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“No Fishing Poles Allowed at the Office,” and Other Suggestions on How to Limit “Fishing Expeditions” to an Outdoor Weekend Activity and Away from the Realm of E-discovery

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“No Fishing Poles Allowed at the Office,” and Other Suggestions on How to Limit “Fishing Expeditions” to an Outdoor Weekend Activity and Away from the Realm of E-discovery

Early settlement is usually encouraged by the courts and welcomed by most parties involved in a lawsuit. However, it may not always be the most favorable result – for the defendant, the plaintiff, nor for the civil justice system in general. This idiosyncrasy arises most when the costs of continuing litigation and adjudication on the merits outweigh those of early settlement. Settlement may provide “relatively foreseeable, fixed costs to the defendant in comparison to the potentially unknown and less limited costs of litigating numerous actions.” It also allows him to avoid “the risk of compensatory and punitive damages awards at the end of a trial, . . . wear and tear on company personnel, and the overall impact of ongoing litigation on the company and the market.” On the other hand, early settlement raises the risk of “encourag[ing] additional, low merit cases that might not otherwise have been filed had the company chosen to litigate existing lawsuits.”

1 See Marvin Schuldiner, Why It Is Better to Settle a Lawsuit Early (Aug. 3, 2009), http://sannsmediation.com/wordpress/?p=370 (last visited Apr. 4, 2010) (advising clients to settle early to avoid the transactional costs involved with drawn out litigation, particularly those accumulated during the discovery phase, and warning about the “escalation of conflict,” which, in essence, stands for the proposition that “the more you’ve spent, the more you want to spend to get the outcome you want” thus making settlements harder to reach). See also John S. Worden & P. Mark Mahoney, The Price of Victory: Controlling Costs in Small “Complex” Cases, BLOOMBERG LAW REPORTS, Vol. 3, No. 34 (2009) (advising practitioners to explore settlement as early as practically possible); INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, A-6 (Aug. 1, 2008) [hereinafter ACTL Interim Report] (“Interestingly, nearly 57% of Fellows indicated their belief that judges do not like taking cases to trial.”).

The Institute for the Advancement of the American Legal System at the University of Denver and the American College of Trial Lawyers Task Force on Discovery recently joined together to investigate the “concern that the costs and burdens of discovery are driving litigation away from the court system and forcing settlements based on the costs, as opposed to the merits, of cases.” Id. at 1. They electronically administered a survey of the College’s Fellows to quantify the scope of the problem; nearly 1500 Fellows responded. Id. The various results of this survey as published in the ACTL Interim Report are stated infra in the pertinent sections of this article.


3 Id.
The phenomenon of electronic discovery\(^4\) (‘e-discovery’) has exponentially increased the occurrence of the latter result within a short timeframe.\(^5\) As a result, defendants, particularly large corporations with “deep pockets,” are often forced to settle prematurely or risk incurring additional exorbitant expenses involved with responding to a request calling for e-discovery.\(^6\)

These counterproductive tactics affect entities of all sizes. Small firms and businesses usually do not possess the resources required to store and retrieve their electronically stored information (‘ESI’) and efficiently respond to e-discovery requests.\(^7\) Large corporations, on the other hand, may fall prey to plaintiffs with less than meritorious claims,\(^8\) particularly when the

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\(^4\) See infra Part II.A. for the definition of electronic discovery.

\(^5\) See ACTL Interim Report, supra note 2, at A-4 (‘Over 75% of Fellows agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery[.]’); see also Karen Sloan, For Litigators, a Different Kind of Recession: The hoped-for litigation surge hasn't materialized, and the fear is that this economy has changed the old rules, THE NAT’L. L.J. (Aug. 18, 2009) (‘[E-discovery] is a much more expensive process than it was even a few years ago . . . . It makes logical sense that the cost associated with e-discovery may be one of the things changing the numbers.’) (quoting Elizabeth Scully, a partner at Baker Hostetler with extensive experience in e-discovery matters, discussing the decline in new claims being filed in court).

\(^6\) See ACTL Interim Report, supra note 2, at A-4 (‘Nearly 71% of Fellows believe that counsel use discovery as a tool to force settlement’ and “63% of Fellows say e-discovery is being abused by counsel”).

\(^7\) Jason Krause, Itsy-Bitsy, Teeny-Weeny E-Discovery (Feb. 22, 2010), http://www.law.com/jsp/lawtechnologynews/PublicArticleLTN.jsp?id=1202443918481&ItsyBitsy_TeenyWeeny_EDiscovery (last visited Mar. 28, 2010) (‘[W]hile large firms can typically hire professional forensic examiners, small firms trying to operate on a tight budget might be inclined to do forensic examinations themselves, which could open up a host of problems.’). Further, small law firms do not have the benefit of a specialized IT department or of a full-time litigation support staff. Id. See also Bridget Mintz Testa, Don’t Kill the Lawyers: When Courts Demand Electronic Documents, IT & Legal Counsel Must Work Together, PROCESSOR, Vol. 32, Issue 4, p. 30 (Feb. 12, 2010) (advising that IT professionals should be involved in responding to e-discovery requests, no matter what size and type of enterprise is the responding party, to streamline the process and avoid wasted resources). “That’s especially true for small and medium-sized enterprises” as “[a]bout 80% of lawyers in the country practice in firms of five lawyers or less.” Id. (internal citations omitted). Further, “[s]maller companies work with small law firms, and small law firms don’t deal with e-discovery.” Id. (internal citations omitted).

\(^8\) See, e.g., R. Robin McDonald, Judge Heaps E-Discovery Costs on Plaintiff, FULTON COUNTY DAILY REPORT (Jan. 14, 2010). Recently, Judge Thomas W. Thrash Jr. sanctioned plaintiff CBT Flint Partners and its counsel more than $268,000 for the cost of services of a computer consultant hired by defendant Cisco IronPort to fulfill their broad discovery demands. Id. The plaintiff’s request for ESI amounted to “the paper equivalent of 1.4 million documents (an estimated 9.8 million pages).” Id. Ultimately finding CBT’s patent infringement claims “objectively baseless,” Judge Thrash also observed that “[i]n their pursuit of a multi-million dollar recovery, counsel for CBT sought to stretch the claims of the patents way beyond anything in the specification or the prosecution history. . . . In hindsight, it is easy to say that this action should never have been brought.” Id. For a more thorough discussion of sanctions, see infra discussion in Part II.E.
plaintiffs are individuals or class action members who have the advantage of a smaller, less complex “paper trail.” Undeserving parties may, therefore, be rewarded not on the merits of their case, but on the defendants’ preference to end the matters through settlement. Conversely, “[d]eserving cases are not brought because the cost of pursuing them fails a rational cost-benefit test.” Moreover, the pervasive acceptance of the practice of early settlement of meritless claims

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9 See, e.g., Davis & Wood, supra note 3, at 18. Interestingly, to settle mass tort class actions, attorneys sometimes utilize the “limited settlement” device. “Where a company believes only a limited number of the claims filed against it are potentially meritous, it may choose to settle only those claims that meet particular criteria.” Id. The existence of this strategy acknowledges that class actions include, as a rule, meritless claims.


Employment litigation, in contrast to commercial litigation between corporate entities with comparable volumes of potentially relevant ESI, usually involves one or more individuals suing an employer or former employer. Even in class or collective actions, where large numbers of potential class members may be involved, the plaintiff class is a group of individual employees and the defendant is, most often, the organization that employed them.

[Therefore,] even when faced with even a reasonable discovery request, full compliance on the part of an employer might require a significant expenditure of costs despite the best efforts to curtail the same. In contrast, an employee with little or no ESI at his or her disposal has little or no incentive to control costs associated with electronic discovery. As individuals, employees may have, at most, a personal computer with potentially relevant information, and one or more online accounts, such as an electronic mail account provided by a public internet service provider.

Id. at 3, 8. See also Eric Van Buskirk, Raging Debate: Who Should Pay for Digital Discovery, N.Y. LAW JOURNAL (Jan. 27, 2003) (“reformers [of the current producing-party-pays rule] complain that the ability to request large amounts of information at the expense of the producer is improperly used in some cases to ‘blackmail’ information-rich producing parties into unnaturally early settlements because it is simply cheaper to settle than to produce”); THE SEDONA CONFERENCE, Framework for Analysis of Cross-Border Discovery Conflicts: A Practical Guide to Navigating the Competing Currents of International Data Privacy & e-Discovery, at 15 (Aug. 2008) [hereinafter SC Cross-Border Discovery] (describing the recent reliance on discovery as a “tactical sword against a large corporate adversary”).

11 See Satterwhite & Quatrara, supra note 12, at 9 (“Even employers involved in cases with little or no evidence of liability, but nevertheless faced with several hundred thousands of dollars in discovery costs, may quickly conclude that settlement of a meritless claim is a better option than incurring those costs.”).

12 ACTL Interim Report, supra note 2, at 3. See also Ken Withers, When E-mail Explodes, SAN DIEGO LAWYER MAGAZINE, Nov.-Dec. 2008, at 36, 36 (“If [e-discovery] really costs millions . . . then you’re going to drive out of the litigation system a lot of people who ought to be there. They’ll go to arbitration . . . They will go somewhere where they will write their own discovery rules . . . .” commented Justice Stephen Breyer at a panel discussion about the impact of e-discovery held at Georgetown University Law Center in March, 2007); Craig C. Martin, Avoiding the Inefficiency of Litigation, PRETRIAL PRACTICE & DISCOVERY, Vol. 15, No. 3, 28 (Spring 2007) (“Recognizing that litigation is an expensive proposition, many businesses now regard it as the dispute resolution strategy of last resort.”); Buskirk, supra note 12 (“Some parties may drop out of litigation early because they cannot afford to remain. These ‘wars of attrition’ can force some litigants to abandon suits based simply on a cost-benefit analysis, rather than based on merit.”).
and its frequent occurrence further perpetuate unfavorable results as e-discovery continues to take on an increasingly prominent role in contemporary civil litigation.\textsuperscript{13}

Practitioners have minimal guidance. Responding to an e-discovery request has been dubbed a “fishing expedition”\textsuperscript{14} and “mining data.”\textsuperscript{15} The 2006 Amendments to the Federal Rules of Civil Procedure\textsuperscript{16} (“FRCP”) addressing e-discovery attempted to appease the various interests involved in litigation. They do not, however, go nearly far enough\textsuperscript{17} as the Rules in general “long have prescribed ‘liberal discovery’ that the producing party must pay for itself and a broad relevance standard – that discoverable evidence need not be admissible, only ‘reasonably calculated to lead to the discovery of admissible evidence.’”\textsuperscript{18} Further, although the Rules yield

\textsuperscript{13}See Martin, \textit{supra} note 14, at 28 (pointing out that a plaintiff’s suit is often driven “by a pressing need for capital” and actually advising defense attorneys that such cases lend themselves perfectly to settling at a “‘fire sale’ price”); Proofpoint, Inc., \textit{Email Archiving: A Proactive Approach to e-Discovery}, 3 (2008) (citing to a study which found that one in five corporate respondents have settled litigation to avoid the costs of e-discovery).


\textsuperscript{15}McDonald, \textit{supra} note 10.

\textsuperscript{16}FED. R. CIV. P. See generally, Bill Tollson, White Paper: Federal Rules of Civil Procedure 101, at 3 (Sept. 2007). The FRCP govern court procedures for civil suits in the United States district courts. \textit{Id.} Pursuant to the Rules Enabling Act, the U.S. Supreme Court produces and promulgates the FRCP; however, the Rules, and any changes made to them, must be then approved by the U.S. Congress. \textit{Id.} Although federal courts are required to apply the substantive state law in cases where state law in question, they almost always use the FRCP as their rules of procedure. \textit{Id.}

\textsuperscript{17}Scott A. Moss, \textit{Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age}, 58 DUKE L. J. 889, 896 (2009) (“Sometimes [the FRCP] do too little, failing to curb discovery excess or allowing costly discovery on meritless claims; other times they do too much, disallowing discovery that meritorious cases need.”).

