

# ELECTRONICALLY STORED INFORMATION: BALANCING FREE DISCOVERY WITH LIMITS ON ABUSE

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## ABSTRACT

*The Federal Rules of Civil Procedure (the Rules) have long sought to limit abuses that developed under the traditional presumption favoring free discovery. The 2006 amendments to the Rules are specifically aimed at curbing abuses associated with electronically stored information (ESI), which has become the basic medium of business communications and has provided businesses with overall productivity benefits. The 2006 amendments introduce a new category of electronic evidence that is “not reasonably accessible” and allow a court to shift the related costs of discovery to the party requesting the information. Cost-shifting, however, creates an incentive for businesses to shelter sensitive data by making it “not reasonably accessible.” This iBrief argues that the current tests created by the courts for cost-shifting should be reassessed and should include a benefit-shifting component that offsets business savings from using ESI as a storage medium. Rather than treating ESI as exceptional, the Rules should adopt a uniform approach that curbs abuses of all discovery.*

## INTRODUCTION

¶1 As businesses have begun to keep most records as electronically stored information (ESI), scholars and practitioners have debated how liberal electronic discovery (e-discovery) standards should be.<sup>2</sup> Amendments to the Federal Rules of Civil Procedure (the Rules) have sought to reduce the “uncertainty, expense, delays and burdens” created by

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<sup>2</sup> Wendy R. Liebowitz, *Digital Discovery Starts to Work*, NAT’L L.J., Nov. 4, 2002, at 4 (reporting that 93 percent of all information generated was in digital form in 1999).

discovering volumes of electronic data.<sup>3</sup> Reformers amended the discovery Rules in 1983, 1993, and 2000 to limit abuses that developed under the traditional presumption favoring free discovery.<sup>4</sup> In 2006, further amendments focused on e-discovery and introduced a new but undefined category of electronic evidence that is “not reasonably accessible.”<sup>5</sup> The amended Rule 26 requires the requesting party to make certain showings before being granted discovery.<sup>6</sup> Even then, a court may shift the costs of discovery, compelling the party requesting the documents to pay some or all of the costs of production. Cost-shifting existed before 2006 as a matter of judicial discretion, but the commentary to the amended Rules expressly incorporates the term for the first time, which may encourage using cost-shifting to limit e-discovery inappropriately.

¶2 This iBrief argues that ESI, which has become the basic medium of business communications, should not be subject to media-specific discovery limitations. Businesses make storage decisions taking many factors into consideration, including the prospect of litigation. To bias that decision by limiting discovery for a particular medium because it is less accessible would invite sheltering of sensitive data. As a result, companies may purposely store potentially adverse data in a way that limits its discovery.

¶3 This iBrief further argues that the multifactor tests for cost-shifting encouraged by the 2006 amendments and previously formulated in cases including *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*<sup>7</sup> and *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*<sup>8</sup> should be reassessed in light of current information management technology. This iBrief recommends that courts should interpret the “reasonably accessible” provision broadly and presume most ESI reasonably accessible, even if kept for backup purposes. Courts should rarely permit exceptions to the rule that custodians bear production costs, and any cost-shifting should include a benefit-shifting component that offsets business savings from using ESI as the storage medium. Rather than treating e-discovery as exceptional, the Rules should address abusive discovery as a separate issue.

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<sup>3</sup> COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 23 (2005), available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf>.

<sup>4</sup> See *infra* Part II.A.

<sup>5</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>6</sup> *Id.* 26(b)(2)(C).

<sup>7</sup> *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) (mem.).

<sup>8</sup> *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 216 F.R.D. 280 (S.D.N.Y. 2003).

## I. BENEFITS OF ESI

¶4 Commentators have warned that making ESI freely discoverable would be too costly and inconvenient.<sup>9</sup> Businesses increasingly use ESI, however, reflecting its overall advantages despite these discovery-related concerns.

¶5 ESI's prevalence<sup>10</sup> reflects the transition to computers for processing business information to realize productivity benefits.<sup>11</sup> Businesses benefit from digitizing information—converting it into a form computers recognize<sup>12</sup>—in many ways, ranging from better communication with customers to more efficient storage.<sup>13</sup> In addition, all businesses are subject to requirements to retain proper records,<sup>14</sup> and storing that information electronically is less costly.<sup>15</sup> In short, digitizing intellectual property improves efficiency and reduces costs for businesses.<sup>16</sup>

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<sup>9</sup> See Henry S. Noyes, *Good Cause Is Bad Medicine for the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 67–68 (2007) (“[E-]discovery is more time-consuming, more burdensome, and more costly than conventional discovery.”); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 592 (2001) (“[E]lectronic discovery can be predicted, as a general matter, to give rise to burdens and expense that are of a completely different magnitude from those encountered in traditional discovery.”).

<sup>10</sup> See *supra* note 2 and accompanying text.

