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IV. Electronic Discovery and Cost Shifting: Who Foots the Bill

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IV. ELECTRONIC DISCOVERY AND COST SHIFTING: WHO FOOTS THE BILL?*

A. Introduction

Has the general rule requiring each party to pay for its own production costs in discovery[1] kept up with the times? The amount of data stored electronically has made it possible for litigants to discover relevant information that would have been unimaginable in the past. E-mail conveys information that, traditionally, would have been orally communicated.[2] Moreover, documents that were once shredded and destroyed remain available in electronic form.[3] Additionally, information about the date and time a document is produced is now automatically created every time a document is saved.[4]

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1. *See, e.g.*, Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 360–64 (1978) (holding that the party responding to a discovery request, plaintiffs in a class action, must pay costs of identifying members of a class); Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003, 1006–07 (Ct. Int'l Trade 1986) (holding that where producing party benefited from technology, party will bear costs of producing e-discovery). *See generally* Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery?*, N.Y. L.J., Jan. 27, 2003 at T4 (discussing reformation of the producer pays rule).

2. *See* David K. Isom, *Electronic Discovery: New Power, New Risks*, UTAH B.J., Nov. 2003, at 8 (noting that information available in electronic form has greatly increased); *Electronic Discovery Request*, Potomac Consulting Group (describing the various types of information available including e-mail messages, word processing files, spreadsheets, address book information, Internet use histories and downloaded files), *at* http://www.potomac.com/stories/Electronic_Discovery_Requests.htm (last visited Aug. 5, 2005). *See generally infra* Part III (describing the scope of e-discovery and methods of production).

3. *See* sources cited *supra* note 2.

4. *See id.*

Along with the increased use of e-mail and computers, the cost of discovery has skyrocketed.[5] When a party requests a "document," this may include not only the paper copy of the document, but also various versions saved on a network or hard drive.[6] Modern-day discovery may also include demands for deleted e-mail, word processing files, and information that have only existed in electronic form.[7] The cost of producing this "electronic discovery"[8] can be astronomical in some cases.[9] Due to the protests of burdened parties and legal scholars, the established "producer pays" rule has come into question.

Critics of this general rule argue that parties use the exorbitant costs of producing electronic documents and information as a tool to frustrate cases into settlement.[10] In this way, an e-discovery request can be used as economic leverage. In many cases, it may be more cost effective for a party to settle the matter rather than spend money on searching for electronic data, extracting those data, reviewing them for privileged information, and paying lawyers to try the case.[11]

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5. *See* Rebecca Levy-Sachs & Richard K. Traub, *What Do You Know About E-Discovery?*, *at* http://www.dri.org/dri/pastarticleshidden.cfm (last visited Feb. 12, 2005); Van Buskirk, *supra* note 1. *But see* Mary Hayes & Paul Travis, *E-Discovery Eases the Paper Chase* (noting that electronic discovery costs are decreasing with the advent of new technology), http://www.informationweek.com/shared/printableArticleSrc.jhtml?articleID=6502957 (last visited Aug. 5, 2005).

6. *Digital Discovery Making Gains, but Costs Remain High*, CHI. DAILY L. BULL., Mar. 25, 2004, http://www.discoveryresources.org/04_cost_sharing_articles.html (last visited Aug. 5, 2005).

7. *See generally infra* Part III.A (describing the breadth of discoverable electronic documents).

8. "Electronic discovery" refers to data requested that is in electronic form. This article refers to electronic discovery as "e-discovery" throughout.

9. *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122, at *6 (N.D. Ill. Aug. 10, 2004) (noting that a small portion of the e-discovery request would cost several hundred thousand dollars); Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587, at *24–*28 (W.D. Tenn. May 13, 2003) (suggesting that e-discovery costs would range into the millions); Van Buskirk, *supra* note 1.

10. Leigh Jones, *The Surging Evolution of E-Discovery: The Cost and Scale of E-Discovery Spawns New Firms*, NAT'L L.J., Aug. 2, 2004, at 1; *see* Jerold S. Solovy & Robert L. Byman, *There Ought to Be a Law*, NAT'L L.J., Jan. 27, 2003, at B6.

11. *See* Solovy & Byman, *supra* note 10.

This practical reality flies in the face of the broad discovery rules, which are in place to ensure fair conflict resolution.[12] Judge Shira Scheindlin of the Southern District of New York, a leader in the e-discovery discourse, has commented on how e-discovery is changing the resolution of cases. She observed, "in the end, [electronic] 'discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.'"[13]

The critic's cries have not fallen on deaf ears. Several judicial decisions have evaluated the circumstances under which the requesting party should bear some, or all, of the financial burden of e-discovery.[14] Furthermore, proposed amendments to the Federal Rules of Civil Procedure (FRCP) attempt to address e-discovery controversies, including who bears the cost.[15] Part B of this Article

12. *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984); *see also* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting that the Federal Rules of Civil Procedure make a civil trial "less a game of blindman's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Hickman v. Taylor, 329 U.S. 495, 501 (1947) (noting that with the Rules, "civil trials in the federal courts no longer need be carried on in the dark"); Isom, *supra* note 2 ("Broad discovery is the cornerstone of our litigation process' in this country." (quoting Jones v. Goord, No. 95 Civ. 8026, 2002 U.S. Dist. LEXIS 8707, at *1 (S.D.N.Y. May 16, 2002))).

13. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) (quoting Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 423 (S.D.N.Y. 2002), *aff'd* 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002)).

14. *See id.* at 318–23 (holding that a court should only consider cost shifting when electronic data is relatively inaccessible and modifiying the *Rowe* factors because they "favored" cost shifting); OpenTV v. Liberate Techs., 219 F.R.D. 474, 477-79 (N.D. Cal. 2003) (applying the *Zubulake* factors to determine whether e-discovery costs should be shifted); Xpedior Creditor Trust v. Credit Suisse First Boston, Inc., 309 F. Supp. 2d 459, 465–67 (S.D.N.Y. 2003) (applying *Zubulake* factors for the same); *Rowe Entm't, Inc.*, 53 Fed. R. Serv. 3d at 296 (adopting a balancing approach consisting of eight factors to determine whether discovery costs should be shifted).

15. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE (2004) [hereinafter PROPOSED AMENDMENTS AND COMMITTEE NOTES], http://www.uscourts.gov/rules/comment2005/CVAug04.pdf . There is a seven-step process to amending the Federal Rules of Civil Procedure: (1) initial consideration by the Advisory Committee; (2) publication of proposed amendments and public comment; (3) consideration of the public comments and final submission of the amendments to the Standing Committee; (4) approval by the Standing Committee; (5) Judicial Conference approval; (6)

explores leading court decisions evaluating cost shifting[16] and determining when it should apply. Also in Part B, this Article surveys which, if any, of these approaches to cost shifting courts have followed and how those approaches differ. Part C discusses the ambiguities and concerns in cost shifting analyses, including the policies behind certain case law trends and the efficiency of current approaches. Finally, Part D examines proposed amendments to the Federal Rules of Civil Procedure that deal with e-discovery cost shifting.

B. The Cost Shifting Analysis and Recent Cases: The Road to Zubulake

Cost shifting is an exception to the established discovery rule that the responding party[17] pays its own production costs.[18] Discussion of the current cost shifting analysis and case law requires some understanding of the evolution of the doctrine. The Federal Rules of Civil Procedure have shaped the current approach to this practical problem. In particular, the judiciary has developed cost shifting analysis through three landmark cases: *McPeek*,[19] *Rowe*,[20] and *Zubulake*.[21] These cases have had a great impact on e-discovery jurisprudence nationwide.

1. Cost Shifting and the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure do not explicitly state that courts have the authority to shift discovery costs. The Supreme Court, however, has recognized that courts can exercise their "discretion under Rule 26(c) to grant orders protecting [a party] from

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Supreme Court approval; and (7) Congressional review. Administrative Office of the U.S. Courts, *The Rulemaking Process* (2004), *at* http://www.uscourts.gov/rules/proceduresum.htm. The current amendment process will be complete in late 2005. *See id.*

16. This article uses the term "cost shifting" throughout this article to refer to the allocation of production costs to the requesting party.

17. This article uses the terms "responding party" and "producing party" interchangeably to refer to the party producing discovery.

18. *See supra* note 1.

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

20. Rowe Entm't, Inc. v. William Morris Agency, Inc., 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002).

21. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).

'undue burden and expense' in [complying with discovery requests], including orders conditioning discovery on the requesting party's payment of the costs of discovery."[22] Also, notes to the 1970 Amendments to Rule 34 state that the judiciary has power to protect respondents from undue burden or expense by restricting discovery or requiring that the discovering party pay costs.[23] Thus, though not expressly stated, Rules 26(c) and the 1970 amendments to Rule 34 provide the courts with authority to shift discovery costs.

Rules 26(c) and 37(a) also dictate when courts will consider cost shifting. Typically, the producing party asks a court to cost shift while seeking a protective order to alleviate a burdensome discovery request under Rule 26(c).[24] Also, the issue can be joined when the requesting party moves to compel under Rule 37(a), and the producing party resists the motion.[25] Thus, these rules provide the vehicle through which the cost shifting question comes into play.

The Rule 26(b)(2)(iii) proportionality test has driven the most recent cost shifting decisions.[26] This test allows a court to alter the scope of discovery "if the burden or expense of the proposed discovery outweighs its likely benefit . . . ."[27] This balancing "take[s] 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

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

23. FED. R. CIV. P. 34 advisory committee's note.

24. *See, e.g.*, Xpedior Creditor Trust v. Credit Suisse First Boston, Inc., 309 F. Supp. 2d 459, 465–67 (S.D.N.Y. 2003); *Rowe Entm't, Inc.*, 53 Fed. R. Serv. 3d at 298; Bills v. Kennecott Corp., 108 F.R.D. 459, 460, 464 (D. Utah 1985).

25. *See, e.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004); Portis v. City of Chicago, No. 02 C 3139, 2004 WL 1535854 (N.D. Ill. July 7, 2004); Cognex Corp. v. Electro Scientific Indus., Inc., No. Civ.A. 01CV10287RCL, 2002 WL 32309413 (D. Mass. July 2, 2002); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d (West) 168 (E.D. La. 2002); *In re* Brand Name Prescription Drugs & Antitrust Litig., Nos. 94 C 987, MDL 997, 1995 WL 360526 (N.D. Ill. June 15, 1995); Haworth, Inc. v. Herman Miller, Inc., No. 1:92 CV 877, 1995 WL 465838 (W.D. Mich. Apr. 20, 1995).

26. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Rowe Entm't, Inc. v. William Morris Agency, Inc., 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001).

