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## COMMENTS

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# WHAT—IF ANYTHING—IS AN E-MAIL? APPLYING ALASKA'S CIVIL DISCOVERY RULES TO E-MAIL PRODUCTION

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*This Comment examines the possible application of Alaska's Rules of Civil Discovery to the production of e-mail. This Comment discusses the characteristics of e-mail in comparison with other kinds of documents. Relevant Alaska law shows how the Alaska Supreme Court likely will treat e-mail as a discoverable form of communication under Alaska Rules of Civil Discovery 26 and 34. The Comment continues by defining and describing the burdens of discovery associated with e-mail and explaining how e-mail also raises issues of privilege regarding the preservation of that privilege. Finally, the Comment recommends several steps that Alaska courts should take to resolve the application of the state's rules of discovery to e-mail.*

### I. INTRODUCTION

In 1980, biologist Debra K. Bennett published a scientific paper with a surprising conclusion: after examining the common physical structures of a group of animals and applying the strict rules used in classifying organisms, she concluded that the entire

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\* Heller, Ehrman, White, & McAuliffe; J.D., Duke University School of Law, 1985.

\*\* Heller, Ehrman, White, & McAuliffe; J.D., Stanford Law School, 2000.

group of animals did not, in fact, exist.<sup>1</sup> In response, biologist Stephen Jay Gould wrote an article with the interesting title “What, If Anything, Is a Zebra?”<sup>2</sup>

In litigation, we now face a similar question. We all know how the rules of civil procedure apply to the production of documents and other tangible items. What we do not know, however, is this: for the purposes of the rules of civil procedure, what, if anything, is an e-mail?

The question is not as frivolous as it first sounds. Courts across the country are wrestling with rules and procedures for e-mail production. Commentators have written numerous articles on the topic.<sup>3</sup> The final outcome of this debate will have important ramifications on the course of litigation for years to come.

In the meantime, attorneys are left with a great degree of uncertainty as to how they should advise their clients to handle e-mail. A minor industry has emerged for consultants who recommend elaborate internal e-mail policies for corporations.<sup>4</sup> Companies wary of major production efforts often choose technology based in part on facility of recall and restoration, introducing a level of inefficiency over and above the direct costs of litigation.<sup>5</sup> With nobody quite sure what the standards will be, attorneys and clients are forced to be overly cautious in preserving electronic information. Even still, there is no way to assure that some important information will not be lost.

As the use of e-mail expands at home and in the workplace, understanding and controlling the potential impact of e-mail discovery will be essential for order and efficiency in the discovery process. Parties on both sides of litigation would benefit greatly

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1. Debra K. Bennett, *Stripes Do Not a Zebra Make, Part I: A Cladistic Analysis of Equus*, 29 SYSTEMATIC ZOOLOGY 272 (1980).

2. STEPHEN JAY GOULD, *What, if Anything, is a Zebra?*, in HEN'S TEETH & HORSE'S TOES: FURTHER REFLECTIONS IN NATURAL HISTORY 355 (1983). The scientists were debating whether the different types of zebras formed their own family or whether they were merely horses or asses with stripes. It was the *group* that might not exist, not the animal. *Id.*

3. See, e.g., *infra* notes 11, 12, 36, 79, 86.

4. See, e.g., Sheila J. Carpenter & Shaunda A. Patterson, *Discovery of Electronic Documents*, THE BRIEF, Summer 2000, at 68-70 (outlining the necessary elements of corporate e-mail policies).

5. See, e.g., Christopher V. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 J. CORP. L. 417, 419 (1999) (noting that corporate document retention programs involve “balancing of potentially competing interests” that include “(1) legal obligations, (2) efficiency considerations, and (3) pre-litigation concerns” (footnotes omitted)).

from more guidance from the courts on these important discovery issues.

In this comment, we will analyze the state of the law relating to e-mail production in Alaska and other jurisdictions and will make simple proposals for handling a few of the more important aspects.

## II. SHOULD E-MAIL BE TREATED LIKE OTHER DOCUMENTS?

The Alaska Rules of Civil Procedure allow for the production of “documents” during discovery.<sup>6</sup> Interpretation of the identical Federal Rule by Federal courts leaves little doubt that e-mail is discoverable.<sup>7</sup> Under current Rule 34 and its limited category of “documents,” e-mail can fall in only one category: “data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”<sup>8</sup> The limited nature of the categories of documents in Rule 34 has led several courts to treat the production of e-mail as if it were identical to the production of hard-copy documents stored in a file drawer.<sup>9</sup> This, however, ignores several important differences between e-mail and traditional documents.

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6. Alaska Rule of Civil Procedure 34 governs the production of documents in civil discovery. It provides:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

ALASKA R. CIV. P. 34(a).

7. See *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 RPP JCF, 2002 WL 63190, at \*6 (S.D.N.Y. Jan. 16, 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) (“During discovery, the producing party has an obligation to search available electronic systems for the information demanded.”); *Simon Property Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000).

8. ALASKA R. CIV. P. 34(a); Fed. R. Civ. P. 34(a).

9. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 8281, at \*1-2 (N.D. Ill. June 15, 1995); *Daewoo Elecs. Co. v. United States*, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986) (“[I]nformation which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms.”).

First, e-mail is far more voluminous than paper documentation. By the year 2005, North Americans will send approximately eighteen billion e-mail messages per day.<sup>10</sup> The sheer volume of information transferred by e-mail can make collecting and producing those “documents” a difficult task.

Second, e-mail is informal. People routinely say things in e-mails that they would never write in hard-copy memoranda or correspondence.<sup>11</sup> Due to the ease and speed of communication, the style of e-mails is much more like that of a conversation than a drafted document.