<sup>11</sup> See, e.g., Eric Brynjolfsson & Lorin M. Hitt, *Computing Productivity: Firm-Level Evidence* 26–27 (MIT Sloan Working Paper No. 4210-01, 2003), available at <http://ssrn.com/abstract=290325> (stating that computers provide a substantial long-term contribution to productivity growth); *Bernanke Discusses Productivity, Not Inflation, in Commencement Address*, USA TODAY, June 9, 2006, [http://www.usatoday.com/money/economy/fed/2006-06-09-bernanke-mit\\_x.htm](http://www.usatoday.com/money/economy/fed/2006-06-09-bernanke-mit_x.htm) (“America’s strong productivity performance has been bolstered . . . by the greater use of computers . . .”).

<sup>12</sup> See Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. REV. 327, 333–34 (2000) (explaining how computers store information in binary form).

<sup>13</sup> See *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985) (mem.) (“From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities . . .”).

<sup>14</sup> See *In re Prudential Inc. of Am. Sales Litig.*, 169 F.R.D. 598, 617 (D.N.J. 1997) (criticizing the absence of a comprehensive document-retention policy that “impede[s] the litigation process and merit[s] imposition of sanctions”).

<sup>15</sup> See *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (mem.) (“With electronic media . . . costs of storage are virtually nil.”).

<sup>16</sup> Barrie Locke, *Case Study: Sony’s Digital Realm*, AIIME-DOC MAG., May/June 2007, at 55, available at <http://www.aiim-digital.org/aiim/20070506/?pg=57> (“Sony Pictures Entertainment has amassed

¶6 Businesses deciding how to store information consider more than the cost benefits from digital storage. They also value technology that enables searching, organizing, and retrieving ESI, which makes daily business operations easier.<sup>17</sup> The prospect of litigation imposes similar demands to make information accessible in an organized, orderly manner.<sup>18</sup> Although responding to discovery involves substantial costs, businesses derive independent benefits from storing and organizing records electronically. In sum, the benefits businesses enjoy from ESI justify investing substantial capital in such technology.<sup>19</sup>

## II. ESI AND COST-SHIFTING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

¶7 Historically, federal courts have permitted broad discovery under the Rules, recognizing that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”<sup>20</sup> Parties responding to discovery requests had to bear the expense of complying with those requests, subject only to an exception for discovery imposing “undue burden or expense” on responding parties,<sup>21</sup> an exception courts applied

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an enormous digital library . . . as a creative repository for its worldwide marketing teams across business units . . . to share media assets and accelerate the servicing, distribution, approval, and print workflows associated with entertainment marketing.”).

<sup>17</sup> See Bryant Duhon, *Managing Documents and Email at the National Geographic Society*, AIIM E-DOC MAG., March/April 2007, at 52, available at <http://www.aiim-digital.org/aiim/20070304/?pg=54> (“[I]f we can’t find an email because it’s lost in this morass of 10GB email boxes, then we may lose some negotiated right to intellectual property or we may have to repeatedly repay to use a photo that we actually have the right to use. Keeping the right email is extremely important to us.”).

<sup>18</sup> See *Wagner v. Dryvit Sys., Inc.*, 208 F.R.D. 606, 610 (D. Neb. 2001) (mem.) (“[P]roducing large amount of documents in no apparent order does not comply with a party’s obligation under Rule 34.”); *Rhone-Poulenc Rorer, Inc. v. Home Indem. Co.*, No. 88-9752, 1991 U.S. Dist. LEXIS 8304, at \*6–7 (E.D. Pa. June 17, 1991) (mem.) (finding that the peculiar manner in which a party maintained records and its computer system did not excuse it from burdensome and costly production).

<sup>19</sup> See Steve Lohr, *The Economy Transformed, Bit by Bit*, N.Y. TIMES, Dec. 20, 1999, <http://partners.nytimes.com/library/financial/122099outlook-econ.html> (reporting that businesses invest \$380 billion per year in computers, up from \$110 billion five years previously, and that this figure probably will continue to increase).

<sup>20</sup> *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

<sup>21</sup> FED. R. CIV. P. 26(c); *accord* *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

narrowly.<sup>22</sup> This combination of allowing one party to enjoy liberal discovery while having the other party pay the related costs invited abuse, and various amendments to the Rules were enacted from 1983 through 2000 to discourage overuse of discovery.<sup>23</sup>

¶8 As ESI became more widespread, lawmakers labored to incorporate ESI into a legal system that was established when record keeping was verbal or written.<sup>24</sup> In 2006, the Rules were amended to reduce inconsistency and to develop a national set of rules for ESI in federal courts.<sup>25</sup> The drafters fit ESI into the existing system, resisting requests to impose additional mandatory limitations on ESI.

¶9 Nevertheless, the 2006 amendments had one potentially restrictive effect on e-discovery: for the first time, the Rules explicitly imposed limitations, including making cost-shifting available, for discovery of ESI that is “not reasonably accessible.”<sup>26</sup> If courts widely impose cost-shifting, it may change the practice of liberal discovery just as effectively as any mandatory limitations.

