SHIFTING BURDENS AND CONCEALING ELECTRONIC EVIDENCE: DISCOVERY IN THE DIGITAL ERA

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I. INTRODUCTION

[1] In the twenty-first century, persons involved in the legal profession will be forced to confront technological issues. Computers and technology have pervaded every aspect of society, and the legal system is no exception. The discovery process is a dramatic example of how lawyers and courts strain to keep up with technological advances. Traditional discovery practices have been severely overhauled as electronic information becomes increasingly prevalent. What was once a simple discovery request can now become an overwhelming task, as defendants must wade through a plethora of electronic documents in an attempt to comply with the court's discovery orders.

[2] As the legal system attempts to adjust to the effects of so-called "e-discovery," both lawmakers and courts have made several attempts to adjust and clarify such standards through both case law and proposed changes to the Federal Rules of Civil Procedure. New laws must strike a balance between reducing costs and burdens for producing parties, while also giving them little ability to evade discovery requests by claiming they are overburdened. The effectiveness of these changes is debatable, but the generally trend indicates a movement toward relaxing the burden on

defendants, leaving them increased opportunity to avoid document production. In many cases, however, the outcome of litigation can turn on a single incriminating e-mail buried among millions of electronic documents.[1] Computer-savvy defendants can take advantage of leeway in the rules and make discoverable documents intentionally difficult to discover by claiming undue burden. Rule makers should proceed with caution when easing the burden on discoverable parties and attempt to devise rules that will continue to give courts the ability to order document production.

[3] In the past, the traditional paper discovery process has been relatively simple. The Federal Rules of Civil Procedure dictate how much evidence litigants must provide to opposing counsel. Complying with traditional discovery requests typically involves sorting through paper files, which is usually a manageable task. With the advent of computer technology, however, companies and individuals are able to process information on a scale never before anticipated. The use of computers to store information and electronic mail to communicate presents huge challenges to the discovery process. As computer technology becomes increasingly advanced, challenges to the legal system will only become more pronounced. This paper will explore the current standards used to cope with these new challenges as well as proposed changes to the Federal Rules of Civil Procedure. It will also discuss the problems surrounding the rules and standards and the potential effects on litigants and the discovery process.

II. THE IMPACT OF COMPUTER TECHNOLOGY ON THE DISCOVERY PROCESS

[4] E-discovery is "the process of acquiring and presenting electronic information in the discovery phase of litigation."[2] It is "the collection, review, and production of electronically stored information – such as e-mail, word processing documents, spreadsheets, and databases – in accordance with state or federal discovery requirements."[3] Effective e-

[1] *See Generally* Geanne Rosenberg, *Electronic Discovery Proves an Effective Legal Weapon*, N.Y. TIMES, Mar. 31, 1997, at D5.
[2] Toby Brown, *Electronic Discovery Basics*, 52 R.I BAR J. 7, 7 (July/Aug. 2003).
[3] Linda G. Sharp, *Restoration Drama: The Complexity of Electronic Discovery Requires Practitioners to Master New Litigation Skills*, 28 L.A. LAW. 31, 31 (Oct. 2005).

discovery both protects the integrity of information and allows that information to be presented in depositions and court appearances."[4] E-discovery has become "a mini-industry," with the discovery process itself increasingly affecting the outcome of litigation.[5] Discovery requests now include deleted information in addition to e-mail and word processing documents.[6] E-discovery is one of the most rapidly changing areas of the law.[7]

[5] Computer technology now permeates all aspects of society and makes life more efficient for people both in business and in their personal lives. Computers serve as replacements for traditional modes of communication and are involved in an increasing number of commercial transactions. Consumer purchases made over the Internet were expected to increase from $289 million in 1996 to $26 billion in 2001,[8] and about 547.5 billion e-mail messages were transmitted in the United States in 2003 alone.[9]

[6] Computers are also used to store records, which makes discovery a daunting process. One hard drive can contain up to 1.5 million pages of data, and one corporate backup tape can contain 4 million pages of data.[10] It is possible to store more documents on a ten-square-inch hard drive than can be kept as hard copies in an entire story of a building.[11] Adding to the complexity of this situation is the fact that deleting a file on a computer does not usually eliminate the file, but merely moves the file to a different location on the hard drive. Additionally, many companies download and store all of their system information, including deleted e-mails and document drafts.[12] The task of looking for one document among all active and deleted files often becomes overwhelming and expensive. Litigators undertake such a job with reluctance.