\textsuperscript{18}Moss, \textit{supra} note 19, at 902 (quoting Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002), where the court disallowed the prediscovery dismissal of a discrimination claim because the federal rules’ “simplified notice pleading standard relies on liberal discovery rules and summary judgment motions . . . to dispose of unmeritorious claims”). \textit{See also} Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (“Thus, it is now beyond dispute that broad discovery is a cornerstone of the litigation process contemplated by the [FRCP]. The Rules...
themselves better to certain types of cases; they are difficult to apply efficiently to others, leading one commentator to conclude that “[o]ne set of rules cannot accommodate all cases.”

The FRCP are also binding only in the federal court system, and though some states have enacted e-discovery provisions, the majority of states have not. While some states are waiting and monitoring others’ experiences with the amended FRCP, “credible sources” report that others have no plans to adapt the FRCP or devise their own e-discovery rules. Additionally, federal local rules exacerbate these problems because they vary by jurisdiction. They are also regarded by many practitioners as inconsistent with the FRCP and criticized for being haphazardly applied.

19 See ACTL Interim Report, supra note 2, at A-2 (for example, personal injury and product liability).

20 Id. (for example, ERISA, labor, administrative law, and mass torts).

21 Id. at B-4. This statement was selected from survey respondents. See also Robert M. Cover, For James Wm. Moore: Some Reflections on a Reading of the Rules, 84 YALE L.J. 718, 732-33 (1975) (“It is by no means intuitively apparent that the procedural needs of a complex antitrust action, a simple automobile negligence case, a hard-fought school integration suit, and an environmental class action to restrain the building of a pipeline are sufficiently identical to be usefully encompassed in a single set of rules which makes virtually no distinctions among such cases in terms of available process.”).

22 See Cornell University Law Schools’ Legal Information Institute, Federal Rules of Civil Procedure, http://www.law.cornell.edu/rules/frcp/ (last visited Mar. 15, 2010) (“[The FRCP] govern the conduct of all civil actions brought in Federal district courts. While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions.”).


24 Id. For example, Nevada.

25 See ACTL Interim Report, supra note 2, at A-3.

26 See id. The Fellows who took the survey described federal local rules as “traps for the unwary” and concluded that “they should either be abolished entirely or made uniform. Id. Further findings of the survey revealed that “[o]nly 40% of the Fellows felt that Local Rules are uniformly applied within the district to which they pertain;
Recent cases have helped to fill practical loopholes left behind by the FRCP. Still, “[n]ot qualifying as ‘final’ orders, discovery rulings ordinarily are nonappealable, so few trial court decisions regarding the scope and logistics of discovery reach the appellate level.”\textsuperscript{27} Therefore, even \textit{Zubulake v. UBS Warburg},\textsuperscript{28} discussed infra, “though ‘widely regarded as the leading case authority’ on e-discovery,” is a “nonbinding district court precedent” and thus has not been universally followed.\textsuperscript{29} Additionally, few e-discovery decisions get published; therefore, “‘any ruling could be a trend.’”\textsuperscript{30}

Perhaps the greatest criticism of these rulings, though, is that courts, in deciding discovery disputes, “rarely say anything about case merits.” In fact, if they do mention them, it is merely to “disclaim any consideration of the merits.”\textsuperscript{31} For example, the court in \textit{Carrizosa v. Stassinos} determined that the discovery motion at issue “[did] not turn on the merits,”\textsuperscript{32} while the court in \textit{Maher v. Monahan} announced that “[plaintiffs] are not required to establish a legally sufficient case . . . as a condition of securing discovery.”\textsuperscript{33}

\begin{footnotes}
\item[27] Moss, \textit{supra} note 19, at 902 (internal citations omitted).
\item[29] Moss, \textit{supra} note 19, at 902.
\item[30] McDonald, \textit{supra} note 10. (quoting Laura Lewis Owens, partner at Alston & Bird and a practitioner with extensive e-discovery experience). \textit{See also} Moss, \textit{supra} note 19 at 948-49 (2009) (“Publication bias” – the fact that published decisions are just the tip of the iceberg, and unpublished or unwritten orders may be very different – is especially salient for discovery rulings, which often deny discovery in unwritten, unappealable oral orders at court conferences.”) (internal footnotes omitted).
\item[31] Moss, \textit{supra} note 19, at 916 (emphases in original).
\item[33] 2000 WL 777877, at *4 (S.D.N.Y. June 15, 2000). For more examples of similar statements dating back to 1941, \textit{see} Moss, \textit{supra} note 19, at n.136.
\end{footnotes}
In addition, numerous “think-tank” organizations have formed to tackle the daunting problem of e-discovery. However, their solutions are merely suggestions that practitioners and courts may, but do not have to consider and implement. Further, these strategies, “although thoughtful and useful guides to e-discovery, promise limited impact” as “[t]hey do not aim for a paradigm shift, instead relying on status-quo methods to limit discovery.”

Furthermore, although numerous bar publications and conferences address e-discovery, it is yet to draw widespread interest from scholars. More articles are written about, for example, civil rights issues, even though discovery is crucial to civil rights litigation. Also, the limited academic writing on e-discovery focuses on “how much discovery is too much for parties to request,” whereas the crucial focus to practitioners is on “how courts decide discovery disputes (which, unlike trials, occur in most lawsuits)”.

In reality, cases are won and lost in discovery; more academic focus on discovery decisions is critical.

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36 Moss, supra note 19, at 903.

37 Id. at 893 (internal citations omitted). “[D]iscovery controversies often are ‘not something that law professors pay a lot of attention to, but lawyers do,’” Id.

38 Id. (emphases in original).

39 See id. at 911. The author suggests that academics are disinterested by these rulings because the majority of them are unappealable district court decisions.
In sum, “there [is] waste and inefficiency in e-discovery, largely driven by fear and ignorance.”\(^{40}\) The current situation seems hopeless.\(^{41}\) “The information explosion threatens the legal profession and the administration of justice itself.”\(^{42}\) Clear, uniform and binding guidelines that reflect and respond to the e-discovery experiences of practitioners, the judiciary, and other major players in civil litigation are necessary to tackle the phenomenon of electronic discovery.

I. The Problem

A. The Scope of E-discovery – What Isn’t E-discovery?

E-discovery is “the process of identifying, collecting, filtering, searching, de-duplicating, reviewing and potentially producing ESI that relates to pending or reasonably anticipated litigation . . . .”\(^{43}\) In order to comprehend the effect of e-discovery and how it had catapulted into the forefront of civil litigation, one must first grasp what the term “ESI” encompasses. The 2006 Amendments to the FRCP, discussed infra, define ESI as “writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations.”\(^{44}\) In practice, however, the list of frequently requested data expands to include “‘databases, spreadsheets, word processing documents, emails, instant messages, voicemail and other recordings, web pages, images, metadata about documents, document backup tapes, erased but still recoverable documents, and everything else attorneys can think of that might help explain the circumstances

\(^{40}\) Craig Ball, EDD Bill of Rights: Requesting Parties Have Rights – and Duties, LAW TECHNOLOGY NEWS http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202437097187&EDD_Bill_Of_Rights&hbxlogin=1 (last visited Feb. 14, 2010). The author describes the attorneys’ confusion and frustration with a twinge of sarcasm: “[e]ven trial lawyers, erstwhile champions of discovery rights, are so cowed and confused by e-discovery, that they’re ready to trade the cow for magic beans enabling them to dodge the hard and humbling task of acquiring new skills.” Id.

\(^{41}\) See ACTL Interim Report, supra note 2, at A-4 (“Less than 30% of Fellows believe that even when properly managed, discovery of electronic records can reduce the costs of discovery.”).

\(^{42}\) Withers, supra note 14, at 36.

\(^{43}\) SC Cross-Border Discovery, supra note 12, at 5.

on which the lawsuit is based.”

Further, ESI can also be found on “website log files, cookies and cache files, . . . hard drives, floppy disks, CDs, DVDs, magnetic tapes, personal digital assistants, cell phones, logs, websites, [and] memory sticks.”

That list is still incomplete. It is evident that there are many places and devices that may contain company information in various formats, most of it electronic. Though much of this data is reasonably accessible, “vast quantities of the data are also preserved in sources that are not reasonably accessible, such as back-up storage media used for disaster recovery.”

Furthermore, files that have been supposedly “deleted” may still be recovered until overwritten. Many ESI storing devices are also portable and thus can be transported outside of the physical boundaries of the office. In addition, a large amount of ESI contains “metadata” which is “information about a particular data set or document that describes how, when and by whom it

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46 Id.

47 See, e.g., Columbia Pictures Indus. v. Bunnell, 2007 WL 2702062 (C.D. Cal. Aug. 24, 2007) (holding that RAM data constituted ESI and was thus discoverable); Nursing Home Pension Fund v. Oracle Corp., 2008 WL 4093497 (N.D. Cal. Sept. 2, 2008) (ordering adverse inference instructions for failure to preserve audio interview transcripts); Arteria Prop. Pty Ltd. v. Universal Funding V.T.O. Inc., 2008 WL 4513695 (D.N.J. Oct. 1, 2008) (holding that websites should be treated the same as other ESI and sanctioning the defendant corporation for failing to maintain the content on its website once litigation was reasonably anticipated); In re Flash Memory Antitrust Litig., 2008 WL 1831668, at *1 (N.D. Cal. Apr. 22, 2008) (“Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition [of ESI].”).


50 See, e.g., id.
was collected, created, accessed, modified and formatted” and in some instances has been more helpful than the actual document to “‘piece together the chronology of events.’”

These characteristics make identifying, gathering, and presenting information a logistical nightmare. Certainly, the larger the entity is, the more likely it will possess the technology that will help to alleviate this burden. It also logically follows, however, that the larger the company, the more ESI it also must produce.

B. The Recent Effect of the Exponential Growth of E-Discovery

If importance were measured by cost, then discovery is by far the most important stage of litigation. “[I]n federal cases, discovery comprises half of all litigation costs; in the most expensive 5 percent of cases, discovery amounts to 90 percent of litigation cost and totals 32 percent of the amount in controversy.” Additionally, less than two percent of cases filed actually go to trial. As a result, discovery “has become an end in itself,” leading The American College of Trial Lawyers Task Force on Discovery to conclude that “[t]he discovery system is . . . broken” specifically because of e-discovery.

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52 Id. (quoting Hagenbuch v. 3B6 Sistemi Elettronici Industriali S.R.L., 2006 WL 665005, at *3 (N.D. Ill. Mar. 8, 2006) (finding the defendant’s original ESI containing metadata would be more relevant to plaintiff’s claims and superior to printouts of the same electronic content); Lake v. City of Phoenix, 218 P.3d 1004 (2009) (holding that if the city maintained a public record in an electronic format, then the electronic version, including any embedded metadata, was also subject to disclosure under Arizona’s public records laws, but declining to address whether and when a public entity has the duty to preserve public records in electronic format).

For a detailed discussion about the production of metadata, see Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep’t of Homeland Sec., 2008 WL 5062700 (S.D.N.Y. Nov. 21, 2008).

53 For further discussions of the exponential growth of e-discovery, see infra II.C.

54 Moss, supra note 19 at 891.


56 ACTL Interim Report, supra note 2, at 3. However, for criticism of the Fellows’ accusations, see Ralph Losey, Trial Lawyers Turn a Blind Eye to the True Cause of the e-Discovery Morass, e-Discovery Team (Sept. 14, 2008), http://e-discoveryteam.com/2008/09/14 (last visited Apr. 3, 2010) (“Not too unexpectedly, [the Fellows]
The growth of e-discovery in contemporary civil litigation has defied all predictions.\textsuperscript{57} Electronic mail in particular is an important type of ESI. Not only does email and its attachments contain 60-70\% of all corporate data,\textsuperscript{58} but “the email of [litigation] participants captures the contemporaneous facts of what happened and why in a way that was unimaginable back in the days of typewriters and phones.”\textsuperscript{59} The average user processed 75 e-mails a day in 2005.\textsuperscript{60} The Radicati Group, Inc., a technology market research firm,\textsuperscript{61} also “estimate[d] that corporate e-mail traffic per user has increased at a rate of 33\% per year and projections are that worldwide traffic in 2006 was at the rate of 183 billion messages per day.”\textsuperscript{62} The average size of email messages placed the blame squarely on poor rules, bad law, and judges. They overlook their own role in the problem. The report does not even acknowledge lawyer incompetence with technology as one of causes of the morass.\textsuperscript{7}. This oft-cited blogger also points out that since, “on average, the respondents ‘had been practicing law for 38 years,’” they constitute “a very old group” and are likely to be “more clueless . . . about technology” than younger attorneys and law students who grew up in front of a computer. \textit{Id.} (emphasis in original).