#### *A. The 1983–2000 Amendments to the Federal Rules of Civil Procedure*

¶10 In 1983, language was added to Rule 26(b)(2)(C) that commentators have characterized as a “radical departure from the free and easy days of liberal discovery.”<sup>27</sup> The added language, known as the proportionality test, directs that discovery “shall be limited” if certain conditions exist, including if discovery is “unduly burdensome or expensive.”<sup>28</sup> The limitation was intended to prevent significant abuse, such as the use of discovery “as a device to coerce a party.”<sup>29</sup>

¶11 In 1993 and 2000, the Committee on the Rules of Practice and Procedure made additional, similarly motivated amendments to procedural rules governing discovery. These amendments included mandatory conferences to develop a plan for disclosure and the separation of

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<sup>22</sup> See, e.g., *Adelman v. Nordberg Mfg. Co.*, 6 F.R.D. 383, 384 (E.D. Wis. 1947) (“It is not a valid objection that the [discovery request] will necessitate large expenditures of time and money by defendant if in other respects the information sought is a proper object of discovery.”).

<sup>23</sup> See *infra* Part II.A.

<sup>24</sup> See, e.g., U.C.C. § 2-201 (2004) (stating that a contract for the sale of goods for \$5,000 or more must be in writing).

<sup>25</sup> See *infra* Part II.B.

<sup>26</sup> See *infra* Part II.B.

<sup>27</sup> Noyes, *supra* note 9, at 56.

<sup>28</sup> FED. R. CIV. P. 26(b)(2)(C).

<sup>29</sup> *Id.* 26(b) advisory committee’s note.

discoverable material into two classes: one that is freely discoverable if it “is relevant to the claim or defense of any party” and another that meets a lesser standard of relevance “to the subject matter involved in the action” and is discoverable only upon a showing of “good cause.”<sup>30</sup>

### *B. The 2006 Amendments to the Federal Rules of Civil Procedure*

¶12 Parties could discover ESI even before the 2006 amendments to the Rules, and perhaps no amendment was needed to make this explicit.<sup>31</sup> The 2006 amendments, however, create a new category<sup>32</sup> of discoverable data that is “not reasonably accessible because of undue burden or cost.”<sup>33</sup> Although the drafters of the 2006 amendments contemplated that the parties would agree on what data are within this third category before discovery begins,<sup>34</sup> the amended Rules provide that, on a motion to compel discovery, a custodian resisting discovery must show that the requested discovery is “not reasonably accessible.”<sup>35</sup> If the proposed discovery meets the “not reasonably accessible” standard, the requesting party then must show good cause, “considering the limitations of Rule 26(b)(2)(C),” for the court to compel the resisting party to produce the ESI. The court also may impose conditions,<sup>36</sup> including cost-shifting, on the e-discovery.<sup>37</sup>

¶13 The Rule 26(b)(2)(C) limitation referenced in the new rule is the same proportionality test that the 1983 amendments impose on all discovery requests.<sup>38</sup> Judges have never applied that test to meaningfully limit discovery,<sup>39</sup> and so it is unlikely judges will apply it more expansively for e-discovery. Thus, commentators have observed that, if the purpose of the 2006 amendments was to provide “additional protection against the cost and burden of discovery beyond that already available,”<sup>40</sup> the addition of the good cause standard is “so vague that it is meaningless.”<sup>41</sup>

¶14 Despite adding no new substantive bar to discovery of ESI, the 2006 amendments provide two important advantages to parties resisting e-

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<sup>30</sup> Noyes, *supra* note 9, at 57–61.

<sup>31</sup> See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120 (LMM) (AJP), 1995 WL 649934, at \*2 (S.D.N.Y. Nov. 3, 1995) (“[I]t is black letter law that computerized data is discoverable if relevant.”).

<sup>32</sup> See *supra* note 30 and accompanying text.

<sup>33</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>34</sup> *Id.* 34(b) advisory committee’s note.

<sup>35</sup> *Id.* 26(b)(2)(B).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* 26(b)(2) advisory committee’s note.

<sup>38</sup> See *supra* text accompanying note 28.

<sup>39</sup> Noyes, *supra* note 9, at 56–57.

<sup>40</sup> *Id.* at 73.

<sup>41</sup> *Id.* at 52.

discovery. First, they permanently embedded the idea that some ESI is “not reasonably accessible” in the Rules, even though the technology that originally made ESI seem inaccessible is rapidly changing. Second, they suggest that courts may impose conditions, including cost-shifting,<sup>42</sup> on discovery of ESI even after a party shows good cause to compel discovery.<sup>43</sup>

¶15 By introducing the term “not reasonably accessible” the 2006 amendments invite courts to revisit traditional doctrines of liberal discovery. Courts have applied various approaches to determine the scope of discovery, which the next Part discusses.

### III. CASE TRENDS IN COST-SHIFTING

¶16 The 2006 amendments made only modest changes to prior practice under Rule 26, so prior cases regarding cost-shifting remain relevant in predicting the Rule’s future application. At the risk of oversimplifying, one possible way to group courts’ various approaches is to divide them into three groups.

¶17 First, some courts apply a bright-line rule that focuses on one or a few determinative factors. The most common determining factor is which party chose the storage medium causing the production costs. Second, some cases take an economics-based approach, which quantifies likely costs and benefits of production and then shifts costs according to the marginal utility of the document request. Third, some cases apply a formula-based approach, sorting the particular facts of the case into a predetermined grid of multiple issues relevant to cost-shifting, often including those issues considered in the first two approaches.

