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Cost Shifting in E-Discovery: A Comparative Analysis Between America and Europe

Umar Bakhsh, Illinois Institute of Technology

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I. INTRODUCTION

With the incredible evolution, advancement and adoption of technology over the past twenty-five years has come a seismic shift in the manner in which business is conducted. Primary amongst these changes has been the use of technology to create electronic documents. Electronic documents have considerable advantages when compared to traditional paper documents. Electronically created documents can be sent and received instantaneously, and can be transmitted, stored, and created at little cost. Modern technology provides a medium for limitless production of electronic documents without the drawbacks associated with traditional documents. An electronic document is any document created digitally, with the aid of a computer or computer software, such as email, records, or computer document files in a variety of formats.

Global business culture has embraced this transition to electronic documents, with computers becoming the primary method of communication across the business world. The creation of email documents has quickly outpaced the use of traditional mail services, with businesses in America generating over 3.25 trillion email messages in 2002, compared with just over 2 billion pieces of mail processed by the United States Postal Service in the same year. This reflects an approximate 15:1 usage ratio for email to traditional mail in American business. In addition to email, businesses create other electronic documents. Approximately eight billion electronic file documents are created globally each year. Since 2000, approximately 93% of all information is first generated in electronic format, of which much is never produced physically. With technological advances allowing for the creation of new

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1 Umar R. Bakhsh, J.D. Candidate, 2012, Chicago-Kent College of Law; B.S. 2008, University of Illinois Urbana-Champaign. I would like to thank Professor Chris Seaman (Chicago-Kent College of Law) for his invaluable feedback and assistance with every stage of this Article. I am truly indebted to my parents, Rahim and Noorus Bakhsh for their endless support. Any errors remaining in this Article are my own.


3 Id. at 328.


5 Id.

6 Id.

7 Id.


10 Id.

11 Id.

12 Id.

13 Id.
Electronic documents anywhere and everywhere, the amount of data created will only continue to increase.\textsuperscript{14}

Electronic documents are not only easy to create and reproduce; they are difficult to completely destroy.\textsuperscript{15} When a paper document is shredded, it can no longer be retrieved.\textsuperscript{16} The same cannot be said for an electronic document that has been deleted or erased.\textsuperscript{17} When an electronic document is deleted, the computer marks the space on the storage media used by that document as free.\textsuperscript{18} That space can then be overwritten by new data.\textsuperscript{19} However, until that space is actually used and overwritten, the data can still be obtained retroactively.\textsuperscript{20} Another caveat is that there are generally several copies of documents created on a variety of storage media, so simply deleting a document from one source will not delete it off the remaining storage devices.\textsuperscript{21} Thus, it is possible to have a copy of an electronic document on an email server, on a computer harddrive, on a smart phone, and on a backup server at the same time.\textsuperscript{22} This problem is only exacerbated by cloud computing, in which electronic documents are stored on remote servers that can be accessed by a number of devices.\textsuperscript{23}

An additional consideration is the fact that electronic storage media is cheap.\textsuperscript{24} Any electronic document stored on electronic storage media is considered “electronically stored information” (ESI).\textsuperscript{25} Businesses no longer need to rent warehouses to store their paper business records.\textsuperscript{26} One gigabyte of electronic data storage can cost as little as $0.05 and can store the equivalent of 500,000 typed pages.\textsuperscript{27} Therefore, businesses additionally are no longer required to permanently delete any document because of the low cost to maintain the documents as records, as this can also be helpful in recovering lost work.\textsuperscript{28}

\begin{footnotes}
\textsuperscript{14} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id at 277-278.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{25} Id at 261.
\textsuperscript{26} Cameron Shilling, Electronic Discovery: Litigation Crashes Into the Digital Age, 22 Lab. Law. 207, 209-210 (2008) (arguing paper document storage has become cost prohibitive).
\textsuperscript{27} See id.
\textsuperscript{28} Id.
\end{footnotes}
easily manageable on a few compact discs or a remote server.\textsuperscript{29} There are several types of storage media available to businesses, at a range of costs.\textsuperscript{30}

Transitioning to a paperless business model has benefits and disadvantages in terms of legal implications.\textsuperscript{31} The volume of information in this possession or under the control of a business has grown exponentially, and thus presents challenges during litigation.\textsuperscript{32} During litigation, discovery of traditional documents related to the suit at issue has always been allowed in the United States.\textsuperscript{33} With the emergence of technology and the resulting increase in ESI, American courts have allowed discovery of ESI as well as traditional documents, terming it “e-discovery.”\textsuperscript{34}

The tremendous amount of ESI in the possession of businesses has driven the discovery cost of this ESI sky high.\textsuperscript{35} One would assume that a paperless business model would lead to reduced discovery costs, as documents could be searched for key words and terms in order to identify relevant material.\textsuperscript{36} However, the opposite has occurred, as the volume and availability of ESI has created an amount of data that is expensive to retrieve and search.\textsuperscript{37} ESI is voluminous and distributed, fragile, exists in many forms, contains non-relevant information and metadata, and is generally maintained in complex systems.\textsuperscript{38} With so many backups and copies, it is difficult to determine exactly what ESI a business possesses for discovery purposes.\textsuperscript{39}

With the increased volume of ESI comes an increased cost of e-discovery.\textsuperscript{40} The cost of discovery has increased to the point that an entire new industry has been created; firms are now available that perform no function other than searching through ESI of businesses, looking for information that is discoverable or otherwise relevant to their cause.\textsuperscript{41} Costs associated with producing discovery requests include searching ESI, extracting relevant documents and materials, reviewing them for privilege, and then paying attorney’s fees.\textsuperscript{42}

\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{See Kronisch v. United States}, 150 F.3d 112, 126 (2d Cir. 1998).
\textsuperscript{36} \textit{See id.}
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} Mia Mazza, \textit{In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information}, 13 Rich. J. L. & Tech. 11, 5-6 (2007).
\textsuperscript{42} \textit{Id.}
Traditionally, the cost of discovery is borne by the producing party.\textsuperscript{43} This principle has translated to e-discovery as well.\textsuperscript{44} With this shift in technology, the traditional discovery model needed to be modified.\textsuperscript{45} Given the volatile nature of e-discovery, and the possibility of the cost creating an undue burden on the producing party, American courts have started implementing cost shifting principles that allow for all or part of the costs of production to be shifted from the producing party to the requesting party.\textsuperscript{46} With the advent of ESI, this principle is becoming increasingly important.\textsuperscript{47} European courts have also addressed the principle of cost shifting dealing specifically with ESI.\textsuperscript{48} Fundamental differences in each judicial system have led to different outcomes when dealing with e-discovery in America compared to Europe.\textsuperscript{49}