\textsuperscript{57} See Gene Albert, \textit{E-Discovery: How to Do it Wrong (and Right!): Avoiding Sanctions through Competent Management of the e-Discovery Process}, at 5 (May 22, 2009).

Both the types of available data storage media and amount of storage available continue to expand unabated under Moore’s law. It would be natural to think that the growth is about to level off, but nothing could be further from the truth. Predictions from [electronic storage and production] equipment manufacturers suggest that the amount of digital information will continue to grow at an exponential rate for as long as we can imagine.\textsuperscript{57} \textit{Id.} Moore’s law, named after former Intel Co-Founder, Gordon E. Moore, generally “stands for the proposition that the speed and storage capacity of technology will double every two years.” SC Cross-Border Discovery, \textit{supra} note 12, at 5-6. The theory had been previously applied in the computing world to predict the growth of RAM capacity, processor speeds, storage capacity of removable media and hard drive volumes. \textit{Id.} at 6. \textit{See also} George Paul & Jason Baron, \textit{Information Inflation: Can the Legal System Adapt?}, 13 \textit{RICH J. L. & TECH.} 1, 1, 9 (2007) (“written information [has multiplied] by as much as ten thousand-fold recently” and “[t]he amount of stored information continues to grow exponentially”) (internal footnotes omitted).

\textsuperscript{58} See, e.g., Whetstone &. Simon, \textit{supra} note 53.

\textsuperscript{59} Albert, \textit{supra} note 62. See Withers, \textit{supra} note 14, at 36 (“Today, e-mail files have become a favorite target for lawyers and government investigators hunting for the proverbial ‘smoking gun’ in more routine and far less high-profile litigation.”); \textit{see also} Basis Tech. Corp. v. Amazon.com, Inc., 878 N.E.2d 952 (Mass. App. Ct. 2008) (finding email communication regarding settlement binding on the parties).

\textsuperscript{60} Thomas Y. Allman, \textit{Discovery Management & E-Discovery, Managing Email: Balancing Litigation and Business Considerations}, at 1 (Sept. 26, 2007).

\textsuperscript{61} The Radicati Group, Inc., http://www.radicati.com/ (last visited Mar. 15, 2010). The firm “provides research on messaging and collaboration, security, email archiving, regulatory compliance, wireless technologies, web services, identity management, instant messaging, unified communications, voice over IP, and more.” \textit{Id.}
was growing as well, resulting in an increase in bandwidth storage requirements per user.\(^{63}\)

Moreover, incredulously, instant messages may surpass e-mails traffic in the near future\(^{64}\) as reports reveal that twelve billion instant messages are sent daily worldwide.\(^{65}\)

These amounts translate into astounding costs. In *Rowe Entertainment, Inc. v. The William Morris Agency*, for example, the cost of satisfying a single request for e-mails found on backup tapes was estimated at $9.75 million.\(^{66}\) That same year, in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, Fluor Daniel spent $6.2 million to restore and print e-mail from 93 backup tapes.\(^{67}\)

An oft cited example of how the volume and complexity of e-discovery can result in disaster is *In re Fannie Mae Securities Litigation*, where the court upheld a contempt order against a non-party for failing to comply with a stipulated discovery order.\(^{68}\) The Office of Federal Housing Enterprise Oversight (“OFHEO”) is a federal agency charged with regulating Fannie Mae and Freddie Mac which are “government-sponsored enterprises participating in the secondary mortgage market.”\(^{69}\) A 2003 special review of Fannie Mae’s accounting and financial

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\(^{62}\) Allman, *supra* note 65, at 1. *Compare with* Withers, *supra* note 14, at 36 ("‘Daily e-mail volume is now at 210 billion a day worldwide and increasing.’"). *See generally* Moss, *supra* note 19, at 894 (estimating that businesses exchange 2.5 trillion e-mails annually, with 2 million at a typical company).

\(^{63}\) Allman, *supra* note 65, at 1.

\(^{64}\) Paul & Baron, *supra* note 62, at 14.

\(^{65}\) *Id.* at n.61. This is a good place to pause to crunch some important numbers. E-discoveryteam.com contains a breakdown of how various file formats convert into hard copies of the same document.

- 1 MB is about 75 pages.
- 1 GB is about 75,000 pages (pick-up truck full of documents).
- CD = 650 MB = 50,000 pages.
- DVD = 4.7 GB = 350,000 pages.


\(^{68}\) 552 F.3d 814, 824 (D.C. Cir. 2009).

\(^{69}\) *Id.* at 816.
practices revealed that it “had departed from generally accepted accounting principles in order to manipulate its reported earnings and inflate executive compensation.” OFHEO’s investigation report subsequently prompted several private civil actions against Fannie Mae and its executives, which were consolidated into multidistrict litigation.

During discovery, three individual defendants, Fannie Mae senior executives, subpoenaed OFHEO seeking records related to the investigation.\(^{70}\) Two deadline extensions later, OFHEO reported that it had produced all of the requested documents. Unconvinced, the defendants pressed further, and, eventually, OFHEO disclosed that it had failed to search for off-site disaster recovery backup tapes.\(^{71}\) The defendants moved to hold OFHEO in contempt, and at the motion hearing the parties “entered into a stipulated order that held the contempt motions in abeyance and required OFHEO to conduct searches of its disaster-recovery backup tapes and provide all responsive documents and privilege logs by January 4, 2008.”\(^{72}\) The order also called for collaboration and instructed that the defendants were to choose the search terms. Their 400 search terms resulted in over 660,000 responsive documents (80% of total emails).\(^{73}\)

The court denied OFHEO’s objections to the terms. In an attempt to comply, OFHEO hired fifty contract attorneys for document and privilege review, spending over $6 million on the discovery request, which was “more than 9 percent of the agency's entire annual budget.”\(^{74}\) The agency still requested an extension, and though granted, it asked for another one several months later.\(^{75}\) The defendants renewed their motions to hold OFHEO in contempt, which the district

\(^{70}\) Id.

\(^{71}\) Id. at 816-17.

\(^{72}\) Id. at 817.

\(^{73}\) Id. See also Albert, supra note 62.

\(^{74}\) 552 F.3d at 817.

\(^{75}\) Id. at 817-18.
court granted. The court recognized OFHEO's efforts at compliance, but deemed them "not only legally insufficient, but too little too late" and chastised the agency for “treat[ing] its Court-ordered deadlines as movable goal posts and . . . repeatedly miscalculate[ing] the efforts required for compliance and [seeking] thereafter to move them.”76 As a sanction, the court ordered production of all privileged documents immediately on an attorney's eyes only basis.

A $6 million bill for services required to comply with a third-party subpoena represents a frightening realization of how quickly matters involving e-discovery can spiral out of control.77 E-discovery has been dubbed, quite aptly, as “‘a weapon of mass discovery.’”78 Further, as the court in Rowe Entertainment, Inc. found, “[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter . . . [and] discovery expenses frequently escalate when information is stored in electronic form.”79 In re Fannie Mae

76 Id.

77 See also Sonomedica, Inc. v. Mohler, 2009 WL 2371507 (E.D. Va. July 28, 2009) (holding third parties in contempt and ordering them to pay plaintiff’s attorney fees and costs in the amount of $108,212.15 for violating a court order forbidding them to “touch the computers except to turn them off between now and then” which resulted in spoliation of ESI).

78 McDonald, supra note 10 (quoting Laura Lewis Owens, a partner at Alston & Bird who has dealt extensively with e-discovery issues).

79 205 F.R.D. at 423. See also Moss, supra note 19, at 907-08, cautioning limiting relevant e-discovery: Although denying relevant discovery due to cost may be defensible pragmatically, it is an unsatisfying concession that litigation accuracy inevitably is limited due to the cost of finding and analyzing evidence needed for accurate verdicts or settlements. Less accuracy is troubling not only morally but economically. Failing to impose liability on the guilty because evidence of guilt is too costly insufficiently deters misconduct and insufficiently assures that parties internalize costs (such as the costs of pollution) they impose on others. Conversely, imposing liability on the innocent because exculpatory evidence was too costly yields ill-targeted deterrence of innocent activity: imposing pollution liability on a nonpolluting business just disincentivizes that socially useful commerce.
demonstrates that even government agencies are not shielded from such abuses.\textsuperscript{80} No wonder some are suggesting that “the best litigation defense strategy may be not to litigate at all.”\textsuperscript{81}

C. The E-discovery Process – A Logistical Nightmare

The e-discovery process itself demonstrates its ability to overwhelm discovery. The complex lifecycle of ESI must be understood in order to be managed. However, as recently as May 2005, there was a “lack of standards and guidelines in the electronic discovery . . . market.”\textsuperscript{82} In response to this problem, attorneys, vendors, and end users collaborated to create the Electronic Discovery Reference Model (“EDRM”) Project as a helpful framework of the process for use by practitioners.\textsuperscript{83} They have identified six stages:

1. Information management – getting your electronic house in order to mitigate risk and expenses should e-discovery become an issue, from initial creation of electronically stored information through its final disposition
2. Identification – locating potential sources of ESI and determining its scope, breadth and depth
3. Preservation and collection – ensuring that ESI is protected against inappropriate alteration or destruction and gathering ESI for further use in the e-discovery process
4. Processing, review and analysis – reducing the volume of ESI and converting it, if necessary, to forms more suitable for review and analysis; evaluating ESI for relevance and privilege; and evaluating ESI for content and context, including key patterns, topics, people and discussion
5. Production – delivering ESI to others in appropriate forms and using appropriate delivery mechanisms
6. Presentation – displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native and near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience.\textsuperscript{84}

\textsuperscript{80} See also S.E.C. v. Collins & Aikman Corp., 256 F.R.D. 403, 418 (S.D.N.Y. Jan. 13, 2009) (“When a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties.”).

\textsuperscript{81} Martin, supra note 14, at 29.


\textsuperscript{83} Id.

“E-Discovery sanctions usually involve failure to deal with one of the major lifecycle components properly.”  

Ironically, most law firms have not kept pace technologically with their clients’ explosion of data. As a result, a multi-billion dollar industry has sprouted within a few years in an effort to capitalize on the secondary market for information technology solutions. 

as one e-discovery solutions vendor remarked, “[w]e have already observed . . . many companies changing counsel because of the lack of expertise of certain law firms regarding electronic discovery.” These specialized businesses thus threaten legal profession’s independence.

To counteract the growing reliance on e-discovery vendors, many U.S. law firms have created new practice groups focused primarily on e-discovery. Still, the availability of highly qualified outside specialists raises the questions of whether failing to “retain a vendor presumably means that the lawyer is entirely exposed to charges that one should have been hired,” and which vendor one should use in order to avoid an e-discovery mishap. Thus,

85 Albert, supra note 62. For a more thorough discussion of sanctions, see infra discussion in Part II.E.

86 Whetstone &. Simon, supra note 53. Courts also are reluctant learners. For example, prior to the 1990s, “courts often ignored cost-based objections to computer discovery, blaming computer-using parties [(major companies and government entities)] for ‘a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them’ and thereby rejecting parties’ ‘impossibility contentions insofar as they are grounded in the peculiar manner in which [they] maintain their computer systems.’” Moss, supra note 19, at 900-01 (second alteration in original) (emphasis added). See also Withers, supra note 14, at 36 (“The legal profession is ill-equipped to handle this information explosion. Traditional document-review practices completely break down under the weight of volume and the pressures of deadlines and budget.”).

87 See, e.g., Garry Heath, Redaction in eDiscovery: Reducing the Risk of Inadvertent Information Disclosure with Electronic Redaction, at 2 (Sept. 2008) (discussing a 2006 Forrester Research report, which concluded that “spending on e-discovery technology is expected to reach at least $4.8 billion by 2011, largely driven by an estimated 40% annual increase in gigabytes to be processed”).


89 Id. at 326

90 Id. at 324.

91 Id. at 328.
deciding which e-discovery vendor to hire, if any, may “involve important new professional skills,” thereby further underscoring the challenges of e-discovery for lawyers.