Third, e-mails contain more information. The electronic version of an e-mail may contain much more information than a hard copy. For example, the electronic version contains information created automatically by e-mail software, about which neither the drafter nor the reader may ever know. The e-mail program may store information about when certain files were created, who has worked on them, what changes were made, and who has accessed the e-mail.<sup>12</sup> Furthermore, some employers may set up programs to monitor their employees’ use of e-mail that can record other types of information.

Fourth, e-mail may be stored in multiple locations. A single e-mail sent from one person to multiple parties may end up stored in the company’s server or servers, each employee’s individual computer hard drive, backup systems, system-wide archives or in hard-copy form if anyone prints the e-mail.<sup>13</sup>

Fifth, e-mail can be forwarded. Employees often reply to e-mail messages by attaching the original message in the reply. Employees also frequently forward the original message to persons who were not on the original distribution list. Thus, a copy of a single message sent to one person may end up attached in several different message strings and distributed to multiple parties without the knowledge of its sender. Maintaining the confidentiality of

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10. See *By the Numbers*, INFOWORLD, Sept. 25, 2000, at 22.

11. See Heidi L. McNeil & Robert M. Kort, *Discovery of E-mail: Electronic Mail & Other Computer Information Shouldn't be Overlooked*, 56 OR. ST. B. BULL., Dec. 1995, at 21-22; Alex Salkever, *Hot on the E-trail of Evidence at Enron*, Business Week, at [http://www.businessweek.com/bwdaily/dnflash/jan2002/nf20020129\\_3701.htm](http://www.businessweek.com/bwdaily/dnflash/jan2002/nf20020129_3701.htm) (Jan. 29, 2002).

12. See James K. Lehman, *Tips for Discovery of Electronic Information*, 8 PRAC. LITIGATOR, Nov. 1997, at 9-10; Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B.C. L. REV. 327, 337-38 (2000).

13. See Salkever, *supra* note 11.

work product and attorney-client materials sent in e-mails has become an important issue.

Finally, e-mail is kept in multiple formats. E-mail is routinely stored on system servers, individual hard drives, backup drives, backup tapes and archive tapes.<sup>14</sup> In each location, the e-mail can potentially be stored in a different format. Furthermore, e-mail can be encrypted for security reasons. Searching and collecting e-mail from these various sources can be a significant technological challenge.

So, what, if anything, is an e-mail? In content and volume, e-mail is more like conversation than correspondence, although it can take either form. From a technological standpoint, e-mail is a blend of human- and computer-generated information likely to be stored in multiple locations and formats. Given these differences, e-mail is far from identical to other types of tangible “documents” that are traditionally the subject of production during civil litigation.<sup>15</sup> Some of the unique issues that arise during e-mail production and ideas that may help facilitate e-mail production need to be considered now.

### III. ALASKA LAW TO DATE

The Alaska Supreme Court has not specifically addressed the issue of e-mail in the context of discovery. In the absence of Alaska case law, two factors are important to note in predicting the decision of Alaska courts on the issue. First, the Alaska Supreme Court has consistently interpreted the Civil Rules regarding discovery broadly so as to favor discoverability and has stated that “Alaska’s discovery rules should be given a liberal interpretation in

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14. See, e.g., *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 RPP JCF, 2002 WL 63190, at \*1-4 (S.D.N.Y. Jan. 16, 2002) (describing storage formats of archived and backed-up e-mails for several defendant companies).

15. *McPeck v. Ashcroft*, 202 F.R.D. 31, 32-33 (D.D.C. 2001)

Using traditional search methods to locate paper records in a digital world presents unique problems. In a traditional “paper” case, the producing party searches where she thinks appropriate for the documents requested under Federal Rule of Civil Procedure 34. She is aided by the fact that files are traditionally organized by subject or chronology . . . , such as all the files of a particular person, independent of subject. Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter.

*Id.*

order to effectuate the underlying purpose of those rules.”<sup>16</sup> Second, in the absence of Alaska case law, the court has stated that federal court decisions interpreting identical Federal Rules of Civil Procedure are “especially persuasive.”<sup>17</sup>

Although the Alaska Supreme Court has not addressed the discoverability of e-mail, it has referred to e-mail messages in five recent decisions.<sup>18</sup> The court’s references to e-mail indicate that the court considers e-mail both a form of communication and a document or record.

#### A. E-mails as Documents

In *Helmuth v. University of Alaska Fairbanks*,<sup>19</sup> the supreme court reviewed an administrative hearing process regarding an employee’s discharge for insubordination.<sup>20</sup> The court held that an administrative record, composed largely of e-mail messages, was sufficient to sustain a hearing officer’s finding of insubordination by an employee: “The numerous electronic mail messages between May and August 1992 evidence instances of impertinence, guile, and unwillingness to conform to [the supervisor’s] directives . . . . Throughout this period, [the employee’s] conduct warranted chastisement by [the supervisor] via electronic mail . . . . The record amply supports a finding of insubordination.”<sup>21</sup> The court’s treatment of e-mail in *Helmuth* shows that as early as 1995, it considered e-mail a communication sufficient to convey an employee’s

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16. *Van Alen v. Anchorage Ski Club, Inc.*, 536 P.2d 784, 787 (Alaska 1975); *see Hazen v. Municipality of Anchorage*, 718 P.2d 456, 461 (Alaska 1986) (“We recognize that the discovery rules are to be broadly construed and that relevance for purposes of discovery is broader than for purposes of trial.”).

17. *Nolan v. Sea Airmotive, Inc.*, 627 P.2d 1035, 1041 (Alaska 1981) (discussing ALASKA R. CIV. P. 23); *see Nome Commercial Co. v. Nat’l Bank of Alaska*, 948 P.2d 443, 450 n.6 (Alaska 1997) (discussing ALASKA R. CIV. P. 22); *Langfeldt-Haaland v. Saupe Enters., Inc.*, 768 P.2d 1144, 1147 (Alaska 1989) (Moore, J., dissenting) (discussing ALASKA R. CIV. P. 35); *Johnston v. All State Roofing & Paving Co.*, 557 P.2d 770, 772-73 n.7 (Alaska 1976) (discussing ALASKA R. CIV. P. 22).