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[4] Brown, *supra* note 2, at 7 (emphasis in original).
[5] Rosenberg, *supra* note 1.
[6] Brown, *supra* note 2, at 7.
[7] Sharp, *supra* note 3, at 31.
[8] Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. REV. 327, 328 (Mar. 2000).
[9] Daniel B. Garrie & Matthew J. Armstrong, *Electronic Discovery and the Challenge Posed by the Sarbanes-Oxley Act*, 2005 UCLA J. L. & TECH. 2, 4 (2005).
[10] Sharp, *supra* note 3, at 31.
[11] Rosenberg, *supra* note 1.
[12] Rosenberg, *supra* note 1.

[7] In many cases, a thorough search of the defendant's electronic documents can be well worth the trouble. In one example, a company was convicted of stock fraud which was revealed in e-mails that were found among 14,000 backup tapes of company e-mails stored in the warehouse.[13] The company should have destroyed the data under their "document retention" program, but their data system was "in disarray."[14] Another well-known computer company was sanctioned for accidentally destroying records and overlooking more than 44,000 boxes of documents and backup tapes within nine months of a plaintiff's document request.[15] In another situation, a sexual harassment case was settled by a single reference to an e-mail containing derogatory language directed at an employee.[16]

[8] Electronic information played a crucial role in the outcome of many well-known cases. During the Iran-contra scandal, investigators found deleted incriminating communications exchanged among President Reagan's former national security advisers, Robert McFarlane and John Poindexter, and Oliver North.[17] During President Clinton's impeachment proceedings, Kenneth Starr and his legal team found a "talking points" document in a computer file that Monica Lewinsky thought she had deleted from her computer, forcing Lewinsky to accept an immunity deal.[18] Clearly, electronic information, no matter how seemingly old or trivial, should not be overlooked.

III. MAJOR PROBLEMS SURROUNDING E-DISCOVERY

[9] The nature of electronic information makes it extremely difficult to discover. Documents that were supposedly deleted may remain retrievable and discoverable. Computer files contain metadata - data retained within a document file that allows old or deleted data to be seen.[19] In popular word processing software, users who have made changes to

[13] Ashby Jones, *What a Mess! For Corporations, Pileup of Electronic Data Could Be Trouble Waiting to Happen*, NAT'L L.J., Dec. 2, 2002, at C6.
[14] *Id.*
[15] *Id.*
[16] Scheindlin & Rabkin, *supra* note 8, at 329.
[17] Rosenberg, *supra* note 1.
[18] Scheindlin & Rabkin, *supra* note 8, at 329.
[19] Brown, *supra* note 2, at 8.

files can see those changes by going to the *file* menu and selecting *properties.*[20] In legal documents, this may enable someone to view confidential client information.[21] E-discovery can be expensive because specialists are often required to download and collate contents of hard drives from personal computers that might be spread around the country, and not stored in any particular order.[22]

[10] One of the biggest challenges companies face is producing backup tapes for old computer files. Producing these backup tapes is an additional burden. These tapes "must have the capacity to store large amounts of information since they are relied upon to replace all the information contained on a computer system after a crash."[23] It can cost hundreds of thousands of dollars to search them.[24] One of the biggest challenges for litigants dealing with backup tapes is developing an understanding of the company's network infrastructure.[25] Different companies have their own unique network environments and their servers back up and store the tapes over varying periods of time.[26] Larger corporations usually have hundreds or thousands of servers that can be backed up by a system of multiple backup tapes.[27]

[11] The vast amount of data stored on backup tapes creates many problems. Sometimes backup tape logs are not kept properly or the people who kept them are no longer with the company.[28] A company's network could also have gone through major changes during the time before the information is sought.[29] In addition to locating these tapes, one must also "restore" them to see the data on them.[30] Many companies no longer have