#### *A. Bright Line Rule: Business Bound by Its Choice of Medium*

¶18 Applying a bright-line rule implies a simplistic determination based on one or a few issues, leaving no room for discretion in complex cases. Courts have cited *In re Brand Name Prescription Drugs Antitrust Litigation*<sup>44</sup> as creating a simplistic rule that courts cannot shift costs when

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<sup>42</sup> See FED. R. CIV. P. 26(b)(2) advisory committee’s note (suggesting that such conditions could include requiring a requesting party to pay part or all of the related costs). Previously, cost-shifting was based in courts’ implicit discretionary authority under Rule 26(c) to issue protective orders limiting discovery that creates “undue burden or expense.” *Id.*

<sup>43</sup> *Id.* 26(b)(2)(B).

<sup>44</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 8281, at \*1 (N.D. Ill. June 15, 1995) (mem.).

the costs result from a backup system a custodian of ESI has chosen.<sup>45</sup> In this case, however, the court considered many factors before focusing on a few when deciding not to shift costs.<sup>46</sup> *In re Brand Name* cited a series of cases that reached similar results.<sup>47</sup> Rather than using a bright-line rule, these courts also considered multiple factors, including which party chose the backup system.<sup>48</sup>

¶19 *In re Brand Name* was a consolidation of various antitrust actions by retail pharmacies against manufacturers and wholesalers of prescription drugs.<sup>49</sup> During discovery, the plaintiffs asked the defendants to search and retrieve e-mails, some of which were indisputably relevant, from backup tapes.<sup>50</sup> Four of the defendants complied without seeking cost-shifting.<sup>51</sup> One did not, estimating a cost of \$50,000 to \$70,000 and arguing that the plaintiff should bear this cost.<sup>52</sup>

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<sup>45</sup> *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (mem.).

<sup>46</sup> *Id.*

<sup>47</sup> *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at \*2.

<sup>48</sup> *E.g.*, *Delozier v. First Nat'l Bank of Gatlinburg*, 109 F.R.D. 161, 164 (1986) (mem.); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 75–76 (1976). For example, in *Kozlowski*, the minor plaintiff sustained severe burns when his pajamas ignited. *Id.* at 74. The plaintiff requested that the defendant, who manufactured and marketed the pajamas, produce “a record of all complaints and communications concerning personal injuries or death caused by the burning of children’s nightwear.” *Id.* The defendant objected and failed to comply with the request. *Id.* at 75. The court considered the relevance of the requested information, the plaintiff’s need for the documents, the defendant’s possession of them, and the plaintiff’s lack of alternate access to them. *Id.* at 75–76. The court then concluded that “[t]he defendant may not excuse itself from compliance . . . by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly expedition.” *Id.* at 76.

<sup>49</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 602 (7th Cir. 1997).

<sup>50</sup> *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at \*1.

<sup>51</sup> *Id.* at \*7.

<sup>52</sup> *Id.* at \*3–4 (finding support for the defendant’s position in the *Manual for Complex Litigation* § 21.446 (2d ed.1993), which provided that “special expenses” incident to production of computerized data requested by a party were “typically” paid by that party). This claim of typicality in the *Manual* was dropped in the Fourth Edition, which now provides instead that courts should “minimize and allocate” such costs, with a preference for the former. MANUAL FOR COMPLEX LITIGATION § 11.446 (4th ed. 2004), available at [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/470](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/470).

¶20 The court considered the issue in terms of “undue burden,”<sup>53</sup> weighing the costs of retrieval against the principle that “if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.”<sup>54</sup> Agreeing that the estimated retrieval costs were high, the court nevertheless noted that the cost resulted from a system of keeping records over which they had no control.<sup>55</sup> Not accepting the defendant’s request to shift a problem that it had caused to the other party, the court instead sought to lessen the problem by ordering the plaintiff to confer with the defendant to reduce the size of the request and to pay copying costs of the documents it would receive.<sup>56</sup> Therefore, although *In re Brand Name* has been cited as a bright-line rule, its policy that seemingly favors parties seeking discovery might be better understood as a rebuttable presumption.

¶21 *In re Brand Name* and the cases the court cited are not alone in reflecting “well established law” that a party should pay costs associated with “unwieldy” record systems it has chosen.<sup>57</sup> Yet it is hard to find recent discovery opinions based on this law, likely because most courts have adopted a broader, formula-based approach that incorporates a variety of factors, which Section C discusses,<sup>58</sup> including economic considerations, which Section B discusses.

### *B. Economics-Based Approach*

¶22 *McPeek v. Ashcroft*<sup>59</sup> articulated an economics-based approach to determine cost-shifting in e-discovery. A federal employee claimed

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<sup>53</sup> *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at \*5; see also FED. R. CIV. P. 26(c) (providing for protective orders from undue burden in discovery).

<sup>54</sup> *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at \*5.

<sup>55</sup> *Id.* at \*6.

<sup>56</sup> *Id.* at \*7–8.

<sup>57</sup> *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, Civ. A. No. 88-9752, 1991 WL 111040, at \*8–9 (E.D. Pa. June 17, 1991) (mem.); see also *Kaufman v. Kinko’s Inc.*, No. Civ.A. 18894-NC, 2002 WL 32123851, at \*2 (Del. Ch. Apr. 16, 2002) (“Upon installing a data storage system, it must be assumed that at some point in the future one may need to retrieve the information previously stored.”); *Linnen v. A.H. Robins Co.*, No. 97-2307, 1999 WL 462015 (Mass. Super. Ct. June 16, 1999) (mem.) (stating that, by using backup technology, the defendant assumed the risk that it would have to produce the information).