Moreover, as document review is by far the most expensive stage in the EDRM cycle - “with billable rates for junior associates at many law firms now starting at over $200 per hour, the cost to review just one gigabyte of data can easily exceed $30,000” - it is not surprising that outsourcing discovery work to entities abroad, particularly document review, is becoming more prevalent. For example, “the estimated number of people working at legal outsourcing firms in India tripled from 1,800 to almost 6,000 lawyers between March 2005, and the end of 2006, and that document review projects done by these firms are typically billed at $15 to $25 per hour.”

The legal profession is rapidly changing. These changes “have given rise to the ‘litigators,’ a class of trial lawyers who seldom, if ever, actually try cases. They conduct discovery and related pre-trial activities in more than 90 percent of cases that never reach the courtroom on the merits.” The driving, if not the sole, force behind this unprecedented evolution is e-discovery. Whether this shift is positive, though, is highly subjective. Contracting outside e-

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93 See Heath, supra note 98, at 3.

94 Practices Commentary on the Use of Search and Information Retrieval Methods in E-discovery, SEDONA CONFERENCE JOURNAL, Vol. 8, 189, 192 (Fall, 2007). See also Heath, supra note 98, at 3. Document review is so resource consuming partly because the collected information must be reviewed for confidential and privileged materials, which must then be redacted. Heath at 3. The FRCP address privilege, confidentiality, and waiver, see infra notes 122-24 and accompanying text; however, a detailed discussion of those topics is beyond the scope of this Note. Still, these requirements shine a light on additional law firm inefficiencies as “a recent survey of law firms across the United States revealed that 74 percent of those law firms taking the survey still perform redaction manually while only 44 percent now employ technology to protect privileged information.” Heath at 2.

Of course, e-discovery complicates the redaction process even more as it is no longer just the traditional blacking out of sensitive information with a marker. Rather, “[i]t is the complete removal of content from an electronic document, making it irretrievable and unavailable for view, print, search or copy. It can be manual (with the user drawing a box over the area), automatic (allowing searches for a text string) or intelligent (by matching patterns – finding all social security numbers).” Id. at 3.

95 See Marcus, supra note 99, at 325-26. See also id. (mentioning a February 2008 San Francisco Reporter article reporting that D.C.-based law firm Howrey was opening an office in India to “‘handle document management in litigation’.”)
discovery vendors and outsourcing data to foreign countries for review may be smart business decisions; however, the frequent utilization of these techniques may also signify a lowered confidence of the legal profession in properly handling e-discovery. The EDRM Project is a good starting point for explicating these complex processes; still, even one of its creators, George Socha, “admits the project is a long way from creating any kind of standard reference model, and will need more input from vendors.”

Clear, uniform and binding guidelines that reflect and respond to the e-discovery experiences of practitioners, the judiciary, and other major players in civil litigation are necessary to ease this discomfort and restore poise among attorneys.

D. The Federal Rules of Civil Procedure

The 2006 Amendments to the FRCP assist counsel and judiciary with dealing the various problems of e-discovery. Effected on December 1, 2006, they are “the culmination of more than five years of drafting, discussion and public comment.” The language inserted into rules 16, 26, 34, and 37 encompasses ESI. The changes reflect the critical role that discovery of email and other ESI has come to play in every case. The drafters also recognized “the inconsistencies in developing case law on e-discovery, the emergence of disparate local federal court rules, and a growing trend toward the balkanization of rules and practice that created a patchwork of rules and requirements throughout the country.”


97 Outsourcing, though relevant to any discussion about the current state of the economy in the United States, is beyond the scope of this article. Similarly, the increasing influence of e-discovery technology vendors is raised briefly to merely illustrate the confounding effect of the phenomenon of e-discovery on modern litigation.


99 Id.
100 Cortese, supra note 54, at 18.
In general, the 2006 Amendments treat e-discovery differently from other discovery; they command early attention to and discussion about e-discovery; they suggest a two-tiered approach whereby parties deal with reasonably accessible information before inaccessible data; they address inadvertent production of privileged or confidential materials; and they provide a safe harbor from sanctions by imposing a good faith requirement. 101

Rule 16(b) was designed “to alert the court to the possible need to address the handing of discovery of [ESI] early in the litigation if such discovery is expected to occur.” 102 It encourages the court to address disclosure or discovery of ESI in the Rule 16 scheduling order, and gives the court discretion to include in the order “any agreements the parties reach for asserting claims of privilege or protection after inadvertent production in discovery.” 103

Rule 26(a)(1) clarifies the parties’ duty to include ESI in their initial disclosures by substituting the word “ESI” for “data compilations.” 104 They must also have an electronic data inventory, including the location, form, and accessibility of all of their ESI, ready at the pretrial conference. 105 The Rule recognizes the initial disclosures will be made “based on the information then reasonably available to [the parties;]” however, it warns that parties will not be excused from making these disclosures for, among other reasons, not fully investigating the case. 106

Rule 26(b)(2) creates a two-tier approach to the discovery of ESI. The Rule states that parties need to identify, though not provide, ESI from sources that have not been searched or


103 Tollson, supra note 18, at 5. See also Fed. R. Civ. P. 16 advisory committee note, 2006 amendment.


105 Tollson, supra note 18, at 5.

produced as they was not reasonably accessible, ex. backup tapes, because of undue burden or cost. If the requesting party nonetheless moves for production of such information, the responding party has the burden of showing that the information is not reasonably accessible. Even if the showing is made, the court may nonetheless order discovery for good cause but impose conditions. This rule also commands courts to engage in a cost-benefit analysis and use their discretion in order to “limit the frequency or extent of discovery otherwise allowed by [the FRCP] or by local rules.”

Rule 26(b)(5) outlines a procedure for asserting privilege after production, a change that parallels those made to Rules 16 and 26(f). If privileged ESI is produced, the receiving party must, upon notification from the producing party, “promptly return, sequester, or destroy the specified information and any copies it has” without reviewing or reading the requested data until the claim is resolved. It is the producing party’s responsibility to realize and notify the receiving party that they had inadvertently released privileged information; the receiving party is under no obligation to make this determination.

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108 Id.
109 Id.
112 Id.
113 Tollson, supra note 18, at 6. Rule 26(b)(5) is often applied in tandem with Rule 502 of the Federal Rules of Evidence (“FRE”) which states that disclosure does not operate as a waiver if it was inadvertent, the privilege holder “took reasonable steps to prevent disclosure,” and “the holder promptly took reasonable steps to rectify the error,” including following FRCP 26(b)(5)(B). Fed. R. Evid. 502(b). The FRE advisory committee pointed out that a party may be found to have taken ‘reasonable steps’ to prevent inadvertent disclosure if it “use[d] advanced analytical software applications and linguistic tools in screening for privilege and work product.” Fed. R. Evid. 502(b) advisory committee note. However, “federal courts have long recognized that such screening comes with limitations and risks because the proper selection and implementation of such technology involves both legal and
Rule 26(f) requires parties to discuss any issues about the discovery of ESI at the pre-trial conference and come up with a “discovery plan.”114 Specifically, they must decide on the form, scope and timing of production and resolve any privilege and protection concerns.115 The amendments also encourage parties to “enter into voluntary agreements under which the inadvertent production of privileged or protected materials would not result in a waiver.”116

Rule 34 explicitly recognizes ESI as a separate category of discoverable data and permits the requesting party to specify, usually at the initial meet and confer meeting, the form of format of data production.117 A key provision of Rule 34 is the production of data in “a form of forms which it is ordinarily maintained or in a form or forms that are reasonably usable.”118

Rule 37(e) is the “safe harbor” provision. It protects a party from sanctions for failing to provide ESI “lost as a result of the routine, good-faith operation of an electronic information system.”119 To claim this protection, a party must show that it modified or suspended the routine operation of computer systems to prevent loss of data subject to a preservation requirement.120 Evidence of a defensible process is required and may include data retention policies, formal scientific knowledge.” Heather Y. Fong, FRE 502: A Reasonable Step to Reduce Costs? (Jan. 14, 2009), http://ediscovery.quarles.com/articles/case-law/ (last visited Apr. 2, 2010). Moreover, cases interpreting the FRE 502 continue to stress the need for attorneys to conduct meticulous privilege review. Id. See, e.g., Rhoads Indus., Inc. v. Bldg. Materials Corp., 2008 WL 4916026 (E.D. Penn. Nov. 14, 2008) (upholding privilege only on inadvertently disclosed documents that were manually reviewed and logged by an attorney); Relion, Inc. v. Hydra Fuel Cell Corp., 2008 WL 5122828 (D. Or. Dec. 4, 2008) (finding privilege waived for holder’s failure to conduct a page by page review).


115 Id.

116 Osterman Research, supra note 112, at 4.

117 Fed. R. Civ. P. 34.


120 Osterman Research, supra note 112, at 2.
litigation holds, attorney follow up, etc. Still, this rule is very subjective, and courts have disagreed with parties’ assertions of good faith finding them liable for spoliation anyway.

The 2006 Amendments are a major step toward offering instructions to counsel and the judiciary about their ever-evolving roles and responsibilities. Nonetheless, the Rules and their Amendments have failed to provide guidance in several crucial areas of discovery. For example, the FRCP have not eased the confusion of when the pre-litigation duty to preserve actually arises as the Amendments “have declined to directly address this issue.” Nor do they specify what sources of ESI should be considered “not reasonably accessible,” thereby creating what one practitioner coins as a “conundrum” of “whether there is any duty to preserve ESI from a source that a party has designated as ‘inaccessible.’” Additionally, while the FRCP explicitly provide

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121 Tollson, supra note 18, at 7.

122 See Wachtel v. Health Net, Inc., 2006 WL 3538935, at *8 (D.N.J. Dec. 6, 2006) (“Health Net’s process for responding to discovery requests was utterly inadequate” as they “relied on the specified business people within their company to search and turn over whatever documents they thought were responsive, without verifying that the searches were sufficient” and “many of these specific employee conducted-searches managed to exclude incriminating documents that were highly germane to Plaintiffs’ requests”); In re NTL, Inc. Sec. Litig., 244 F.R.D. 179, 194, 199 (S.D.N.Y. Jan. 30, 2007) (“Although NTL sent out hold memos . . . those hold memos were not sufficient, since they subsequently were ignored . . . The evidence, in fact, is that no adequate litigation hold existed.”); see also Google Inc. v. Am. Blind & Wallpaper Factory, Inc., 2007 WL 1159950, at *2 (N.D. Cal. June 27, 2007) (ordering American Blind to provide a declaration stating “what they did with respect to preserving and collecting documents” (emphasis in original)); Exact Software N. Am., Inc. v. Infocon, Inc., 2006 WL 3499992 (N.D. Ohio Dec. 5, 2006) (demanding an outline of steps taken to preserve, search and collect ESI in response to the discovery request). But see Gippetti v. UPS, Inc., 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008) (denying spoliation sanctions for destruction of ESI pursuant to a defensible document retention policy).

123 SEDONA CONFERENCE, The Sedona Commentary on Legal Holds: The Trigger and the Process, at 5 (Aug. 2007) [hereinafter SC Legal Holds]. Nonetheless, the courts are willing to impose sanctions “molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine” for destroyed or lost emails even in situations where a preservation hold was in effect. Silvestri v. GMC, 271 F.3d 585, 590 (4th Cir. 2001) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2nd Cir. 1999)).

124 See Fed. R. Civ. P. 26(b)(2), advisory committee notes, 2006 amendment (describing the task of “defin[ing] in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information” as impossible).

125 Steve Puiszis, Conundrum of preserving backup tapes and inaccessible sources of information (Apr. 27, 2009), http://blog.hinshawlaw.com/practicalediscovery/2009/04/27/conundrum-of-preserving-backup-tapes-and-inaccessible-sources-of-information/ (last visited Feb. 13, 2010). To complete this Catch-22, the advisory committee’s notes to FRCP 26(b)(2) caution that “[a] party’s identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve
for collaboration, they “fall short in explaining why such collaboration is essential, the extent to which it must occur, or its necessary iterative fashion.” Further, the FRCP, particularly Rules 26(b)(2) and 37(e), expose litigants to ambiguous tests that are difficult to apply in today’s state of global information technology. Legally loaded and open-ended phrases such as “undue costs and burden,” “reasonably accessible,” “routine good faith operation,” and “good cause” found in these rules can turn into traps that even the most well-intentioned litigant would stumble over.