27. FED. R. CIV. P. 26(b)(2)(iii).

in resolving the issues."[28]

The FRCP play a principal role in the cost shifting analysis. Rules 26(c) and the 1970 amendments to Rule 34 provide the basis for the judiciary's discretion to shift discovery costs from the producing party to the requesting party.[29] Rule 26(c) and Rule 37(a) motions provide the introduction to the cost shifting analysis.[30] Additionally, the Rule 26(b)(2)(iii) proportionality test has been the basis for the most influential cost shifting decisions.[31] Despite criticism from some legal scholars who suggest that the FRCP do not provide enough guidance in the cost shifting determination, the FRCP are clearly entrenched in the cost shifting case law.[32]

2. The Evolution of Cost Shifting Case Law

In early e-discovery cases, courts were reluctant to stray from the traditional "producer pays" rule.[33] Some courts reasoned that where the costs of e-discovery were relatively small, the producer should continue to bear the costs.[34] Other courts reasoned that where a company chooses to benefit from technology, that company should bear the costs of searching through said technology.[35] Only recent

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28. *Id.*

29. *See supra* notes 22–23 and accompanying text.

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

31. *See supra* notes 26–28 and accompanying text.

32. For a discussion of the proposed amendments to the FRCP, see *infra* Part IV.D.

33. The traditional rule is that each party bears the costs of its own discovery production. *See* sources cited *supra* note 1.

34. *See, e.g.*, Mackey v. IBP, Inc., 167 F.R.D. 186, 199 (D. Kan. 1996) (holding that "[i]n most instances, [producing discovery] will entail some burden" and requiring the producing party to bear the costs of e-discovery); Haworth, Inc. v. Herman Miller, Inc., No. 1:92 CV 877, 1995 WL 465838 (W.D. Mich. Apr. 20, 1995) (noting that the costs and burden involved in producing e-discovery was miniscule in comparison to the amount in controversy and holding that the producing party should bear the costs); Bills v. Kennecott Corp., 108 F.R.D. 459, 460, 464 (D. Utah 1985) (holding that because the expense of the discovery production was not excessive and the "burden in obtaining the data would be substantially greater to the requesting party," the costs should not be shifted to the requesting party).

35. Daewoo Elecs. Co. v. United States, 650 F. Supp. 1003 (Ct. Int'l Trade 1986) (holding that if a party employs technology that produces electronic evidence, in most cases, it will have to bear the cost associated with searching for and producing that evidence); *In re* Brand Name Prescription Drugs &

cases have seriously considered cost shifting for e-discovery.

a. McPeek v. Ashcroft

The court in *McPeek v. Ashcroft*,[36] a landmark case in e-discovery cost shifting, reconsidered the rationale behind the traditional "producer pays" rule and provided a careful analysis of e-discovery issues in light of the problems cost shifting seeks to address. The *McPeek* court rejected the rationale that the producing party's "choice" to use computers in its normal course of business justified requiring the party to pay for the production of discovery.[37] In modern times, producing parties hardly have a "choice" to employ computers in the course of business and thus should not be penalized for not using "quill pens."[38] Further, the court in *McPeek* recognized the traditional rationale encouraged the requesting party to be overly broad in its discovery requests.[39]

The *McPeek* court also considered the "market" approach, which requires the requesting party to pay for the production of the e-discovery it requests.[40] The court reasoned this approach would guarantee discovery requests would be narrowly tailored.[41] It posited that narrowly tailored discovery requests would likely reduce costs, and that the requesting party would receive the e-discovery it paid

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Antitrust Litig., No. 94 C 987, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (reasoning that if the producing party benefited from technology, it cannot then use that technology as a shield in litigation and noting that "if a party chooses an electronic storage method, the necessity for a retrieval program . . . is an ordinary and foreseeable risk"); *see also* Rhone-Poulenc Rorer, Inc. v. Home Indem. Co., Civ. A. No. 88-9752, 1991 WL 111040, at *2 (E.D. Pa. June 17, 1991) (holding that the established law of liberal discovery does not penalize the requesting party for the producing party's "unwieldly [computerized] record-keeping system" by shifting the cost to the requesting party).

36. 202 F.R.D. 31 (D.D.C. 2001).

37. *Id.* at 33–34.

38. *Id.* at 33.

39. *Id.* at 33–34 ("American lawyers engaged in discovery have never been accused of asking for too little . . . . [T]hey hope that if they ask for what they want, they will get what they need . . . . [T]hey hardly need any more encouragement to demand as much as they can from their opponent.").

40. *Id.* at 34.

41. *Id.*

for.[42] The court noted, however, that this market approach would require the requesting party to pay for e-discovery in situations where it would not pay for paper discovery.[43]

The *McPeek* decision described a second approach to e-discovery: the "marginal utility" approach. The basic tenet of this approach is that "[t]he more likely it is that [e-discovery] contains information that is relevant to a claim or defense, the fairer it is that the [producing party] search at its own expense."[44] The court noted that even if courts required requesting parties to show the e-discovery sought contained relevant information, the expense of producing e-discovery would likely "beat [the producing party] into settlement."[45]

McPeek propelled the cost shifting analysis forward. Previously courts had not often strayed from the traditional "producer pays" rule when addressing e-discovery issues.[46] Although the "market" and "marginal utility" approaches have not gained national acceptance, they have been cited[47] and followed in some jurisdictions.[48]

b. Rowe Entertainment, Inc. v. William Morris Agency, Inc.

Rowe Entertainment, Inc. v. William Morris Agency, Inc.[49] built upon *McPeek* by incorporating the "marginal utility" approach and making the cost shifting analysis a more fact-intensive balancing test.[50] Specifically, the court in *Rowe* used the Rule 26(b)(2)(iii) proportionality test as a basis for determining that a balancing test

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *See supra* notes 34–35 and accompanying text.
47. *E.g.*, Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002).
48. *E.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587 (W.D. Tenn. May 13, 2003); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002).
49. 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002).
50. *Id.*

was appropriate in the cost shifting analysis.[51] The court also used the proportionality test to derive the factors it would consider in the cost shifting determination: (1) specificity of the discovery request, (2) likelihood of a successful search, (3) availability of information from other sources, (4) purposes of retention, (5) benefit to the parties, (6) total costs, (7) ability and incentive to control costs, and (8) parties' resources.[52]

The *Rowe* court also gave some guidance as to how to weigh each factor. For example, regarding the "specificity of the request" factor, the court indicated that the more specific the discovery demand, the more appropriate it is to leave the costs to the producing party.[53] As to the "likelihood of a successful search" factor, the court used the *McPeek* "marginal utility" approach.[54] It reasoned that the more likely relevant information will be found, the fairer it is for the responding party to bear the costs.[55] Application of the "availability from other sources" factor is fairly straightforward: this factor favors cost shifting where the producing party has provided equivalent information, or if it is accessible in a different format at less expense.[56] In considering the "purposes of retention," the *Rowe* court found that if a party maintains information for current business purposes, then it may be expected to bear the costs of producing that information.[57]

The *Rowe* court analyzed the "benefits to the parties" factor from the point of view of the producing party.[58] If the producing party itself benefits from the information, there is less reason to shift

51. *Id.* at 300 ("Although there are no firm rules, courts may take 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.'" (quoting FED. R. CIV. P. 26(b)(2)(iii))).

52. *Id.* at 303–10.

53. *Id.* at 303.

54. *Id.* at 303–06.

55. *Id.* at 303; *see supra* note 43 and accompanying text.

56. *Rowe Entm't, Inc.*, 53 Fed. R. Serv. 3d at 306.

57. *Id.* In contrast, if a party has the information for emergency situations or "simply because it has neglected to discard it," it may not be required to bear the costs. *Id.*

58. *Id.* at 307.

the costs of producing e-discovery to the requesting party.[59] Under the "total costs" factor, if the total cost of the requested discovery is not substantial, there is no need to deviate from the presumption that the responding party will bear the expense.[60] The "ability and incentive to control costs" factor encourages requesting parties to narrowly tailor their discovery requests.[61] It may be more efficient to place the burden on the requesting party because it controls how expansive discovery will be.[62] The "parties' resources" factor becomes significant when one party is more financially capable of paying for the production costs of e-discovery.[63] Yet, the relative financial strength of the parties may be a neutral factor when each party has sufficient resources to conduct discovery.[64]

Courts deciding cases involving shifting of e-discovery costs have widely discussed and cited the *Rowe* factors.[65] *Rowe* is a

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59. *Id.*

60. *Id.* at 308–09. For a discussion of the controversy involving what the term "costs" refers to and whether all "costs" can be shifted, see *infra* Part IV.C.1.

61. *See Rowe Entm't, Inc.*, 53 Fed. R. Serv. 3d at 309 (noting that requesting parties are better suited to decide whether further searches are justified).

62. *Id.*

63. *See id.* at 310.

64. *Id.*; *see also* Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587, at *29 (W.D. Tenn. May 13, 2003) (finding that the relative financial strength factor was neutral where neither party adduced persuasive evidence of their inability to bear the costs of discovery and both parties had expended significant resources for legal services in the case); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., 52 Fed. R. Serv. 3d (West) 168, 177 (E.D. La. 2002) (holding that all parties had sufficient resources to bear the costs of litigation and thus the factor was neutral).

65. *E.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004); Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004); Thompson v. United States Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Computer Assocs. Int'l v. Quest Software, Inc., 56 Fed. R. Serv. 3d (West) 401 (N.D. Ill. 2003); *Medtronic Sofamor Danek, Inc.*, 2003 U.S. LEXIS 8587, at *3; Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002); *see also* Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 652 (D. Minn. 2002) (citing *Rowe* to show electronic documents are discoverable); *In re* Bristol-Meyers Squibb Sec. Litig., 205 F.R.D. 437, 443 (D.N.J. 2002)

significant case in that it, along with *McPeek*, rejected a bright-line test for cost shifting determinations. Further, *Rowe* established that such determinations are fact-intensive rather than policy-driven.

c. Zubulake v. USB Warburg LLC

In *Zubulake v. USB Warburg LLC*,[66] the court revisited the *Rowe* balancing test. The *Zubulake* decision made some changes to the *Rowe* factors and clarified apparent inconsistencies between *Rowe* and Supreme Court precedent.[67] Further, *Zubulake* described when courts should consider cost shifting and outlined the steps relevant to an e-discovery cost shifting analysis.[68]

The *Zubulake* court emphasized that not all e-discovery cases require courts to consider cost shifting. The court stated that "[m]any courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence is involved."[69] The court, however, rejected this assumption, recognizing that in many cases, searching for electronic evidence is easier and less expensive than paper discovery.[70]

The *Zubulake* court found that cost shifting analysis should only occur when the expense of producing e-discovery is unduly burdensome.[71] The court stated that "whether production of documents is unduly burdensome or expensive turns primarily on whether [documents are] kept in an *accessible or inaccessible* format."[72] To guide this analysis, the court identified five categories

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(referring counsel to *Rowe*'s "comprehensive" discussion of cost shifting); Cognex Corp. v. Electro Scientific Indus., No. Civ.A. 01CV10287RCL, 2002 WL 32309413, at *3 (D. Mass. July 2, 2002) (citing *Rowe* for the proposition that cost shifting orders may be appropriate in certain circumstances).

