperscript{135} See supra note 134 and accompanying text.

\textsuperscript{136} John B. v. Goetz, 531 F.3d 448, 461 (6th Cir. 2008).

\textsuperscript{137} Id. at 460-61. The court discussed that affirmative evidence of a party’s failure to preserve information or of its destruction of information is usually required before forensic imaging should be compelled, neither of which could be found in the record. Id. at 461. Additionally, the court reiterated concerns relating to the privacy issues implicated by imaging personal computers, as well as the confidentiality issues implicated by the imaging of state officials’ computers. Id. at 461.

\textsuperscript{138} Id. at 461.
C. An Important Factor to Consider: Cost

Another distinction of *John B. v. Goetz*, as compared to other forensic imaging cases, is that cost was not a concern and therefore not analyzed by the court. Because these costs can be staggering, many courts address this issue when examining whether to compel forensic imaging.\(^{139}\) The presumption as to cost allocation is that the producing party pays the costs for retrieving and producing responsive information because in theory, that party controls how many records it keeps, as well as how the information is stored.\(^{140}\) However, because of the evolution of technology and the increasing popularity of electronic storage, this premise is no longer valid.

Parties retain more information than ever before, primarily because of the low costs and ease of electronic storage.\(^{141}\) In the past, information was printed on hard copy documents, which were then boxed and stored. Storage of these boxes was expensive because of the space required, and therefore, parties would regularly review the information kept in these boxes to determine which documents should be kept and which could be destroyed. However, now that documents are stored on a computer hard drive or server, a party may be less motivated to destroy unnecessary documents.\(^{142}\) The increased number of stored documents now leads to more production during litigation, which increases the ultimate cost of discovery.

Rule 26(b)(2)(C) allows courts to protect the producing party from undue burden or expense during discovery by either preventing production or shifting the costs.\(^{143}\) Courts engage in a benefit/burden analysis, which weighs the expected value of the information produced with the costs of production.\(^{144}\) If


\(^{140}\) *Rowe Entmt’ Inc.*, 205 F.R.D. at 429 (acknowledging that the court may limit discovery if: “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues”).

\(^{141}\) *Id.* (“Information is retained not because it is expected to be used, but because there is no compelling reason to discard it.”).

\(^{142}\) *Id.*

\(^{143}\) *Cenveo Corp.*, 2007 WL 442387, at *1 (acknowledging that the court may limit discovery if: “(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues”).

\(^{144}\) *Rowe Entmt’ Inc.*, 205 F.R.D. at 429.
the anticipated benefits outweigh the burdens, then production will likely be compelled, although the court may shift costs if appropriate.145

Courts typically examine eight factors when applying the benefit/burden test.146 The first factor examines the specificity of the discovery requests, and usually, the broader the request, the more likely the court will shift the cost or refuse to compel production.147 The second factor analyzes the likelihood of discovering key information, and if the requesting party fails to provide evidence that the discovery request will likely produce useful information, that party should bear the expense.148 The third factor examines the possibility of obtaining the relevant information from other less expensive sources.149 The fourth factor looks at the purpose of the producing party’s retention of the information, and if the information is used often and easily accessible, the producing party will likely pay.150 The fifth factor analyzes the benefit to the producing party, and if it would likely benefit from the production, then that party should logically bear the expense.151 After all, if the producing party would have produced the information in support of its own claim or defense, there is no purpose in shifting the cost to the requesting party. The sixth factor looks at the total costs of the requested production, and if the costs are not substantial, there may not be a reason to shift them.152 The seventh factor weighs the ability of the parties to control the costs associated with production.153 Courts will sometimes allocate costs to the party that controls the extent of the discovery to ensure that the production occurs as efficiently as possible.154 The