Therefore, a glance at recent case law of e-discovery is required to further assist in understanding its intricacies and subtleties.

E. Case Law

Undoubtedly the best known and most often cited series of e-discovery cases is *Zubulake v. UBS Warburg*. The decisions, spanning three years, set out widely followed tests and standards regarding various areas of major e-discovery concerns – cost-shifting, application of adverse inference instructions, and counsels’ duties in assuring compliance.

In this gender discrimination and illegal retaliation lawsuit filed by one of UBS’s former female employees, the plaintiff, Zubulake, requested that defendant UBS Warburg (“UBS”) produce “[a]ll documents concerning any communication by or between UBS employees evidence” and preservation requirements “depend[] on the circumstances of each case.”

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127 *See* Final Report on the Joint Project of The American College of Trial Lawyers Task Force on Discovery and The Institute for the Advancement of the American Legal System, 14 (Apr. 15, 2009) [hereinafter ACTL Final Report].

concerning plaintiff.”

Since she herself produced 450 pages of relevant emails, defendant’s production of only 350 pages was obviously inadequate. Zubulake requested that the defendants produce the missing emails from archival media, which consisted of backup tapes and optical disks.

Claiming undue burden and expense, UBS urged the court to shift the cost of production to the plaintiff, citing the Rowe decision. Noting that cost-shifting “should be considered only when electronic discovery imposes an ‘undue burden or expense’ on the responding party,” with the burden turning primarily on whether the data is accessible, Judge Scheindlin determined that the application of the Rowe factors may result in disproportionate cost shifting away from large defendants. Therefore, she set forth a new seven-factor test, urging that the factors should not be weighed equally, and ordered UBS to produce, at its own expense, all responsive email existing on its optical disks, active servers, and five backup tapes as selected by Zubulake, with a proper cost-shifting analysis to be conducted after the contents of the backup tapes were reviewed and UBS’s costs were quantified.

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129 Zubulake I, see supra note 140, at 312.

130 Id. at 313.

131 Id. at 316 (citing Rowe Entertainment, Inc. v. The William Morris Agency, discussed supra note 72).

132 Id. at 318, 320 (emphasis in original).

133 The seven factors are:

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

Id. at 322.

134 Id. at 322-24.
In *Zubulake III*, Judge Scheindlin applied the seven-factor test she had established in *Zubulake I*. Determining that factors 1, 2, and 3 weighed slightly against cost-shifting, that application of factor 4 would not rule out cost-shifting, that factors 5 and 6 were neutral, but that factor 7 favored cost-shifting as the plaintiff had more to gain from the discovery than the defendant, the judge ordered 25% of the estimated $166,000 for restoring and searching the back-up tapes be shifted to Zubulake. However, the judge did not shift any of estimated $108,000 for producing the restored emails.

In the restoration effort ordered in *Zubulake III*, the parties discovered that certain backup tapes were missing and that emails had been deleted. In *Zubulake IV*, Zubulake moved for monetary sanctions and an adverse inference instruction for UBS’s failure to preserve the

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135 *Zubulake III*, *see supra* note 140, at 284-89.

136 *Id.* at 289-91.

137 *Id.* The *Zubulake* test has generally been followed and respected by the courts. *But see* Tierno v. Rite Aid Corp., 2008 WL 3287035, at *4 (N.D. Cal. July 31, 2008) (magistrate judge “clearly erred” by analyzing cost-shifting dispute for paper production under the seven-factor *Zubulake* test which is “intended solely for electronic discovery, not for discovery of paper documents”) (emphasis in original); Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County, 124 Cal. App. 4th 762 (Cal. Ct. App. 2004) (holding that the plaintiffs should pay for the 800 million backup tapes they had requested which would cost $1.5 to $1.9 million to restore, concluding that “[o]ur Legislature has identified the expense of translating data compilations into usable form as one that, in the public’s interest, should be placed upon the demanding party). Nonetheless, Satterwhite and Quatrara predict that, even in light of the 2006 Amendments to the FRCP, the “courts will more likely continue to look to the analysis in *Zubulake* because it remains one of the most comprehensive discussions on [determining accessibility of ESI].” Satterwhite & Quatrara, *supra* note 12, at 10. They point out that although FRCP 26(b)(2)(C) indicates that a party “need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost,” the *Zubulake* decision makes distinctions between accessible and inaccessible “based purely on the technological methods used for retrieval.” *Id.* (quoting *Fed. R. Civ. P. 26(b)(2)(C)). Therefore, “to avoid further disparity in allocating the costs of electronic discovery, courts must be prepared to take a broader view of accessible versus inaccessible within the meaning of Rue 26.” *Id.* at 11. Additionally, as the parts of Rule 26 from which the reasoning in *Zubulake* was derived were not amended, courts will likely continue to look to the *Zubulake* test in determining the appropriateness of cost-shifting. *Id. See, e.g.*, In re Veeco Instruments, Inc., 2007 U.S. Dist. LEXIS 23926 (S.D.N.Y. Apr. 2, 2007) (addressing the 2006 Rule Amendments and the advisory committee’s recommendations, but nevertheless relying on the *Zubulake* test in cost shifting analysis).

138 *Zubulake IV*, *see supra* note 140, at 215.
missing tapes and emails. Judge Scheindlin determined that the duty to preserve attached in April 2001 when “almost everyone associated with Zubulake recognized the possibility that she might sue.” She then outlined the scope of a party’s preservation obligation:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes . . ., which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible . . ., then such tapes would likely be subject to the litigation hold.

Finding that UBS failed to comply with its own retention policy, Judge Scheindlin concluded that UBS had a duty to preserve the backup tapes at issue and that it destroyed them with the requisite culpability. However, as Zubalake could not demonstrate that the lost evidence would have supported her claims, an adverse inference instruction was not warranted. Nevertheless, the judge ordered UBS to bear Zubulake’s costs for re-deposing certain witnesses in light of the destroyed ESI.

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139 Id. at 215-16. A party seeking an adverse inference instruction based on the spoliation of evidence must establish:

- (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) that the records were destroyed with a “culpable state of mind” and
- (3) that the destroyed evidence was “relevant” to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. In this circuit, a “culpable state of mind” for purposes of a spoliation inference includes ordinary negligence. When evidence is destroyed in bad faith (i.e., intentionally or willfully), that fact alone is sufficient to demonstrate relevance. By contrast, when the destruction is negligent, relevance must be proven by the party seeking the sanctions.

Id. at 220 (internal citations and footnotes omitted).

140 Id. at 217. Zubulake was hired on August 23, 1999; filed her EEOC charge on August 16, 2001; was fired on October 9, 2001; and commenced the lawsuit on February 15, 2002. Zubulake, 217 F.R.D. at 312.

141 220 F.R.D. at 218.

142 Id. at 219, 221 (“UBS was grossly negligent, if not reckless, in not preserving those backup tapes.”).

143 Id. at 221-22. See also Scalera v. Electrograph Sys., Inc., 2009 WL 3126637 (E.D.N.Y. Sept. 29, 2009) (denying plaintiff’s request for adverse inference absent demonstration that lost emails were favorable to plaintiff); ACORN v. County of Nassau, 2009 WL 605859 (E.D.N.Y. Mar. 9, 2009) (finding the failure to implement a litigation hold as grossly negligent but declining to order an adverse inference instruction where plaintiff failed to establish relevance of the information destroyed).
The essence of the dispute in *Zubulake V* was that “during the re-depositions required by *Zubulake IV*, Zubulake learned about more deleted e-mails and about the existence of e-mails preserved on UBS's active servers that were, to that point, never produced.” ¹⁴⁵ Alleging that, by producing the recovered emails long after the initial document requests, UBS has prejudiced her case and having now real evidence that UBS personnel purposely deleted relevant e-mails, Zubulake again moved for an adverse inference instruction.¹⁴⁶

This time the court found that “UBS acted wilfully [sic] in destroying potentially relevant information, which resulted either in the absence of such information or its tardy production[, and b]ecause UBS's spoliation was willful, the lost information is presumed to be relevant.”¹⁴⁷ Therefore, the jury instruction was appropriate and UBS was ordered to pay costs.¹⁴⁸ The judge also noted that although the duty to preserve and produce rests on the parties, the defense counsel was partly to blame because it had failed to monitor compliance with the litigation hold by not taking “*some reasonable steps*.”¹⁴⁹ She then outlined a lengthy list of counsels’ responsibilities:

[C]ounsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client's information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly

¹⁴⁴ *Id.* at 222.

¹⁴⁵ *Zubulake V*, see *supra* note 140, at 426.

¹⁴⁶ *Id.* at 426, 430.

¹⁴⁷ *Id.* at 436.

¹⁴⁸ *Id.* at 439-40.

¹⁴⁹ *Id.* at 431-34.
and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve.150

Zubulake eventually prevailed at trial, winning a $29.3 million verdict, including $20.2 in punitive damages.151 This case stands as a classic example of what can happen if compliance with preservation obligations is placed “in the hands of custodians whose personal behavior was implicated by the allegations of wrongdoing.”152

Forest Laboratories, Inc. v. Caraco Pharmaceutical Laboratories, Ltd.153 further interpreted Zubulake. The defendants filed a spoliation motion claiming the plaintiff failed to preserve backup tapes concerning the drug it manufactured which was the focus of the litigation.154 The court relied on Zubulake’s reasoning that, generally, inaccessible backup tapes, such as those “typically maintained solely for the purpose of disaster recovery,” do not fall within the scope of a litigation hold.155 However, if the backup tapes are “actively used for information retrieval” and thus are accessible, they are likely subject to the litigation hold and must be preserved.156 The Forest Labs court ultimately found that the plaintiff’s backup tapes were inaccessible because they were used solely for disaster recovery.157

150 Id. at 439.


152 Allman, supra note 65, at 1.


154 Id. at *2-*3.

155 Id. at *11 (quoting Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

156 Id.

157 Id. at *13.
The plaintiff’s victory was short-lived, though, as the district court also recognized that \textit{Zubulake} identified an exception to its general rule:

If a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of “key players” to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to \textit{all} backup tapes.\footnote{Id. at *14-*15 (quoting Zubulake, 220 F.R.D at 218) (emphasis in original). Moreover, as Puiszis, supra note 137, points out, “it [sic] a party uses its backup tapes for anything other than for disaster recovery, it is unlikely that a court will conclude those backup tapes are inaccessible.”}

Accordingly, the \textit{Forest Labs} court ordered a hearing to determine if the exception was applicable to the backup tapes in question.\footnote{Id. at *21-*23.} Therefore, even a favorable finding did not shield the plaintiff from further scrutiny in the realm of e-discovery.\footnote{For other instances where a party ultimately succeeded on the merits but still faced severe sanctions for e-discovery mishaps, see Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., 2009 U.S. Dist. LEXIS 31555 (E.D. Mich. Apr. 14, 2009); Qualcomm Inc. v. Broadcom Corp., 2008 WL 66932 (S.D. Cal. Jan. 7, 2008); Keithley v. Homestore.com, Inc., 2008 WL 383384 (N.D. Cal. Aug. 12, 2008). For instances where even inadvertent deficiencies in the preservation of ESI have compromised and otherwise-valid claim or defense, see Arista Records, LLC v. Usenet.com, Inc., 2009 WL 1873589 (S.D.N.Y. June 30, 2009); Kvitka v. The Puffin Co. LLC, 2009 U.S. Dist. LEXIS 11214 (M.D. Pa. Feb. 13, 2009).}

Another notable federal magistrate, John M. Facciola, explained in \textit{Peskoff v. Faber} that accessible data must be produced at the cost of the producing party, unless the producing party can prove the documents are inaccessible.\footnote{240 F.R.D. 26, 31 (D.D.C. Feb. 28, 2007). \textit{See also} F.R.C.P. 26(b)(2)(b).} In a subsequent hearing,\footnote{Peskoff v. Faber, 251 F.R.D. 59 (D.D.C. July 7, 2008).} the court determined that, as a result of the defendant's failure to preserve ESI, inadequate search efforts, and general unwillingness to take “discovery obligations seriously,”\footnote{Id. at 62.} the ESI sought by plaintiff from defendant could not be obtained without the aid of a forensic examination, which “necessarily involves the search of sources ‘not reasonably accessible because of undue burden or cost.’”\footnote{Id. at 60.}
However, as the ESI sought was “highly relevant, not duplicative, and [could not] be obtained from other sources,” the court found that good cause existed. Further, as “[t]his [was] a problem of [the defendant’s] own making and, consequently, the expense and burden of the forensic examination can hardly be described as ‘undue,’” the court allocated the costs to defendant under FRCP 26 and FRCP 34.165

In *Lorraine v. Markel American Insurance Company*, plaintiffs sued an insurer to enforce a private arbitrator’s award.166 The insurer counterclaimed and both parties filed cross-motions for summary judgment. The court was unable to resolve the matter based on the submissions, however, because the parties' documentary evidence was not authenticated, as required by Fed. R. Civ. P. 56(e).167 In denying both motions without prejudice, the court explained that, to be admissible, “ESI must be 1) relevant, 2) authentic, 3) not hearsay or admissible hearsay, 4) the ‘best evidence’, and 5) not unduly prejudicial.” The court concluded that it “can be expected that electronic evidence will constitute much, if not most, of the evidence used in future motions practice or at trial, [and] counsel should know how to get it right on the first try.”168

In addressing the proper timing of a litigation hold, the court in *Oxford House, Inc. v. City of Topeka*, a suit alleging that the defendant improperly denied several conditional housing permits, determined, in response to the plaintiff’s motion to compel, that until there was a likelihood of litigation there was no obligation to preserve overwritten e-mails.169 Usually, “a party is deemed to have notice of pending litigation if the party has received a discovery request, 

165 *Id.* at 63.