66. 217 F.R.D. 309 (S.D.N.Y. 2003).

67. *Id.* The inconsistencies arose from *Rowe*'s preference for cost shifting and the Supreme Court's mandate in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), that the producing party must presumptively bear production costs. *Zubulake*, 217 F.R.D. at 320.

68. 217 F.R.D. at 324.

69. *Id.* at 318.

70. *Id.* (suggesting that electronic evidence may be cheaper to produce because it can be searched, collected, and reviewed automatically, thus obviating the need for mass photocopying).

71. *Id.*

72. *Id.*

of data: (1) active, online data, (2) near-line data, (3) offline storage/archives, (4) back-up tapes, and (5) erased, fragmented or damaged data.[73] The *Zubulake* court found the first three categories were typically "accessible" data, and the last two were "inaccessible" data.[74] In effect, the court created a threshold question for cost shifting in e-discovery: are the data accessible? If so, then cost shifting should be disregarded. If not, then cost shifting should be considered.[75]

Finding the *Rowe* factors inadequate, the *Zubulake* court modified the *Rowe* approach to make the cost shifting analysis more complete.[76] For example, the *Zubulake* court decided that the amount in controversy and the importance of the issues being litigated were necessary factors in the cost shifting analysis, factors that were not considered in *Rowe*.[77] Also, the *Rowe* analysis gave equal weight to all factors where the *Zubulake* court held that certain factors were more important.[78] Further, the court in *Zubulake* determined that courts applying the *Rowe* factors failed to develop a full factual record.[79] Finally, the *Zubulake* court found the *Rowe* analysis favored cost shifting, contrary to the presumption that the producing party should bear the cost of discovery.[80]

Zubulake established the following seven factors to be weighed in the cost shifting determination: (1) the extent to which the

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73. *Id.* at 318–19.

74. *Id.* at 318–20.

75. *See id.* at 318; *see also* Kenneth J. Withers, *Electronic Discovery Disputes: Decisional Guidance*, CIV. ACTION (Nat'l Ctr. for State Courts) Summer 2004, at 4, 6 (examining different forms of electronic documents and whether they are accessible). *But see* Laura E. Ellsworth & Robert Pass, *Cost Shifting in Electronic Discovery*, 5 SEDONA CONF. J. 125, 140–41 (2004) (explaining that *Zubulake* does not create a strict threshold question but instead simply states that a cost shifting and proportionality analysis is not appropriate under Rule 26(b)(2) because "accessible" data is normally not expensive to recover).

76. *Zubulake*, 217 F.R.D. at 320–21.

77. *Id.*

78. *Id.*

79. *Id.* at 321, 323 (noting that courts applying *Rowe* factors base their analysis on whether relevant information would be found and that such information rarely exists before the requested production).

80. *Id.* at 320 (noting that the *Rowe* factors were weighed equally and thus favored cost shifting over the traditional "producer pays" presumption).

discovery request is specifically tailored to ascertain relevant information; (2) the availability of information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total costs 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 sought.[81]

Zubulake's first factor combines *Rowe* factors one and two, which comprised the marginal utility theory introduced by *McPeek*.[82] The third *Zubulake* factor modified the sixth *Rowe* factor by taking into account the total cost of production and the amount in controversy, while *Rowe* only considered the costs.[83] Finally, the sixth *Zubulake* factor was not addressed at all in *Rowe*. The *Zubulake* court explained that "if a case has the potential for broad public impact, then public policy weighs heavily in favor of permitting extensive discovery."[84]

The modifications to the *Rowe* factors at first appear to be minimal. They are, however, considerable because the deciding court must take into account more information in determining cost shifting under *Zubulake*. This broader inquiry could significantly alter the outcome of many cost shifting decisions.

In addition to modifying the content of the *Rowe* factors, the *Zubulake* decision modified the weight each factor receives.[85] According to the *Zubulake* court, the factors should not have equal weight.[86] The first two factors are the most important, while factors three, four, and five address cost issues and are of secondary importance in the analysis.[87] Factor six will rarely be significant, but has the potential to impact those cases where public policy is at

81. *Id.* at 321–23.

82. *See id.* (citing McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001), which described the "marginal utility" theory as a balance between the likelihood that the back-up tape contains information and the fairness of forcing the responding party to search at its own expense).

83. *Id.* at 321.

84. *Id.*

85. *Id.* at 323.

86. *Id.*

87. *Id.*

stake.[88] The last factor is the least significant because discovery requests will generally favor the requesting party.[89]

Zubulake broke the cost shifting analysis into three steps:

1. The court must examine the responding party's computer system to determine whether data are accessible, and consider cost shifting only when electronic data are inaccessible.[90]

2. The responding party must restore and produce responsive documents from a small sample of the requested back-up tapes so the court has some factual basis on which to rest its determination.[91]

3. The court must apply the seven-factor test based on the sample supplied by the responding party.[92]

These steps are fact-intensive and require that the parties and the court develop a comprehensive record.[93] The sampling method used by *Zubulake*,[94] and previously by *McPeek*,[95] established the factual record necessary for the analysis.[96]

In conclusion, the *Zubulake* decision gave some guidance as to when courts should consider cost shifting in e-discovery.[97] It provided a three-step analysis to help courts tackle the seemingly untenable task of managing e-discovery and cost shifting.[98] *Zubulake* also maintained the presumption that the producer pays for its own discovery costs.[99]

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88. *Id.*
89. *Id.*
90. *Id.* at 324.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* The *Zubulake* sampling method "require[s] the responding party to restore and produce responsive documents for a small sample of backup tapes." *Id.*
95. *Id.* at 323 (citing *McPeek*'s use of a sampling method or "test run" to establish a factual record).
96. *Id.*
97. *See supra* notes 71–74 and accompanying text.
98. *See supra* notes 90–92 and accompanying text.
99. *See supra* notes 80–89 and accompanying text.

3. The Effect of *McPeek*, *Rowe*, and *Zubulake*: The Evolution Continues

The Supreme Court's holding in *Oppenheimer Fund, Inc. v. Sanders*[100] is the only binding precedent involving e-discovery and cost shifting. While *McPeek*, *Rowe*, and *Zubulake* have provided insight into the e-discovery cost shifting analysis, none of these decisions are binding on any other court.[101] Courts across the country, however, have widely discussed, cited, and in some cases, followed these cases and their reasoning.[102] Several courts have used these decisions as the basis for their cost shifting analysis, but either incorporated new factors,[103] departed from the original reasoning,[104] or combined all three decisions without determining which approach the court would follow in what instance.[105]

a. Applications of McPeek

McPeek was decided in the District of Columbia.[106] In addition to the D.C. District Court, two other district courts in the First and Eighth Circuits have followed, at least partially, the *McPeek*

100. 437 U.S. 340 (1978) (holding that the party responding to the discovery request must pay costs).

101. All three cases are district court cases and are thus merely persuasive authority. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003); Rowe Entm't, Inc. v. William Morris Agency, Inc., 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001); *see also* Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587, at *18–*19 (W.D. Tenn. May 13, 2003) (relying on *Rowe* but noting that "*Rowe Entertainment* is not the final word, nor even the definitive word, on [the cost shifting] issue").

102. *See infra* Part IV.B.3.

103. *See* Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122, at *4 (N.D. Ill. Aug. 10, 2004) (following *Zubulake* but adding its own factor to the analysis).

104. *See Medtronic Sofamor Danek, Inc.*, 2003 U.S. LEXIS 8587, at *18–*23 (applying *Rowe* but departing from the *Rowe* reasoning in one factor and applying *McPeek* instead).

105. *See* Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 602–03 (E.D. Wis. 2004) (discussing *McPeek*, *Rowe*, and *Zubulake* and then applying both *Zubulake* and *McPeek*); Thompson v. United States Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003) (discussing *McPeek*, *Rowe*, and *Zubulake*, and declining to apply any of them to the case).

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

reasoning.[107] Further, courts reference *McPeek* often in discussions of *Rowe* and *Zubulake*, as both cases incorporated *McPeek's* "marginal utility" theory.[108]

In *Cognex Corp. v. Electro Scientific Indus.*,[109] the District Court of Massachusetts, which sits in the First Circuit, found that of the case law relied on by the parties in their briefs, *McPeek* was the most analogous to the case at bar.[110] The dispute in *Cognex* involved the searching of back-up tapes with partially deleted or inaccessible information.[111] The court, relying on *McPeek*, held that case law did not establish a general duty to search back-up tapes.[112]

The court then considered whether discovery of relevant data was likely.[113] *McPeek's* marginal utility theory addresses the likelihood of obtaining relevant information from the search and reasoned that if the search is unlikely to yield relevant results, it should be paid for by the requesting party.[114] In *Cognex*, the court used the marginal utility theory to reach a different result. The court held that the search would likely not yield relevant results as the "most relevant emails [were] to be deleted at the time."[115] The court did not shift costs as had the court in *McPeek*, but it did not compel the producing party to search its back-up tapes either.[116]

Even though the requesting party in *Cognex* offered to pay for the extraction of the inaccessible information, the court did not shift

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107. *See* Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645 (D. Minn. 2002); Cognex Corp. v. Electro Scientific Indus., Inc., No. Civ.A. 01CV10287RCL, 2002 WL 32309413 (D. Mass. July 2, 2002).

108. *See, e.g.*, *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 602 (E.D. Wis. 2004) (finding that the first two *Zubulake* factors "mirror the marginal utility test found in *McPeek*"); *Wiginton* 2004 WL 1895122, at *5 (noting that the first two factors in *Zubulake* comprise *McPeek*'s marginal utility test); *Medtronic Sofamor Danek, Inc.*, 2003 U.S. LEXIS 8587, at *18–*24 (applying the *Rowe* factors but discussing *McPeek*'s marginal utility theory).

109. No. Civ.A. 01CV10287RCL, 2002 WL 32309413, at *4 (D. Mass. July 2, 2002).

110. *Id.*

111. *Id.* at *2.

112. *Id.* at *5.

113. *Id.*

114. *See supra* note 43 and accompanying text.

115. *Cognex*, 2002 WL 32309413, at *5.

116. *Id.*

costs.[117] The court found there was "something inconsistent with our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it."[118] The court in *Cognex* relied on the marginal utility theory to protect the producing party, but not by shifting costs. Rather, the court denied discovery altogether.[119]

In *Antioch Co. v. Scrapbook Borders, Inc.*,[120] the District Court of Minnesota in the Eighth Circuit, relying on *McPeek,* among other cases, reasoned that since relevant information could be found from the search of the producing party's computer system, the information was discoverable.[121] This court noted that it was not conducting a cost shifting analysis, as the requesting party offered to pay for the extraction of the electronic information.[122] The court, however, seemed to allow the requesting party to pay for the search because the likelihood of discovering relevant information was low, but not non-existent, and the requesting party was willing to pay for it.[123]

The two cases discussed above seem to follow *McPeek* to some degree, but they do not scrupulously adhere to *McPeek.* They mention *McPeek*, reference the marginal utility analysis, and even touch on the problems with the market approach that *McPeek* addressed.[124] The limited reliance on *McPeek* does not diminish *McPeek*'s importance, however. The *McPeek* analysis has been incorporated into the *Rowe* and *Zubulake* tests, and thus courts tend to apply *McPeek* as part of the *Rowe* and *Zubulake* analysis.[125]

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117. *Id.*

118. *Id.* at *5.