18. *Gwich’in Steering Comm. v. State, Office of the Governor*, 10 P.3d 572, 581, 582 (Alaska 2000); *Copper River Sch. Dist. v. Traw*, 9 P.3d 280, 282, 288, 289 (Alaska 2000); *Nickerson v. Univ. of Alaska Anchorage*, 975 P.2d 46, 48, 51, 54 (Alaska 1999); *Helmuth v. Univ. of Alaska Fairbanks*, 908 P.2d 1017, 1018, 1019, 1021 n.10, 1023 (Alaska 1995); *Paul Wholesale v. State*, 908 P.2d 994, 1006 (Alaska 1995).

19. 908 P.2d 1017 (Alaska 1995).

20. *Id.*

21. *Id.* at 1023.

intent to disregard a supervisor's commands.<sup>22</sup> The court also treated e-mail as a document or record—in this case, a contemporaneous record of the insubordination sufficient to uphold the administrative hearing officer's findings of fact.<sup>23</sup> The court's later references to e-mail are consistent with this approach.

In *Gwich'in Steering Committee v. State, Office of the Governor*,<sup>24</sup> the court considered whether e-mails between the Governor's Deputy Chief of Staff and the Director of State/Federal Relations fell within the deliberative process privilege exception to Alaska's Public Records Act.<sup>25</sup> Analyzing the e-mails in the same manner as several other categories of documents, including memoranda<sup>26</sup> and a draft media plan,<sup>27</sup> the court concluded that the e-mails were protected by the deliberative process privilege.<sup>28</sup>

#### B. E-mails as Communications

In *Paul Wholesale v. State*,<sup>29</sup> the court concluded that an e-mail message “in conjunction with other circumstances” produced the appearance of impropriety in a state contract solicitation, justifying the State's cancellation of the solicitation.<sup>30</sup> In *Copper River School District v. Traw*,<sup>31</sup> the two-justice dissent argued that an e-mail, in conjunction with two oral conversations, was a communication sufficient to rescind a contract offer made by the School District.<sup>32</sup> In *Nickerson v. University of Alaska Anchorage*,<sup>33</sup> the court relied on an e-mail in the context of other communications in its review of whether the University of Alaska's dismissal of a student from his practicum comported with due process and the University's procedural requirements.<sup>34</sup>

In sum, the Alaska Supreme Court has treated e-mail as a form of communication and as a document or record. This treatment, in conjunction with the court's precedent for liberally inter-

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22. *See id.* at 1018-19 (“[The supervisor] and [the employee] communicated more frequently by electronic mail than in person.”).

23. *See id.* at 1023.

24. 10 P.3d 572 (Alaska 2000).

25. *Id.* at 580-84.

26. *See id.* at 581-82.

27. *See id.* at 582.

28. *Id.* at 583.

29. 908 P.2d 994 (Alaska 1995).

30. *Id.* at 1002.

31. 9 P.3d 280 (Alaska 2000).

32. *Id.* at 288 (Matthews, C.J., dissenting).

33. 975 P.2d 46 (Alaska 1999).

34. *Id.* at 51, 54.

preting the Alaska Civil Rules in favor of discovery, suggests the court would likely find e-mail discoverable under Civil Rules 26 and 34.

#### IV. THE BURDENS OF E-MAIL DISCOVERY

A relatively large body of case law<sup>35</sup> and authority<sup>36</sup> has discussed burdens associated with the discovery of e-mail and other electronic data. This discussion is understandable given several cases in which the costs associated with production of archived and backup e-mails has reached \$1 million.<sup>37</sup> The potentially extraordinary costs of responding to discovery requests are only one of the burdens of e-mail discovery. Many other burdens, some of which have been explicitly recognized by courts considering the matter, exist today.<sup>38</sup> Potential amendments to the Alaska Civil Rules and an emerging trend toward cost-shifting could remedy some of these problems.

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35. See, e.g., *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1052-54 (S.D. Cal. 1999); *In re General Instrument Corp. Securities Litigation*, No. 96 C 1129, 1999 WL 1072507, at \*5-6 (N.D. Ill. Nov. 18, 1999); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM) (AJP), 1996 WL 22976 (S.D.N.Y. Jan. 23, 1996).

36. See, e.g., Timothy Q. Delaney, *E-mail Discovery: The Duties, Danger and Expense*, FED. LAWYER, Jan. 1999, at 42, 46; Richard L. Marcus, *Complex Litigation at the Millennium: Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROBS. 253, 270-71 (2001); Scheindlin & Rabkin, *supra* note 12, at 356-61; Marnie H. Pulver, Note, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1379 (2000).

37. Janet Novack, *Control/Alt/Discover*, FORBES MAG., Jan. 13, 1997, at 60 (describing court order requiring corporate litigant to produce 50,000 backup storage tapes at an estimated cost of over \$1 million); see *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 RPP JCF, 2002 WL 63190, at \*2-4 (S.D.N.Y. Jan. 16, 2002) (listing estimated costs to produce archived e-mail with costs to individual defendants ranging from \$247,000 to \$403,000); *United States v. Visa USA, Inc.*, No. 98 Civ. 7076 (BSJ), 1999 WL 476437, at \*2 (S.D.N.Y. July 7, 1999) (noting Visa's cost to produce archived e-mail at \$130,000); *In re Brand Name Prescription Drugs*, 1995 WL 360526, at \*2 (N.D. Ill. June 15, 1995) (ordering defendant to retrieve backed-up data at estimated cost of \$50,000 to \$70,000); *Linnen v. A.H. Robbins Co.*, No. 97-2307, 1999 WL 462015, at \*4 (Mass. Sup. Ct. June 16, 1999) (noting cost to restore defendant's archived e-mails was estimated at between \$850,000 and \$1.4 million).