[20] *Id.*
[21] *Id.*
[22] Mark Ballard, *Digital Headache: E-discovery Costs Soar into the Millions, and Litigants Seek Guidance*, NAT'L L.J. Feb. 10, 2003, at A18.
[23] Hagemeyer N. Am. Inc. v. Gateway Data Sci. Corp., 222 F.R.D. 594, 600 (E.D. Wis. 2004).
[24] *Id.* at 601.
[25] Sharp, *supra* note 2, at 33.
[26] *Id.* at 33-34.
[27] *Id.* at 34
[28] *Id.*
[29] *Id.*
[30] *Id.*

the hardware and software to read these tapes.[31] The tapes may contain legacy data, which is data created with applications that no longer exist on the company's servers.[32] The data requested must be segregated from everything else on the tape.[33]

[12] Companies must go to considerable expense to perform all of the steps necessary to retrieve data, which often involves hiring or consulting outside personnel to get the job done. According to the latest research, most companies aren't prepared to preserve and produce electronic information when the time comes for them to do so. An American Bar Association Annual Survey conducted in 2000 indicated that eighty-two percent of clients had no established method for handling e-discovery requests.[34] Sixty percent of lawyers reported that in thirty to sixty percent of their cases involving discovery, their clients were not aware that electronic data could later become evidence in litigation.[35]

[13] The traditional discovery rules provide little guidance for creating an ideal e-discovery protocol. The Federal Rules of Civil Procedure were designed during a time when information was almost always stored on paper documents, and do not mention the possibility of information being stored in electronic form. Rule thirty-four attempts to include electronic information in its definition of "documents," but does so awkwardly.[36] Newly enacted laws do not take the burden of electronic information into consideration. For example, the Sarbanes-Oxley Act distinguishes public companies from their private counterparts in mandating that public companies must retain financial data to comply with the legislation.[37] This means that there are no equitable judicial outcomes under the Act.[38] The legal system is generally not prepared to handle the challenges of e-discovery, despite the profound effect it can have on litigation.

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[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Janet Ramsey, *Technology and the Law: Zubulake V: Counsel's Obligations to Preserve and Produce Electronic Information,* 84 MICH. BAR J. 26, 27 (Oct. 2005).
[35] *Id.*
[36] FED. R. CIV. P. 34; *see also* Scheindlin, *supra* note 8, at 331.
[37] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).
[38] Garrie & Armstrong, *supra* note 9, at 4.

[14] The most pressing question in most e-discovery cases is who should bear the burden for the costly and time-consuming e-discovery process. Many plaintiffs ask why they should be penalized because their corporate opponents utilize systems that are efficient but do not preserve records well.[39] Lawyers for corporations and insurers generally support shifting costs of discovery to the party making the request and providing a "safe harbor" that protects companies who delete documents from their computers. Under the laws of some countries, such as England, costs are imposed on the side that does not prevail.[40] Our system rejects this rule because some parties may not be able to afford to comply. The question remains whether plaintiffs should be punished because defendants chose to utilize inexpensive systems that do not adequately archive electronic records.[41]

IV. CASE LAW'S COST SHIFTING STANDARDS

A. THE FIRST JUDICIAL STANDARDS

[15] Several courts have attempted to articulate standards about when the burden of electronic discovery shifts to the defendant. According to *Hagemeyer North America Inc. v. Gateway Data Science Corp.*, courts developed four approaches to help determine when cost shifting is proper.[42] The Cost-benefit Analysis states that a requesting party always bears burden of producing data that is computer generated.[43] The "Marginal Utility Approach" states that "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."[44] Two subsequent cases articulated the final two approaches for determining who should bear the burden of discovery. *Rowe Entertainment Inc. v. The*

[39] Ballard, *supra* note 22.
[40] *Id*.
[41] *Id*.
[42] Hagemeyer N. Am. Inc. v. Gateway Data Science Corp., 222 F.R.D. 594, 601 (E.D. Wis. 2004) (citing Stephen D. Williger & Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 RICH. J.L. & TECH 52, at ¶¶ 13-25 (2004)).
[43] *Hagemeyer*, 222 F.R.D. at 602 (citing Marnie H. Pulver, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379 (2000)).
[44] *Id.* (citing McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001)).