119. *Id.* (reasoning that a sense of fairness dictates that those with "deeper pockets" should not have a strategic advantage in litigation). Arguably, under *McPeek* the costs would be shifted, as the less likely the search is to yield relevant results, the fairer it would be to shift the production costs to the requesting party. *See supra* note 43 and accompanying text.

120. 210 F.R.D. 645 (D. Minn. 2002).

121. *Id.* at 651.

122. *Id.* at 652 n.6.

123. *See id.*

124. *See Cognex*, 2002 WL 32309413, at *5 (noting that *McPeek* was analogous to the case at bar and discussing the marginal utility test); *Antioch*, 210 F.R.D. 645 (discussing the market approach introduced in *McPeek* and its problems).

125. *See supra* note 108.

b. Applications of Rowe

Rowe was decided in the Southern District of New York, and while that court subsequently modified *Rowe* in *Zubulake*, *Rowe* has nonetheless made an impact nationally.[126] District courts in the Fourth and Sixth Circuits have followed the *Rowe* reasoning.[127] Of course, since no appellate level court has yet considered cost shifting for e-discovery, no binding precedent constrains district courts, many of which have taken liberties in their applications of the *Rowe* analysis.[128]

In *Murphy Oil USA v. Fluor Daniel, Inc.*,[129] the Eastern District of Louisiana, which sits in the Fourth Circuit, applied the *Rowe* factors to a cost shifting request stemming from a motion to compel in a breach of contract dispute.[130] The court found that of the eight *Rowe* factors, five weighed in favor of shifting the cost to the requesting party.[131] Two of the factors weighed against cost shifting, and one factor was neutral.[132] Based on this analysis, the court shifted the costs of production to the requesting party.[133] The court, however, only shifted to the requesting party the costs involved with production, and did not shift the costs involved with reviewing the data for privileged information.[134]

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126. *See supra* note 64 and accompanying text.

127. Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587 (W.D. Tenn. May 13, 2003); Murphy Oil USA, Inc. v. Fluor Daniel, Inc., Inc., 52 Fed. R. Serv. 3d (West) 168 (E.D. La. 2002).

128. *See supra* notes 101–107 and accompanying text; *see also Medtronic Sofamor Danek, Inc.*, 2003 U.S. LEXIS 8587, at *18–*19 (noting that *Rowe* is not binding precedent and departing from the *Rowe* reasoning).

129. 52 Fed. R. Serv. 3d (West) 168 (E.D. La. 2002). This case applied the *Rowe* factors. It obtained the factors, however, from the original January 16, 2002 order from U.S. Magistrate Judge Francis in the *Rowe* case and not the May 9, 2002 review of that order by Judge Patterson, which is the opinion referred to throughout this article as *Rowe*. *See id.* at 173 (citing Rowe Entm't, Inc. v. William Morris Agency, Inc., No. 98 Civ. 8272, 2002 WL 63190 (S.D.N.Y. Jan. 16, 2002)).

130. *Id.* at 170.

131. *Id.* at 177.

132. *Id.*

133. *Id.*

134. *Id.* at 178. For a discussion of various approaches to privilege review costs and whether courts deem them legitimate costs relevant to cost shifting see *infra* Part IV.C.1.

In *Medtronic Sofamor Danek, Inc. v. Michelson*,[135] the Western District of Tennessee, sitting in the Sixth Circuit, applied the *Rowe* factors to a cost shifting request stemming from a motion to compel in a trade secret dispute.[136] The court did not stray from the *Rowe* analysis except in its discussion of the "[p]urpose for [m]aintaining the [d]ata" factor.[137] This court disagreed with the *Rowe* court's reasoning that cost shifting was warranted where a party did not search its back-up tapes for information in the course of its business.[138] This court reasoned that "*Rowe Entertainment* is not the final word, nor even the definitive word on the issue."[139] The court instead applied the *McPeek* marginal utility test to this factor, concluding that because the requesting party had not made a showing that there would be relevant information on the back-up tapes, the factor weighed toward cost shifting.[140] The court found five of the eight *Rowe* factors warranted cost shifting in that case.[141]

Murphy Oil and *Medtronic* exemplify the two extremes of how courts apply the *Rowe* factors.[142] The *Murphy Oil* decision did not depart from the *Rowe* court's application of the factors.[143] While the *Medtronic* court claimed to be applying *Rowe*, it expressly departed from the *Rowe* reasoning and stated that *Rowe* was not binding.[144] It is clear courts recognize *Rowe* as an important decision with useful insight into the cost shifting analysis. Courts also realize, however, this area of the law is being developed piecemeal and each case can be decided largely through the discretion of the sitting judge.

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135. No. 01-2373-M1V, 2003 U.S. LEXIS 8587 (W.D. Tenn. May 13, 2003).

136. *Id.*

137. *Id.* at *18.

138. *Id.*; *see also* Rowe Entm't, Inc. v. William Morris Agency, Inc., 53 Fed. R. Serv. 3d (West) 296, 306 (S.D.N.Y. 2002) (citing Rowe Entm't, 2002 WL 63190, at *10 ("Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the costs of retrieving deleted e-mails.").

139. *Medtronic Sofamor Danek, Inc.*, 2003 U.S. LEXIS 8587, at *18–*19.

140. *Id.* at *19–*23.

141. *Id.* at *29.

142. This can also be said about the way courts apply *McPeek* and *Zubulake*.

143. *See* Murphy Oil USA, Inc. v. Fluor Daniel, Inc., Inc., 52 Fed. R. Serv. 3d (West) 168 (E.D. La. 2002).

144. *See* Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587 (W.D. Tenn. May 13, 2003).

c. *Applications of* Zubulake

District courts nationwide have embraced the *Zubulake* decision slightly more readily than they have *McPeek* or *Rowe*.[145] Some of these courts, however, have also applied *Zubulake* very liberally, much like the application of *McPeek* and *Rowe*.[146] Some have applied the *Zubulake* factors in tandem with one of the other cases,[147] and others have also departed from or added to *Zubulake* to make the cost shifting determination.[148]

The court in *Xpedior Creditor Trust v. Credit Suisse First Boston, Inc.*,[149] however, meticulously applied the *Zubulake* factors in a case involving a class action breach of contract suit between a class of corporations and an investment banker who sought a protective order from producing electronic data and requesting cost shifting.[150] The *Xpedior* court determined that the data in question were inaccessible, and thus a cost shifting analysis was appropriate.[151] Further, the court noted that it would weigh the

145. More courts have applied the *Zubulake* factors than *McPeek* and *Rowe*, and more courts have held that *Zubulake* would apply in cost shifting determinations. *E.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004); Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004); Multitech. Servs. v. Verizon S.W., No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004); Xpedior Creditor Trust v. Credit Suisse First Boston, Inc., 309 F. Supp. 2d. 459 (S.D.N.Y. 2003); OpenTV v. Liberate Techs., 219 F.R.D. 474 (N.D. Cal. 2003).

146. *See supra* notes 103–105, 109–123, 128, 135–144 and accompanying text; *infra* note 148.

147. *E.g.*, Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594 (E.D. Wis. 2004) (applying *Zubulake* factors after discussing *McPeek* and *Rowe* and relying on *McPeek* for some portion of the analysis).

148. *E.g.*, Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004) (applying *Zubulake* but adding an eighth factor that the court determined was necessary for a fair resolution of the case at bar); Multitech. Servs. v. Verizon S.W., No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004) (applying *Zubulake* but failing to discuss all the *Zubulake* factors). *But see* Xpedior Creditor Trust v. Credit Suisse First Boston, Inc., 309 F. Supp. 2d. 459 (S.D.N.Y. 2003) (applying the *Zubulake* factors scrupulously, as the case was decided by Judge Scheindlin, who was also the author of the *Zubulake* decision).

149. 309 F. Supp. 2d. 459 (S.D.N.Y. 2003).

150. *Id.*

151. *Id.* at 465.

factors as the *Zubulake* opinion instructed.[152] The court determined cost shifting was not appropriate, as the first four factors weighed against cost shifting and the remaining factors were neutral.[153] Judge Scheindlin, who decided this case, also decided *Zubulake,* which may explain why it was an exact application of the prior case.[154]

Unlike *Xpedior*, *OpenTV v. Liberate Technologies*[155] did not adhere closely to the *Zubulake* factors or the three-step analysis.[156] In the Northern District of California, the *OpenTV* court found a cost shifting analysis was warranted because the data requested were very costly to retrieve, even though the data were not inaccessible.[157] Further, the *OpenTV* court did not weigh the factors as *Zubulake* instructed. Instead, the court determined that the first two factors plus two others[158] weighed against cost shifting, while one factor was neutral and two weighed in favor of cost shifting.[159] According to *Zubulake*, the first two factors should carry the most influence in the determination.[160] The court determined that cost shifting was appropriate, however, "because the parties [were] similarly situated" and split the costs of producing the electronic data between the parties.[161] Clearly, this court was giving greater weight to factor four, the cost of production, as opposed to the resources of the parties, which according to *Zubulake* was of secondary importance.[162]

In *Wiginton v. CB Richard Ellis, Inc.*,[163] a class action suit alleging nationwide sexual harassment, an Illinois district court carefully reviewed *McPeek*, *Rowe*, and *Zubulake* before deciding to

152. *Id.* at 465 n.6.
153. *Id.* at 467.
154. *See id.* at 459; Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003).
155. 219 F.R.D. 474 (N.D. Cal. 2003).
156. *See id.*
157. *See id.* at 477.
158. *Id.* at 479 (holding that factor three, the total cost of production compared to the amount in controversy, and factor five, the relative ability of each party to control costs, weighed against cost shifting).
159. *Id.*
160. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).
161. *OpenTV*, 219 F.R.D. at 479.
162. *Zubulake*, 217 F.R.D. at 323.
163. No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004).

apply the *Zubulake* factors, plus an additional factor determined by the court.[164] The additional factor was "the importance of the requested discovery in resolving the issues at stake in the litigation."[165] While this factor seems almost identical to *Zubulake* factor one (the extent to which the request is specifically tailored to discover relevant information), the *Zubulake* factor arguably focuses on the specificity of the request rather than the information being sought. Despite adding a factor, the court weighed all factors as described in *Zubulake* and made it a point to maintain the presumption that the producing party pays for discovery.[166] The court held that cost shifting was warranted and the requesting party should bear twenty-five percent of the discovery costs.[167]

The adherence to *Zubulake* was even less structured in *Multitechnology Services v. Verizon Southwest*,[168] a case decided in the Northern District of Texas.[169] The court did not limit the cost shifting analysis to inaccessible data, as *Zubulake* instructed, opting instead to read *Zubulake* as not "interfer[ing] with the court's authority to enter any appropriate protective order in the discovery process . . . ."[170] Further, the court considered only five of the seven *Zubulake* factors and made no mention of the weight accorded to each.[171] Of the factors discussed, only one of them weighed in favor of cost shifting.[172] Of the remaining four, three weighed against cost shifting.[173] The court mentioned the final factor but did not determine whether it weighed for or against cost shifting.[174] The court ultimately determined the cost of the e-discovery should be

164. *Id.* at *4.
165. *Id.*
166. *Id.* at *4, *8.
167. *Id.*
168. No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004).
169. *Id.*
170. *Id.* at *1.
171. *See id.* at *2 (failing to discuss *Zubulake* factors four and six).
172. *Id.* (explaining that *Zubulake* factors one, two, and five weighed against cost shifting, mentioning factor three with no determination of whether it weighed in favor or against cost shifting, and holding that factor seven weighed in favor of cost shifting).
173. *Id.*
174. *Id.*

split evenly between the parties.[175]

While *Zubulake* has been more widely accepted than *McPeek* and *Rowe*, it is by no means meticulously followed.[176] The *Zubulake* opinion identified the complex issues involved in the cost shifting determination and, along with its predecessors, formed the framework of the e-discovery cost shifting analysis.[177] Like *McPeek* and *Rowe*, however, *Zubulake* seems to be the springboard from which individual courts jump to their own conclusions.