145. Id. at 429-32.
146. Id. at 429 (employing the balancing test to determine whether to shift costs and deciding that the costs should be shifted to the requesting party).
147. Id. at 429-30 (stating that when a “party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the costs.”).
148. Id. at 430 (recognizing that this method of allocation should deter frivolous discovery requests); see also McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001) (“The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [that party] search at its own expense.”).
149. Rowe Entm’t, Inc., 205 F.R.D. at 430 (discussing that discovery may be denied or costs shifted if the same information can be accessed from a less expensive source or in a more accessible format).
150. Id. at 430-31. If the producing party maintains the information for everyday use, it is likely easy to access and produce, and that party will likely bear the cost of production. Id. However, if the producing party retains it for no identifiable purpose, maybe simply because it has failed to discard it or has kept it for emergency purposes, the requesting party would likely have to pay for production. Id. at 431. Backup tapes, for example, would fall into this latter category. Id.
151. Id. at 431.
152. Id.
153. Id. at 431-32.
154. Id. at 432 (stating that when the “discovery process is going to be incremental, it is most efficient to place the burden on the party that will decide how expansive the discovery will be”).
final factor considers the parties’ resources in relation to the costs of production.\textsuperscript{155}

Forensic imaging can be very costly, even for relatively minor imaging.\textsuperscript{156} Obviously, the costs of imaging are directly related to the amount of information imaged. Unrestricted imaging entails copying all files stored on a hard drive, and as discussed above, more data is now stored electronically. If the presumption as to cost allocation is followed in the context of forensic imaging, the producing party would have to pay for the imaging of an entire hard drive, including information that is irrelevant to the litigation, and these costs may be over burdensome. Therefore, the court should carefully weigh the factors from above, and in most instances, the principles of fairness would seem to require that the requesting party should bear the costs associated with the imaging.\textsuperscript{157}

\textbf{D. Forensic Imaging as a Tool}

Forensic imaging, when used properly, can be a valuable tool to aid in the discovery process. It acts like a camera, taking a picture of the designated segments of a computer hard drive, and preserving the information.\textsuperscript{158} The information stored on a computer changes constantly, as data is written over or destroyed during daily use.\textsuperscript{159} Accordingly, forensic imaging can allow parties to preserve the information as required for litigation purposes without depriving them of use of their computers.

\begin{footnotesize}
\begin{enumerate}
\item[155.] Rowe Entm’t, Inc., 205 F.R.D. at 432 (acknowledging that even a modest costs can consume all of one party’s resources, which may justify shifting the costs to the other party).
\item[156.] See Citizens for Responsibility and Ethics in Washington v. Executive Office of the President, No. 07-1707 (HHK/JMF), 2008 WL 2932173, at *3 (D.D.C. July 29, 2008) (recognizing that the expected benefits do not outweigh the costs of imaging: “the typical cost of forensic imaging a 100GB hard drive is between $400 and $1,000 and it takes approximately two to three hours to complete the imaging”).
\item[157.] When the factors are weighed, a party requesting unrestricted forensic imaging should bear the costs. Here, unrestricted forensic imaging contains no specificity because it requires the indiscriminate imaging of the entire hard drive. Additionally, it is not possible to know whether the search would be successful, nor if the information could be recovered from another source because unrestricted imaging does not target specific information, it targets all of it. Also, as discussed above, a party stores a substantial amount of information on hard drives, and it is likely that some of the information imaged would not be stored for business reasons. Yet, the producing party would be required to pay the costs of production for all the information, even if it is unrelated to the litigation. Additionally, the producing party does not stand to benefit from unrestricted forensic imaging, especially considering the dangers of privacy, confidentiality, and privilege discussed. See supra Damage or Prejudice section (IV)(A)(2); see also supra Clearly Erroneous section (IV)(A)(3). Finally, the costs are very high, and the requesting party could control these costs by outlining a limited request for forensic imaging, as opposed to unrestricted access. Therefore, the costs should be shifted to the requesting party.
\item[158.] Balboa Threadworks, Inc. v. Stucky, No. 05-1157-JTM-DWB, 2006 WL 763668, at *3 (D. Kan. March 24, 2006) (recognizing that forensic imaging assures preservation of information, which can be difficult to do considering how easily information can be erased).
\item[159.] See Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 650-51 (D. Minn. 2002) (acknowledging that data stored on the hard drive is overwritten during the every day use of the computer).
\end{enumerate}
\end{footnotesize}
However, forensic imaging poses some dangers. To effectively protect the concerns discussed above, forensic imaging should only be permitted if either the parties or the court outlines appropriate limitations prior to the imaging. Parties should use pretrial conferences to outline a mutually agreeable strategy containing potential solutions to protect these concerns. Additionally, should the court decide to compel forensic imaging, it should outline its own protocol to address privacy, confidentiality, and privilege. If these safeguards and protocols are used, most of the parties’ concerns should be alleviated.