38. See *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (noting that the government would have "to insist that its employees do the restoration [of backup tapes] lest confidential information be seen by someone not employed by the government who has no right to see it").

### A. Defining the Burdens

The first step in addressing the potential burdens associated with e-mail discovery is identifying those burdens. Such an inquiry should not be limited to the million-dollar newspaper headline cases.

One burden of e-mail discovery is the time, effort and cost of drafting corporate e-mail policies and document retention policies regarding e-mail. This issue springs directly from the imprecise fit of e-mail into the discovery rules. Much has been written about the need for corporate e-mail policies to safeguard against high production costs and the potential for spoliation in later unforeseen litigation.<sup>39</sup> However, the direct correlation between the uncertainty in the application of the discovery rules to e-mail and the risk-averse tendency of attorneys to safeguard excessively against that uncertainty has received less attention.

Another burden is the time required to respond to discovery requests for e-mail. As noted above, the sheer volume of e-mail in corporate America makes review of that e-mail in the context of discovery potentially overwhelming. The court in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>40</sup> for example, noted that one party had estimated that it would take two and one-half years to fully respond to a request to produce archived e-mails.<sup>41</sup> The court in *In re General Instrument Corp. Securities Litigation*<sup>42</sup> also recognized that the burden on the defendant associated with the technical aspect of retrieving archived material would be “just the start of the process” and that “[d]efense counsel would then have to read each e-mail, assess whether the e-mail was responsive, and then determine whether the e-mail contained privileged information.”<sup>43</sup>

Another burden involves intrusion into the computer records of the responding party necessary to accomplish discovery. The potential intrusiveness of e-mail discovery may exceed an acceptable level.<sup>44</sup> Among other forms of embedded information, e-mails

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39. See, e.g., Randolph A. Kahn & Kristi L. Vaiden, *If the Slate is Wiped Clean: Spoliation: What It Can Mean for Your Case*, BUS. L. TODAY, June 1999, at 13; Delaney, *supra* note 36, at 42.

40. No. 98 Civ. 8272 RPP JCF, 2002 WL 63190, at \*6 (S.D.N.Y. Jan. 16, 2002).

41. *Id.* at \*4.

42. No. 96 C 1129, 1999 WL 1072507, at \*5-\*6 (N.D. Ill. Nov. 18, 1999).

43. *Id.* at \*6.

44. See Marcus, *supra* note 36, at 270. Professor Marcus notes: “[P]erhaps the intrusiveness now possible is of a different magnitude, and calls for revising the basic idea that protecting privacy should be the exception, not the rule, where discovery is concerned,” and that: “[e]xcept for a few privileged matters, nothing is

may contain histories of revisions of the e-mail; the times e-mail was sent and received, and by whom; whether the e-mail was actually opened, thereby indicating a greater likelihood the e-mail was actually read; and the specific computer from which the e-mail was sent. This amount of information about a particular document stands in stark contrast to the black and white of ink on paper, which contains no more and no less than is visible to the eye. These embedded forms of information in e-mail may reveal too much information about individuals' personal and professional activities that may or may not be discoverable under the current rules of discovery. Regardless, as more of our world becomes digitized, the burdens associated with the level of intrusiveness in civil discovery will increase dramatically and the issue of intrusiveness should not be ignored.<sup>45</sup>

Finally, the financial burdens of discovery responses on individuals and small businesses can be significant. A potential cost of as much as several thousand dollars for searching computer hard drives or backup tapes for deleted and archived e-mails would be relatively more burdensome for individuals or small businesses than a similar request to a multi-national corporation. Further, the interruption of a small business in order to accomplish discovery of that business's e-mail can be significant. These concerns have not gone unnoticed by the courts. One of the few published cases allowing discovery of a computer hard drive for "deleted" information involved a large corporation's discovery request to an individual's small business.<sup>46</sup> The court minimized the impact on the individual by requiring the corporation to "pay the costs associated with the information recovery, . . . accommodate Defendant's schedule as much as possible," and minimize the down time of the individual's computer.<sup>47</sup>

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sacred in civil litigation." *Id.* (quoting *Coca-Cola Bottling Co. v. Coca Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985)); *see also* *Strasser v. Yalamanchi*, 669 So.2d 1142, 1145 (Fla. Ct. App. 1996) (noting that plaintiff's request to inspect defendant medical doctor's computer system would involve "patients' confidential records . . . and all of the records of defendant's entire business, including those not involved in the instant action.").

45. *See Rowe Entm't*, 2002 WL 63190, at \*7 (rejecting privacy argument employer raised on behalf of employees: "[A]n employee who uses his or her employer's computer for personal communications assumes some risk that they will be accessed by the employer or by others.").

46. *Playboy Enter., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1053 (S.D. Cal. 1999).

47. *Id.* at 1054.

## B. Alaska Civil Rule 26(b)(2)'s Limitation of Burdensome Discovery

Federal courts are becoming increasingly aware of the potentially extraordinary burdens that discovery of e-mails and other electronic data can place on litigants. In response, several recent decisions have limited otherwise valid discovery requests where the burdens of the discovery exceeded the benefits.<sup>48</sup>

The basis for limiting burdensome requests is Federal Rule of Civil Procedure 26(b)(2). Alaska's identical counterpart establishes limits to discovery and provides in relevant part:

The court may alter the limits in these rules . . . . The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: . . . *the burden or expense of the proposed discovery outweighs its likely benefit*, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).<sup>49</sup>

Moreover, a policy of minimizing the costs of litigation underlies the Alaska Civil Rules. Rule 1 provides that "[the] rules shall be construed to secure the just, speedy and inexpensive determination of every action and proceeding."<sup>50</sup>

In the context of e-mail discovery, some federal courts have seized upon the language in Rule 26(b)(2) and ruled that parties need not produce archived or deleted materials.<sup>51</sup> In response, the

48. See the cases discussed in footnotes 35 & 37.

49. ALASKA R. CIV. P. 26(b)(2) (emphasis added). The advisory committee notes to the 1983 amendments to Federal Rule of Civil Procedure 26 explain the purpose of the limitations. As to Federal Rule of Civil Procedure 26(b)(2)(iii), the notes state:

The elements of Rule 26(b)(1)(iii) [now (b)(2)(iii)] address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms.