C. Ambiguities and Concerns in the Cost Shifting Analyses

Although the cost shifting approaches discussed above have been widely commended, they have not been immune from criticism.[178] While these cost shifting analyses have provided significant guidance in the cost shifting determination, they have not satisfactorily answered all questions. This section addresses the ambiguities and concerns in the cost shifting analyses, including: the confusion regarding what costs should be shifted; the concern that the threshold question in *Zubulake* may be too extreme; the role of the sampling method employed by *McPeek* and *Zubulake*; the

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175. *Id.*

176. *See supra* notes 146, 155–175 and accompanying text.

177. *See* MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 14:29.10 (2004) (praising the *Zubulake* decision as a thoughtful analysis of some of the complex issues concerning the use of e-discovery).

178. *See, e.g., id.*; Joan E. Feldman et al., Computer Forensics, Inc., Show Me The Money: Cost Concerns in Computer Discovery, (explaining that *McPeek* was a sensible approach to cost shifting issues), http://www.forensics.com/pdf/Show_Me_the_Money.pdf (last visited Aug. 5, 2005); Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53 (2004) (crediting the *Zubulake* decision with developing a sound, pragmatic, and cost sensitive approach to e-discovery), *available at* http://law.richmond.edu/jolt/V10:5/article53.pdf. *But see* Bahar Shariati, Note, Zubulake v. UBS Warburg*: Evidence that the Federal Rules of Civil Procedure Provide the Means for Determining Cost Allocation in Electronic Discovery Disputes?*, 49 VILL. L. REV. 393, 427–28 (2004) (criticizing *Zubulake* for confusing the application of the Federal Rules of Civil Procedure with the application of its "vague hierarchy" of importance in balancing factors); Patrick J. Burke & John G. Siegal, *Managing Electronic Records in the E-Discovery Challenge*, N.Y. L.J. TECHTRENDS, Sept. 15, 2003, at T6 (speculating that making inaccessible data a pre-requisite for a cost shifting analysis would encourage corporations to store their data inaccessibly, thus driving up cost and burdening requesting parties).

method courts use to determine how much of the costs should be shifted; and whether courts employ the cost shifting option when discovery requests should be denied.

1. What Costs Are Shifted?: Privilege Review and Other Miscellaneous Expenses

E-discovery involves many expenses, not all of which courts consider in the cost shifting analysis. In particular, courts have determined that the costs of reviewing data for privileged information, responsiveness to the discovery request, as well as preserving electronic data for litigation purposes are not production costs and thus are not included in the cost shifting determination.[179] With few exceptions, the production costs of electronic data constitute the only issue in the cost shifting analysis.[180]

Privilege review costs are the most hotly debated.[181] The time, effort, and money expended to search exorbitant amounts of data for responsive and privileged information is just as likely to bully a party into settlement as the costs of production.[182] Courts have overwhelmingly held, however, that privilege review costs are not

179. *See, e.g*, Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004) (holding that the costs of data review for privileged information and for responsiveness would not be shifted to the requesting party); Computer Assocs. Int'l v. Quest Software, Inc., 56 Fed. R. Serv. 3d (West) 401 (N.D. Ill. 2003) (holding that costs litigated in the case were not for production of electronic data, but for reviewing data for privilege, costs which are not eligible to be shifted); OpenTV v. Liberate Techs., 219 F.R.D. 474 (N.D. Cal. 2003) (holding that costs of privilege review would be borne solely by the producing party); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004 (N.D. Ill. June 3, 2002) (holding that the producing party should bear the costs of privilege review and responsiveness review, despite finding that the cost of producing electronic data should shift to the requesting party).

180. *See, e.g.*, Chimie v. PPG Indus., 218 F.R.D. 416, 422 (D. Del. 2003) (noting that because privilege review in this case was such a "daunting task" as it spanned twenty years of data, cost shifting may be considered); *In re* Gen. Instrument Corp. Sec. Litig., No. 96 C 1129, 1999 WL 1072507, at *6 (N.D. Ill. Nov. 18, 1999) (noting that the costs of privilege review should be considered in any calculus of whether to allow discovery).

181. *See supra* note 179 and accompanying text (describing several cases where, in addition to production costs, privilege review costs were at issue).

182. *See supra* notes 10–11 and accompanying text (discussing how production costs can be used as a tool to frustrate cases into settlement).

costs that can be shifted to the producing party.[183]

While most courts have decided not to consider the costs for privilege review in the cost shifting analysis, few courts have actually discussed their reasoning for not doing so.[184] The court in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*[185] reasoned that that the responding party's choice to retain privileged or confidential information in electronic form without designating the data to specific files is analogous to a situation where "a company fails to shred its confidential paper documents and instead leaves them intermingled with non-confidential discoverable papers."[186] The court continued that the producing party should bear the costs resulting from such a choice.[187] This reasoning is convincing, as the party asserting the privilege should not be able to force the requesting party to bear an expense for review that exclusively benefits the opponent. Such a rule would allow producing parties to assert privilege as a tool to frustrate cases into settlement.[188]

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183. *See* cases cited *supra* note 179.

184. *See, e.g*, Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (holding that although initial costs in retrieving and restoring information may be shifted, the responding party should bear the cost of reviewing data once it has been restored to an accessible form); Computer Assocs. Int'l v. Quest Software, Inc., 56 Fed. R. Serv. 3d (West) 401 (N.D. Ill. 2003) (holding that privilege review costs are borne by the producing party, but offering no analysis as to why); Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-M1V, 2003 U.S. LEXIS 8587 (W.D. Tenn. May 13, 2003) (holding that privilege review costs are generally borne by the responding party, but withholding analysis because parties in the case had come to an agreement as to privilege review costs); Byers v. Ill. State Police, No. 99 C 8105, 2002 WL 1264004, at *12 (N.D. Ill. June 3, 2002) (holding that each party should bear their own expenses associated with privilege review, but not citing support or reasoning for that decision).

185. No. Civ.A. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002).

186. *Id.* at *7.

187. *Id.*

188. The fear that requesting parties would frustrate cases into settlement with broad e-discovery requests mentioned in Part A of this Article was addressed by the *McPeek*, *Rowe*, and *Zubulake* courts, which all require specific and relevant discovery requests. *See Digital Discovery Making Gains, But Costs Remain High*, *supra* note 6 (quoting Judge Francis, author of the *Rowe* opinion, "If the parties are on a fishing expedition, they should have to pay for the fishing party."). Similarly, the fear that the producing parties will abuse the assertion of privilege review to prolong and frustrate litigation is addressed by the current cases holding that producing parties should bear the

Privilege review costs, responsiveness review costs, and data preservation costs are borne by the producing parties in the paper discovery realm.[189] Further, it makes sense to have the producing party bear the costs of review and preservation because the producing party is in the best position to control these costs.[190] Not only do the producing parties control the costs of review and preservation, but these costs also differ from production costs because the producing party is the sole beneficiary of privilege review and preservation.[191] Thus, in addition to it being unjust to have the requesting party bear costs for the express purpose of benefiting the opposing party, such a practice would encourage abuses that would frustrate the fair resolution of cases.[192]

2. The *Zubulake* Threshold: A Barrier to Legitimate Cost Shifting Requests?

Zubulake's creation of a threshold question (whether the data sought are accessible or inaccessible) has been the basis for some discussion.[193] This question is based on the premise that if the data are accessible, then they will not be expensive to retrieve, and thus cost shifting is not warranted.[194] Some have argued this threshold does not remove all discretion from the courts, however, and that it

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privilege review costs. *See supra* note 179.

189. *See Zubulake*, 216 F.R.D. at 290.

190. *See id.* (noting that the producing party decides which person conducts the privilege review and which protocol is employed and thus controls the costs of the review).

191. The producing party benefits from the privilege review, as it is the party asserting the privilege. The producing party benefits from the responsiveness review because it prefers to give the opposing party the minimum amount of information. The producing party benefits from data preservation to avoid spoliation sanctions.

192. *See supra* note 188 and accompanying text.

193. *See e.g.*, Burke & Siegal, *supra* note 178 (speculating that making inaccessible data a pre-requisite for a cost shifting analysis would encourage corporations to store their data inaccessibly, thus driving up cost and burdening requesting parties); Ellsworth & Pass, *supra* note 75, at 140 (explaining that *Zubulake* does not create a strict threshold question, but instead simply states that a cost shifting and proportionality analysis is not appropriate under Rule 26(b)(2) because "accessible" data is normally not expensive to recover).

194. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318–20 (S.D.N.Y. 2003).

serves merely as a guide to help the court weed out frivolous cost shifting requests.[195]

In *Multitechnology Services v. Verizon Southwest*,[196] discussed above, the court did not limit the cost shifting analysis to inaccessible data when applying *Zubulake*.[197] The court read *Zubulake* as not "interfer[ing] with the court's authority to enter any appropriate protective order in the discovery process."[198] While the *Zubulake* language was absolute,[199] it is not binding, and courts are free to interpret the threshold question only as a guide to whether the cost shifting analysis should occur.[200]

Despite *Zubulake* not being binding, however, some could argue the threshold question may narrow the number of cases in which courts employ the cost shifting analysis. Narrow application of the analysis is consistent with the liberal policy underlying civil discovery and is therefore desirable.[201] The accessible/inaccessible data distinction not only reduces the likelihood that an inappropriate cost shifting request will be granted,[202] but also preserves the

195. *See* Multitech. Servs. v. Verizon S.W., No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004); Ellsworth & Pass, *supra* note 75, at 140–41.

