
COMMENT

WHEN SHOULD DISCOVERY COME WITH A BILL? ASSESSING COST SHIFTING FOR ELECTRONIC DISCOVERY

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INTRODUCTION	1524
I. DEFINING THE PROBLEM: EARLY APPROACHES TO COST SHIFTING	1530
A. <i>Electronic Discovery Expenses as a Cost of Doing Business</i>	1530
B. <i>The Rise of Electronic Discovery</i>	1532
C. <i>The Move Toward Cost Shifting</i>	1534
II. COST-SHIFTING TESTS PRIOR TO THE 2006 E-DISCOVERY AMENDMENTS	1536
A. <i>The Marginal Utility Test</i>	1537
B. <i>The Rowe Test and Discovery Protocol</i>	1540
1. The Eight-Factor <i>Rowe</i> Test.....	1541
2. The Plaintiff-Friendly <i>Rowe</i> Discovery Protocol ...	1546
C. <i>The Zubulake Test</i>	1548
III. RULE 26(B) (2) AND THE 2006 E-DISCOVERY AMENDMENTS	1554
A. <i>Rule 26(b)(2) Prior to the 2006 Amendments</i>	1554
B. <i>The 2006 Electronic Discovery Amendments</i>	1556
1. The Two-Tiered System	1557
2. The Advisory Note to Rule 26(b) (2)	1559
3. Trends from Practice	1561
IV. REACHING EQUILIBRIUM: WHAT IS THE OPTIMAL COST-SHIFTING PARADIGM?	1566

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CONCLUSION.....1574

INTRODUCTION

The plaintiff, a whistleblower suing his former employer for improperly eliminating his position, requests all documents, notes, memoranda, e-mails, and metadata¹ related to organizational restructuring from the employer’s external hard drives.² The defendant is a relatively poor rural county that moves for a protection order, arguing that the requests are overbroad and would cost the county approximately \$49,000 to produce, not including attorney review time.³ The plaintiff’s potential recovery in the case is estimated to be “significantly less” than \$100,000.⁴ How should a judge rule on the request?

The explosion of costly electronic discovery in the mid-1990s made this type of problem commonplace for district and magistrate judges, who in turn began exercising their authority under Federal Rule of Civil Procedure 26(c) to allocate some expenses to the requesting parties.⁵ When a majority of the Supreme Court recently cited “sprawling, costly, and hugely time-consuming” discovery as a reason for its recognition of a heightened civil pleading standard in *Bell Atlantic Corp. v. Twombly*,⁶ Justice Stevens retorted that Rule 26(c), among others, supplied a better tool for managing pretrial costs.⁷

¹ Metadata is defined as “evidence, typically stored electronically, that describes the characteristics, origins, usage and validity of other electronic evidence.” CRAIG BALL, BEYOND DATA ABOUT DATA: THE LITIGATOR’S GUIDE TO METADATA 2 (2005), <http://www.craigball.com/metadata.pdf> (internal quotation marks omitted). In other words, it is “data about data.” *Id.* (internal quotation marks omitted).

² This example is derived from *Haka v. Lincoln County*, 246 F.R.D. 577, 578 (W.D. Wis. 2007). For further discussion of this case, see subsection III.B.3.

³ 246 F.R.D. at 578.

⁴ *Id.*

⁵ Rule 26(c)(1) provides that the “[t]he court may, for good cause, issue an order to protect a party or person from . . . undue burden or expense, including . . . specifying terms, including time and place, for the disclosure or discovery.” FED. R. CIV. P. 26(c)(1); see also FED. R. CIV. P. 34 advisory committee’s note to 1970 amendments (“[C]ourts have ample power under Rule 26(c) to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs.”).

⁶ 550 U.S. 544, 560 n.6 (2007).

⁷ Justice Stevens stated,

The Court vastly underestimates a district court’s case-management arsenal. . . . Indeed, Rule 26(c) specifically permits a court to take actions “to protect a party or person from annoyance, embarrassment, oppression, or undue

Providing an exception to the traditional discovery presumption that each party to a lawsuit bears its own discovery costs,⁸ Rule 26(c) permits the district court to shift costs onto the party requesting discovery upon a finding of “good cause.”⁹ But what constitutes “good cause,” and how should a court determine the appropriate amount of cost shifting? With little guidance from the Rules themselves¹⁰ or the courts of appeal,¹¹ lower courts initially developed several analytical frameworks for analyzing the problem. These approaches can be roughly grouped into four categories: (1) the “marginal utility” test promulgated in *McPeck v. Ashcroft*,¹² (2) the *Rowe* test,¹³ (3) the *Zubulake* test,¹⁴ and, following the 2006 electronic discovery amendments to the Rules, (4) the application to cost shifting of seven factors outlined

burden or expense” by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant.