1. Potential Solutions to Address Privacy, Confidentiality, and Privilege Concerns

As discussed above, the request for relief in John B. v. Goetz was for writ of mandamus, and by granting the petition, the court set aside the district court’s orders. Thus, the Sixth Circuit did not have the opportunity to outline solutions to the issues of privacy, confidentiality, and privilege. However, courts can and have used potential solutions to the above mentioned concerns. These solutions include instituting protective orders, allowing the producing party the right to review the image before the requesting party receives it, utilizing search terms, and creating and accepting claw back agreements. When used properly, many courts agree that such precautions will protect against disclosure of private and confidential information, as well as privilege waiver.

a. Protective Order

The first potential solution to address the concerns listed above is for the court to institute a protective order. If constructed properly, the order can address privacy and confidentiality concerns, as well as prevent inadvertent privilege waiver. The order can prevent any documents seen by opposing counsel from constituting a waiver of privilege or breach of confidentiality, and the order can also prohibit the expert from revealing any information observed

162. See, e.g., Equity Analytics v. Lundin, 248 F.R.D. 331, 334 (D.D.C. 2008) (stating that by adopting a claw back agreement into an order, judicially compelled disclosure would not act as a waiver); Simon Prop. Group, L.P., 194 F.R.D. at 641-42 (allowing the producing party to review documents for privilege before the requesting party receives them); Playboy Enters., Inc., 60 F. Supp. 2d at 1054-55 (declaring that because the expert was an officer of the court and subject to a protective order, no waiver of privilege could occur); Etzion v. Etzion, 796 N.Y.S.2d 844, 846-47 (N.Y. Sup. Ct. 2005) (outlining a protocol to generally protect privacy and privilege concerns).
163. See Balboa Threadworks, Inc., 2006 WL 763668, at *4-5 (recognizing that confidentiality could be protected through a protective order and use of search terms).
during the imaging process.\textsuperscript{164} Finally, the order can punish anyone who violates it by holding them in contempt of court.\textsuperscript{165} In addition to instituting a protective order, a court can also make the computer expert an officer of the court, and thus a neutral party, which also prevents privilege waiver.\textsuperscript{166}

However, these two safeguards may not adequately address all concerns relating to privacy, confidentiality, and privilege.\textsuperscript{167} Depending on the circumstances, the requesting party will likely pay the expert, which creates the appearance of an employer/employee relationship, which arguably instills a sense of loyalty in the computer expert. The producing party may be concerned with the safety of imaged information in the hands of a paid employee of the requesting party.\textsuperscript{168} Therefore, some danger that private, confidential, or privileged information may be disclosed exists. The magnitude of this risk depends on how well the computer expert understands her duty and responsibilities under the protective order and her respect of the legal system. Although the hope is that she will remain neutral under the protective order, the possibility that disclosure may occur should be recognized.

b. Opportunity to Review

Another potential solution is to allow the producing party to review the image before disclosure to the requesting party so that the attorneys provide only responsive, unprivileged documents.\textsuperscript{169} Although the process of reviewing should prevent the disclosure of private, confidential, and privileged documents unrelated to the litigation, this is not a complete solution for two reasons. First, the expert is still exposed to these documents while she images the hard drive, which may constitute an invasion of privacy.\textsuperscript{170} Additionally, because the expert may be exposed to confidential information while imaging the hard drive, a breach of confidentiality may still occur. Finally, waiver of privilege may be prevented depending on whether the court has instituted a protective order.