196. No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004).

197. *Id.* at *1.

198. *Id.*

199. *See Zubulake*, 217 F.R.D. at 324 ("A court should consider cost shifting *only* when electronic data is relatively inaccessible.").

200. *See supra* notes 101, 193 and accompanying text.

201. If courts were to contemplate cost shifting in every e-discovery request, they would raise a barrier to discovery and cut against the liberal discovery policies. Liberal discovery is favored and employed in civil matters to encourage resolution of conflicts by reaching the truth and deciding cases on their merits. *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984); Shlagenhauf v. Holder, 379 U.S. 104, 114 (1964) (noting that the FRCP 26–37 should be accorded a broad and liberal treatment to ensure that civil trials in federal courts no longer need be carried on in the dark); Hickman v. Taylor, 329 U.S. 495 (1947) (recognizing the "liberal atmosphere" surrounding the federal discovery rules); Todd D. Robichaud, *Old Wine in New Bottles: Discovery Disputes and Cost Shifting in the Digital Age*, BRIEF, Winter 2004, at 56, 57 (noting that the discovery contemplated by the FRCP is broad and liberal).

202. Courts generally employ cost shifting to protect the producing party from undue burden. If the data is relatively accessible, then the burden on the producing party will likely not be undue, and thus cost shifting would be

presumption that the producing party should bear the production costs unless the burden is undue.[203] Cost shifting is a tool used by courts to protect producing parties from undue burden, not an entitlement from which every producing party should benefit.[204]

3. Sampling Method: Essential to the Fact-Intensive Cost Shifting Analysis

The sampling method was intended to aid the court in gathering the information necessary to properly conduct a cost shifting analysis.[205] While the *Zubulake* court held that the responding party must restore and produce responsive documents from a small sample of the requested data to give the court some facts on which to base its determination,[206] some could argue that this sample is not the only way to gather such facts.[207] Nonetheless, the sampling method accurately estimates the costs of producing the data and the likelihood that relevant information will be found.[208]

In *Hagemeyer North America v. Gateway Data Sciences*,[209] the

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inappropriate.

203. By employing cost shifting only when the producing party shows that the burden involved in production is undue, the presumption that the producing party pays for the costs of production is preserved. The producing party can prove that the burden is undue much more easily when the date is inaccessible.

204. *See* Robichaud, *supra* note 201, at 57 (noting that courts can protect parties by precluding or limiting discovery when the discovery involves "undue burden or expense" and that the court may order the costs and expenses of producing the information sought be shifted to the requesting party).

205. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003). The court in *McPeek* also employed the sampling method to gather facts for its analysis. *See* McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001).

206. *See Zubulake*, 217 F.R.D. at 324.

207. *See, e.g*, Multitech. Servs. v. Verizon S.W., No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480 (N.D. Tex. July 12, 2004) (applying the *Zubulake* factors without ordering a sample of the data be restored); Thompson v. United States Dep't of Hous. & Urban Dev., 219 F.R.D. 93 (D. Md. 2003) (holding that a factual record is necessary for the cost shifting determination and asking for particularized facts from the parties, however, not ordering restoration of a sample of the data).

208. *See* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 282–83 (S.D.N.Y. 2003) (noting the exact length of time required for restoration services, the hourly fee, and the number of relevant e-mails restored is information that the court and parties were able to use in extrapolating the total costs of production and the likelihood that relevant e-mails would be located).

209. No. 97-C-635, 2004 WL 1810273 (E.D. Wis. Aug. 12, 2004).

court followed the *Zubulake* and *McPeek* reasoning regarding sampling and required the producing party "to restore a sample of backup tapes and . . . to make additional submissions addressing whether the burden or expense of satisfying the entire request is proportionate to the likely benefit."[210] The *Hagemeyer* court noted that the cost shifting analysis was fact-intensive.[211] It also noted cost shifting should only occur when the burden or expense on the producing party is undue.[212]

Although an estimate of the facts needed for the cost shifting analysis may be acceptable to some courts,[213] it is not as precise as a sample. Further, producing parties may be encouraged to overestimate their costs and underestimate the relevant data to be found in order to shift costs to the requesting parties. The sampling method not only produces accurate factual information that leads to appropriate cost shifting determinations, but also reduces the likelihood that producing parties will be tempted to misrepresent their burden.

4. Allocation of Costs: The Guessing Game

The cost shifting analysis is guided by *McPeek*, *Rowe*, and *Zubulake*.[214] Even when courts determine that cost shifting should occur, however, it is unclear (and unpredictable) how they will divide costs.[215] The cost shifting cases do not offer much guidance as to what amount of the costs should be shifted.[216]

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210. *Id.* at *9.
211. *Id.*
212. *Id.*
213. *See supra* note 207 and accompanying text.
214. *See infra* Part IV.B.2.
215. *See, e.g.*, Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 WL 1895122, at *8 (N.D. Ill. Aug. 10, 2004) (declaring without explanation that the requesting party should bear seventy-five percent of the production costs); Multitech. Servs. v. Verizon Southwest, No. Civ.A. 4:02-CV-702-Y, 2004 WL 1553480, at *2 (N.D. Tex. July 12, 2004) ("requiring the parties to evenly shoulder the expense" of producing the data but relying only on balancing the parties' interests); OpenTV v. Liberate Techs., 219 F.R.D. 474 (N.D. Cal. 2003) (splitting the costs of the data extraction evenly between the parties but giving no indication of what reasoning was used to determine the cost allocation).
216. *See* cases cited *supra* note 215.

In *OpenTV v. Liberate Technologies*,[217] the court split the costs between the parties after determining cost shifting was appropriate.[218] The *OpenTV* court found that "because the parties [were] similarly situated" cost shifting was warranted.[219] Thus, the court gave the greatest weight to factor four, the cost of production as opposed to the resources of the parties,[220] which, according to *Zubulake,* was of secondary importance.[221] Other than the court's reference to the parties' resources, the court gave no indication as to what reasoning it used to split the production costs evenly between the parties.[222]

In *Wiginton v. CB Richard Ellis, Inc.*,[223] the court held that although cost shifting was appropriate, the requesting party should only bear seventy-five percent of the production costs.[224] In order to preserve the presumption that the producing party should bear the costs of production, the court reasoned that the responding party should pay for the remaining twenty-five percent of the costs.[225] The *Wiginton* court allocated production costs with no mention of the method employed to reach the seventy-five percent/twenty-five percent allotment.[226]

Zubulake did not discuss how to divide the costs when cost shifting was deemed appropriate.[227] The court in its progeny *Zubulake III*[228] stated, however, that "[i]t is beyond cavil that the precise allocation is a matter of judgment and fairness rather than a mathematical consequence of the seven factors . . . Nonetheless, the

217. 219 F.R.D. 474 (N.D. Cal. 2003).
218. *Id.* at 478.
219. *Id.*
220. *See id.*
221. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).
222. *See OpenTV*, 219 F.R.D. at 478.
223. No. 02 C 6832, 2004 WL 1895122 (N.D. Ill. Aug. 10, 2004).
224. *Id.* at *8.
225. *Id.*
226. *See id.*
227. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).
228. 216 F.R.D. 280 (S.D.N.Y. 2003). Discussed in Part IV.B.2.c., Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003), was the first of five opinions involving the same case and parties.

analysis of those factors does inform the exercise of discretion."[229] The *Zubulake III* court noted that the share of the costs to be shifted should not be so "costly [that] it [would] chill the rights of litigants to pursue meritorious claims."[230] Thus, *Zubulake III* explained there is no calculus to cost allocation and parties in cost shifting disputes are at the mercy of the courts.[231]

5. Are Courts Shifting Costs When They Should be Denying Requests?

Some critics have argued courts are too eager to allow cost shifting in situations where the discovery request should be denied.[232] Cost shifting is just one tool courts have to protect producing parties from "undue burden" as allowed by the Federal Rules of Civil Procedure.[233] Critics argue courts are increasingly turning to cost shifting when it would be fair to deny the discovery request altogether.[234]

In *Antioch Co. v. Scrapbook Borders, Inc.*,[235] the court opted to shift production costs to the requesting party, noting that the requesting party was willing to pay for such costs.[236] The court seemed to allow the requesting party to pay for the search even

229. *Zubulake*, 216 F.R.D. at 289.
230. *Id.*
231. *See id.*
232. Ellsworth & Pass, *supra* note 75, at 140–41 (noting that turning to cost shifting when prohibiting discovery would be appropriate hurts the litigation process by imposing costs on the judiciary and delaying the resolution of cases).
233. *See* FED. R. CIV. P. 26(b)(2), (c); *see also* Ellsworth & Pass, *supra* note 75, at 140–41 (noting that cost shifting is a possible remedy only after undue burden is found under Rule 26(b)(2)); Jonathan M. Redgrave & Erica J. Bachmann, *Ripples on the Shores of Zubulake: Practice Considerations from Recent Electronic Discovery Decisions*, FED. LAW., Nov.–Dec. 2003, at 30, 31–33 (explaining that cost shifting is only one option held by courts when dealing with e-discovery and that under Rule 26(c), courts could deny discovery requests, limit discovery including designation of time or place, decide on discovery methods different than one proposed by either party, limit scope of discovery, limit persons involved, limit discovery to exclude trade secrets, etc.).
234. *See* Ellsworth & Pass, *supra* note 75, at 140–41; Redgrave & Bachmann, *supra* note 233, at 31–33.
235. 210 F.R.D. 645 (D. Minn. 2002).
236. *Id.* at 652 n.6.

though the likelihood of discovering relevant information was low, but not non-existent, because the requesting party was willing to pay for it.[237] This case arguably presented a situation where the court should have denied the discovery request rather than shift the production costs to the requesting party.

In *Cognex Corp. v. Electro Scientific Industries*[238] the requesting party was also willing to bear the costs of their discovery request.[239] The court found that there was "something inconsistent with our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it."[240] Instead of allowing the cost shifting to occur, the court denied the discovery requests.[241]

Whether courts deny discovery requests or shift production costs to the requesting party, the court has achieved the goal of Rule 26(c), protecting the producing party from undue burden or expense.[242] Further, by turning to cost shifting rather than denying requests, courts further the FRCP policy of allowing matters to be litigated and decided on their merits.[243] While there is some concern about costs to the judiciary,[244] liberal discovery encourages parties to settle cases out of court, which lessens the time and monetary expense to the court system.

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237. *See id.*

238. No. Civ.A. 01CV10287RCL, 2002 WL 32309413, at *4 (D. Mass. July 2, 2002).

239. *Id.*

240. *Id.* at *5.

241. *Id.*

242. *See* FED. R. CIV. P. 26(c); Redgrave & Bachmann, *supra* note 233, at 31–33.