This Article offers an alternative set of principles for cost shifting when dealing with e-discovery. Specifically, it proposes that courts should implement a synthesis of the rules and theories applied by courts in America and Europe. Rather than the current American model, which, in its most basic application, requires the producing party to foot the bill, or the European model, which potentially forces the defeated litigant to pay for e-discovery, courts should shift costs \textit{ex post} after finding a greater than 50\% chance the requested e-discovery will uncover information material to either party through a sampling of the discovery. This standard places the burden on requesting parties to be judicious with the volume of discovery requested and prevents parties from using discovery requests as leverage into larger settlement amounts. Should the discovery produced meet the required percentage, the American law requiring the producing party should then apply. Part II of this Article discusses a brief history of cost shifting in both America and Europe, and additionally elaborates on the guiding principles that have transformed cost shifting theory in both legal systems. Part III compares the current standards of both entities and proposes a hybrid legal standard that addresses the issues with the current laws, among them being rapidly escalating costs of production, bullying and using discovery as a negotiating tool by litigating parties, and uncertainty in the current laws.

\section*{II. The Evolution of E-discovery Cost Shifting Principles in America and Europe}

In the American judicial system, there is an active presumption that the party receiving a discovery request will bear the costs of production for documents associated with the compliance of discovery requests.\textsuperscript{50} European courts, however, take a different approach.\textsuperscript{51} The European

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{43}] See Amy Longo, \textit{Current Trends in Electronic Discovery}, SK071 ALI-ABA 303, 320 (2005).
\item[\textsuperscript{44}] See Ronald J. Hedges, \textit{Discovery in Environmental Litigation}, SP059 ALI-ABA 201, 334-336 (2009).
\item[\textsuperscript{45}] Id.
\item[\textsuperscript{46}] See id.
\item[\textsuperscript{49}] See id.
\item[\textsuperscript{51}] See Gavin Foggo, \textit{Comparing E-discovery in the United States, Canada, the United Kingdom, and Mexico}, ABA Sec. of Lit. Newsletter Vol. 8, no. 4, 1 (2007).
\end{itemize}
\end{footnotesize}
approach to the discovery cost burden stems from the strict privacy control and data protection beliefs, as well as from elements of traditional European legal procedure.\textsuperscript{52} In Europe, the party that loses a case is generally responsible for all of the victorious party’s legal fees and court costs.\textsuperscript{53} Included in these fees and costs are the costs of discovery.\textsuperscript{54} Thus, in many ways, the European model has already embodied much of what the American federal judiciary system has recently adopted.\textsuperscript{55} However, Europe has not clearly addressed whether the traditional model will continue apply to e-discovery as opposed to paper discovery in uniform fashion.\textsuperscript{56} Additionally, although the countries in Europe follow the presumption of awarding attorney’s fees and court costs to the prevailing party, the customs amongst the countries in terms of the percentage of fees typically awarded varies and there is no clear leading principle or guideline.\textsuperscript{57}

Both America and Europe have addressed e-discovery and the related challenges to a certain degree.\textsuperscript{58} In 1970, Rule 34 of the Federal Rules of Civil Procedure (FRCP) was amended to include “in accord with changing technology” and “stored in any medium.”\textsuperscript{59} This ensured that ESI is discoverable within the traditional discovery rules in America.\textsuperscript{60} In Europe, the 1998 European Union Privacy Directive (EUPD) was the first time the issue of e-discovery was addressed by Europe, albeit indirectly.\textsuperscript{61} The EUPD placed strict regulations on what is considered ESI, as well as stringent regulations on whether ESI is discoverable and can be transferred.\textsuperscript{62}

\textbf{A. MODERN COST SHIFTING IN AMERICAN LAW}

Under the FRCP, parties are allowed to obtain discovery regarding any non-privileged matter that is relevant to the claim or defense of any party.\textsuperscript{63} The FRCP also comes with the presumption that the producing party will bear the expense of complying with discovery requests, and also to shift discovery costs to the requesting party upon a finding of good cause.\textsuperscript{64} However, under Rule 26(c), courts have discretion to grant protective orders against discovery requests that will create an undue burden or expense on the producing party.\textsuperscript{65} Also, courts can grant orders conditioning discovery on the requesting party’s payment of discovery costs.\textsuperscript{66} An

\begin{flushleft}
\textsuperscript{52} Id.
\textsuperscript{53} Id at 5-6.
\textsuperscript{54} Id.
\textsuperscript{55} See id at 1-3.
\textsuperscript{56} Id.
\textsuperscript{57} Id at 6.
\textsuperscript{58} Id at 1.
\textsuperscript{60} Id.
\textsuperscript{62} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Fed. R. Civ. P. 26(c).
\end{flushleft}
undue burden is determined by the needs of the particular case, the amount in controversy, each party’s resources, the importance of the issues in litigation, and the importance of the proposed discovery.\textsuperscript{67} This discretion has become increasingly important when dealing with expensive e-discovery requests.\textsuperscript{68}

With the costs of retrieving, reviewing, and producing e-discovery easily reaching millions of dollars, courts can no longer use the traditional approach to paying for discovery.\textsuperscript{69} Cost shifting amongst litigating parties has become a key consideration for courts.\textsuperscript{70} Among the most important factors for considering cost shifting is the accessibility of the information requested.\textsuperscript{71} Accessibility will directly affect the cost of production and the courts have addressed this issue through case law.\textsuperscript{72}

In \textit{Rowe Ent., Inc. v. William Morris Agency, Inc.}, the court held that the costs of producing certain e-discovery were to be shifted to the requesting party.\textsuperscript{73} The case was a discrimination suit in which the plaintiffs served a broad discovery request that would have required the defendants to obtain assistance from e-discovery vendors to sort through a vast amount of ESI.\textsuperscript{74} The court held that the burden on the producing party outweighed the possible benefit to the requesting party, and in the process created an eight factor test to determine if the cost of production would be shifted.\textsuperscript{75} The \textit{Rowe Ent., Inc.} decision created the initial cost shifting test and was widely adopted, leading to a rapid increase in cost shifting instances among most circuits.\textsuperscript{76}

In 2003, however, the \textit{Rowe} test was supplanted with a new test from \textit{UBS, Inc. v. Zubulake}.\textsuperscript{77} In \textit{Zubulake}, a UBS employee requested e-discovery of a variety of ESI related to an employee discrimination suit.\textsuperscript{78} The court in that case criticized the \textit{Rowe} test as undercutting the traditional presumption that the responding party pays for production, and highlighted the fact that the test allowed for “fishing expeditions” for parties as long as they were willing to finance discovery.\textsuperscript{79} The \textit{Rowe} test also created an artificial presumption of cost shifting.