167 *Id.* at 585.

168 *Id.*

a complaint has been filed, or any time a party receives notification that litigation is likely to be commenced.\textsuperscript{170} As the defendant received a notice of pending litigation only two months \textit{after} destroying the disputed emails, there was not duty to preserve the evidence.\textsuperscript{171} Moreover, the court balanced the costs and benefits and found that retrieval of the requested ESI from backup tapes used primarily for disaster recovery would be unduly burdensome.\textsuperscript{172}

However, the magistrate in \textit{Phillip M. Adams & Associates, L.L.C. v. Dell, Inc.} held that a defendant should have imposed a litigation hold eight years before the suit was filed. The loss of evidence thus could not be excused as "'a result of the routine, good-faith operation of an electronic information system.'"\textsuperscript{173} This decision illustrates how far some courts will go.

\textit{Mancia v. Mayflower Textile Services Co.} underscored the importance of cooperation and communication between parties during discovery. In this case, employees filed an action against defendant under the Fair Labor Standards Act for “knowingly failing to compensate [p]laintiffs for overtime work and illegally deducting wages from the [p]laintiffs' pay.”\textsuperscript{174} At a subsequent hearing aimed at addressing plaintiff’s objections to defendant’s allegedly inadequate answers to interrogatories, Magistrate Judge Grimm raised concerns about the seemingly excessive breadth and cost of plaintiff’s discovery demands as well as the defendant’s boilerplate objections.\textsuperscript{175}

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\begin{itemize}
  \item \textsuperscript{170} \textit{Id.} at *10.
  \item \textsuperscript{172} \textit{Oxford House Inc.}, 2007 U.S. Dist. LEXIS 31731, at *16.-*17. \textit{Cf.} Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd., discussed \textit{infra} notes 166-73 and accompanying text.
  \item \textsuperscript{173} 621 F.Supp.2d 1173, 1191 (D. Utah 2009) (quoting Fed. R. Civ. P. 37(e)).
  \item \textsuperscript{174} 253 F.R.D. 354, 355 (D. Md. 2008).
  \item \textsuperscript{175} \textit{Id.} at 356.
\end{itemize}
After commenting that this dispute lent itself well to a resolution through increased cooperation and communication and advising the parties on what proper steps they should take next, Magistrate Judge Grimm turned his attention to “[o]ne of the most important, but apparently least understood or followed” FRCP, 26(g).\(^{176}\) This Rule requires that every request, response and objection be signed by an attorney.\(^{177}\) The signature certifies that, to the best of the signing party’s “knowledge, information, and belief formed after a reasonable inquiry,”\(^ {178}\) the discovery request, response, or objection, is (i) consistent with the FRCP and warranted by existing law; (ii) not imposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.\(^ {179}\)

Next, the Magistrate remarked upon Rule 26(g)’s function in limiting discovery. First, the Rule “is intended to impose an ‘affirmative duty’ on counsel to behave responsibly during discovery,” which includes “cooperation rather than contrariety, communication rather than confrontation.”\(^ {180}\) Second, the Rule authorizes the court to impose sanctions if it is violated, absent “substantial justification,” as a means of penalizing and deterring noncompliance.\(^ {181}\) Third, it “aspires to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party” as

\(^{176}\) Id. at 356-57.

\(^{177}\) FED. R. CIV. P. 26(g)(1).

\(^{178}\) Id.

\(^{179}\) FED. R. CIV. P. 26(g)(1)(B).

\(^{180}\) Mancia, 253 F.R.D at 357-58.

\(^{181}\) Id. at 358.
well as ending “the equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis.”182

Rule 26(g) is becoming the go-to enforcement device in the federal courts.183 Therefore, “[w]hile Mancia does not specifically address e-discovery issues, it could have a wide-ranging effect on cases that involve massive amounts of [ESI]”184 if it is followed by other courts.

In Victor Stanley, Inc. v. Creative Pipe, Inc. Magistrate Judge Grimm held the defendants in a copyright suit did not take reasonable precautions to prevent inadvertent disclosure and thereby waived their privilege to 165 documents that were discovered and produced as a result of an insufficient keyword search.185 Although these documents were first reviewed for privilege by the company’s former attorneys, time constraints permitted them to look only at the titles.186 Magistrate Judge Grimm, in ruling against the company and pointing to their fatal error of not sampling the produced data, warned that “[a]ll keyword searches are not created equal”187 and considered “any order issued now by the court to attempt to redress these disclosures would be the equivalent of closing the barn door after the animals have already run away.”188

Magistrate Judge Facciola expressed a similar concern when he opined in United States v. O’Keefe that determining “whether search terms or ‘keywords’ will yield the information sought

182 Id.


184 Id.


186 Id. at 256.

187 Id. at 256-27.

188 Id. at 263.
is a complicated question involving the interplay, at least, of the sciences of computer
technology, statistics and linguistics.”

He went on to suggest, that

[g]iven this complexity, for lawyers and judges to dare opine that a certain search
term or terms would be more likely to produce information than the terms that
were used is truly to go where angels fear to tread. This topic is clearly beyond
the ken of a layman and requires that any such conclusion be based on evidence
that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence
[which dictates that an expert witness may testify “[i]f scientific, technical, or
other specialized knowledge will assist the trier of fact to understand the evidence
or to determine a fact in issue . . . .”]

Although this was a criminal case, the judge applied the FRCP because the
Federal Rules of Criminal Procedure did not encompass the significant e-discovery issues
involved in this case. In response to the co-defendant’s motion to compel claiming that
the government had not fulfilled its discovery obligations, the judge ultimately ordered
the parties to make a good faith attempt to reach an agreement on production.

Similarly, Facciola ordered expert testimony to challenge the search terms at issue in

*Equity Analytics, LLC v. Lundin.*

Remarkably, the FRCP do not “explicitly mandate the use of information retrieval
experts in the discharge of discovery obligations.” However, although the Rules do not

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190 Id. (quoting FED. R. EVID. 702). *But see* D’Onofrio v. SFX Sports Group, Inc., 254 F.R.D. 129 (D.D.C.
2008) (Facciola creating his own search protocol for the parties to follow); William A. Gross Constr. Assocs. Inc. v.
searches in the dark, by the seat of the pants, without adequate . . . discussion with those who wrote the emails [at
issue]” and complaining that the situation “left the Court in the uncomfortable position of having to craft a keyword
search methodology for the parties, without adequate information from the parties,” before finally concluding that
although expert testimony was not necessary at that point, “what is required is something other than a lawyer’s
guesses, without client input, and without any quality control testing to see if the search terms produce reasonably
all the responsive ESI and limited ‘false positives’”).


192 Id. at 21.

formally hold parties to the standards of FRE 702, courts sometimes look to it for guidance when considering productions of ESI, as *O’Keefe* and *Equity Analytics* clearly demonstrate. This is yet another example of the FRCP’s inability to provide sufficient directive to practitioners and of the need to supplement the Rules with other sources of law. Furthermore, as the cases highlighted in this section reveal, the FRCP are often subjective and open-ended, which makes it difficult to extricate predictable patterns to use for future reference before issues of preservation and/or production arise. As “[t]he federal amendments were the result of many compromises necessitated by their application to all federal cases in courts throughout the country . . . , they did not attempt to solve all e-discovery problems . . . .” The 2006 Amendments are thus, at best, a good starting point. However, early experience with them underscores the importance of continued assessment, evaluation and communication in a collective effort to develop clear, uniform and binding guidelines that reflect and respond to the e-discovery experiences of practitioners, the judiciary, and other major players in civil litigation.

F. Is Proceeding with Litigation in Pursuit of a Victory Worth Dealing with E-discovery?

One commentator did not think so: “[e]ven in the small number of cases in which there is a net return to investors, the settlement may often be, at best, only roughly related to the merits of the underlying claims, resulting in the over-compensation of weak claims and the under-compensation of strong claims.” Others remarked that “[i]t is ‘amazing’ how often [small complex cases] ultimately will settle for amounts that bear little resemblance to the parties’

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195 *Id.* at 5.
196 Cortese, *supra* note 54, at 18.
substantive damage contentions, but rather are settled on cost of defense grounds” and warn that winning this type of a case on its merits may sometimes be “the worst thing that can happen to a client (and its lawyers who may not get paid in full).” 198

Additionally, the recently published results of surveys administered by the American College of Trial Lawyers reported that the Fellows strongly agreed that discovery is too expensive (87% in agreement), as is litigation in general (85% in agreement), with the costs impacting the initiation of lawsuits as well as their settlement. 199 Specifically:

- Nearly 81% of Fellows report that their firms turn away cases when it is not cost-effective to handle them;
- 83% of Fellows believed that litigation costs drive cases to settle that should not settle on the merits; and
- Over 94% of Fellows believed trial costs are an important factor in driving cases to settle, and a nearly equal number believe the same about attorney fees. 200

Another determinative factor contributing to attorneys’ hesitations of going forth with litigation may be the stringent consequences for failure to meet the standards imposed upon them. In general, an attorney owes a duty of care to clients to “exercise the competence and diligence normally exercised by lawyers in similar circumstances.” This relatively low standard has recently gained more force as “the skills and legal knowledge that might be deemed an essential part of ‘competency’ are rapidly changing with technological advances,” particularly in the context of e-discovery. 201

Whereas in the past disciplinary actions were limited to situations

198 Worden & Mahoney, supra note 2.
199 ACTL Interim Report, supra note 2, at A-6.
200 Id. See also Marie Gryphon, Greater Justice, Lower Cost: How a “Loser Pays” Rule Would Improve the American Legal System, 11 CIVIL JUSTICE REPORT 9 (Dec. 2008) (“Reasons Lawyers Decline Contingent Fee Cases” – 47%, no liability; 19%, inadequate damages; 13%, no liability and inadequate damages; 11%, outside area practice; 11%, other) (from Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States, Stanford University Press, 2004, Table 3.9.)
201 Kwuon & Wan, supra note 56.
that involved a pattern of neglect and consistent failure to carry out obligations, attorneys are now charged with the affirmative duty of ensuring rules-compliant document production, which “makes it highly probable that malpractice claims will largely center on counsel’s competency in advising clients as to preservation and production of e-discovery as well as compliance with the federal e-discovery amendments.”

Again, attorneys have little guidance. State professional ethics committees failed to state how e-discovery “fits into the competency matrix of ‘legal knowledge, skill, thoroughness and preparation’ necessary for representation.” Further, the applicable standards are set by elusive case law. Attorneys must thus tread blindfolded toward a precipice and face the possibility of sanctions for deficient discovery responses under FRCP 26(g), liability for negligence and intentional misconduct under FRCP 37, and even personal liability for common law spoliation.