243. *See, e.g.*, Shlagenhauf v. Holder, 379 U.S. 104, 114–15 (1964) (noting that FRCP 26–37 should "be accorded a broad and liberal treatment to effectuate their purpose that civil trials in the federal courts no longer need be carried on in the dark"); *see also* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984) ("Liberal discovery is provided for the . . . purpose of assisting the preparation and trial, or settlement of litigated disputes."); Hickman v. Taylor, 329 U.S. 495, 505 (1947) (recognizing the "liberal atmosphere" surrounding the federal discovery rules); Robichaud, *supra* note 201, at 57 (noting that the discovery contemplated by the FRCP is broad and liberal).

244. *See* Ellsworth & Pass, *supra* note 75, at 140–41 (noting that turning to cost shifting when the prohibition of discovery would be appropriate hurts the litigation process by imposing costs on the judiciary and delaying the resolution of cases).

D. *Proposed Amendments to the Federal Rules of Civil Procedure and Their Effect on the Cost Shifting Analysis*

The proposed amendments to the Federal Rules of Civil Procedure seek to address the perceived inadequacies of the current rules in the realm of e-discovery.[245] The amendments address five areas related to e-discovery.[246] This section will discuss those amendments that have a direct impact on costs and cost shifting issues.

1. Proposed Amendment to Rule 26(f): Codifying the Obvious

The proposed amendment to Rule 26(f), the meet and confer provision, seeks to have litigating parties "address during their conference any issues relating to the disclosure or discovery of electronically stored information, including the form of production, and also to discuss issues relating to the preservation of electronically stored information and other information that may be sought during discovery."[247] This amendment focuses on the early identification of problems involving e-discovery.[248] Although the amendment does not focus on costs or cost shifting, it does have an impact upon the expenses borne by the court and the parties by avoiding delays and identifying e-discovery related conflicts between the parties.[249]

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245. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15; Advisory Comm. on Fed. Rules of Civil Procedure, *Report of the Civil Rules Advisory Committee* (2004), http://www.uscourts.gov/rules/comment2005/CVAug04.pdf [hereinafter Request for Comment].

246. *See* Request for Comment, *supra* note 245, at 5 (stating that the five topics the proposed amendments address are: "[1] early attention to issues relating to [e-discovery] . . .; [2] discovery of electronically stored information that is not reasonably accessible; [3] the assertion of privilege after production; [4] the application of Rules 33 and 34 to electronically stored information; and [5] a limit on sanctions under Rule 37 for the loss of electronically stored information.").

247. *Id.* at 6.

248. Gregory P. Joseph, *Electronic Discovery I*, NAT'L L.J., Oct. 4, 2004, at 12 (noting that the amendment encompasses important subjects and that the amendment reminds counsel and judges that these subjects should be considered at the inception of litigation).

249. *See id.* at app. 17–18 (noting that discussion of e-discovery conflicts will prove useful, even if unresolved, as parties will then be informed of the

The amendment to Rule 26(f) is modest.[250] It does not affect traditional paper discovery[251] and does not obligate parties to reach any agreements in regards to e-discovery conflicts; rather, the amendment merely requires that the issues be discussed.[252] Thus, some have posited that the amendment to Rule 26(f) is benign and only codifies what is already in practice.[253]

2. Proposed Amendment to Rule 34(b): The Form in Which Electronically Stored Information is to be Produced

The proposed amendment to Rule 34(b) allows the requesting party to indicate in which form it would prefer the electronic data to be produced. It also allows the producing party to object to the form requested, and provides that absent a request or court order regarding the form of production, the producing party may produce the data in the "form in which it is ordinarily maintained, or in an electronically searchable form."[254] Allowing requesting parties to specify the "desired form may facilitate the orderly, efficient, and cost effective discovery of electronically stored information."[255] The costs of

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issues opposing parties face and will know how to proceed early on).

250. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 22; *see also* Ken Withers, *Two Tiers and a Safe Harbor: Federal Rulemakers Grapple with E-Discovery*, FED. LAW., Sept. 2004, at 29, 31–32 (noting that not all cases will be affected by the amendments, as only cases involving e-discovery will be bound to the new amendments); Shira A. Scheindlin, *Outside Counsel: Electronic Discovery Takes Center Stage*, N.Y. L.J., Sept. 13, 2004, at 4 (noting that the proposed amendments only affect parties that have e-discovery issues).

251. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 18 (noting that even if no agreement is reached, the discussion of e-discovery issues will be helpful).

252. *See id.*

253. *See, e.g.*, James E. Rooks Jr., *Will E-Discovery Get Squeezed?*, TRIAL, Nov. 2004, at 18 (noting that the amendments other than the three discussed in his article are "benign, albeit unnecessary"); Todd L. Krause & Brian D. Coggio, *Electronic Discover: Where We Are, and Where We're Headed,* 16 J. PROPRIETARY RTS. 16, 18 (2004) (noting that the current practice in most jurisdictions is to confer with opposing counsel and attempt to agree upon electronic discovery matters and that the proposed amendments to Rule 26(f) are meant to encourage this early discussion of e-discovery issues).

254. PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at 16, app. 27 (proposed amendment to Rule 34(b)); Request for Comment, *supra* note 245.

255. PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at

litigating the form in which data will be produced and the costs of producing data in more than one form will be restricted to limited cases.[256]

This amendment seeks to bring e-discovery in line with traditional paper discovery, where the form of production is limited by the FRCP.[257] The amendment limits the form in which parties can produce data, as "there are infinite choices of form for production."[258] Yet the proposed amendment does not explain what a "searchable" format is.[259] Without clarification as to whether the proposed amendment requires production in a word-searchable format, a searchable database, or an index, litigation over the form of e-discovery production may continue.[260]

3. Proposed Amendment to Rule 26(b)(2): Establishing a Two-Tier Approach to E-Discovery

The proposed amendment to Rule 26(b)(2) reads:

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not

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app. 30.

256. *See id.* at app. 31; *see also* Krause & Coggio, *supra* note 253, at 19 (discussing the costs involved with the form electronic data is produced in and when courts require producing parties to produce in both electronic and hard-copy form); Withers, *supra* note 250, at 34 (noting that the proposed amendment to Rule 34(b) will limit the requesting party's ability to litigate the form of the data if it did not specify the form of production in the initial request).

257. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 30–31 (explaining that although the option of an electronically searchable form is "not precisely the same as the option to produce hard-copy materials organized and labeled to correspond to the requests, it should be functionally analogous"); *see also* Withers, *supra* note 250, at 34 (explaining that in the paper discovery realm, responding parties can produce the information as it is kept in the normal course of business or in response to the form specified in the discovery request and that the Rule 34(b) amendment gives e-discovery producers "two default options that are roughly analogous to the options they now have for producing paper documents").

258. Withers, *supra* note 250, at 34.

259. Scheindlin, *supra* note 250, at 32.

260. *See id.*

> 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.[261]

The proposed amendment was drafted to limit the type of electronic data that is discoverable to that which is reasonably accessible.[262] It allows for producing parties to self-designate their data as inaccessible.[263] It also permits producing parties not to produce such data unless compelled by the courts.[264] This part will explain the two-tiered approach to e-discovery that the proposed amendment creates, the presumptions that are created by this amendment, the potential for abuses, and the proposed amendment's effects on the current cost shifting analysis.

a. The two tiers

The first tier presumptively requires that the producing party "produce those electronic records that are relevant and reasonably accessible [which is] defined as that which is routinely maintained by the [producing] party in the usual course of its regular activities."[265] Critics argue the first tier invites abuse by allowing producing parties to self-designate their data as inaccessible.[266] While producing parties may self-designate, however, upon a motion to compel from the requesting party the producing party must demonstrate to the court that the requested material is inaccessible.[267] This process may delay discovery of accessible data, and thus increase costs to the parties. Yet it will not prohibit the discovery of those data.

The second tier created by the proposed amendment allows for the production of relevant inaccessible data upon a showing of good cause from the requesting party.[268] "The good-cause analysis

261. PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 6.

262. *See id.* at app. 11.

263. *See id.*

264. *See id.* at app. 11–12.

265. Scheindlin, *supra* note 250, at 32.

266. *See* Rooks, *supra* note 253, at 22 (arguing that allowing producing parties to determine what electronic information is not accessible will invite more "stonewalling than requesting parties already encounter").

267. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 11; Scheindlin, *supra* note 250, at 32.

268. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15,

balances the requesting party's need for the information against the burden on the [producing] party."[269] Courts would apply this balancing test by looking to Rule 26(b)(2)(i),(ii), and (iii) to determine whether the effort involved in retrieving the information sought is warranted.[270]

b. New presumptions and burdens

The proposed amendment changes the basic presumption upon which courts have based discovery decisions: that is, all relevant data are discoverable unless an undue burden to the producing party can be shown.[271] In the realm of electronically stored information, the alternative presumption is that only accessible data, as characterized by the producing party, are discoverable.[272] The requesting party can overcome the presumption that the producing party's designation is correct by moving to compel discovery.[273] Only then will the producing party have to prove its information is inaccessible.[274]

Another presumption created by the proposed amendment is that once a court deems the data inaccessible, those data are not

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at app. 11–12; *see also* Scheindlin, *supra* note 250, at 32 (discussing whether information is "reasonably accessible").

269. PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 11.

270. *Id.* at 11–12. The committee notes recognize that courts have begun to determine the proper application of the principles of Rule 26(b)(i), (ii), and (iii) in opinions like *Zubulake*, *Rowe*, and *McPeek*. *See id.* at 11.

271. *See* FED. R. CIV. P. 26(b)(2)(iii); *see also* Withers, *supra* note 250, at 34 (noting that the proposed amendment to Rule 26(b)(2) would eliminate the current presumption "that all relevant, accessible and non-privileged electronically stored information is presumed to be discoverable unless undue burden is shown and create the new presumption that only accessible data is discoverable"); Scheindlin, *supra* note 250, at 32 (noting that the proposed rules create certain presumptions).

272. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 11 (stating that the producing party need not provide data that is not reasonably accessible and that only upon a motion to compel will the producing party need to demonstrate to the requesting party and the court that such electronic information is in fact inaccessible); *see also* Withers, *supra* note 250, at 34 (citing the proposed amendment and explaining that the burden of making a motion to compel will fall on the requesting party once the producing party has declared the information inaccessible).

273. *See supra* notes 265–267 and accompanying text.

274. *See supra* notes 265–267 and accompanying text.

discoverable.[275] The relevance of the inaccessible data is not a factor.[276] To overcome this presumption, the requesting party must show that there is good cause for compelling the producing party to supply the inaccessible data.[277]

These new presumptions would also shift the burdens of the litigating parties. Currently, if seeking relief from the court, the producing party must show that producing the data requested would constitute an undue burden.[278] Only then can a producing party be relieved from the obligation to turn over relevant data.[279] Under the proposed amendment, the requesting party would have to compel the producing party to demonstrate that the data are inaccessible.[280] Then the requesting party would be required to show the burden of producing the inaccessible data would not be undue.[281]

While some would argue the proposed amendment rectifies an injustice against producing parties that, to date, have been burdened with producing expensive electronic data, others could argue the proposed amendment creates burdens and presumptions that fly in the face of the Federal Rules' policy of encouraging liberal and broad discovery.[282] In particular, the proposed amendment would

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275. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at 10–12; *see also* Withers, *supra* note 250, at 38 (explaining that under the proposed amendment, there is no longer a presumption of discoverability to overcome).

276. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at 11; *see also* Withers, *supra* note 250, at 38 (noting that "[t]he amendment would change the current presumption that all relevant information is discoverable").

277. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at 6; *see also* Withers, *supra* note 250, at 38 (explaining that burden of showing good cause to compel production falls on the requesting party); Scheindlin, *supra* note 250, at 32 (noting that the requesting party will only have to show good cause to compel if the data is deemed inaccessible).

278. *E.g.*, Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003); Rowe Entm't, Inc. v. William Morris Agency, Inc., 53 Fed. R. Serv. 3d (West) 296 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001); *see* FED. R. CIV. P. 26(b)(2); *see also* Withers, *supra* note 250, at 38 (explaining that currently the burden is on the producing party to show an undue burden in producing data).

279. *See* sources cited *supra* note 278.

280. *See supra* notes 271–272 and accompanying text.

281. *See supra* note 277 and accompanying text.

282. *See* Jones, *supra* note 10, at 25 (noting e-discovery has become very

obstruct liberal discovery by allowing the producing party to withhold relevant information until compelled to produce it. By changing these burdens and presumptions, the goal of determining cases on their merits is pushed further out of reach.

c. Potential for abuse

Because producing parties can self-designate their data as inaccessible, requesting parties may be subjected to "stonewalling."[283] For instance, the producing party could claim that the data are inaccessible, and if the requesting party does not move to compel, the producing party will have avoided discovery.[284] If the requesting party moves to compel, the producing party's claim of inaccessible data will constitute an effective delaying tactic.[285] That is, the more time parties spend on a motion to compel, the less time they spend pursuing litigation. The longer litigation takes, the more likely one of the parties will run out of resources to fund the suit. Further, the proposed amendment could encourage companies to store their data in relatively inaccessible formats.[286] In essence, the FRCP would create an escape clause to the discovery rules,[287] and the proposed amendment could bring more disputes to our already

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complicated and has overburdened producing parties in large-scale litigation, sometimes pushing them into settling); Solovy & Byman, *supra* note 10 (commenting that producing parties have become disadvantaged by e-discovery costs). *But see* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) (noting that the Federal Rules of Civil Procedure make a civil trial "less a game of blind man's buff [sic] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent"); Hickman v. Taylor, 329 U.S. 495, 501 (1947); Robichaud, *supra* note 201, at 57 (noting that "[t]he discovery contemplated by the FRCP is liberal and broad").

283. *See* Rooks, *supra* note 253, at 22 (arguing that allowing producing parties to determine what electronic information is not accessible "will invite more stonewalling than requesting parties already encounter").

284. *See id.*

285. *See id.*

286. Some have argued that the *Zubulake* threshold encourages this as well. Burke & Siegal, *supra* note 178, at T6 (speculating that the *Zubulake* decision making inaccessible data a pre-requisite for a cost shifting analysis would encourage corporations to store their data inaccessibly, thus driving up cost and burdening requesting parties).

287. *See* Rooks, *supra* note 253, at 22–23.

overburdened federal courts.[288]

Another possible problem with the proposed amendment to Rule 26(b)(2) is how it will work in tandem with the proposed amendment to Rule 37(f).[289] Rule 37(f) creates a "safe harbor" for parties that destroy discoverable electronic data if 1) "the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action" and 2) the loss of the information was due to a routine operation of the party's electronic information system.[290] Thus, courts could only sanction parties for knowingly and deliberately destroying discoverable information.[291]

Parties could reasonably read the proposed amendment to Rule 26(b)(2) and the proposed Rule 37(f) to mean that if a producing party destroys what it thought were inaccessible data, there will be no repercussions. Under the proposed amendment to Rule 26(b)(2), the producing parties are allowed to self-designate data as inaccessible and that presumption must be overcome by a motion to compel.[292] Before the court grants the motion to compel, the producing party could deliberately and knowingly destroy electronic data because they are technically not discoverable.[293] In this regard, the proposed amendments would legalize spoliation of electronic data.

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288. *See id.*

289. *See id.* (noting that "[o]perating together, the two proposals would open a vast area for legalized spoliation. The early, frequent, total, and 'routine' destruction of data, under a belief—or assertion—that the data did not relate to a claim or defense . . . would be protected from sanctions by the safe-harbor provision."); *see also* Withers, *supra* note 250, at 40 (explaining that "'inaccessible' data may be routinely destroyed while litigation is pending without incurring sanctions under Rule 37").

290. PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 32.

291. *See id.* at 17; *see also supra* note 289 and accompanying text (discussing potential problems created by amendments to Rules 26(b)(2) and 37(f)).

292. *See supra* notes 275–277 and accompanying text.

293. *See supra* notes 275–277 and accompanying text; *see also supra* note 289.

d. The impact on the current cost shifting analysis

The proposed amendment to Rule 26(b)(2) would largely limit the applicability of the cost shifting analyses.[294] If courts follow *Zubulake*, they will only conduct the analysis in cases where they find good cause to compel the producing party to turn over inaccessible data.[295] If courts choose to ignore or minimize the *Zubulake* threshold, then the cost shifting analysis will be employed more often.[296] If the standard of undue burden as developed and articulated in *McPeek*, *Rowe*, and *Zubulake* is upheld by courts,[297] however, there should be fewer opportunities for producing parties to shift costs to requesting parties, especially when inaccessible data are deemed not discoverable.[298]

The cost shifting analyses are based on Rule 26(b)(2)(iii), the proportionality test.[299] The proposed amendment to Rule 26(b)(2)'s good-cause analysis will be based in part on the proportionality test as well.[300] In fact, the drafters of the proposed amendment intend for the good cause analysis to resemble the analyses in *McPeek*, *Rowe*, and *Zubulake*.[301]

Courts determining whether the requesting party has shown good-cause to compel the producing party to turn over inaccessible data will use the same factors and reasoning to determine whether costs should be shifted from the producing party to the requesting

294. The most widely followed cost shifting analysis is that of *Zubulake*. *See supra* note 145 and accompanying text. *Zubulake* establishes a threshold, indicating that if data is accessible, courts should not consider cost shifting. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).

295. Only in cases where the data is inaccessible does the *Zubulake* test apply. 217 F.R.D. at 323.

296. If courts read *Zubulake* as a guideline, rather than a mandate for cost shifting, then the threshold will not bar courts from shifting production costs. *See supra* note 195 and accompanying text.

297. *See infra* Part IV.B.2.

298. Reasonably accessible data is not as expensive and thus not as burdensome to produce as inaccessible data. *See Zubulake*, 217 F.R.D. at 323 (discussing the types of data that were accessible and inaccessible).

299. *See infra* Part IV.B.1.

300. *See supra* notes 268–270 and accompanying text.

301. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 14. The committee notes recognize that courts have begun to determine the proper application of the principles of Rule 26(b)(i), (ii), and (iii) in opinions like *Zubulake*, *Rowe*, and *McPeek*. *See id.* at 11.

party due to undue burden.[302]

While the proposed amendment does not expressly challenge or attempt to change the presumption that the producing party pays its own production costs,[303] it may have an effect on that concept. The new presumption that inaccessible data are not discoverable may sway courts in their determination of what constitutes an undue burden for the producing party. It is foreseeable that a court would be more likely to find an "undue burden" where a party must produce data that the FRCP have determined is not discoverable.

The proposed amendment does not directly address cost shifting,[304] but it seeks to correct the same perceived wrongs that cost shifting was intended to address.[305] The burden and expense of producing large amounts of electronic data was dissipated by cost shifting, and it would be greatly reduced by the proposed amendment.[306] Yet both cost shifting and the proposed amendment seem to be in direct conflict with the policy of liberal and broad discovery that has been the foundation of civil jurisprudence. Both cost shifting and the proposed amendment raise obstacles to disinterring the truth and make it difficult for matters to be settled on their merits.

E. Conclusion: The Swinging Pendulum of E-Discovery and Cost Shifting

It is surprising that an area of the law as new as cost shifting in e-discovery has been subject to a swinging pendulum, but it has. Once the Supreme Court determined electronic data were discoverable, the courts required producing parties to produce electronic data with little mention of the burden on those producing

302. *See id.* at app. 14; *see also supra* notes 268–270 and accompanying text.

303. *See* PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at app. 14 (making no mention of cost shifting).

304. *See id.*

305. Courts use cost shifting to alleviate the undue burden of producing electronic data. *See supra* notes 5–11 and accompanying text. The proposed amendments also note that "[t]he good cause analysis balances the requesting party's need for the information against the burden on the responding party." PROPOSED AMENDMENTS AND COMMITTEE NOTES, *supra* note 15, at 11.

306. *See* sources cited *supra* note 305.

parties.[307] With *McPeek* and *Rowe*, the pendulum began to swing in favor of producing parties, with courts more sympathetic to their plight allowing production costs to shift to requesting parties.[308] That swing was short-lived, however. *Zubulake* pared back the effect of *Rowe* and *McPeek* by attempting to preserve the presumption that the producing party bears the costs of production.[309] By preserving that presumption, the *Zubulake* court was trying to adhere to the FRCP's policy of liberal and broad discovery. Currently, the proposed amendments swing in favor of producing parties by significantly limiting the electronic data that are presumed discoverable.[310] In late 2005 we will see where the cost shifting pendulum lands, at least for the time being.

307. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 357 (1978) (holding that party responding to the discovery must pay costs of production); Daewoo Elecs. Co., v. United States, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986) (holding that where producing party benefited from technology, party will bear the burden of producing e-discovery); *see also* Mackey v. IBP, Inc., 167 F.R.D. 186, 199 (D. Kan. 1996) (holding that "[i]n most instances, [producing discovery] will entail some burden" and requiring the producing party to bear the costs of e-discovery production); Haworth, Inc. v. Herman Miller, Inc., No. 1:92 CV 877, 1995 WL 465838, at *1 (W.D. Mich. Apr. 20, 1995) (noting that the costs and burden involved in producing e-discovery was miniscule in comparison to the amount in controversy and holding that the discovery producer should bear the costs of production); Bills v. Kennecott Corp., 108 F.R.D. 459, 460, 464 (D. Utah 1985) (holding that because the amount of money involved in the discovery production is not excessive and the burden in obtaining the data would be greater for the requesting party, the costs should not be shifted to the requesting party).

308. *See infra* Part IV.B.2.a–b.

309. *See infra* Part IV.B.2.c.

310. *See infra* Part IV.D.