FED. R. CIV. P. 26 advisory committee's notes to the 1983 amendments.

50. ALASKA R. CIV. P. 1.

51. *In re* General Instrument Corp. Sec. Litig., No. 96 C 1129, 1999 WL 1072507, at \*6 (N.D. Ill. Nov. 18, 1999) (quoting Federal Rule of Civil Procedure 26(b)(2)); *cf. Welles*, 60 F. Supp. 2d at 1054 (citing weighing of benefits versus burden of discovery under Federal Rule of Civil Procedure 26(b)(2) in granting

Advisory Committee in 2000 amended Federal Rule of Civil Procedure 26(b)(1) by adding one sentence to the end of the Rule: “(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . . All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).”<sup>52</sup> The Advisory Committee Notes explain the addition of the last sentence:

[A] sentence has been added calling attention to the limitations of subdivision (b)(2)(i), (ii), and (iii). These limitations apply to discovery that is otherwise within the scope of subdivision (b)(1). The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated. This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.<sup>53</sup>

Some federal courts have also cited Rule 26(b)(2)(iii) in crafting discovery limitations related to e-mail and electronic data discovery. In *General Instrument*, the court denied the plaintiffs’ motion to compel discovery of archived e-mails and other electronic data from backup tapes.<sup>54</sup> The court found three reasons for holding that the burden or expense of the proposed discovery outweighed its likely benefit. First, the defendant had “already pro-

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plaintiff’s request to access defendant’s computer hard drive); *Simon Prop. Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 642 (S.D. Ind. 2000) (“In short, the court believes plaintiff is entitled to look for this material [deleted e-mails], but in terms of the factors relevant under Rule 26(b)(2)(iii), the court is not convinced that the subject of this very expensive discovery lies at the very heart of the case.”); *but see In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at \*2 (N.D. Ill. June 15, 1995) (“[I]f a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.”). In *Brand Name*, the court ruled that the defendant should bear the \$50,000 to \$70,000 cost of creating a retrieval program for archived e-mails and fulfilling the production requests. *Id.* at \*2-3.

52. FED. R. CIV. P. 26(b)(1) (emphasis added).

53. *Id.* advisory committee notes to the 2000 amendments (citations omitted). The case of *Crawford-El v. Britton*, 523 U.S. 574 (1998), cited in the committee notes, involved an inmate’s suit against a correctional officer under 42 U.S.C. § 1983 (2000). *Crawford-El*, 523 U.S. at 579-80. One question the Court addressed was what discretion a district court has to ensure “that officials are not subjected to unnecessary and burdensome discovery or trial proceedings” when the defendant has a qualified immunity defense. *Id.* at 597-98. The Court stated that “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery.” *Id.* at 598. Quoting the discovery limitations present in Rule 26(b)(2), the Court concluded that the provisions of Rule 26 “create many options for the district judge.” *Id.* at 599.

54. 1999 WL 1072507, at \*6.

duced more than 110,000 pages of documents” making it “unlikely that additional documents [were] necessary.”<sup>55</sup> Second, the plaintiffs failed to identify “any specific factual issue for which additional discovery would help them prove their case.”<sup>56</sup> Third, the plaintiffs had previously indicated “that discovery had been concluded.”<sup>57</sup> The court recognized that the expense burden on the defendant associated with the technical aspect of retrieving archived material only “start[ed] the process,” and that “[d]efense counsel would then have to read each e-mail, assess whether the e-mail was responsive, and then determine whether the e-mail contained privileged information.”<sup>58</sup>

In *Alexander v. Federal Bureau of Investigation*,<sup>59</sup> the court also refused to require the Executive Office of the President to “completely restore all deleted files and e-mail.”<sup>60</sup> Citing the costs and time involved in an exhaustive search of archived e-mails and backup tapes, the court limited discovery to “targeted and appropriately worded searches of back-up and archived e-mail and deleted hard drives for a limited number of individuals.”<sup>61</sup>

In sum, some federal courts seem to be increasingly hesitant to require parties to fulfill broad ranging discovery requests for archived and/or deleted electronic data, including e-mails, when the burdens of discovery outweigh the benefits.

### C. Shifting Costs of Burdensome Discovery

The general rule of civil discovery is that the responding party pays the costs of production incurred in responding to discovery requests. As noted above, in the context of e-mail and other electronic discovery, those costs can be substantial. However, Alaska’s Civil Rules provide means for shifting unusually burdensome costs from a producing party to a requesting party.<sup>62</sup>

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. 188 F.R.D. 111 (D.D.C. 1998).

60. *Id.* at 117.

61. *Id.*

62. See ALASKA R. CIV. P. 26(b)(2) & (c). The Manual for Complex Litigation, interpreting the identical Federal Rules of Civil Procedure, notes:

Taken together, these provisions give the court broad authority to control the cost of discovery. They permit the court to impose not only limits but also conditions. The court can implement the cost/benefit rationale of the rule by conditioning particular discovery on the payment of its costs by the party seeking it.