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203 Kwuon & Wan, supra note 56 (quoting MODEL RULES OF PROF’L CONDUCT R.1.1).

204 Id. Spoliation is “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Byrnie v. Town of Cromwell, 243 F.3d 93, 107 (2d Cir. 2001) (quoting West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) (internal citations omitted)). Today, sanctions for spoliation almost exclusively involve ESI and can include civil contempt or monetary sanctions with the penalty being related to the other party’s attorneys’ fees and costs, specifically authorized by FRCP 37(b)(2), or an arbitrary amount; exclusion of testimony or evidence; adverse inference instructions which inform the jury that it can infer that the compromised documents contained adverse evidence; dismissal of claims or defenses, an extreme sanction usually reserved for intentional destruction of ESI; civil causes of action for spoliation already recognized by some states; and obstruction of justice as in the extreme circumstances where criminal penalties are involved. Steven A. Weiss, Do Not Delete: Sanctions for Spoliation of Electronic Evidence, ABA THE COMMITTEE ON PRETRIAL PRACTICE AND DISCOVERY NEWSLETTER, Vol. 13, No. 2, at 6-7 (Spring 2005). “Sanctions are intended to place the aggrieved party in the position it would have been had the spoliation not occurred (and also have some deterrent effect.” Id. at 9. Still, choosing the proper one can be difficult because it is impossible to know the content of what was destroyed. Id. However, it has long been established that “spoliation of evidence germane ‘to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.’” Zubulake v. UBW Warburg, 229 F.R.D. 422, 430 (citing Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1999)). Therefore, adverse inference instructions are
The result in Qualcomm Inc. v. Broadcom Corporation\textsuperscript{205} perhaps best demonstrates the consequences of not adhering to these delicate procedures. In this patent infringement case, a California federal court judge sanctioned wireless chip developer Qualcomm Inc. over $8.5 million in attorneys’ fees and costs for its failure to produce tens of thousands of documents that Broadcom had requested in discovery.\textsuperscript{206} One of Qualcomm’s central arguments rested on their position that “prior to September 2003 it had not been involved in working on a committee tasked with creating a video coding standard.”\textsuperscript{207} A subsequent search, though, revealed 46,000 emails totaling over 300,000 pages supporting the contrary.\textsuperscript{208}

The magistrate also found that six of Qualcomm’s outside attorneys “assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm’s document search was inadequate, and blindly accepting Qualcomm’s unsupported assurances that its document search was adequate.”\textsuperscript{209} She observed that these attorneys “then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury.” The magistrate concluded the attorneys had violated their discovery obligations and

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\textsuperscript{207} Id.
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\textsuperscript{208} Qualcomm, 2008 WL 66932, at *8.
\textsuperscript{209} Id. at *18.
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surmised they also may have violated their ethical duties so he referred the outside lawyers to the California bar for investigation of ethical violations.\textsuperscript{210}

Still, possibly the most expensive e-discovery dispute to date is that between Coleman Holdings, Inc. (“CH”) and Morgan Stanley & Co., Inc. (“MS”). CH sued MS for fraud in connection with a stock-swap transaction with Sunbeam.\textsuperscript{211} At issue were MS’s knowledge and the timing of that knowledge regarding Sunbeam’s fraudulent scheme.\textsuperscript{212} Finding that Morgan Stanley had illegally destroyed potentially relevant documents and it had repeatedly failed to produce the responsive material in its possession, the court granted the motion for an adverse inference jury instruction and awarded costs.\textsuperscript{213} This multi-page instruction identified in detail each one of Morgan Stanley’s egregious discovery violations.\textsuperscript{214} Ultimately, the jury awarded $604.3 million in compensatory damages and $850 million in punitive damages.\textsuperscript{215}

\textit{Qualcomm} makes clear that attorneys can no longer rely on their clients’ assurances about e-discovery.\textsuperscript{216} The responsibility of counsel to properly and fully inform and advise their

\textsuperscript{210} Id.

\textsuperscript{211} 2005 WL 679071, at * 1 (Mar. 1, 2005).

\textsuperscript{212} Id.

\textsuperscript{213} Id. at *4-*8.

\textsuperscript{214} Id. at *8-*9.

\textsuperscript{215} See Landon Thomas, \textit{Jury Tallies Morgan’s Total at $1.45 Billion}, \textit{N.Y. TIMES} (May 19, 2005).

\textsuperscript{216} See also Samsung Electronics Co., Ltd. v. Rambus, Inc., 439 F.Supp.2d 524, 565 (E.D. Va. 2006) (“It is not sufficient . . . for a company merely to tell employees to ‘save relevant documents,’ without defining what documents are relevant . . . . [T]his sort of token effort will hardly ever suffice.”); GFTM, Inc. v. Wal-Mart Stores, Inc. 2000 WL 335559 (S.D.N.Y. 2000) (sanctioning defendant after its lawyer, relying on information from defendant’s in-house contact, assured the court that certain ESI was no longer available, but a later deposition of defendant’s IT employees showed that the ESI in question had been available at the time the representation was made but subsequently destroyed).
clients is "heightened in this age of electronic discovery."\footnote{Qualcomm, 2008 WL 66932, at *9. Additionally, company leaders must be cautious about who they entrust with e-discovery responsibilities. \textit{See, e.g.}, Danis v. USN Communications, Inc., 2000 U.S. Dist. LEXIS 16900, at *42, *158 (N.D. Ill. Oct. 20, 2000) (fining the defendant’s CEO $10,000 and giving an adverse inference instruction for delegating the responsibility of document production to a new, in-house lawyer with no experience in litigation nor in document preservation.)} They are expected to be proactive and have a continuing, affirmative duty to ensure that complete and adequate searches have been conducted and all relevant data has been saved. Failure to consider the intricacies of e-discovery will result in dire consequences.\footnote{See Magana v. Hyundai Motor Am., 220 P.3d 191 (Wash. 2009) (upholding the trial court’s $8,000,000 default judgment plus reasonable attorney fees upon recognizing that the manufacturer defendant was a sophisticated multinational corporation experienced in litigation and finding that the manufacturer’s responses to the passenger’s request for production and interrogatory willfully and deliberately false, misleading, and evasive); Keithley v. Homestore.com, Inc., 2008 WL 3833384 (N.D. Cal. Aug. 12, 2008) (labeling defendants’ failure to issue a written document retention policy even well after its preservation duty arose as "among the most egregious this court has seen" and ordering defendants to pay over $250,000 in fees and costs associated with prior and future motion practice and expert fees, as well as imposing an adverse jury instruction against the defendants); S. New England Tel. Co. v. Global NAPs, Inc., 251 F.R.D. 82 (D. Conn. 2008) (entering a $5,247,781 default judgment and awarding $645,760 in attorneys’ fees and costs as a result of defendants’ willful violations of the court’s discovery orders, including giving misleading and nonresponsive answers to discovery requests and destroying and/or withholding documents that were within the scope of the discovery requests and the court’s discovery orders); United States v. Philip Morris USA, 327 F.Supp.2d 21 (D.D.C. 2004) (finding Philip Morris $2.75 million for destroying two years of emails after a preservation order was in place and precluding 11 witnesses from testifying in the government tobacco cases). \textit{But see} Ferron v. EchoStar Satellite, LLC, 2009 WL 2370623 (S.D. Ohio July 30, 2009) (no sanctions where plaintiff was unable to establish bad faith in defendant’s alleged failure to preserve website links to images contained in email messages sent by defendant conveying a commercial advertisement and displaying the name and/or logo of “Dish Network” and where plaintiff was unable to show that the images at issue were necessary or relevant to her claims); Nursing Home Pension Fund v. Oracle Corp., 2008 WL 4093497 (N.D. Cal. Sept. 2, 2008) (refusing to grant terminating sanctions for failure to preserve audio interview transcripts, noting that public policy strongly favored deciding the case on its merits).} After all, “[n]o one wants to be the next Morgan Stanley.”\footnote{Whetstone & Simon, supra note 53 (quoting George Socha, EDRM project creator). Although a federal magistrate recently lifted the discovery sanctions against six of Qualcomm’s outside attorneys upon a finding of insufficient evidence of bad faith on their part, the litigation had already taken its toll — “Day Casebeer[, the firm representing Qualcomm[,] struggled and then merged with Howrey[, two associates . . . and two partners . . . left big firm practice altogether[, and the case was paraded around as an example of what not to do during discovery.” Zusha Elinson, Judge Lifts Sanctions Over Qualcomm Discovery Scandal, \textit{The Recorder} (Apr. 6, 2010).} G. The International Community’s View of the United States’ Discovery System

International corporations and legal practitioners have described the practice of discovery in U.S. litigation as “boiling a whole ocean just to make a cup of tea.”\footnote{Cefic, \textit{The Chemical Industry is Not in Favour of the Americanisation of Litigation in the EU}, at 2 (Nov. 27, 2006).}
Overall the US system has created a strong, and unfair, unbalance between the position of the plaintiff and of the defendant. Because of the special features of this system, a defendant is not in the position to fight and to have the dispute decided by a court on the merits. The only way out for a defendant is to settle, even in cases it has sound legal arguments against the claim.\footnote{Id. at 1.}

Moreover, “[s]ymptomatic is the concept of US legal practice to settle ‘at nuisance value.’”\footnote{Id. at 2.}

Current U.S. discovery requirements conflict with international laws. For example, the European Union’s laws include “those that limit the retention of certain types of information and those that limit the transportation of information to the United States for discovery purposes.”\footnote{SC Legal Holds, supra note 134, at 13 (discussing DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA AND ON THE FREE MOVEMENTS OF SUCH DATA, effective October 1998).}

These “blocking statutes” are designed to hinder or prevent U.S. discovery in the countries that have implemented them.\footnote{Marcus, supra note 99, at 339.} Such precautions are in place because the EU currently considers the United States as unable “to ensure an ‘adequate’ level of protection,” which it requires of any country or territory seeking the transfer of personal data\footnote{SC Legal Holds, supra note 134, at 13.} The transfer of such data is thus permitted only in several very narrowly defined circumstances.\footnote{Id. (for example, if the party seeking the information takes certain steps to qualify for the European Commission’s Safe Harbor status).}

Furthermore, the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, also known as the “Hague Evidence Convention,” a multilateral treaty signed in 1970, instituted a uniform procedure for the issuance of “letters of requests” which are “petitions from a court in one nation to a designated central authority in another, requesting assistance from that
authority in obtaining relevant information located within its borders.”\textsuperscript{227} A State is not obligated to honor such a request, however, even if directed to the proper agency, and can “ignore or deny such a request if it ‘considers that its sovereign of security would be prejudiced’ by executing it or if the State believes the request is restricted by privilege law or “blocking” statute.\textsuperscript{228}

Article 23 of the Hague Evidence Convention presents an even greater obstacle. It instructs that “a contracting State may at the time of signature, ratification or accession, declare that it will not execute letters of request issued for the purpose of obtaining pretrial discovery of documents known in common law countries.”\textsuperscript{229} Essentially, the treaty signatories “have declared that they will not allow discovery of information, regardless of relevance, if the information is sought in relation to a foreign proceeding.”\textsuperscript{230}

Still, the American judiciary has generally been unwilling to limit U.S. discovery only because the information is located abroad. “Thus, the Supreme Court has resisted the notion that U.S. district courts should curtail discovery regarding cases before them in deference to the Hague Evidence Convention and affirmed that American courts have broad authority by statute to authorize U.S. discovery for use in foreign proceedings” even if it is not permitted by the court in which the litigation is proceeding.\textsuperscript{231} For example, in \textit{Gucci America, Inc. v. Curveal Fashion} the court ordered a third party to comply with the plaintiff’s motion to compel production of all documents regarding the defendant’s Malaysian bank accounts despite substantive evidence that violation of a Malaysian blocking statute could subject a person to civil and criminal penalties.

\textsuperscript{227} SC Cross-Border Discovery, supra note 12, at 10, 17.

\textsuperscript{228} Id. at 17 (quoting \textit{HAGUE EVIDENCE CONVENTION}, Art. 12).

\textsuperscript{229} Id. (quoting \textit{HAGUE EVIDENCE CONVENTION}, Art. 23).

\textsuperscript{230} Id.