Id. at 593-94 n.13 (Stevens, J., dissenting).

⁸ As the Court stated in *Oppenheimer Fund, Inc. v. Sanders*,

Under [discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court’s discretion under Rule 26(c) to grant orders protecting him from “undue burden or expense” in doing so, including orders conditioning discovery on the requesting party’s payment of the costs of discovery.

437 U.S. 340, 358 (1978).

⁹ FED. R. CIV. P. 26(c)(1).

¹⁰ Although the Rules were amended in 2006 to address electronic discovery concerns, they have not established a uniform analytical framework for addressing cost shifting. *See infra* Part III.

¹¹ The highly deferential “abuse of discretion” standard governing appellate review of cost-shifting discovery issues also precludes robust guidance from circuit courts. *See, e.g., Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) (affirming without extensive discussion the district court’s expense-shifting order due to Rule 26(c)’s grant of “considerable discretion in determining whether expense-shifting in discovery production is appropriate in a given case”); *see also* Alan F. Blakley, *Unanswered Questions in the December 2006 Federal Rules Changes*, FED. LAW., Nov.–Dec. 2006, at 39, 40 (noting the dearth of appellate authority regarding electronic discovery).

¹² *See McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001) (“The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is ‘at the margin.’”).

¹³ *See Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (developing an eight-factor test discussed in subsection II.B.1).

¹⁴ *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322-23 (S.D.N.Y. 2003) (developing a hierarchical seven-factor test discussed in Section II.C).

in the Advisory Committee's Note to Rule 26(b)(2), which were actually intended to guide the threshold question of whether certain discovery should be *produced* in the first place.¹⁵

This Comment analyzes the benefits and disadvantages of each cost-shifting approach in the context of electronic discovery (e-discovery).¹⁶ It examines civil cases in which the court considered ordering the requesting party to bear some or all of the expenses of the responding party's technical search, restoration, and production of electronically stored information (ESI).¹⁷ The Comment's scope is limited to cost-shifting disputes between *parties* to a lawsuit.¹⁸ It also

¹⁵ See FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments; see also *infra* subsection III.B.2.

¹⁶ Electronic discovery involves electronically stored information, or ESI. See FED. R. CIV. P. 34(a) advisory committee's note to 2006 amendments (defining ESI broadly as any type of information stored in any electronic medium).

¹⁷ Courts have typically refused to order reimbursement for parties to cover pre-production attorney review time because these costs do not relate to the technical inaccessibility of data (which justifies cost shifting) and because the producing party could strategically pass heavy costs onto its opponent by controlling which attorneys scrutinize the data and how thoroughly they do so. See *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290-91 (S.D.N.Y. 2003) (opining that "the responding party should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form" for two main reasons: (1) "the producing party has the exclusive ability to control the cost of reviewing the documents," and (2) "cost-shifting is only appropriate for inaccessible . . . data"); *Rowe*, 205 F.R.D. at 432 ("[I]f any defendant elects to conduct a full privilege review of its e-mails prior to production, it shall do so at its own expense."). But see *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 562 (W.D. Tenn. 2003) (ordering the requesting party to be responsible for the full cost of the producing party's relevance and privilege review for one set of backup tapes and the full cost of the relevance review and half the cost of the privilege review for another set of backup tapes). The Advisory Note to Rule 26(b)(2) cautions against shifting attorney review costs but counsels that "the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery." FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments. At least one court has denied a motion to compel discovery by focusing on the burden presented by attorney review time. In *In re General Instrument Corp. Securities Litigation*, the court found

that the requested documents could be retrieved from the backup tapes without undue expense. Nevertheless, the technical matter of retrieving the documents from the backup tapes would be just the start of the process. Defense counsel would then have to read each e-mail, assess whether the e-mail was responsive, and then determine whether the e-mail contained privileged information. Given that the volume of e-mail at issue here is potentially very large, the court finds that the burden of reviewing the requested documents would be heavy.

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

¹⁸ Courts are much more likely to shift costs away from subpoenaed nonparties. See, e.g., *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310, 313 (N.D. Ind. 2007) (stating

does not analyze cost-shifting orders meant to serve as a sanction for discovery violations.

Part I explores how the rise of costly electronic discovery in the 1990s led judges to consider cost shifting without developing robust analytical tests.