Until recently, the federal courts seemed to be unsympathetic to responding parties' cries of undue burden and generally required parties to bear the costs of searching their electronic backups for relevant archived and/or deleted e-mails.<sup>63</sup> Currently, however, the question of who should bear the costs of production seems to depend more on the context of the situation.<sup>64</sup> This seems due in part to a growing concern that electronic discovery can, without appropriate limitations, impose extraordinary burdens on parties as well as the courts.<sup>65</sup> This contextual analysis played out in *Resource Investment, Inc. v. United States*.<sup>66</sup> There, Judge Turner denied the plaintiff's motion to require the government to produce, at its own cost, backup tapes potentially containing relevant e-mail of the Army Corps of Engineers:

It strikes me that the principle of diminishing returns has some application here. It would appear that all the veins have been mined that are going to reveal information at a reasonable cost and we're down to the point of considering how much is it worth to go through these other tapes. That makes me wonder if

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DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.433, at 81 (3d ed. 2001). The Manual makes specific reference to the applicability of cost-shifting in its section discussing discovery of computerized data. *Id.* § 21.446, at 87 & n.187.

63. See *In re Brand Name Prescription Drugs Antitrust Litig*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at \*2-3 (N.D. Ill. June 15, 1995); Delaney, *supra* note 36, at 44 ("Federal district courts have not been sympathetic to parties' arguments of undue expense and burden when faced with requests for relevant e-mail.").

64. See *McPeek v. Ashcroft*, 202 F.R.D. 31, 33-34 (D.D.C. 2001) (requiring defendant-employer to perform backup restoration of e-mails attributable to computer of plaintiff-employee's supervisor for one-year period following date of letter to supervisor complaining of retaliation and threatening to file an administrative claim); *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ. 2120 (LMM) (AJP), 1996 WL 22976, at \*2 (S.D.N.Y. Jan. 23, 1996) (requiring requesting party to pay costs of programming required to fulfill discovery request for computerized data); *Brand Name Prescription Drugs*, 1995 WL 360526, at \*2-3 (requiring producing party to produce its responsive, computer-stored e-mail at its own expense and requiring requesting party to narrow the scope of its request and pay twenty-one cents per page for copying); Tr. of Oral Argument, *Resource Investments, Inc. v. United States*, No. 98-419L, at 40 (Fed. Cl. Nov. 9, 1999) (on file with authors).

65. See *McPeek*, 202 F.R.D. at 34 ("If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single e-mail."); see generally Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257 (2000).

66. No. 98-419L (Fed. Cl. Nov. 9, 1999).

it shouldn't be the party that thinks it is worth doing that pays for it in this circumstance.<sup>67</sup>

The decision in *Resource Investment* is typical of a growing number of court decisions that base cost allocation in the context of e-mail discovery on the likelihood that relevant information will be found.

The court in *McPeek v. Ashcroft*<sup>68</sup> also reached this conclusion. There, an employee sued the Department of Justice ("DOJ"), claiming that he was retaliated against because he accused a supervisor of sexual harassment.<sup>69</sup> A discovery dispute arose after DOJ searched its electronic records in response to McPeek's discovery requests but refused to perform a search of backup and archived electronic records.<sup>70</sup> McPeek sought the backed-up and archived data, claiming that it might contain files "ultimately deleted by the user but . . . stored on the backup tape."<sup>71</sup> The DOJ "protest[ed] that the remote possibility that such a search will yield relevant evidence cannot possibly justify the costs involved."<sup>72</sup>

The court began by rejecting the notion that a party is obligated by the Civil Rules to restore and search archived backup tapes in every case.

There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search, and the handful of cases are idiosyncratic and provide little guidance. The one judicial rationale that has emerged is that producing backup tapes is a cost of doing business in the computer age. *In re Brand Name Prescription Drugs*, 1995 WL 360526, at \*3 (N.D. Ill. June 15, 1995). But, that assumes an alternative. It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens?<sup>73</sup>

The court also rejected the notion that a requesting party should always pay the costs of production of backup tapes based on a market economic approach, positing that such a rule would "guarantee that the requesting party would only demand what it needs":

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67. Tr. of Oral Argument Re Disc. Mot., *Resource Investment, Inc. v. United States*, No. 98-419L at 40 (Fed. Cl., Nov. 9, 1999) (on file with authors).

68. 202 F.R.D. 31 (D.D.C. 2001).

69. *Id.* at 31-32.

70. *Id.* at 32.

71. *Id.*

72. *Id.*

73. *Id.* at 33 (footnote omitted).

[A] strict cost-based approach ignores the fact that a government agency is not a profit-producing entity and it cannot be said that paying costs in this case would yield the same “profit” that other foregone economic activity would yield . . . . Second, if it is reasonably certain that the backup tapes contain information that is relevant to a claim or defense, shifting all costs to the requesting party means that the requesting party will have to pay for the agency to search the backup tapes even though the requesting party would not have to pay for such a search of a “paper” depository.<sup>74</sup>

Instead, the Court returned to the trend of shifting costs based on the likelihood of success of the search:

A fairer approach borrows, by analogy, from the economic principle of “marginal utility.” The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is “at the margin.”<sup>75</sup>

Finally, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>76</sup> the court adopted a balancing approach considering a number of factors to decide which party should bear the financial burden of production of archived and backed-up e-mail, including:

(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.<sup>77</sup>

In *Rowe*, the court decided that the plaintiffs’ extremely broad discovery requests, the marginal expected success rate of the search, the defendant’s lack of a business use for its archived backup tapes, the absence of any prospective benefit to the defendant of production, the extraordinary total costs of production, and the plaintiffs’ ability to limit the costs of production made cost-shifting to the requesting plaintiff appropriate.<sup>78</sup>

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74. *Id.* at 34.

75. *Id.*

76. No. 98 Civ. 8272 RPP JCF, 2002 WL 63190 (S.D.N.Y. Jan. 16, 2002).

77. *Id.* at \*8.

78. *Id.* at \*8-11. The court found that the “availability of other sources” factor favored defendant’s bearing the costs of production and that “the parties’ resources” factor was a neutral factor. *Id.* at \*9, \*11.