William Morris Agency, Inc.[45] and *Zubulake v. UBS Warburg, LLC*[46] utilized multi-prong tests, shifting the standard closer to the proportionality test of Rule 26(b)(2), and making analysis dependant on the facts of each case.[47]

[16] Courts have traditionally appreciated the value of allowing plaintiffs to easily procure the information they need. For example, in *OPENTV v. Liberate Technologies*,[48] the court stated that "shifting the cost of production from the producing party to the requesting party should be considered only when inaccessible data is sought."[49] "Accessibility," the court opined, "turns largely on the expense of production."[50] In *Rowe Entertainment*, the court stated that "too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. . . . [D]iscovery expenses frequently escalate when information is stored in electronic form."[51] The court also stated that for purposes of litigation, "electronic documents are just as discoverable as paper documents."[52] The court astutely pointed out that if any of the defendants are engaged in illicit practices, "it is less likely that communications about such activities would be memorialized in an easily accessible form such as a filed paper document."[53]

[17] The *Rowe Entertainment* court presumed that the responding party must bear expense of complying with discovery requests.[54] Nevertheless, the court said that it had the ability to protect the responding party from "undue burden or expense" by shifting some or all costs to the requesting party.[55] The court then came up with eight factors used to determine whether the cost should be shifted to the requesting party.[56] The

[45] Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).
[46] Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).
[47] *Hagemeyer*, 222 F.R.D. at 603.
[48] OPENTV v. Liberate Tech., 219 F.R.D. 474 (N.D. Ca. 2003).
[49] *Id.* at 476.
[50] *Id.* at 476-77.
[51] *Rowe Entm't.* 205 F.R.D. at 423.
[52] *Id.* at 428.
[53] *Id.*
[54] *Id.* (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 359 (1978)).
[55] *Id.* at 428 (citing Federal Rule of Civil Procedure Rule 26(c)).
[56] These included (1) the specificity of requests, (the less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that

plaintiff's counsel were ultimately ordered to "formulate a search procedure for identifying responsive e-mails and . . . notify each defendant's counsel of the procedure chosen, including any specific word searches."[57]

B. THE SEVEN-PART *ZUBULAKE* TEST

[18] *Zubulake v. Warburg* set the standard for how courts approach the burden of e-discovery. The court favored a broad approach to the discoverability of data. It stated that "[i]n the world of electronic data . . . any data that is retained in a machine readable format is typically accessible."[58] It went on to say that "broad discovery is a cornerstone of the litigation process contemplated by the Federal Rules of Civil Procedure."[59] In this case, plaintiff Zubulake sued her former employer for gender discrimination. She requested discovery of "all documents concerning any communication by or between UBS employees concerning Plaintiff . . . including, without limitation, electronic or computerized data compilations."[60] UBS utilized a complicated back-up process that made it difficult to retrieve old e-mails and other types of electronic documents.

[19] The court stated that cost shifting should only be considered when e-discovery imposes an "undue burden or expense" on the responding party.[61] Consideration depends on whether the data is kept in an

party.) (2) the likelihood of a successful search, (3) the availability from other sources, (sometimes information is made available or is accessible in a different format at less expense.) (4) the purpose of retention, (if a party retains electronic data because it currently uses it, it must respond to the discovery request at its own expense.) (5) the benefit to the parties, (if the responding party benefits for some reason, there isn't much reason to shift the burden to the requesting party.) (6) the total cost, (if the cost is not substantial, there is no reason to deviate from the presumption that the responding party will bear the expense.) (7) the ability to control costs, ("Where the discovery process is going to be incremental, it is more efficient to place the burden on the party that will decide how expansive the discovery will be.") and (8) the parties' resources (The cost of discovery might be too much for one of the parties, so it would make sense to shift the burden to the other). *Id.* at 429-32.

[57] *Id.* at 433.

[58] *Zubulake*, 217 F.R.D. at 318.

[59] *Id*. at 311 (quoting Jones v. Goord, 2002 U.S. Dist. LEXIS 8707, No. 95 Civ. 8026, 2002 WL 1007614, at *1 (S.D.N.Y 2002)).

[60] *Id.* at 313.