<sup>58</sup> See *infra* Part III.C; see also *Semsroth v. City of Wichita*, 239 F.R.D. 630, 634 (D. Kan. 2006) (mem.) (“The Court is not aware of any decision since [*Zubulake I*] that unequivocally prohibits cost-shifting where the Defendant voluntarily utilized storage technology that is difficult to access or restore.”).

<sup>59</sup> *McPeek v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) (mem.).

retaliation based on his prior claim of sexual harassment.<sup>60</sup> The plaintiff wanted the defendant to search backup tapes for evidence of retaliatory motives in deleted e-mails.<sup>61</sup> The court considered the defendant's objection that this process was too costly under the "undue burden or expense" standard of Rule 26(c).<sup>62</sup>

¶23 The court began by rejecting the bright-line rule of *In re Brand Name*, stating that *In re Brand Name*'s order for the custodian to pay for backup restoration relied on the mistaken assumption that using electronic storage requires adequate retrieval capability.<sup>63</sup> The *McPeek* court also rejected *In re Brand Name*'s assumption that businesses could find an alternative to using backup tape, stating that no alternative exists in contemporary business.<sup>64</sup> This rejection has two problems. First, the custodian likely chose the e-mail system for use in everyday communication rather than for its backup capabilities. The e-mail system, therefore, may not have adequate backup or retrieval capabilities.<sup>65</sup> Second, alternatives to inaccessible backup tape exist, as do optional technologies that enable cost-effective retrieval from backup tape.<sup>66</sup>

¶24 The *McPeek* court instead applied a "marginal utility" test that assumed that "[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [custodian] search at its own expense."<sup>67</sup> Suggesting that Rule 26(c)

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<sup>60</sup> *Id.* at 31–32.

<sup>61</sup> *Id.* at 31–33.

<sup>62</sup> *Id.* at 34.

<sup>63</sup> *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 U.S. Dist. LEXIS 8281, at \*5 (mem.).

<sup>64</sup> *McPeek*, 202 F.R.D. at 33 ("What alternative is there? Quill pens?").

<sup>65</sup> Compare *In re Brand Name Prescription Drugs*, 1995 U.S. Dist. LEXIS 8281, at \*5 ("[I]f a party chooses an electronic storage system, the necessity for a retrieval program or method is an ordinary and foreseeable risk."), with *id.* at \*6 ("[Defendant] essentially admits that part of the burden attendant to searching its storage files results from 'the limitations of the software [it] is using.'" (quoting Affidavit of Paul G. Keegan at 7, *In re Brand Name Prescription Drugs*, 1995 LEXIS 8281 (No. 94 C 897, MDL 9897))).

<sup>66</sup> See Benjamin D. Silbert, Comment, *The 2006 Amendments to the Rules of Civil Procedure: Accessible and Inaccessible Electronic Information Storage Devices, Why Parties Should Store Electronic Data in Accessible Formats*, RICH. J.L. & TECH., Spring 2007, art. 14, at 23, <http://law.richmond.edu/jolt/v13i3/article14.pdf> ("[A]s accessible electronic information storage devices (ATA disks, large hard drives, online backup services, etc.) become the norm, it remains to be seen how much cost-shifting occurs, if any, when a party decides to store discoverable information in an inaccessible format.").

<sup>67</sup> *McPeek*, 202 F.R.D. at 34.

protective orders should weigh cost against the probability of finding something relevant, the court ordered a “test run” of backup e-mails from the computer of the plaintiff’s supervisor for a one-year period.<sup>68</sup> The court directed the parties to return when the test was completed to argue whether the costs and benefits of this search justified further retrieval.<sup>69</sup> Although few courts have followed *McPeek*’s holding alone, the decision remains significant because courts incorporated its analysis into the dominant formula-based approach Section C discusses.<sup>70</sup>

### C. Formula-Based Determinations

¶25 *Bills v. Kennecott Corp*<sup>71</sup> is a useful, early example of a court-assembled list of multiple factors courts can weigh when deciding ESI cost allocation. The opinion noted four factors persuasive in denying cost-shifting: (1) the overall cost would not be large, (2) the cost would be greater for the plaintiff than for the defendant, (3) the cost would be a substantial burden to the plaintiffs, and (4) the party making the discovery request would derive some benefit from the data to be produced.<sup>72</sup> Two additional persuasive factors considered in *Bills* but sometimes omitted from summaries of its holding<sup>73</sup> are: (1) “information stored in computers should be as freely discoverable as information not stored in computers, so parties requesting discovery should not be prejudiced thereby; and (2) the party responding is usually in the best and most economical position to call up its own computer stored data.”<sup>74</sup> The latter two factors suggest a presumption against parties seeking cost-shifting.

¶26 This presumption against cost-shifting changed in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,<sup>75</sup> in which the court arrived at a somewhat different list:

- (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

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 216 F.R.D. 280, 284 (S.D.N.Y. 2003) (stating that the first two *Zubulake I* factors comprise the marginal utility test *McPeek* described).