\textsuperscript{69} Id at 4-7.
\textsuperscript{70} Id at 97.
\textsuperscript{71} Id at 104.
\textsuperscript{72} Id. at 102; See \textit{e.g. Toshiba Am. Elec. Components, Inc. v. Lexar Media}, 124 Cal. App. 4\textsuperscript{th} 762 (App. Ct. 2004) (holding requesting party bears burden of reasonable costs of producing e-discovery if material is inaccessible according to \textit{Zubulake} standard); \textit{Waltzer v. Tradescape & Co., LLC}, 31 A.D.3d 202 (N.Y. App. Div. 2006) (holding requesting party generally bears cost of e-discovery production depending on accessibility).
\textsuperscript{73} 205 F.R.D. 421 (S.D.N.Y. 2002).
\textsuperscript{74} Id.
\textsuperscript{75} Id at 429.
\textsuperscript{76} Id.
\textsuperscript{78} Id at 312.
\textsuperscript{79} Id at 320.
whenever e-discovery was involved because of its mechanical approach.\textsuperscript{80} Instead, the \textit{Zubulake} court created a new seven factor test that modified \textit{Rowe}.\textsuperscript{81} The court identified the following factors, in order of decreasing importance:

(1) the extent to which the request is specifically tailored to discover relevant information;
(2) the availability of the information from alternate sources;
(3) the cost of production compared to the amount in controversy;
(4) the total cost of production compared to each party’s available resources;
(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 when dealing with public policy issues; and finally
(7) the relative benefits to the parties of obtaining the information.\textsuperscript{82}

Also, the court advocated using a sample run of data collection to determine whether additional production would be appropriate, and if so, who should bear the production costs.\textsuperscript{83} Importantly, the \textit{Zubulake} opinion cautioned against cost shifting becoming a presumption in any case involving e-discovery.\textsuperscript{84} Instead, cost shifting is to be considered only when e-discovery creates an undue burden or expense, and if shifting is warranted, the percentage remains under the court’s discretion.\textsuperscript{85} An undue burden is when the burden to produce outweighs the potential benefits after considering the factors outlined in \textit{Zubulake}.\textsuperscript{86} Additionally, \textit{Zubulake} held that an important consideration in determining undue burden was the type of storage media involved.\textsuperscript{87} The case distinguishes between accessible and inaccessible data formats and breaks down all storage media types into five categories.\textsuperscript{88} Each of the five categories is described in terms of accessibility and resulting burden on the producing party.\textsuperscript{89} Importantly, the case does not consider the accessibility of information specific to the case, rather access to any of the information stored on the media generally.\textsuperscript{90} In the wake of \textit{Zubulake}, while the majority of courts have adopted the proposed test, some courts have not, showing that there is still tension between traditional discovery principles and the application to e-discovery.\textsuperscript{91} The courts that did.

\textsuperscript{80} \textit{Id} at 318.
\textsuperscript{81} \textit{Id} at 320-321.
\textsuperscript{82} \textit{Id}.
\textsuperscript{83} \textit{Id} at 324.
\textsuperscript{84} \textit{Id}.
\textsuperscript{85} \textit{Id} at 318.
\textsuperscript{86} \textit{Id}.
\textsuperscript{87} \textit{Id}.
\textsuperscript{88} \textit{Id} at 318-319.
\textsuperscript{89} \textit{Id} (creating categories in order of accessibility: (1) active data; (2) near-line data; (3) offline storage; (4) backup tapes; and (5) erased or fragmented data).
\textsuperscript{90} \textit{Id}.
not adopt the Zubulake test argue that although it is built upon sound reasoning, the outcomes of the test can diverge based on the least important factors.\^92

With Rule 34 expanded via amendment to include e-discovery, American courts have tackled the issue of e-discovery directly.\^93 Rule 34 stipulates that the requesting party can determine the format of production the producing party must provide, including native file formats.\^94 This is a strategic concern for parties, due to the abundance of metadata that can be obtained from native files.\^95 If the requesting party does not request a specific format, then the producing party can provide the documents in the format in which they are normally maintained or any other electronically searchable form.\^96 For information that is not easily accessible, Rule 26 provides guidance.\^97

Aiming to unify the different approaches, the evolution of cost shifting continued with amendments to Rule 26 in 2006.\^98 The amendment to Rule 26 created a two-tiered approach to e-discovery that, most importantly, found reasonably inaccessible data to be presumptively undiscoverable.\^99 This presumption could be overcome only by a showing of good cause, which could be found by considering the seven factors outlined in the Advisory Committee’s Notes for Rule 26(b)(2).\^100 The seven factors given are:

1. the specificity of the discovery request;
2. the quantity of information available from other and more easily accessed sources;
3. the failure to produce relevant information that seems likely to have existed but is no longer available from more easily accessed sources;
4. the likelihood of finding relevant, responsive information that cannot be obtained from other sources;
5. predictions as to the importance and usefulness of the further information;
6. the importance of the issues at stake in the litigation;
7. the parties’ resources.\^101

\^92 \textit{Id.}
\^94 Fed. R. Civ. P. 34.
\^95 \textit{See e.g. Kentucky Speedway, LLC v. NASCAR}, 2006 WL 5097354 (E.D. Ky. 2006) (holding that whether or not metadata should be produced should be discussed during a 26(f) conference between parties); \textit{Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey}, 371 B.R. 823 (E.D.Pa. 2007) (holding screenshots of website were acceptable rather than cache files); \textit{Columbia Pictures, Inc. v. Bunnell}, 245 F.R.D. 443 (C.D. Cal. 2007) (holding server logs from computer Random Access Memory was to be produced although information was stored temporarily).
\^96 Fed. R. Civ. P. 34(b).
\^97 Fed. R. Civ. P. 26(b)(2) (proportionality principle: party need not provide discovery when potential benefits are outweighed by costs involved).
\^99 \textit{Id} at 222.
\^100 Committee Note to Rule 26(b)(2006).
\^101 Committee Note to Rule 26, Subsection (b)(2)(2006)
Before allowing e-discovery, courts require a “meet and confer” conference under Rule 26(f). The aim of this conference is to minimize the cost and burden of e-discovery upon the producing party. During this time, parties are required to cooperate and share information regarding the types of backup and electronic storage systems in place by the producing party, and the requesting party can provide instructions on what information the producing party should prevent from deletion. During this conference, the court is to consider the relevant time, cost, and effort involved in order to determine the scope of e-discovery.