[61] *Id.* at 318.

accessible or inaccessible format. Data is accessible when it is "readily available in a usable format and reasonably indexed."[62] Inaccessible data included backup tapes and "erased, fragmented, or damaged data."[63] The court went on to enumerate five categories of data listed from most to least accessible, the first three of which are considered discoverable.[64]

[20] The court in *Zubulake* criticized the *Rowe* test for not taking into account the "amount in controversy or the importance of the issues at stake in the litigation."[65] They also recommended that courts consider the total cost of the proposed discovery as well as the cost of production compared to the "amount in controversy."[66] The *Zubulake* court eliminated two prongs of the *Rowe* test, and came up with a new test comprised of seven factors.[67] In doing so, the court emphasized that the purpose behind the responding party's maintenance of the requested information is usually not important.[68]

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[62] *Id.* at 318.
[63] *Id.*
[64] These were (1) active, online data, (2) near-line data, typically consisting of "a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records." (3) Offline storage/archives, often consisting of a removable disk or magnetic tape media that can be labeled or stored in a shelf or rack, (4) Backup tapes, which are devices "like a tape recorder, that reads from and writes data onto a tape, that have capacities of anywhere from a few hundred kilobytes to several gigabytes," (5) Erased, fragmented or damaged data.[64] When files are erased, their clusters are made available again as free space. Eventually some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk. Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing." *Id.*
[65] *Id.* at 321.
[66] *Id.* at 323.
[67] *Id.* at 322. The seven factors included:

1. The extent to which the request is specifically tailored to discover relevant information
2. The availability of such information from other sources
3. The total cost of production, compared to the amount in controversy
4. The total cost of production, compared to the resources available to each party
5. The relative ability of each party to control costs and its incentive to do so
6. The importance of the issues at stake in the litigation, and
7. The relative benefits to the parties of obtaining the information.

Id.
[68] *Id.* at 322 (quotations omitted).

[21] The seven factors should not necessarily be weighted equally, and should only serve as guidance in deciding whether a discovery request imposes an "undue burden or expense on the responding party," and "how important [the] evidence [is] in comparison to the cost of production."[69] The court stated that the individual circumstances of each case should be taken into account, and that a factual basis is required to support the analysis.[70] To perform this test, litigants and courts must familiarize themselves with the responding party's computer system, both with respect to active and stored data.[71] Because cost-shifting analysis is so fact-intensive, it is necessary to determine what data can be found on the inaccessible media.[72] Although this poses significant challenges for all parties involved, it may help each party access crucial information.

C. IMPACT OF THE *ZUBULAKE* TEST

[22] The *Zubulake* test obligated parties and their lawyers to make every effort possible to comply with discovery requests. It addresses not only a party's obligations to preserve and produce electronic information, but also the obligations of their counsel.[73] Counsel has an obligation under *Zubulake* to find all sources of information that may be relevant to the case. To do this, lawyers must become educated about their client's document retention policies and data retention system. This requires attorneys to communicate with the client's information technology staff who can explain concepts such as "system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy."[74] It is counsel's responsibility not just to tell the client that they have to retain and produce all information relevant to the case, but also to follow up with the client and continuously remind them of what they are required to do. Under *Zubulake*, counsel's obligation is to find and preserve all sources of potentially relevant information, whether in paper or electronic form. Clients must be aware of all duties to preserve information, "whether imposed by litigation or state or federal

[69] *Id.*
[70] *Id.* at 323.
[71] *Id.* at 324.
[72] *Id.*
[73] Ramsey, *supra* note 34, at 28.
[74] *Id.*

regulation."[75] Until the client begins to realize the impact of technology in litigation, the lawyer must educate them to provide the best service and avoid sanctions litigation that could be damaging.[76]

[23] The *Zubulake* test has generally been followed and respected by courts over the past two years. However, some courts have rejected the *Zubulake* cost-shifting test. The first case to do this was *Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County*.[77] The plaintiffs in the *Toshiba* case had requested more than 800 million backup tapes that would cost $1.5 million to $1.9 million to restore. The court held that plaintiffs should pay because "[o]ur Legislature has identified the expense of translating data compilations into usable form as one that, in the public's interest, should be placed upon the demanding party."[78] As a increasing number of courts grapple with the issues of cost shifting in e-discovery cases, it is likely that the *Zubulake* decision will continue to be questioned, and less onerous and expensive alternatives explored.