\textsuperscript{231} Marcus, supra note 99, at 339 (internal footnotes omitted).
232 Similarly, the court in *Accessdata Corporation v. ALSTE Technologies GmbH* granted plaintiff’s motion to compel and ordered the defendant, a German company, to produce third-party personal data notwithstanding objections that such disclosure would violate German law.233

Thus, the U.S. judiciary’s stance continues to place companies in a “catch 22” whereby they are forced to choose between violating EU privacy law and violating U.S. court orders.234 This imposition comes with a high social price for the U.S.: “when a foreign multinational is looking to make significant investments around the world, it must consider whether locating a facility in the United States and creating jobs there is worth the cost, expense and risk of being exposed to U.S.-style litigation.”235 For example, some chemical companies have refrained from researching and entering the U.S. market because of the excessive lawsuits against manufacturers of drugs and medical devices.236

E-discovery has already impacted the United States’ competitiveness as a business venue. The perception that “engaging in business in the United States opens one up to broad intrusive

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236 Cefic, *supra* note 238, at 1.
and highly expensive discovery and frivolous litigation”\textsuperscript{237} is concerning, particularly in light of the current delicate economic situation. Additionally, “[m]ost commentators agree that criminal penalties for ‘data destruction’ will likely increase in the future, exacerbating cross-border discovery conflicts.”\textsuperscript{238} Therefore, any future attempts at rulemaking must bear in mind their impact on the global arena. They cannot be created in the vacuum of U.S. courts alone because borders between countries today are not as apparent as they were just a few years ago. Globalization stands in direct correlation with the exponential growth in ESI, and, as the two are invariably interlinked, they cannot be considered separately.

In sum, the adversarial system in the United States contradicts the inquisitorial litigation model adhered to by the majority of the world and threatens to undermine its position as a global market leader. Thus clear, uniform and binding guidelines that reflect and respond to e-discovery experiences of practitioners, the judiciary, and other major players in civil litigation, domestic and abroad, are necessary to sustain and to fortify our leadership position in the world.

II. Strategies and Solutions

In a valiant effort to stay afloat in this flood that has become e-discovery, practitioners have crafted several creative strategies. Early case assessment (“ECA”), for example, is useful in deciding the merits of a civil dispute. One need only recall the Fannie Mae case to appreciate the benefits of this seemingly simple tactic. However, in a world of exponentially expanding ESI and shrinking review times, ECA has become a cumbersome process. Also, as most cases settle before trial, the frontloading of costs for these case-specific preparations results in waste.

Through rolling discovery, “[a] smaller initial discovery request would test the search terms and criteria. It could be used to develop a realistic estimate of the eventual costs and could

\textsuperscript{237} Miller, \textit{supra} note 253, at 32.

\textsuperscript{238} SC Cross-Border Discovery, \textit{supra} note 12, at 5.
let attorneys begin their review earlier in the production process.” Future discovery requests
could then be more focused. A similar technique is used in class action litigation; courts “grant
limited discovery prior to the motion for class certification and the rest of discovery only when
and if the motion is granted.” However, in most disputes, rolling discovery increases the
possibility that data, particularly ESI, will be reviewed multiple times or missed altogether.

Collaboration between the parties during discovery is a recent development. The first
FRCP considered discovery “as an essentially cooperative, rule-based, party-driven process,
designed to exchange relevant information.” However, they did not expressly require a duty to
cooperate, even though a failure to do so exposed parties to the possibility of sanctions under
Rule 37. Moreover, collaboration seemed counterintuitive under U.S.’s adversarial system.

E-discovery has dramatically affected that attitude, and the change is reflected in the
2006 Amendments to the FRCP (especially in Rule 26), numerous think-tanks’ propositions (for
example, the Sedona Conference Cooperation Proclamation), and the judiciary’s approach to e-
discovery disputes. For example, Magistrate Judge Grimm spiritedly endorsed collaboration
between the parties in *Mancia v. Mayflower Textile Services Co.* and partially relied on the
Cooperation Proclamation to support his decision that boilerplate discovery objections and
responses violated the “good faith basis” requirement of the FRCP 26(g) certification. Moreover,
the ACTL’s survey results reveal that “the system works best when experienced lawyers are

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239 Johnette Hassell, *Judge Shira Scheindlin Advocates Rolling Discovery*, Computer Forensics & E-
Discovery Blog (May 27, 2009), http://www.computerforensicsediscovery.com/2009/05/articles-1/ediscovery/judge-

240 Moss, *supra* note 19, at 938.


involved (they use discovery less or work out disputes themselves), when collegiality is encouraged and when competent, experienced judges play an active supervisory role.”

Therefore, everyone benefits when parties in a litigation work together toward a solution.

Motions to dismiss are technical strategies that completely dispose of the plaintiff’s claims. When not feasible, partial dispositive motions can reduce litigation costs if they eliminate high-damages claims or claims that have “particular discovery costs attached to it, such as requiring a particular expert not called for by other aspects of the case.” Both types of motions are criticized, however, for their limited power to restrict litigation to meritorious claims.

Rule 26(c) motion to stay discovery has been receiving much attention lately for its effectiveness in controlling discovery costs. Under this Rule, a court has discretion to stay discovery “for good cause” pending the determination of a dispositive motion. For example, the court in Stone v. Lockheed Martin Corporation ruled that a Rule 26(c) discovery stay was appropriate where the plaintiff sought “to conduct extensive discovery . . . resulting in undue burden and expense to all parties[, that] the defendant ha[d] a likelihood of prevailing on its motion to dismiss[, and that no] party [would] suffer substantial or irreparable harm by a stay pending ruling on the motion to dismiss.”

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244 ACTL Interim Report, supra note 2, at 5.

245 Martin, supra note 14, at 29.

246 See ACTL Interim Report, supra note 2, at A-3 (“Nearly 71% of Fellows stated that motions to dismiss for failure to state a claim are not effective tools to limit claims and narrow litigation.”); Moss, supra note 19, at 932 (“Dismissal motions do not weed out all low-merit lawsuits, only the lawsuits in which the lack of merit is sufficiently clear on paper filings, given that the Supreme Court has cautioned against granting such motions too readily.”).


A modified version of this strategy has also been proposed, recommending that “[a]ll e-
discovery should be stayed during the pendency of any motion to dismiss unless the plaintiff
agrees to reimburse the defendant for all e-discovery costs in the event that the defendant's
motion to dismiss is granted.” Still, distinguishing between e-discovery and regular discovery
seems absurd because, in the words of Zubulake Judge Shira Scheindlin, “now there’s no other
discovery.” Therefore, staying “only” e-discovery would ultimately have the effect of halting
all discovery until the dispositive motions are resolved, possibly delaying the entire matter.

A Rule 68 offer of judgment transfers some of the risk of the defendant’s forward-going
litigation costs to the plaintiff at the outset of the dispute. “The defendant submits an offer of
judgment to the court for a specified amount, and, if the plaintiff does not accept the offer and
obtains a judgment for less than the offered amount, the plaintiff is responsible for paying the
defendant’s costs after the offer is made.” An offer of judgment can be particularly useful in
reducing litigation costs when damages are obvious and in high-risk adverse judgment cases.

More drastic suggestions include increasing pleading requirements and a “loser-pays”
rule. Currently, little time is spent on the pleading; the main focus is on discovery. “The
simplified pleading requirements were designed to make legal judgments turn on the underlying
merits of the case rather than the skill of lawyers in satisfying arcane pleading rules.”

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249 Michael H. Gruenglas et al., A Proposal to Prevent Blackmail at the Pleading Stage, N.Y. LAW

250 Ralph Losey, Judge Shira Scheindlin and I Speak on e-Discovery and Education (Mar. 23, 2009),

251 Martin, supra note 14, at 29.

252 Id.

253 Keith N. Hylton, When Should a Case Be Dismissed? The Economics of Pleading and Summary
many believe that notice pleading allows plaintiffs to disguise meritless claims at the outset and force defendants to choose between coerced settlement and costly discovery.\textsuperscript{254}

Interestingly, a higher evidentiary standard is required in class action certifications. “[M]otions for class certification in many cases will now require the submission of well-developed evidence and findings on that evidence, reaching even into the merits of the case itself, to confirm whether the elements for certification of a class can be met.”\textsuperscript{255} Additionally, the ACTL recommends replacing the notice pleading by a fact-based pleading, which “should set forth with particularity all of the material factors that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.”\textsuperscript{256} This change would likely reduce the number of lawsuits surviving the motion to dismiss stage of litigation. Cautionary steps must be taken, however, to ensure access to the court for everyone with a meritorious claim.

A “loser pays” rule would force requesting parties to “particularize” their discovery requests in order to conserve costs they might be required to pay at the end of judgment. The Manhattan Institute researched how such a rule would work in the U.S. It concluded that, if adopted, a “loser pays” rule would “reduce the number of low-merit lawsuits, . . . encourage business owners and other potential defendants to try harder to comply with the law, . . . and deter ordinary low-merit suits.”\textsuperscript{257} However, it “would not discourage low-merit class actions

\textsuperscript{254} See, e.g., Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 IOWA L.R. 873; see also ACTL Interim Report, supra note 2, at A-3 (“Only 21\% of Fellows agreed that the answer to a complaint . . . shapes and narrows the issues in a case[, while o]ver 64\% of Fellows indicated that fact pleading can narrow the scope of discovery.”).

\textsuperscript{255} Mark P. Szpak and Anne E. Johnson, Class Certification in the United States: The Rise of Rigor among the Federal Circuits, CLASS ACTION DEFENCE QUARTERLY, Vol. 3, No. 4, 1 (June 2009).

\textsuperscript{256} ACTL Final Report, supra note 138, at 5.
\textsuperscript{257} Gryphon, supra note 216, at Executive Summary.
the same extent because the risk of enormous losses, rather than the costs of legal defense, is the primary source of pressure on defendants to settle.”258

Although these creative efforts are commendable, concerning is the fact that attorneys’ success in effectively representing their clients’ interests largely depends on successfully maneuvering through a procedural obstacle course.

IV. Conclusion

As the above illustrates, the goal of a “just, speedy, and inexpensive determination of every action and proceeding,”259 as envisioned by the authors of the FRCP, is practically unattainable260 under the current discovery system in the United States.261 It is now time to get realistic and stop skirting around the core issue – e-discovery is here to stay, and, if the past few years are at all indicative of the things to come, it will continue to expand and evolve. Legislators were correct in recognizing that e-discovery requires guidelines, and the 2006 Amendments to the FRCP are far-reaching in their attempt to streamline the e-discovery process. However, in striving toward utopian ends, the chosen means have proven to muddy the waters rather than provide clarity. Moreover, multiple directives for e-discovery beyond the FRCP – including local rules, international limitations on data release, case law, and regulatory statutes – further splinter the few predictable standards and thereby add to the confusion. Any slight adjustments to an already failing system are, therefore, insufficient and will only sink in the morass that is e-discovery. Similarly, the existing strategies utilized by practitioners provide only short-term

258 Id.

259 FED. R. CIV. P. 1.

260 See, e.g., Martin, supra note 14, at 28 (“Litigation, as it is currently practiced, has built-in inefficiencies that make it virtually impossible to obtain a quick, decisive resolution of even the most straightforward lawsuits.”).

261 See also ACTL Interim Report, supra note 2, at B-3 (“The rules on e-discovery are completely out of touch with the costs of such discovery.”).
relief. The need for a complete reassessment of the FRCP reflecting upon and responding to the lessons learned from experiences with e-discovery has never been greater.

The legal profession is now in an opportune position to address this inevitable problem. Open communication must be encouraged and input should be sought from all stakeholders in the civil justice system. Ironically, the influx of information technology, though dreaded in the context of e-discovery, has facilitated conversations about the problem and the possible solutions between parties who may have been unable to have such discussions in the past. Further, e-discovery education and training should be mandatory and start in law school. The Bar should play an active role in ensuring that its members are competent in this area so that they could effectively represent their clients. Academic institutions and scholars should continue exposing weaknesses in the system, whereas practitioners should share their every day experiences to illustrate how the guidelines function when applied.

In conclusion, clear, uniform and binding guidelines that reflect and respond to the e-discovery experiences of practitioners, the judiciary, and other major players in civil litigation are necessary to tackle the ever-evolving and spiraling-out-of-control phenomenon of electronic discovery.