Although similar, the Rule is not simply a codification of the Zubulake test. The Rule borrows from Zubulake, but focuses on whether or not discovery should be allowed. If it is not, then there is a presumption that the data is not discoverable. This then shifts the burden back on the requesting party to show good cause. Courts that have confused Rule 26 as a codification of Zubulake have undermined its uniform application. However, the requesting party must consider the proportionality test outline in Rule 26(b)(2)(c), which limits discovery to materials where the burden to produce proposed discovery is outweighed by the likely benefits. Rule 26(b)(2)(c) is referred to as the “Proportionality Standard.” Under this rule, courts can limit both the frequency and extent of discovery if it determines that there is another source from which the information can be more easily obtained, or if the likely benefit is outweighed by the burden or expense of the proposed discovery, considering the needs of the case, the amount in controversy, each party’s resources, the importance of the issues in the action, and the importance of discovery in resolving the issues. The proportionality principle allows courts to resist excessive discovery demands because the court has discretion to allow parties to withhold relevant and non privileged information because the burden outweighs the potential benefit. The key difference between Zubulake and Rule 26 is that Zubulake is conditioned upon the finding of accessibility of data, and the test lays out different levels of accessibility for the spectrum of storage media.

104 Id.
105 Id.
106 Id.
107 Shilling, Electronic Discovery: Litigation Crashes Into the Digital Age, 22 Lab. Law. At 222.
108 Id at 223.
109 Id.
110 Tennis, Cost-Shifting in Electronic Discovery, 119 Yale L.J. at 1119-1120.
112 William Maguire, Current Developments in Federal Civil E-discovery Practice, 795 PLI/Lit 435, 460 (2009).
114 Maguire, Current Developments in Federal Civil E-discovery Practice, 795 PLI/Lit at 461.
115 Tennis, Cost Shifting in Electronic Discovery, 119 Yale L.J. at 1120.
On the other hand, Rule 26 states that parties do not have to provide discovery of ESI from sources that the party has identified as not reasonably accessible, focusing on whether or not discovery should be allowed. The Rule does not differentiate between types of storage media, but provides an explanation of what is reasonably accessible in the Committee Notes. A determination of accessibility is found by considering the time, effort, and cost of retrieving the information. By allowing individual party’s to determine what is accessible, the Rule allows flexibility for application of cost shifting in cases involving individuals as parties. For example, if an individual is the defendant in a case, producing discovery even from what is termed “active” media in Zubulake may still be too costly or create an undue burden on that individual. Under Zubulake, however, that individual would still be forced to produce the documents and would not be entitled to cost shifting. Lastly, the Rule does not provide any differentiation in terms of weight between the factors, unlike the weighted Zubulake test.

Rule 26(b)(2) is applicable to any type of discovery, particularly in instances where data is inaccessible, lending the majority of its application to e-discovery. However, courts have not uniformly applied Rule 26(b)(2) in practice. Courts have found tension between the Zubulake definition of accessibility, and subsequent separation of storage media into categories, and the definition provided in Rule 26 of media that a party has determined is not accessible and would create an undue burden. Even after the amendments, some courts have continued to apply the Zubulake test, and also used the brightline separation of accessible and inaccessible storage media. Additionally, because courts have not routinely implemented Rule 26, it is subject to varying interpretations by different courts.

B. MODERN COST SHIFTING IN EUROPEAN LAW

Discovery, typically called disclosure, in Europe is fundamentally different than the American model. A combination of privacy laws, tradition, and diversity amongst member countries has caused Europe to develop a unique approach to discovery. Traditionally, the losing party in a European court is liable not only for the final judgment, but for a portion of the

116 Id at 1118-1119.
117 Id (referring to Committee Note, Rule 26).
118 Id at 1118-1120.
119 Id.
120 See id.
121 Id.
122 Id.
123 Shilling, Electronic Discovery: Litigation Crashes Into the Digital Age, 22 Lab. Law. At 223-224.
124 Tennis, Cost Shifting in Electronic Discovery, 119 Yale L.J. at 1120.
125 See id at 1121.
126 Id.
127 Id.
128 Nigel Murray, E-disclosure and Privacy in the UK and EU, Assoc. of Litigation Support Professionals, 1, distributed via www.trilantic.co.uk (2007).
129 Id.
winning party’s attorney’s fees and litigation costs as well.\textsuperscript{130} The objective fact of defeat is regarded as sufficient grounds for imposing costs.\textsuperscript{131} Because the traditional model has sufficed, there has not been a need to codify or create statutes specifically addressing e-discovery.\textsuperscript{132} Courts have ruled that the traditional European discovery model applies to e-discovery as well.\textsuperscript{133} The ramifications of this approach permeate the entire European judicial system.\textsuperscript{134}

Discovery costs, including e-discovery, are included in a party’s cost of litigation.\textsuperscript{135} Therefore, a losing party is directly responsible for the winning party’s e-discovery costs.\textsuperscript{136} Because of this, each party has implicit incentive to minimize the costs of e-discovery by providing a limited number of specific discovery requests.\textsuperscript{137} Additionally, this system minimizes “fishing expeditions” by parties that are not sure whether or not they have a meritorious case.\textsuperscript{138} By holding the losing party accountable for discovery costs at the end of trial, each party will work independently to ensure that the costs of discovery are proportional to the amount in controversy.\textsuperscript{139}