Second, even though the producing party’s counsel has the opportunity to review for privilege, the possibility of inadvertent waiver still exists. Because of

\textsuperscript{164} See \textit{In re Honza}, 242 S.W.3d 578, 583-84 (Tex. Ct. App. 2008) (providing that the order protected both confidentiality and privilege and prohibited the requesting party from later asserting a waiver claim or using any revealed data).

\textsuperscript{165} See id.


\textsuperscript{167} See Menke v. Broward County Sch. Bd., 916 So. 2d 8, 10 (Fla. Dist. Ct. App. 2005) (acknowledging the producing party’s concern that any confidential or privileged communications would be revealed to the opposing party’s paid representative).

\textsuperscript{168} Id.

\textsuperscript{169} Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2006 WL 3825291, at * 6 (E.D. Mo. Dec. 27, 2006) (recognizing that allowing the producing party to review for responsive documents should alleviate privacy and privilege concerns).

\textsuperscript{170} See Menke, 916 So. 2d at 10 (stating that the expert’s examination arguably constitutes a significant invasion of privacy).
the time constraints of discovery, the producing party has a short time between
when the image is created and production to the requesting party. Therefore, the
inherent issues relating to inadvertent waiver are still an issue, including the
possibility that privileged documents may be accidentally produced.171 The
breadth of the imaging request will significantly affect the number of documents
copied, and accordingly, the necessary review time. Because unrestricted
forensic imaging of an entire hard drive would produce a substantial number of
documents, each of which must be reviewed, it becomes even more probable that
inadvertent disclosure may occur. This review process would also force the
producing party to review each and every document stored on an entire hard
drive, drastically increasing the costs and time associated with production.

Although allowing the producing party to review the image before the
requesting party receives it will address some of the privacy, confidentiality, and
privilege concerns, it clearly cannot act as a complete solution. Thus, it should
be used in conjunction with other methods discussed in this section.

c. Search Terms

Next, the parties can agree to certain terms that the computer expert will use
to search for responsive documents to be imaged.172 While recognized as a good
tool to narrow the number of potentially responsive documents on a hard drive,
inherent limitations and risks should be recognized.173 One of these limitations
is that the results may be over or under inclusive primarily because of the
vagueness of the English language.174 For example, many words or word
combinations can be used to describe the same concept, and it is virtually
impossible to account for them all in a search. Additionally, search terms may
not account for misspellings or abbreviations within the documents, and
pronouns are often used to reference terms the key words are attempting to
retrieve.

For search terms to be used successfully, attorneys should confer with
experts to develop a protocol to capture as many responsive documents as
possible.175 Additionally, it is important to critically think about the search terms

(describing inadvertent waiver and its effects).
172. See Equity Analytics v. Lundin, 248 F.R.D. 331, 332 (D.D.C. 2008); Balboa Threadworks,
recognizing that search terms can alleviate concerns with privacy, confidentiality, and privilege).
"proper selection and implementation obviously involves technical, if not scientific knowledge,"
thus making a successful search more challenging to create).
174. Id. at 261 (recognizing that "the inherent malleability and ambiguity of spoken and written
English" affect the success of a keyword search) (internal quotations omitted).
175. See Equity Analytics, 248 F.R.D. at 333 ("Determining whether a particular search
methodology, such as keywords, will or will not be effective certainly requires knowledge beyond
the ken of a lay person . . . and requires expert testimony."); see also Victor Stanley, Inc., 250
F.R.D. at 261.
chosen and understand the reasoning behind each. An explanation
demonstrating the reasonableness of each term is vital to determining whether
inadvertent waiver of privilege has occurred in a balancing jurisdiction.176
Again, while search terms are useful, this method has inherent limitations and
risks and should not be used as a complete solution.