Although the logic of allocating costs for discovery searches of archived e-mail based on the likelihood that the backup tapes contain relevant evidence is sound, the process presents several problems. First, such a cost allocation scheme, by its nature, could potentially require extensive judicial supervision over the discovery process. Therefore, while solving the problem of the fair allocation of costs, the solution exacerbates an existing problem—judicial backlog. Second, the fair outcome described in *McPeck* assumes one critical fact: that the trial court has a strong familiarity with the particular case and can accurately assess the likelihood that backup tapes will contain relevant evidence. The assumption that a particular judge will have the requisite familiarity with a case may play out in some, or many cases, but it will certainly not be true in others. As one commentator has pointed out, discovery disputes often arise early in litigation and at a time when judicial familiarity with the case is understandably low.<sup>79</sup>

The issues raised by e-mail discovery have led to calls for, and discussions of, amendments to the Federal Rules of Civil Procedure to provide for cost-shifting.<sup>80</sup> Recently, Texas amended its Rules of Civil Procedure to specifically account for concerns about the burdens of discovery associated with e-mail and electronic data. Texas Rule of Civil Procedure 196.4 provides:

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

This comment does not suggest that Alaska should follow Texas's lead and adopt a cost-shifting rule. That being said, Alaska, as the only state with a mandatory attorney fee-shifting

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79. See John L. Carroll, *Discovery Disputes & Electronic Media*, ALI-ABA Course of Study, Civil Practice and Litigation Techniques in the Federal and State Courts, ALI-ABA Course of Study Materials, August 23-24, 2001.

80. See Scheindlin & Rabkin, *supra* note 12, at 374-77; Marcus, *supra* note 36, at 274-79.

structure in its civil rules,<sup>81</sup> has shown that fairly allocating the burdens of civil litigation is an important policy underlying its civil rules.<sup>82</sup> Alaska courts, then, should be cognizant of their inherent power under Alaska Civil Rule 26 to limit unduly burdensome discovery requests or shift costs from the responding to the requesting party.<sup>83</sup>

#### V. ATTORNEY-CLIENT PRIVILEGE ISSUES

E-mail discovery raises important attorney-client privilege issues in two ways.<sup>84</sup> First, in order to preserve the privilege, a responding party has the obligation to review each document before producing it to the requesting party. In the case of e-mail, the responding party's attorney currently must review each e-mail for privileged information before producing it. Thus, when there are three million e-mails potentially responsive to a discovery request, the responding party's attorney must expend considerable effort reviewing each e-mail individually in order to ensure that none contains privileged matter.<sup>85</sup> This issue falls seamlessly back into

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81. ALASKA R. CIV. P. 82. Rule 82(a) provides that “[e]xcept as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney’s fees calculated under this rule.” *Id.*; see also ALASKA R. CIV. P. 79 (“Unless the court otherwise directs, the prevailing party is entitled to recover [allowable] costs.”).

82. See *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973); *Preferred General Agency of Alaska, Inc. v. Raffetto*, 391 P.2d 951, 954 (Alaska 1964) (“The purpose of Civil Rule 82 in providing for the allowance of attorney’s fees is to partially compensate a prevailing party for the costs to which he has been put in the litigation in which he was involved.”).

83. See ALASKA R. CIV. P. 26(b)(2).

84. See *Securities & Exchange Comm’n v. Cassano*, 189 F.R.D. 83, 86 (S.D.N.Y. 1999); *Aramony v. United Way of Am.*, 969 F. Supp. 226, 235 (S.D.N.Y. 1997); see generally *Scheidlin & Rabkin*, *supra* note 12, at 368-69.

85. Counsel, of course, have the obligation to perform this review in order to fulfill obligations to clients under the ethical rules governing attorneys. ALASKA R. PROF’L CONDUCT 1.3 (Diligence), 1.6 (Confidentiality of Information). Rule 1.6(a) specifically provides:

A lawyer shall not reveal a confidence or secret relating to representation of a client unless the client consents after consultation . . . . For purposes of this rule, “confidence” means information protected by the attorney-client privilege under applicable law, and “secret” means other information gained in the professional relationship if the client has requested it be held confidential or if it is reasonably foreseeable that disclosure of the information would be embarrassing or detrimental to the client. In determining whether information relating to representation of a client is protected from disclosure under this rule, *the lawyer shall resolve any uncertainty about whether such information can be revealed against revealing the information.*

the aforementioned issue of the burdens associated with applying current rules to e-mail.<sup>86</sup>

#### A. The Problem of Forwarding E-mails

Attorney-client privilege issues arise specifically in the case of e-mail because of the ease of forwarding or copying e-mails to others. As one commentator has noted:

E-mails within a company may take on a life of their own. For example, an e-mail sent to one person can then be forwarded to several additional persons. Each person may add to the message, thereby creating a lengthy string of communications on a particular subject. To the extent attorneys are participants in the string, the issue of privilege arises.<sup>87</sup>

The risk exists that within that lengthy string of communications, one or more participants has *changed* the subject of the original message. By changing the subject, this practice of forwarding or copying e-mails can have the unintended consequence of waiving privileges that would otherwise protect the e-mail or its attachments from discovery.

#### B. E-mailing Expert Witnesses

One particular area where e-mail discovery can have potentially serious litigation consequences involves expert witnesses. The general rule is that information provided by a party in litigation to an expert witness must be disclosed, even if it would otherwise qualify as attorney work product: the work product protection is “waived by disclosure of confidential communications to expert witnesses.”<sup>88</sup> The results of inadvertent waiver can be disastrous.

In *In re Pioneer Hi-Bred International, Inc.*, Monsanto Company sued Pioneer for patent infringement and breach of contract after Pioneer merged with another company.<sup>89</sup> Pioneer had con-

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ALASKA R. PROF'L CONDUCT 1.6(a) (emphasis added).