Compared to the American system, discovery requests in Europe are treated differently.\textsuperscript{140} Parties must request documents with a high level of specificity, and although they can obtain information regarding their opponent’s storage systems, they cannot provide blanket discovery requests.\textsuperscript{141} The European system allows courts to maintain rigid control over the scope of discoverable material.\textsuperscript{142} European courts use a proportionality standard to determine whether or not to allow discovery.\textsuperscript{143} The court considers (1) the importance of the requested information; (2) the amount in dispute; (3) the cost of production; (4) the ease of production; and (5) the financial position of the parties.\textsuperscript{144}

\begin{flushright}
\textsuperscript{130} Id. \\
\textsuperscript{132} \textit{See id.} \\
\textsuperscript{133} Id. \\
\textsuperscript{134} Id. (Although I have referenced a “European judicial system,” please keep in mind that many European countries have similar judicial models or systems and, literally speaking, there is no uniform European judicial system. Rather, there are variations and nuances particular to each country in terms of rules and procedure but they do not affect the analysis in this Article.) \\
\textsuperscript{135} Id at 218. \\
\textsuperscript{136} Id. \\
\textsuperscript{137} Murray, \textit{E-disclosure and Privacy in the UK and EU} at 2. \\
\textsuperscript{138} Foggo, \textit{Comparing E-discovery in the United States, Canada, the United Kingdom, and Mexico}, at 1-5. \\
\textsuperscript{139} Id. \\
\textsuperscript{140} \textit{See id.} \\
\textsuperscript{141} Id. \\
\textsuperscript{142} Murray, \textit{E-disclosure and Privacy in the UK and EU} at 2-3. \\
\textsuperscript{143} Id. \\
\end{flushright}
Strict privacy laws have affected e-discovery. The European Union (EU) enacted the European Union Directive on Data Protection (Directive) in 1998. This Directive explicitly impacted e-discovery by severely limiting the scope of what information is discoverable. The purpose of the Directive was to create a uniform standard for all member countries regarding the transfer and use of personal data. The European attitude towards privacy, especially concerning electronic data, is incredibly stricter than the American approach, and the Directive embodies this cultural concern. Included in the Directive are definitions of “personal data,” “process,” and “transfer.” These terms are of legal significance in e-discovery because the Directive binds European courts.

In Europe, there is a heavy presumption against allowing discovery of personal data. The definition of personal data comes from the Directive, where it has a broad definition and is interpreted to include any and all email. Personal data includes any data that may relate to or provide information that relates either directly or indirectly to a given individual. Email is personal data because it includes the identity of both the sender and recipient. Because email is considered personal data, it is generally not discoverable, regardless of whether the email was created during the course of business or a private email sent from a private email account. In general, the only instance where email discovery will be granted is if the requesting party can provide specific information regarding the persons between which the communication took place, the nature of the discussion, reasons why that communication is relevant, and a description of what information is required so the remainder can be redacted. However, only a readable copy of the email will be provided as the Directive essentially bans the transfer of native files, citing privacy concerns. Native files contain personal information and other information that may not be directly related to the case at issue and thus cannot be discoverable. However, once a requesting party has fulfilled its burden of proving that an email, or any other personal data is required and should be discoverable, the producing party cannot provide it unless they have the

146 Garrett, Conducting E-discovery in Europe, 783 PLI/Lit at 281.
147 Id.
148 Id.
149 Id at 281-282.
150 Id.
151 Id.
152 See id at 283.
153 Id at 282.
154 Id.
155 Id.
156 Id.
158 Id.
159 Garrett, Conducting E-discovery in Europe: Practice Pointers for Corporate Counsel, 783 PLI/Lit at 283-284.
right to “process” the information, and subsequently, the right to “transfer” the information. The Directive defines process as any collection, storage, retrieval, or transmission of data. Copying information from one source to another is considered processing. One way in which parties seek the right to process and transfer personal data as defined in the Directive is by having their employees sign consent forms. However, courts have routinely discarded these agreements as being coerced due to the fact that employment is contingent upon the employee signing them.

The e-discovery that is allowed by courts is generally more expensive than e-discovery in America. This is primarily because there are several different cultures, languages, and business practices that are used within the EU. The additional costs stem from differences in technology and the need to translate documents from one language to another. Additionally, in a suit filed in a different country, a party will also generally need to hire local counsel, further driving up litigation costs. This leads to an added consideration; the amount of time spent in litigation. European courts recognize that there may be suits involving different countries. By allowing a larger scope of e-discovery, the courts will increase the length of time parties are litigating due to logistical and practical concerns.

III. A COMPARATIVE ANALYSIS BETWEEN AMERICAN AND EUROPEAN APPROACHES TO COST SHIFTING AND A PROPOSED NEW APPROACH

Both American and European courts have recognized the importance of e-discovery and the need to create specially tailored rules and guidelines to assist courts in determining when cost shifting is appropriate. Accordingly, both judicial systems have implemented rules by which cost shifting can take place between parties. However, each system of cost shifting has certain

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160 Id at 281.
161 Id at 282.
162 Id.
163 Id.
164 Id.
165 Id at 284.
166 See id.
168 See id.
169 See id.
170 Id.
171 Foggo, Comparing E-discovery in the United States, Canada, the United Kingdom, and Mexico at 1.
172 See id at 2-3.
advantages and disadvantages that prevent the system from reaching an optimal state. An ideal system would incorporate elements of both American and European judicial theories.

A. COMPARATIVE ANALYSIS: AMERICA VS. EUROPE

The American approach to cost shifting has several advantageous qualities. By allowing cost shifting in cases of undue burden, the theory is that the producing party will not be bullied into a settlement or have excess court costs. Also, adopting innovative, expensive new technologies will not disadvantage parties because they may not have to pay the production costs during discovery. However, application of the law does not reflect these theoretical benefits in the American system.

With the 2006 amendments to the FRCP, American law made a strong attempt to create concrete guidelines for courts to use when determining cost shifting. By creating a list of factors, the law has become clearer and more predictable. However, the law does not serve its purpose when it is not used properly. One of the major issues with the American approach to cost shifting is the lack of uniformity in application. Some courts have adopted case law standards that are not identical to the Federal Rules of Civil Procedure, while others have adopted Rule 26 from the FRCP. Additionally, implementation of the analysis varies across districts. Some courts have a tendency to grant cost shifting, using a liberal approach to the analysis involved rather than denying meritless discovery. Other courts use a more balanced approach to cost shifting which results in fewer granted requests of cost shifting. This creates a statistical advantage for parties to file in certain districts.

By filing suit in a district more likely to grant some form of cost shifting, a party can obtain a distinct advantage, which leads to a second issue with the American approach: a party that is wealthier than its opponent, or else more willing to pay for e-discovery can have better access to discovery materials.