<sup>71</sup> *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 459 (D. Utah 1985) (mem.).

<sup>72</sup> *Id.* at 464.

<sup>73</sup> See, e.g., Scheindlin & Rabkin, *supra* note 12, at 360 (listing only the four factors).

<sup>74</sup> *Bills*, 108 F.R.D. at 463–64.

<sup>75</sup> *Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002) (mem.).

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>76</sup>

The *Rowe* factors reversed the earlier presumption against cost-shifting.<sup>77</sup>

¶27 One reason for this reversal was the effect of *Rowe*'s sixth factor, the cost of production, which "is almost always an objectively large number in cases where litigating cost-shifting is worthwhile."<sup>78</sup> Therefore, the court in *Zubulake I* slightly revised the *Rowe* formula to include the following factors:

(1) [t]he extent to which the request is specifically tailored to discover relevant information; (2) [t]he availability of such information from other sources; (3) [t]he total cost of production, compared to the amount in controversy; (4) [t]he total cost of production, compared to the resources available to each party, (5) [t]he relative ability of each party to control costs and its incentive to do so; (6) [t]he importance of the issues at stake in the litigation; and (7) [t]he relative benefits to the parties of obtaining the information.<sup>79</sup>

The *Zubulake I* formula compensates for the *Rowe* pro-shifting bias by evaluating production costs, not in absolute terms, but rather in relation to the resources of the parties. Yet *Zubulake I* did not adequately acknowledge the overriding tradition of free discovery that has historically justified reluctance to extend cost-shifting, which *In re Brand Name* and *Bills* articulated.<sup>80</sup> In fact, the *Zubulake I* court eliminated the one *Rowe* factor that might acknowledge these principles, the fourth factor, which considers the purpose for which a responding party retained the information.<sup>81</sup> The fact that the responding party managed data storage in the course of its business seems highly relevant to a decision to leave related costs of retrieval with the responding party, because the cost of retrieval will likely be offset by the benefits derived from using the system in its daily business.

¶28 Numerous cases have applied the *Rowe* or *Zubulake I* formulas, sometimes slightly changing the groupings of various factors, with varying

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<sup>76</sup> *Id.* at 429.

<sup>77</sup> See *Zubulake v. UBS Warburg, L.L.C. (Zubulake I)*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003) ("[O]f the handful of reported opinions that apply *Rowe* or some modification thereof, *all of them* have ordered the cost of discovery to be shifted to the requesting party.").

<sup>78</sup> *Id.* at 321.

<sup>79</sup> *Id.* at 322.

<sup>80</sup> See *supra* notes 57, 74 and accompanying text.

<sup>81</sup> *Zubulake I*, 217 F.R.D. at 321–22.

results.<sup>82</sup> These cases incorporate the economics-based insights of *McPeek* into a complex analysis that dilutes the principles of free discovery underlying earlier decisions that discouraged cost-shifting, such as *In re Brand Name*. These factor-based tests, however, overlook a crucial fact: the custodian chose the particular data-storage and search-and-retrieval methods because they offered business benefits despite inefficiencies in litigation, and thus custodians with these inefficient retrieval mechanisms voluntarily accepted the related litigation costs.

#### IV. PROPOSALS TO REFORM COST-SHIFTING

¶29 This Part advances three proposals that modify the formula-based approach in a way that both honors traditional, liberal discovery principles and limits the abuses associated with free discovery. To achieve this balance, courts should (1) eliminate the marginal utility test, (2) shift benefits as well as costs, and (3) discontinue media-based restrictions.

##### A. Eliminate the Marginal Utility Test

¶30 The marginal utility test suffers from several weaknesses. First, the test requires courts to predict how beneficial discovery will be before the discovery actually takes place.<sup>83</sup> A test run to estimate utility as suggested in *McPeek* is an inexact substitute for full knowledge.<sup>84</sup>

¶31 Second, the numerical test is biased toward quantity rather than quality. Marginal utility cannot measure the possibility of finding one key “smoking gun,” which is fairly common in e-mail discovery.<sup>85</sup> *McPeek* ignores the value of computerized discovery in this respect, dismissing the possibility of finding a needle in a haystack,<sup>86</sup> which is precisely the sort of task computers can perform economically.<sup>87</sup>

¶32 Third, the marginal utility test focuses on utility only at the micro level rather than the macro level. The actual economic benefits of an expensive backup procedure can best be measured from the perspective of the complete computerized business operation into which the procedure is

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<sup>82</sup> See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 573 (N.D. Ill. 2004) (mem.) (applying a slightly modified version of the *Zubulake I* factors).

<sup>83</sup> See *Zubulake I*, 217 F.R.D. at 323 (“[S]uch proof will rarely exist in advance of obtaining the requested discovery.”).

<sup>84</sup> See *supra* note 69 and accompanying text.

<sup>85</sup> See, e.g., *Zubulake I*, 217 F.R.D. at 312 n.8 (describing an employee who, after alleging retaliatory firing, found an e-mail suggesting she be fired to avoid paying a bonus after she filed an EEOC complaint).

<sup>86</sup> *McPeek v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (mem.).