d. Claw Back Agreements

Parties can enter into claw back agreements, also called non-waiver
agreements, to prevent waiver by allowing the producing party to recall
privileged materials that were unintentionally disclosed if discovered within a
reasonable period.177 In effect, these agreements allow the parties to contract
around the general effects of inadvertent production, most notably, waiver.178
Claw back agreements attempt to address the difficulty, and sometimes apparent
impossibility, of performing an individual document review within the period set
by the discovery timeline. Although most courts accept and give effect to claw
back agreements, some do not.179 In order to ensure effectiveness and validity of
the agreement, parties should ask the court to adopt the agreement in a court
order.180

One of a court’s primary concerns with claw back agreements is that parties
will enter into the agreement and then fail to do any document review, believing
that they can simply assert privilege when the document is later discovered.181
Parties should only use a claw back agreement to facilitate the discovery process,
not as a “get out of jail free” card.182 In order to protect against this result, courts
have applied a balancing test to determine whether privilege should be protected
if waiver occurred under a claw back agreement.183 First, the party must
demonstrate the reasonableness of precautions taken to prevent disclosure in
light of the amount of time available and the number of documents searched.184

176. See Victor Stanley, 250 F.R.D. at 261; Hopson, 232 F.R.D. at 236 (both discussing and
outlining the “balancing approach” to privilege waiver).
178. Edna Selan Epstein, The Attorney-Client Privilege and the Work-Product
(refusing to accept a claw back agreement, believing that it would lead to poor privilege review
which may endanger a client’s case).
180. Hopson, 232 F.R.D. at 244 (describing inadvertent waiver and its effects and
recommending that courts independently determine whether a full privilege review can be
accomplished during the timeline, and if not, accepting the agreement into a court order).
181. Id. (suggesting that parties should assume a full privilege review is required because of
potential effects in a balancing jurisdiction, but regardless of the jurisdiction, should always
attempt to complete a thorough privilege review).
182. Id.
183. Id. at 243. This test is essentially an abbreviated version of the “balancing approach” test
for inadvertent waiver. See also Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 261
(D. Md. 2008).
Next, the party must show that it took reasonable steps to promptly assert privilege. Finally, the court must have compelled the production of the document. If a party can show that its actions were reasonable and justified, a court will likely protect the privilege.

Claw back agreements seem to provide some protection in situations where forensic imaging is compelled. In theory, to protect privilege under a claw back agreement, a producing party needs only to assert privilege to each relevant document in a timely manner. However, although claw back agreements are becoming more accepted, some risks still exist. First, jurisdictions vary in their approach and acceptance of them, so it is important to be aware of local rules. Also, while these agreements are respected in federal courts, waivers that occur under them in state courts may not be protected, and local rules and court discretion will determine their acceptance. Additionally, claw back agreements only apply to privilege, so they do not protect against the invasion of privacy or breach of confidentiality. Therefore, while this is an apparent solution to privilege waiver, it does not address the two other primary concerns discussed above.

2. A Model Protocol

Should the court need to facilitate an agreement as to the parameters of forensic imaging or compel discovery, it is imperative that any protocol provided include restrictions and clear limitations in order to protect the interests of the parties. Several courts have outlined protocols that attempt to address and protect these concerns. One protocol designed by the court in *Playboy Enterprises, Inc. v Welles* has been adopted by other courts. The first step in this protocol was the court would appoint a computer expert to create the image. The court stated that the parties could either agree upon an expert, or if they could not reach an agreement, the court would choose an expert from a

185. *Id.*
186. *Id.* (describing inadvertent waiver and its effects). Courts have recognized that disclosure of privileged information is not a waiver if the production was judicially compelled. See also *Equity Analytics v. Lundin*, 248 F.R.D. 331, 334 (D.D.C. 2008).
list provided by the parties. The court would then designate the expert as an officer of the court and have him sign a protective order. Next, the court ordered the parties to agree to a date and time for the imaging based on the producing party’s schedule, so that the imaging would only minimally interrupt the producing party’s business. The court then stated that the created image should be given to the producing party’s counsel for review, who should provide any responsive documents to the requesting party. Finally, the court stated that the producing party’s counsel would retain the mirror image until the litigation had concluded.