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173 See id.
174 See id.
175 See id at 2.
177 Id at 220.
178 Id.
179 Tennis, Cost-Shifting in Electronic Discovery, 119 Yale L.J. at 1114.
180 See id.
181 See id.
182 See id.
183 Id.
184 Id.
185 Id.
186 Id.
188 See id.
The European model of cost shifting shares some of the application issues that the American model has.\textsuperscript{189} The European model lacks uniformity – lack of uniformity is inherent due to the nature of each individual country’s laws, regulations, and interpretations of the law.\textsuperscript{190} Although the same can be said for different circuits within the American judicial system, the FRCP is uniform governing law and increases certainty when dealing with cost shifting.\textsuperscript{191} Europe does not have one uniform governing set of laws, rather there are general guidelines provided and counties are free to create unique sets of laws within those guidelines.\textsuperscript{192}

Another issue with the American system is that when it comes to e-discovery, courts are quick to abandon the traditional presumption that the producing party pays.\textsuperscript{193} Although it has slowed since the FRCP amendments, the trend in American courts is to automatically shift costs rather than preventing meritless discovery.\textsuperscript{194} This provides parties with the opportunity to potentially “buy” discovery, and thus bully an opponent with fewer resources into a favorable settlement.\textsuperscript{195} If a party has a greater willingness to pay for discovery, they are at an advantage during litigation simply because of the volume of information they can discover.\textsuperscript{196}

This issue is avoided under the European model because the loser is responsible for e-discovery costs, regardless of who requested or produced.\textsuperscript{197} However, under the European model, attorneys have an incentive to drive up litigation costs.\textsuperscript{198} Regardless of who ends up with the bill, the attorneys will get paid.\textsuperscript{199} This may not be as unscrupulous as it seems, however, because under the European model, the stakes of litigation are higher, and thus attorneys will expend more energy, effort, and time advocating for their client.\textsuperscript{200} Also, cases that end up in litigation will be longer and more drawn out since neither party will be willing to surrender.\textsuperscript{201}

Additionally, the European model has several desirable traits inherent in the nature of the system.\textsuperscript{202} There is no need to force a conference between the parties in order to minimize discovery costs; the chance of being responsible for both parties’ costs at the end of trial provides

\textsuperscript{189} See Foggo, \textit{Comparing E-discovery in the United States, Canada, the United Kingdom, and Mexico}, at 3-5.
\textsuperscript{190} See id.
\textsuperscript{191} U.S. Const. art. VI, § 2 (“all state judges must follow federal law when a conflict arises between federal law and either the state constitution or state law of any state”).
\textsuperscript{193} Tennis, \textit{Cost-Shifting in Electronic Discovery}, 119 Yale L.J. at 1119.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Gong, \textit{Pretrial Negotiation, Litigation, and Procedural Rules} at 220.
\textsuperscript{198} Id at 221.
\textsuperscript{199} Id.
\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{202} See id at 218.
an inherent incentive to minimize costs. With the inherent advantage to avoid excess e-
discovery costs, the European model has a built in check against parties bullying each other by
threatening to drive up discovery costs.

The European model also encourages parties to be judicious with e-discovery requests. By knowing that they potentially will have to bear the costs themselves, parties will create more specific, tailored requests and are generally prevented from fishing expeditions. The analysis does not carry through to when a party is certain of victory, in which circumstance they could potentially drive up the opposing party’s costs, but the European model has a check on this behavior with the court limiting the scope of discovery. The uncertainty of the outcome of litigation factors into each party’s decision of whether to litigate or settle, and if to settle, for what amount. By limiting the scope of discovery, the European model creates a system with a lower maximum cost since not nearly as much information is presumed discoverable.

Another key difference between the American and European models is that in Europe, if the court allows e-discovery, parties are only obligated to produce non-privileged documents that they intend to rely on, weaken or support either party’s arguments, and any documents the court requires. However, the court maintains discretion over every step, and the court applies its proportionality standard to the facts of each individual case.

B. An Ideal Standard

The aim of any e-discovery cost shifting approach should be to maintain efficient administration of justice, uniform results, and fair access to the discovery process regardless of an individual party’s wealth. An ideal approach to e-discovery and cost shifting would not only shift costs when necessary, but also aim to reduce costs altogether.

As e-discovery costs escalate, courts must consider a hybrid cost shifting approach between the American and European models that resorts to cost shifting only when there is a greater than 50% likelihood of uncovering critical information in the requested discovery. Courts will be able to determine this using an ex post approach after sampling the requested

203 See id.
204 See id at 219.
205 See id at 218.
206 Id at 219.
207 See id.
208 Id.
209 See id.
210 See Foggo, Comparing E-discovery in the United States, Canada, the United Kingdom, and Mexico, at 5.
211 Id.
213 See id.
214 See id.
discovery. By uncovering critical information, the truth seeking function of the law is served. There is no bright line approach to cost shifting that will withstand advances in technology. The law reacts to technology, and the delay in creating and adopting legislation is not an immediate process. Although a bright line standard would promote uniformity amongst courts and create a more predictable outcome, cost shifting should not be outcome determinative for a case. Rather, cost shifting should be a fact specific determination made under the courts discretion after considering the seven factors provided under Rule 26. These factors should be weighted, however, in the manner suggested by Zubulake: the first two factors carrying the most weight, and the remaining five progressively carrying reduced weight.

The party most likely to benefit from the requested e-discovery should also be a factor considered by the court during cost shifting analysis. If only the requesting party is going to benefit, then no cost should be shifted. However, if there is a chance that both parties will benefit, then cost shifting should be considered.

A party’s willingness to share in part of the e-discovery cost burden should not factor into the court’s final decision regarding cost shifting, contrary to Rule 26 in the American system. This would allow the opportunity for parties to purchase discovery, giving them an unfair advantage in litigation. E-discovery requests can potentially be used as economic leverage in this circumstance.