86. For an in-depth discussion of the application of the attorney-client privilege to e-mail production, see Colleen L. Rest, Note, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 CASE W. RES. L. REV. 309 (1998); Armen Artinyan, *Legal Impediments to Discovery and Destruction of E-mail*, 2 J. LEGAL ADVOC. & PRAC. 95, 100-05 (2000); Delaney, *supra* note 36, at 46; Scheindlin & Rabkin, *supra* note 12, at 368, 379-80. It is important to note that under either the current Alaska Rules or Federal Rules, whether it is possible to minimize the potentially extraordinary costs associated with attorney review of individual e-mails for privilege remains unresolved.

87. Delaney, *supra* note 36, at 46.

88. *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001).

89. *Id.* at 1372-73.

sulted with a law firm regarding the financial and tax consequences of the merger prior to the Monsanto litigation. During the litigation, Pioneer provided its expert witness with the law firm's analyses.<sup>90</sup> That action, the Federal Circuit held, waived both attorney-client and work product protections. "We are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party."<sup>91</sup> The *Pioneer* court held that Monsanto was entitled to discovery of the information through both document production and oral testimony.<sup>92</sup>

Although *Pioneer* did not directly address the issue of e-mails, its broad holding suggests that forwarded or copied e-mail can waive privileged matters contained in the e-mails. Given that attorneys and their clients frequently communicate by e-mail in modern business practice, it is conceivable that both attorneys and, especially, clients could unintentionally waive attorney-client privilege and work product protections by forwarding or copying expert witnesses in their communications. This danger grows in proportion to the lengthy string of communications in forwarded and copied e-mails.

## VI. RECOMMENDATIONS

The record from other jurisdictions has shown that e-mail production can cause significant problems for all of the parties involved. As Alaska courts begin to address these issues, three simple ideas may prove to be useful.

First, courts should emphasize the inclusion of the specific items for e-mail discovery in pre-trial discovery discussions. This could be accomplished through an amendment to Alaska Rule of Civil Procedure 26(f).<sup>93</sup> During the meeting required by Rule 26(f),

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90. *Id.* at 1373.

91. *Id.* at 1375.

92. *Id.* at 1376.

93. ALASKA R. CIV. P. 26(f) provides in full:

Meeting of Parties; Planning for Discovery and Alternative Dispute Resolution. Except when otherwise ordered and except in actions exempted from disclosure under Rule 26(a), the parties shall, as soon as practicable and in any event at least 14 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, including whether an alternative dispute resolution procedure is appropriate, to make or arrange for the disclosures required by subparagraph (a)(1), and to develop a proposed discovery plan and a proposed alternative dispute resolution plan. The plan shall indicate the parties' views and proposals concerning:

the parties should be required to reach specific agreements about the scope and procedures for production of e-mail, including whether e-mail would be produced in electronic or paper form, the scope of required searches for archived and backed up e-mails and the amount of material the parties will be required to maintain in databases. A specific agreement between the parties will alleviate many problems related to unintentional spoliation of evidence and will significantly cut expenses related to over-broad searching and the requirement of maintaining enormous databases of saved materials.

Second, courts should emphasize the burden-sharing aspects of Rule 26(b)(2). Allocation of burdens between parties to litigation is already common in Alaska. For example, Alaska Rule of Civil Procedure shifts a portion of the cost of litigation onto the losing party, and Rule 68 allows a party to reduce its risk of continuing litigation by submitting a reasonable offer of judgment. If the courts require costs of extensive or exotic e-mail production to be borne, in whole or in part, by the parties seeking that production, then no rule specifically allocating costs of electronic production (as in Texas) will be necessary.

Third, the courts should expand the scope of inadvertent waiver protection. Much of the burden of producing e-mail comes from reviewing the enormous amount of messages in order to protect against disclosure of privileged, proprietary or embarrassing or

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- (1) what changes should be made in the timing or form of disclosures under paragraph (a), including a statement as to when the disclosures under subparagraph (a)(1) were made or will be made and what are appropriate intervals for supplementation of disclosure under Rule 26(e)(1);
  - (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
  - (3) what changes should be made in the limitations on discovery imposed under these rules and what other limitations should be imposed;
  - (4) the plan for alternative dispute resolution, including its timing, the method of selecting a mediator, early neutral evaluator, or arbitrator, or an explanation of why alternative dispute resolution is inappropriate;
  - (5) whether a scheduling conference is unnecessary; and
  - (6) any other orders that should be entered by the court under paragraph (c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging and being present or represented at the meeting, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 10 days after the meeting a written report outlining the plan.

damaging irrelevant materials. The parties could save a significant amount of time and expense if inadvertent waiver rules were broadened to require the automatic return of any such materials. If the party receiving the material disagreed with the request for return, it could, of course, seek relief from the court.<sup>94</sup>

## VII. CONCLUSION

This Comment has raised the question, what, if anything, is an e-mail? In answering this simple question, we have concluded that, analogous to Dr. Bennett's conclusion about the zebra, it is difficult to place e-mail into an existing category for purposes of discovery under the current Alaska Civil Rules. Whatever e-mail may be, though, it is a fact of life—and of civil litigation discovery. Understanding how to treat discovery of e-mail has been a challenge for all who have attempted to address it. The informal style of discourse, the total amount of information and the new and changing technology that store the information make it an unique form of communication. Each court that has been asked to address the issue of e-mail discovery has brought its own interpretation and has added to our understanding. Alaska has an opportunity to build on the wisdom of these other courts and to craft a set of rules that benefit all parties to litigation.

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94. This practice is already commonly implemented by agreement between parties to complex litigation with voluminous document production. *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, No. 98 Civ. 8272 RPP JCF, 2002 WL 63190, at \*11 (S.D.N.Y. Jan. 16, 2002) (proposing this solution for parties involved in electronic data discovery dispute but noting that court could not require it).