This protocol adequately addresses most concerns of the producing party and balances the needs of the requesting party. Appointment of the expert by the court minimizes concern of loyalty or bias to either party because the expert is appointed by a neutral figure, thus diminishing the appearance of an employer/employee relationship. Declaring the expert an officer of the court and issuing a protective order protects against privacy and privilege concerns to the extent possible. The protocol also provides a period during which the producing party’s counsel can review for privilege. In addition to this safeguard, if the parties execute and the court accepts a claw back agreement, all privilege concerns should be alleviated.

While this protocol addresses many concerns, it has some deficiencies. First, the order specifically states that the date is subject to the producing party’s schedule. Assuming that forensic imaging is compelled because of the producing party’s noncompliance with past discovery orders, allowing the date for imaging to depend on this same party may prove problematic. For example, the party could continually delay the imaging by claiming to be busy. This would hinder the preservation of data and potentially allow data to be lost or destroyed, which would defeat the primary purpose of compelling forensic imaging. To prevent this result, the court should include a deadline by which the

192. Id.
193. Id. The court believed that if the expert was both an officer of the court and bound by a protective order, the producing party’s privacy and privilege concerns would be alleviated. Id. The court also stated that the imaging process would not constitute a waiver. Id.
194. Id. The court also specified that only the producing party’s counsel and the producing party could be present while the expert created the image. Id. Accordingly, the requesting party could not be present.
195. Id. (The court stated that documents withheld based on a privilege claim would be recorded in a privilege log).
196. Id.
197. See Menke v. Broward County Sch. Bd., 916 So. 2d 8, 10 (Fla. Dist. Ct. App. 2005) (acknowledging the producing party’s concern that any confidential or privileged communications would be revealed to the opposing party’s paid representative).
imaging must occur. This would accommodate the producing party’s schedule while balancing the need for expediency.

The next deficiency with the protocol is that the producing party retains possession of the only copy of the image.200 Again, assuming that forensic imaging is only compelled if the producing party is either destroying information or failing to preserve it, allowing that same party to retain the only copy of the image poses an obvious danger. The producing party’s reputation is already in question, and if that party keeps the only copy of the image, it cannot be verified whether all information is in fact being produced. However, this concern can be avoided if the expert submits a copy of the image to the court, which should be viewed only if necessary.201

Additionally, the expert should file a report with the court outlining the work performed and the volume and types of records submitted to the producing party’s counsel.202 This would allow the court to compare the number of total documents preserved with the amount of documents provided to the requesting party. Therefore, while the protocol used in Playboy Enterprises, Inc. is a good starting point, these extra steps should give the requesting party confidence that the information is adequately preserved and available for discovery while protecting the producing party’s interests of privacy, confidentiality, and privilege.

V. CONCLUSION

In 2006 the Federal Rules of Civil Procedure were amended to address e-discovery issues, and courts continue to define the rules and their boundaries. John B. v. Goetz is an example of this process. Here, the court correctly set aside orders compelling unrestricted forensic imaging of the defendant’s computers.203 The court determined that the issues of privacy and confidentiality significantly outweighed the need to compel unrestricted forensic imaging.204 Unrestricted forensic imaging should rarely, if ever, be compelled because it potentially results in an invasion of privacy, breach of confidentiality, and waiver of privilege. Therefore, the John B. v. Goetz court correctly applied this principal and in doing so, effectively limited the breadth of e-discovery.

200. Id.
201. For example, if reasonable suspicion exists that the producing party is not providing relevant information that may be stored in the image, the court should review its copy.
202. See Simon Prop. Group L.P., 194 F.R.D. at 641-42. The court here adopted a protocol similar to that used in Playboy Enters., Inc., but it made a few adjustments. Id. One of these changes was to require the expert to provide the court with a report that outlined the general work performed and the results (volumes and types) recovered. Id.
204. Id. at 460-61.