Another potential improvement to the cost shifting model would be to differentiate between what costs within e-discovery would be shifted. Perhaps only the cost of searching ESI should be considered when shifting costs. That way, if there is relevant information found, then the producing party should bear the full burden of paying to extract and review the information for privilege. This puts the burden on the requesting party only to determine

\[\text{id} \]
\[\text{see id} \]
\[\text{see id at 1572-1573.} \]
\[\text{see id} \]
\[\text{see id.} \]
\[\text{id at 1570-1572.} \]
\[\text{see id.} \]
\[\text{see gong, pretrial negotiation, litigation, and procedural rules at 219-220.} \]
\[\text{id.} \]
\[\text{id.} \]
\[\text{see vainberg, when should discovery come with a bill?, 158 u. pa. l. rev. at 1529.} \]
\[\text{see id.} \]
\[\text{see e.g. cognex corp. v. electro scientific industries, inc., no. 01-10287, 2002 wl 32309413, at 4 (d. mass. july 2, 2002) (noting that the plaintiff's willingness to pay for restoration of backup tapes made the question of ordering discovery "a close call," but denying discovery anyways).} \]
\[\text{see vainberg, when should discovery come with a bill?, 158 u. pa. l. rev. at 1574.} \]
\[\text{see id.} \]
\[\text{see id at 1527-1529.} \]
exactly which storage media should be searched. If the court determines that the media is worth searching, it is the producing party’s responsibility to fulfill the e-discovery request.

However, a strict rule presuming that the producing party will pay e-discovery costs, as in the American system, will not best serve the discovery process in the future. As new technology continues to be adopted by businesses, the costs of e-discovery will continue to rise. With this rise in costs, a requesting party can effectively bully a producing party into settling a case rather than dealing with the high costs of production. For example, if a suit involves a dispute over a sum of $1 million, and the cost of producing discovery is $300,000, a party may be coerced into settling rather than continuing with litigation. Considering the cost of production at $300,000, along with court costs and attorney’s fees of another $300,000 and the associated externalities of litigation, it is in the party’s best interest to settle for any sum less than $600,000. Knowing this, the requesting party can continue to drive up the discovery costs for their opposition, thereby essentially forcing a settlement by making litigation an unfavorable option.

Without any cost shifting standard in place, requesting parties under the American discovery system would be encouraged to create blanket requests and highly costly discovery procedures. This would provide them with a tactical advantage and also help encourage a settlement in their favor. At a minimum, if the producing party does not settle, the requesting party will have an advantage simply due to the volume of information at their disposal. After finding that cost shifting is indeed necessary, an important consideration is when it should be granted. Extensive granting of cost shifting would help reduce the amount of discovery requested and help combat the rising costs of e-discovery. By realizing that they will bear a part of the burden for producing e-discovery, the requesting party will be incentivized to tailor their requests to specific data and media, in order to minimize their own costs. Liberal cost shifting would also allow for flexibility in cases where the court is not sure of the potential benefit of a particular discovery request.

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231 See id.
232 Id.
234 See Garrett, Conducting E-discovery in Europe: Practice Pointers for Corporate Counsel, 783 PLI/Lit at 279-280.
235 See id.
237 See id.
238 See id.
239 See id at 221.
240 See id.
241 Id.
242 See id.
244 See id.
245 See Gong, Pretrial Negotiation, Litigation, and Procedural Rules at 223.
However, liberal cost shifting may reduce the amount of information actually discovered and thus potentially frustrate the truth finding function of the judicial system.\textsuperscript{246} Without access to enough information, it will be more difficult for parties to uncover an accurate and complete representation of the facts of a case.\textsuperscript{247} Additionally, a policy favoring cost shifting would hurt individual or less wealthy parties who may not be able to bear even a portion of e-discovery costs.\textsuperscript{248}

A better policy is an approach that grants cost shifting only in certain circumstances.\textsuperscript{249} For example, a presumption against cost shifting is beneficial in instances where an individual party brings a meritorious suit against a larger, wealthier party.\textsuperscript{250} By forcing the producing party to pay for production, the individual will be able to obtain relevant information that he or she could not otherwise afford.\textsuperscript{251}

In addition to the factors provided in Rule 26, courts should only resort to cost shifting when the informational uncertainty makes the likelihood of finding critical information a close call, or over 50\%.\textsuperscript{252} Courts could implement a sampling process, like the \textit{Zubulake} court did, to determine the likelihood of finding relevant information, and make an informed decision to shift costs.\textsuperscript{253} However, a factor for courts to consider would be which party would be responsible for the production of the sample.\textsuperscript{254} In some cases, the costs of sampling can be significant and affect a party’s decision to litigate.\textsuperscript{255} The court should use its discretion in a situation where the party requesting the sample may be doing so in bad faith, or the party producing the sample has limited resources.\textsuperscript{256} Upon finding that information is likely to be relevant, courts could then implement Rule 26(b)(2) to reach a decision on cost shifting.\textsuperscript{257}

Regardless, some form of cost shifting is beneficial.\textsuperscript{258} In situations where the likelihood of relevant information being discovered is relatively low, cost shifting can be an effective tool to encourage the requesting party to create specific requests.\textsuperscript{259} Courts should force parties requesting e-discovery to be specific in all aspects of their requests, particularly the timeframe and methods of storage media that they would like the requesting party to produce, similar to the

\begin{footnotes}
\item[246] See \textit{id}.
\item[248] See \textit{id}.
\item[249] See \textit{id}.
\item[250] See \textit{id}.
\item[251] See \textit{id}.
\item[252] \textit{Id} at 1530.
\item[253] See \textit{Zubulake}, 217 F.R.D. at 324 ("By requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork.").
\item[255] See \textit{id}.
\item[256] See \textit{id}.
\item[257] See \textit{id}.
\item[258] See \textit{The Sedona Principles}, available at http://www.thesedonaconference.org/publicationns.html
\item[259] See \textit{id}.
\end{footnotes}
European emphasis on specific requests and a limited scope of discovery. Requiring a high level of specificity will put the burden on the requesting party to determine early in litigation what kind of storage systems the opposing party has in place, and forces them to determine where they are most likely to find relevant material. In addition to keeping e-discovery costs down, this would prevent parties from creating blanket e-discovery requests at the last minute.

Parties should not be discouraged from adopting new technology and using new storage systems. By maintaining the possibility of cost shifting, parties can rest assured that by adopting an expensive new technology, they are not going to be liable for the full cost of production should the need arise in litigation. The opposite would be true with a liberal cost shifting policy. Parties would be encouraged to use outdated storage systems that are expensive to search, relying on cost shifting to discourage the opposing party to request e-discovery from them since the opposing party would have to share the cost of production. Technology can help reduce e-discovery costs as well. With increasingly sophisticated computer search programs, much of the e-discovery process can be completed electronically. Also, with accurate automated translation programs already in existence, the cost associated with hiring a human translator for translating documents in foreign languages is no longer required.