<sup>87</sup> See *infra* note 105 and accompanying text.

integrated, an effect that courts can consider in the context of benefit-shifting, which Section B discusses.

### *B. Consider Broader Benefit-Shifting*

¶33 The *Zubulake I* court characterized the seventh factor—the relative benefits to the parties—as the “least important” factor.<sup>88</sup> Yet this factor lets courts consider not only how much the requestor will benefit from the ESI (which favors cost shifting), but also how much the responding party benefits generally from its computerized storage system (which disfavors cost-shifting). The business’s general benefits from a computerized storage system transcend the high-cost, low-benefit function of backup storage and retrieval<sup>89</sup> and encompass the overall productivity benefits gained by managing data electronically.<sup>90</sup> Such a calculation would likely show that occasional retrieval costs of ESI previously transferred to backup tape are a small and necessary part of foreseeable computer-related expenditures.<sup>91</sup> Retrieval of ESI in discovery is a cost of doing business and should come as no surprise to large or small businesses.<sup>92</sup> Businesses budget, or should budget, for such expenditures as part of a general commitment to have a complete and productive computer operation.

¶34 Even if benefit shifting is restricted to account only for data-storage operations, the seventh factor should recognize savings realized by a responding party that uses an inexpensive backup system rather than more expensive, and more accessible, media.<sup>93</sup> The responding party made a business decision when it opted for an inexpensive backup system over a more expensive but more accessible system with lower retrieval costs. Thus, courts should balance the high retrieval costs associated with an

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<sup>88</sup> *Zubulake I*, 217 F.R.D. at 322. For a list of the *Zubulake I* factors, see text accompanying note 79.

<sup>89</sup> See *supra* Part I.

<sup>90</sup> See *supra* Part I.

<sup>91</sup> See *supra* note 19.

<sup>92</sup> See Jennifer Schiff, *Rules About to Change in E-Discovery Game*, ENTERPRISESTORAGEFORUM.COM, Nov. 7, 2006, <http://www.enterprisestorageforum.com/continuity/features/article.php/3642421> (stating that a 2005 law firm study showed that companies with at least \$1 billion in annual revenue were involved in an average of 147 lawsuits at any one time, while the corresponding number for companies with revenues under \$1 billion was thirty-seven).

<sup>93</sup> See Stephen J. Bigelow, *Tape Backup Overview*, SEARCHSTORAGE.CO.UK, Aug. 7, 2007, [http://searchstorage.techtarget.co.uk/news/article/0,289142,sid181\\_gci1292227,00.html](http://searchstorage.techtarget.co.uk/news/article/0,289142,sid181_gci1292227,00.html) (“Although tape performance is relatively slow, tape fits well into the storage architecture, because it allows users to store a large volume of data at a reasonable price.”).

inexpensive but less accessible backup system against the savings gained by the responding party when it initially purchases that system. Unless responding parties who initially purchase inexpensive systems are forced to internalize the costs of using those systems, there is no incentive for a company to use anything but the least expensive, least technologically efficient, and least accessible system.

¶35 In assessing benefits under the seventh factor, one may consider the drafters' concern that creating this category of ESI would lead corporations to "make[] information 'inaccessible' because it is likely to be discoverable in litigation."<sup>94</sup> Although the drafters felt that existing provisions for sanctions would take care of this concern,<sup>95</sup> some abusive actions do not justify sanctions. Thus, the Supreme Court observed that nonsanctionable actions to keep documents out of the hands of others "are common in business."<sup>96</sup>

¶36 These actions are often legal and may even be prudent business strategies. In any case, it would be difficult to prove a business's motive for choosing a particular ESI storage medium.<sup>97</sup> Rather than demand that a requesting party prove a suspected motive,<sup>98</sup> it may be more efficient simply to interpret *Zubulake I*'s seventh factor as weighing against cost-shifting whenever a business has a more accessible alternative to using a

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<sup>94</sup> COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 3, at 32.

<sup>95</sup> *Id.*

<sup>96</sup> *Arthur Andersen LLP v. United States*, 544 U.S. 696, 704 (2005).

<sup>97</sup> *But see* Posting of Paladin to ExDHL,

<http://exdhl.com/forums/index.php?showtopic=757> (Sept. 10, 2005, 12:29 PM)

("[Despite better alternatives,] some companies continue using backup tapes because they fear that online archiving will create more discoverable data, according to [one software consultant].").

<sup>98</sup> See Robert Allan Eisenberg, *Proactive on Backups*, N.Y.L.J., June 28, 2005,

[http://www.doar.com/apps/uploads/literature22\\_NYLJ\\_Back-up\\_Tapes.pdf](http://www.doar.com/apps/uploads/literature22_NYLJ_Back-up_Tapes.pdf)

(suggesting that prospective responding parties should discontinue using backup tapes for purposes other than backup to avoid courts classifying the tape as accessible). Courts conducting cost-shifting inquiries must diligently watch for possible gaming. See CRAIG BALL, *WHAT JUDGES SHOULD KNOW ABOUT DISCOVERY FROM BACKUP TAPES 4* (2007), available at