V. DISCOVERY RULES AND PROPOSED CHANGES: AN EFFECTIVE SOLUTION?

[24] The rules of discovery have been subject to constant change even before the issue of e-discovery arose. According to some, "[t]he Federal Rules of Civil Procedure change with the telephone directory. Every year, something is tweaked, torn, wrenched or rewritten. Most of this is merely annoying. Sometimes, though, buried amid the clutter is an amendment that caries a real wallop for major aspects of practice."[79]

The rules for discovery, Rules 26 through 37, generally provide little guidance about discovery of electronic information or shifting extremely costly burdens between parties. Rule 26(b)(1) states that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ."[80] These rules allow a

[75] *Id.*
[76] *Id.* at 29.
[77] 124 Cal. App. 4th 762 (Cal. Ct. App. 2004).
[78] Toshiba, 124 Cal. App. 4th at 772.
[79] Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 18 (2004).
[80] FED. R. CIV. P. 26(b)(1).

court to limit the scope of discovery if it finds either that the discovery request is more easily obtained from another source (including information already collected), or the requesting party has had sufficient opportunity to obtain discovery, or the request is unduly burdensome or expensive.[81] Rule 26(b)(2)(iii) provides 5 factors that helps courts decide whether the burden or discovery request is overly burdensome; these include the specific requirements of the case, the amount in controversy, the resources of each party, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[82]

[25] Many legal experts have agreed for some time that the prevalence of electronic evidence called for major changes to the discovery rules. According to one commentator, "[R]ules amendments are necessary now because, without Rules amendments, corporate defendants and the defense bar will continue to lack a clear sense of how to treat electronic evidence and what to do with it in civil discovery."[83] As early as 1997, the Discovery Subcommittee convened in a series of meetings with practicing lawyers to get their opinions about what changes to the Federal Rules would be useful, and e-discovery was a topic which arose frequently. In September of 2002, Professor Richard L. Marcus, Advisor and special consultant to Advisory Committee and Discovery Subcommittee, sent letter and memo to 250 "E-discovery Enthusiasts" seeking suggestions about developing proposals to amend the Federal Rules of Civil Procedure to "address special features of discovery of electronic, or computer-based information."[84] The Committee also considered work of the Sedona Conference Working Group on Electronic Document Production, a group of attorneys and others who specialize in electronic discovery matters, concerning whether the rules developed for paper discovery would be adequate.[85] This group drafted an article entitled *Sedona Principles: Best Practices Recommendations and Principles for Addressing Electronic*

[81] *Id.*
[82] *Id.*
[83] BALLARD, *supra* note 22, at A18 (quoting Rex K. Linder, president of Lawyers for Civil Justice, association for corporate and defense counsel).
[84] Henry S. Noyes, *Is E-Discovery so Different that it Requires New Discovery Rules? An Analysis of Proposed Amendments to the Federal Rules of Civil Procedure*, 71 TENN. L. REV. 585, 591 (2004).
[85] *Id.*

Document Production in which they set out a list of fourteen recommendations and principles.[86] In 2003, the Discovery Subcommittee met to come up with new language for the rules and presented the proposed rule language to the U.S. Judicial Conference Advisory Committee for discussion.[87] In 2004, they recommended a "package of proposals aimed at discovery of electronically stored information" for publication and comment.[88] The amendments to the Federal Rules of Civil Procedure were approved by Standing Committee on the Federal Rules in June of 2005, and the Judicial Conference in September of 2005, and, with Supreme Court approval and without congressional intervention, the proposed rules will take effect on December 1, 2006.[89]

A. PROPOSED RULE 26 REVISIONS

[26] The new rule changes generally favor a departure from the traditional standard of broad-based discovery. The rules take the cost and burden of production into account at the expense of thorough discovery. Rules 26 and 34 will soon be revised to say that that "electronically stored information that is not reasonably accessible is discoverable only upon a showing of good cause."[90] They also establish that a "party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible," but rather "[o]n motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery."[91] Whether information is reasonably accessible should be determined on a case-by-case basis.[92]

[86] *Id.*
[87] *Id.*
[88] *Id.* at 593.
[89] Lloyd S. Van OostenRijk, *Paper or Plastic? Electronic Discovery and Spoliation in the Digital Age*, 42 HOUS. L. REV. 1163, 1169 (2005).
[90] Noyes, *supra* note 84, at 634 (citations omitted).
[91] *Id.* (citations omitted).
[92] *Id.*