Independent of which e-discovery courts adopt, its interpretation must be dynamic, given the nature of technology. For example, in Zubulake, the court defined what technology is accessible. What is easily accessible today will one day become obsolete, and the law must anticipate this. Additionally, with improvements in technology, what may be inaccessible or prohibitively burdensome to access today may become accessible in the future. These are considerations when developing a comprehensive cost shifting model.

The cost shifting principles a court implements directly affects parties’ decisions regarding whether to settle or commence litigation. The consequences of these principles arise from the fact that the costs each party will incur influence its decision regarding pursuing

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260 See id.
261 See id.
262 See id.
263 See generally id.
264 See id.
265 See id.
266 See id.
267 See id.
268 See id.
269 See Garrett, Conducting E-discovery in Europe, 783 PLI/Lit at 286.
270 Id.
271 Zubulake, 217 F.R.D. at 324 (creating five categories of data discussed above).
272 See Garrett, Conducting E-discovery in Europe, 783 PLI/Lit at 285.
273 See id.
274 See id.
litigation.\textsuperscript{276} For example, assume there is a case with $1 million in controversy.\textsuperscript{277} Including all discovery costs and attorney’s fees, each party will incur a cost of $500,000 for litigation.\textsuperscript{278} Through the plaintiff’s lens, under the American system in its purest form, the party bringing suit will incur a maximum cost of $500,000.\textsuperscript{279} However, they maintain the potential to win a sum of $1 million, which would leave them with a resulting profit of $500,000 if they won the full judgment.\textsuperscript{280} So for the plaintiff, the outcome is either a loss of $500,000 or a gain of $500,000.\textsuperscript{281} Depending on their likelihood of success, they will consider both these outcomes before litigating.\textsuperscript{282} Through the defendant’s lens, they stand to either lose $500,000, if they win the suit, or lose a total of $1.5 million if they lose.\textsuperscript{283} Once again, by determining the strength of their defense, they can decide whether they should litigate or settle.\textsuperscript{284} Regardless, they would settle at any cost less than $500,000.\textsuperscript{285}

Applying European principles to the same case, the outcome is drastically different.\textsuperscript{286} For the plaintiff, if they win the case, they will win not only the $1 million judgment, but also their litigation fees, resulting in a net profit of $1 million, which happens to be double the profit under the American system.\textsuperscript{287} If the plaintiff ends up losing, however, they will incur their own costs of $500,000, but will also have to pay the defendant’s fees of $500,000, leaving them with a potential loss of $1 million, which is also double the amount under the American system.\textsuperscript{288} For the plaintiff, under the European model, the stakes are essentially double.\textsuperscript{289} Switching to the defendant’s point of view, if they lose the suit, they are liable for their own litigation costs of $500,000, the plaintiff’s costs of $500,000, as well as the $1 million judgment, leaving them with a loss of $2 million.\textsuperscript{290} If the defendant ends up winning the case, however, they lose nothing other than the time and effort spent in litigation.\textsuperscript{291} In both circumstances, the defendant’s stakes are increased compared to the American model.\textsuperscript{292}

\textsuperscript{276} Id.
\textsuperscript{277} See id at 219-222.
\textsuperscript{278} See id.
\textsuperscript{279} See id.
\textsuperscript{280} See id.
\textsuperscript{281} See id.
\textsuperscript{282} See id.
\textsuperscript{283} See id.
\textsuperscript{284} See id.
\textsuperscript{285} See id.
\textsuperscript{286} See id at 222.
\textsuperscript{287} See id.
\textsuperscript{288} See id.
\textsuperscript{289} See id.
\textsuperscript{290} See id.
\textsuperscript{291} See id.
\textsuperscript{292} See id.
Where these differences become important is when parties are decided whether to litigate or settle. Under the American system, the stakes for each party are less during litigation, whereas they can be drastically increased under the European model. Under the European model, when a defendant has a potential loss of $2 million, they will likely settle for a higher dollar amount than they would for an identical case under the American system, assuming the likelihood to prevail remains constant. Likewise, a plaintiff considering settling under the European system will potentially settle for a higher dollar amount than they would under the American system, since they have a higher potential profit from the case. Regardless, the European system incentivizes parties to reach a settlement, by essentially subsidizing the winning party and taxing the losing party. With higher stakes, each party is forced to seriously consider their position and honestly assess the merits of their case. Because of its propensity to encourage settlement, the European model increases judicial efficiency by limiting frivolous

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293 See id.
294 See id.
295 See id.
296 See id.
297 Id at 220.
298 Id.
litigation.\textsuperscript{299} However, the drawback inherent in this reasoning is that the European model also discourages meritorious litigation; a party with a meritorious suit may be discouraged from litigating simply because they cannot afford the risk of having to pay both parties’ costs.\textsuperscript{300} Thus, by imposing cost shifting, the European model discourages litigation generally.\textsuperscript{301} Note, however, that this reasoning applies only to cases where a party is not 100% certain of prevailing in a case.\textsuperscript{302} In a case where a party is 100% certain to prevail, the European model would encourage litigation, while the American system would still allow for a settlement.\textsuperscript{303}

IV. Conclusion

Judicial intervention with cost shifting is needed most when there is a structural imbalance in the amount of discovery each party must produce, such that the requesting party has little incentive to negotiate mutual limits. To ensure a winning party does not inflate or exaggerate their own discovery costs, knowing that the losing party will reimburse them, the court could possibly maintain discretion over the litigation costs and absorb a portion of the fees from the losing party.

A hybrid of the American and European model would be the best approach to cost shifting for e-discovery. The optimal approach would first involve a sampling of the relevant storage media in order to determine whether there is any pertinent information to be uncovered. If the court finds a greater than 50% likelihood that relevant material will be discovered, the court should proceed with cost shifting analysis. The second step in the ideal cost shifting analysis would be under a weighted analysis of Rule 26. The court would also consider the financial situations of the parties, which party is likely to benefit, and which specific costs within e-discovery should be shifted. Finally, there should be a presumption against cost shifting unless analysis of the factors led to a different outcome. The standard should finally be dynamic and easily adapted to new technologies.

\textsuperscript{299} Id.
\textsuperscript{300} See id.
\textsuperscript{301} See id.
\textsuperscript{302} See id.
\textsuperscript{303} See id.