[http://www.craigball.com/What\\_Judges\\_Should\\_Know\\_About\\_Discovery\\_from\\_Backup\\_Tapes-corrected.pdf](http://www.craigball.com/What_Judges_Should_Know_About_Discovery_from_Backup_Tapes-corrected.pdf) (urging courts to inquire, (1) Does the responding

party sometimes restore backup tapes to ensure proper system function or to retrieve mistakenly deleted files? (2) Have these backup tapes been restored in other circumstances? (3) Does the responding party have the in-house capacity to restore the data? (4) Are search and extraction technologies available that do not require wholesale tape restoration? (5) Are cheaper outside restoration services available?).

less accessible medium<sup>99</sup> because the business derived the overall productivity benefits associated with managing data electronically.<sup>100</sup>

### *C. Courts Should Not Use Cost Allocation to Control Abusive Discovery*

¶37 Abusive discovery is a long-standing problem, and courts did not condone it even when applying traditional doctrines of liberal discovery.<sup>101</sup> Considerable efforts to address the abuses have been made over the past twenty years, with approaches that apply uniformly to all media forms.<sup>102</sup> Although commentators have argued that ESI is particularly susceptible to abuse,<sup>103</sup> drafters of the 2006 amendments concluded that changing the rules only for a particular data-storage medium is not the best way to control discovery abuses that exist for all media.<sup>104</sup> In fact, the capacity of computers to quickly search large quantities of ESI has the potential to reduce the burdens of discovery.<sup>105</sup> Judge Scheindlin gives an instructive example: e-mail messages revealed a party's plan to force a favorable settlement by running up discovery costs, which was critical in a jury's deliberations.<sup>106</sup>

¶38 If abusive discovery is a problem, it should be corrected through measures directed at all abusive practices, not merely those involving e-discovery. Discovery that is intended to coerce settlement, or that is unduly burdensome or expensive under the proportionality rule applicable across media forms,<sup>107</sup> should be prohibited altogether, rather than subjected to

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<sup>99</sup> For a list of alternative backup systems, see *supra* note 66.

<sup>100</sup> See Jake Frazier, *Are Market Forces and Technological Advances Already Making the "Reasonably Accessible" Category Obsolete?*, DIGITAL DISCOVERY & E-EVIDENCE, May 2005,

[http://www.renewdata.com/pdf/Pike\\_&\\_Fischer\\_article\\_reprint\\_May\\_05.pdf](http://www.renewdata.com/pdf/Pike_&_Fischer_article_reprint_May_05.pdf) ("If the rules accord information on 'backup tapes' an extra layer of protection from discovery, for example, then perhaps corporations might be encouraged to use antiquated techniques for a strategic advantage.").

<sup>101</sup> See *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (warning against examinations "conducted in bad faith or in such a manner as to annoy, embarrass or oppress").

<sup>102</sup> See *supra* Part II.A.

<sup>103</sup> See *supra* note 9.

<sup>104</sup> COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 3, at 21–38.

<sup>105</sup> See Scheindlin & Rabkin, *supra* note 12, at 344 (giving the example of what would be one thousand hours of billable document review time completed in minutes).

<sup>106</sup> *Id.* at 339 n.42.

<sup>107</sup> See *supra* note 29 and accompanying text.

cost-shifting. The court in *Cognex Corp. v. Electro Scientific Indus., Inc.*<sup>108</sup> pointed to a basic flaw of simply using cost-shifting in such a case: “There is 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.”<sup>109</sup>

#### CONCLUSION

¶39 Effective management of ESI has let businesses store and communicate information much more efficiently. ESI has also affected the discovery process, however, raising concerns about the accessibility of data and the cost of retrieval. From the 1980s on, various amendments have incorporated ESI into the Federal Rules of Civil Procedure. Courts have also developed strategies to review discovery of ESI, such as economic- or formula-based approaches to balance the need for discovery of all relevant facts against the burden of retrieval. Courts have been mindful of abusive discovery techniques that seek to raise the cost of retrieval as well as shift the costs, potentially affecting the outcomes of a particular case. As the Rules and the courts have tried to incorporate ESI into the existing framework, new technological advances such as better retrieval mechanisms have changed the methods of storage and retrieval, requiring courts to add additional factors to review and balance e-discovery burdens.

¶40 Previous concepts of “undue burden” and “not reasonably accessible” ESI may soon be outdated due to these advances, and courts will need to adjust previous approaches. This iBrief’s recommendations provide a framework for future review. First, eliminating the marginal utility test would preserve the full body of ESI for discovery purposes and allow the plaintiff to search for a “smoking gun” e-mail. Second, benefit shifting allows the consideration of a broader range of items than cost-shifting when evaluating the full cost of ESI. Lastly, a uniform approach to curb abuses of all discovery would be more efficient and meaningful than focusing only on ESI. As a whole, these recommendations would allow the courts to keep pace with ESI advancements while balancing discovery needs with proper limitations on abusive discovery practices.

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<sup>108</sup> *Cognex Corp. v. Electro Scientific Indus., Inc.*, No. Civ.A. 01CV10287RCL, 2002 WL 32309413 (D. Mass. July 2, 2002) (mem.) (rejecting a party’s request to examine voluminous backup tapes despite its offer to pay production costs).

<sup>109</sup> *Id.* at \*6.