[27] Amendments of Rule 26(b)(2)(B) and (C) call for a "two-tiered process" for electronic discovery.[93] In the first tier, responding parties must produce all relevant accessible data from data storage systems and description and location of all relevant data that is not "reasonably accessible" on their systems.[94] If the data is not reasonably accessible, it is considered to be outside the scope of discovery unless the producing party can show "good cause," a standard that is only ambiguously defined.[95] In the second tier, or stage of the discovery process, when the party requesting information shows "good cause," the court can hear arguments from both sides and weigh the cost of producing documents against needs of the party requesting. Even if the requesting party agrees to pay for the discovery, the court can still rule against it if the producing party's burden to review information for relevance and privilege is greater than the need.[96]

[28] The changes to Rule 37(f) eliminate the possibility of judicial sanctions when parties evade discovery requests. The Rule allows sanctions only when there are "exceptional circumstances for data lost because of the routine, good-faith operation of an electronic information system."[97] Under the new regime, parties will no longer have to fear court sanctions or a demand to produce relevant, non-privileged materials, but rather may be allowed to destroy potentially incriminating documents using a document retention policy. Ideally, the rules help facilitate discovery requests, and mitigate mounting discovery costs due to the expense of electronic storage devices as well as an increase in the amount

[93] One of the proposed amendments to the Federal Rules of Civil Procedure, Rule 26(b)(2)(B), states that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. 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. *See* Daniel B. Garrie et al., *Hiding the Inaccessible Truth: Amending the Federal Rules to Accommodate Electronic Discovery*, 25 REV. LITIG. 115, 115 (2006) (referencing *Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, app. C, *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf (September 2005)).

[94] *Id.*

[95] Garrie, et al., *supra* note 93 at 116.

[96] *Id.* at 117.

[97] *Id.* (citations omitted).

of digitally stored data.[98] In application, however, the rules are biased in favor of big companies with a greater document pool who would otherwise have to use considerable resources for electronic document retrieval and review. This cost implicitly encourages them to make their electronic document storage system as inaccessible as possible.

B. DRAWBACKS OF THE PROPOSED RULES

[29] While the changes to the rules are cost-effective for parties faced with discovery, they also provide defendants with more ways to avoid complying with discovery requests. Litigants can abuse the discovery process through the destruction or concealment of incriminating evidence. Software engineers and programmers can intentionally design storage facilities for software that are purposefully inaccessible by making data access financially or technically impractical. This would relieve them of the burden to produce. To accomplish this, a corporation may make it too difficult or expensive to search for or restore data, or change the data's format. They could also try to evade the 2-tiered discovery process by failing to disclose enough information about data "categories, descriptors, or designs" that contain accessible or inaccessible material data stored on their computer systems.[99] Also, some "may frustrate the doctrine of broad discovery by shifting costs to requesting parties, forcing them" to go through many rounds of highly technical discovery battles.[100]

[30] Two of the rules proposed at the Committee's most recent meeting in September of 2005 give producing parties two potential options to evade certain discovery requests. Proposed Rule 26(b)(2)(B), in particular, gives parties the ability to determine data's accessibility and, therefore, their own production responsibilities.[101] The Rule does not define "not

[98] *Id.* at 118.

[99] *Id.* at 119 (reducing producing parties' costs while increasing requesting parties' costs by using a "needle in a haystack" approach where requesting parties would have to first compel sample document production from producing parties' systems, and if that looked good, request more).

[100] *Id.*

[101]
> 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

reasonably accessible" adequately, and parties can easily claim that their data is not accessible for technical or monetary reasons. The *Zubulake* court named five categories of data storage systems, two of which were considered inaccessible. Under the rule change, however, even data stored in the so-called accessible categories may be considered inaccessible because of undue burden or cost. Courts do not often possess the technical expertise to discern when a party might be bluffing by claiming that accessing data is too costly or burdensome. The producing party itself provides the initial assessment of whether the data is accessible.[102] A company might deliberately set up a complicated mainframe access to data which would not be easily accessible for the opposing party. In such a case, plaintiffs would need to have the same expensive mainframe system to view the data and would have to pay a great deal for access to people and technology that could get, convert, and deliver data to the requesting party. The Rule encourages companies who are asked to produce to invest in "digital document storage systems" that allow them to say their data is not reasonably accessible even when it is.[103]

[31] The "good cause" requirement of the second part of Rule 26(b)(2)(B) allows a court to order discovery of inaccessible information, but this requirement is not well defined. In addition, if a producing party fails to disclose the existence of certain documents, a discovering party will not know they exist, making it hard to show good cause to compel production. In "situations where certain electronic documents are especially incriminating, litigants may be able to mischaracterize, re-characterize, or refrain from disclosing the existence of their data," making an efficient discovery process nearly impossible for the requesting parties.[104]

> undue 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.

(Civil Rules Advisory Comm., Report to the Judicial Conference, app. C45-46 (May 27, 2005, as revised July 25, 2005), *available at* http://www.uscourts.gov/rules/Reports/ST09-2005.pdf.

[102] Garrie et al., *supra* note 93, at 124.

[103] *Id.* at 125.

[104] *Id.* at 126.

[32] The new proposed Rule 37(f) also allows defendants room to evade certain discovery requirements. The Rule proposes 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."[105] In other words, there will be no sanctions for losing documents unless there was reckless operation of a document retention or deletion policy. This rule is a "sharp divergence" from the current Federal Rules and common law that prevents "parties from destroying documents under a document retention policy once they know or should have known the data is likely to be requested in litigation."[106]

[33] Parties to litigation are enabled by these rules to circumvent requests for electronic discovery by "proactively deleting entire subsets of potentially harmful data before they have notice that the documents are likely to be requested in discovery."[107] Modern technology lets companies design "e-document storage systems that are able to proactively screen and delete documents that tend to incriminate a company or subject it to civil liability," like objectionable e-mails.[108] Litigants can delete certain types of electronic files, like e-mail, and face no liability so long as they have no reason to know that plaintiffs would want to request any specific e-mails.[109]

[34] The combined effect of proposed Rules 26(b)(2)(B) and 37(f) is that companies can get the "benefits of a data deletion policy" without actually deleting anything.[110] Although these new rules will help corporate defendants get through the litigation process without incurring a great deal of expense, it will also allow them more room to conceal important files and electronic documents. In the future, technically savvy defendants will have a distinct advantage in evading discovery of potentially damaging documents. In many cases, this could change the entire outcome of the litigation.

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[105] *Id.*
[106] *Id.* at 127.
[107] *Id.* at 128.
[108] *Id.*
[109] *Id.* at 128-29.
[110] *Id.* at 130.

VI. CONCLUSION

[35] Discovery is an important phase of litigation, and the newly proposed electronic discovery rules will dilute its effectiveness. The new rules will give large organizational defendants a huge advantage over their opponents. The rules will cater to such defendants by giving them ample room to evade discovery by claiming that pertinent documents are not accessible. In addition, courts and lawyers are not often technical experts and will not always be aware of defendants' capabilities to purposely evade discovery.

[36] Defendants should not be able to escape liability through discovery so easily. Recent litigation such as the *Lewinsky*[111] and *Enron*[112] cases discussed above reveals that incriminating evidence can often be found in one document out of millions. Additionally, the Enron scandal has shown that corporate wrongdoing can have a huge affect on the lives of many people, including employees, the local community, and the economy as a whole. Large organizations such as these should not be allowed to escape liability by burying crucial documents among supposedly inaccessible computer files.

[37] Although the results of litigation are not always so dramatic, no organization of any kind should be able to get away with wrongdoing. Lawmakers should retain a broad approach when devising the rules for electronic discovery. Additionally, courts and attorneys should familiarize themselves with technological issues. Otherwise, the validity of the litigation process will be severely threatened.

[111] Rabkin, *supra* note 8, at 329 (citing Gregory Whitehair & Kimberly Koontz, *Discoverability of Electronic Data*, COLO. LAW., Oct. 1998, at 45. *See* State Prosecutor v. Judicial Watch, Inc. 356 Md. 118 (Md. 1999).
[112] *See In re* Enron, 274 B.R. 327 (Bankr. S.D.N.Y. 2002).