Part II traces the development of multifactor tests as a more sophisticated tool to handle expensive discovery requests. Although these tests were more systematic than the earlier approaches, they contained flaws. The marginal utility test in practice largely ignored the economic costs of each particular production.¹⁹ The *Rowe* test employed a mechanical factor-counting approach that led to liberalized cost shifting in every reported case where it was applied.²⁰ It also accompanied a plaintiff-friendly discovery protocol, which seemed to authorize intrusive “fishing expeditions” so long as they were financed by the requesting parties.²¹ The weighted-factor *Zubulake* test provided sound analytical underpinnings, but in practice it resulted in somewhat divergent decisions hinging on the least important factors.²²

Part III evaluates the 2006 amendments to Rule 26(b)(2), which provided a multifactor test for the production of inaccessible data that many courts apply in determinations of cost shifting. This Part’s qualitative analysis is supplemented with some broader observations from a survey of sixty-five published federal cases discussing cost shifting.²³

that nonparty status was “[t]he most crucial factor” in the court’s decision to order reimbursement of the subpoenaed nonparty for \$7200 in costs).

¹⁹ See *infra* Section II.A.

²⁰ See *infra* subsection II.B.1.

²¹ See *infra* subsection II.B.2.

²² See *infra* Section II.C.

²³ To be robust, any quantitative conclusions on cost shifting should be based on a full review of every federal case on the topic, including magistrate opinions and orders, many of which are not selected for publication in any electronic database—an effort beyond the scope of this Comment. In order to ascertain some *possible* trends, however, the following methodology was used. First, a search of the Westlaw database was conducted for federal decisions dated before December 1, 2006, citing the *McPeck*, *Rowe*, or *Zubulake* cases or containing the words “electronic,” “discovery,” “shift,” and “cost” in close proximity to each other. The second step involved a review of leading journal articles on cost shifting to identify important cases the searches may have missed. These two steps provided a pool of twenty-eight relevant opinions prior to the 2006 amendments. In these twenty-eight cases, the court ordered cost shifting eleven times, although in three of them, the requesting party had offered to pay. See, e.g., *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 651-53 (D. Minn. 2002) (permitting the requesting party to hire an expert at its own expense to create a “mirror image” of the defendants’ computers and restore all data prior to a Rule 26(f) conference and the beginning of any formal discovery); *Simon Prop. Group L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000) (permitting the plaintiff to search

A significant majority of these cases involve individual plaintiffs requesting information preserved by corporate defendants on complex electronic networks and storage tapes.²⁴ This pattern is unsurprising.

the defendant's computers for deleted files at the plaintiff's own cost); *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (same). *But see Cognex Corp. v. Electro Scientific Indus., Inc.*, No. 01-10287, 2002 WL 32309413, at *4-5 (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). Next, the above search was rerun to focus on opinions published after the 2006 amendments. Ken Withers's comprehensive compilation of 223 federal cases relating to electronic discovery between December 1, 2006, and August 15, 2008 was also reviewed. *See* KEN WITHERS, FEDERAL COURT DECISIONS INVOLVING ELECTRONIC DISCOVERY: DECEMBER 1, 2006–AUGUST 15, 2008 (2008), <http://www.ck10.uscourts.gov/conference/downloads/ediscovery7.pdf>. These two searches located thirty-seven opinions issued after December 1, 2006, that analyzed cost shifting outside of sanctions. Cost shifting was ordered in only three of these decisions, two of which involved requesting parties willing to pay to conduct their own forensic examinations of the respondents' computers. *See Sterle v. Elizabeth Arden, Inc.*, No. 06-01584, 2008 WL 961216, at *2 (D. Conn. Apr. 9, 2008) (ordering conditional cost shifting if the plaintiff did not uncover relevant documents from the defendant's systems); *Thielen v. Buongiorno USA, Inc.*, No. 06-0016, 2007 WL 465680, at *3 (W.D. Mich. Feb. 8, 2007) (ordering "forensic examination of plaintiff's computer"). The sole cost-shifting decision in which the requesting party was clearly opposed to paying expenses provides the example in the Introduction to this Comment. *See Haka v. Lincoln County*, 246 F.R.D. 577, 578 (W.D. Wis. 2007). This case is discussed in subsection III.B.3.

²⁴ *See, e.g., Haka*, 246 F.R.D. at 578 (describing an individual plaintiff's requests for documents related to employment discrimination); *In re Veeco Instruments, Inc. Sec. Litig.*, No. 05-1695, 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007) (explaining the lead class action plaintiff's request for documents from the corporate defendant); *Quinby v. WestLB AG*, 245 F.R.D. 94, 96 (S.D.N.Y. 2006) (describing the individual plaintiff's requests related to gender and employment discrimination); *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 569-70 (N.D. Ill. 2004) (recounting class action plaintiffs' requests for documents relating to sexual harassment in the workplace); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 311-12 (S.D.N.Y. 2003) (illustrating the potential complexity of an individual plaintiff's requests for extensive documentation related to employment discrimination); *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423-24 (S.D.N.Y. 2002) (describing individual concert-promoter plaintiffs' broad requests for documents from defendant booking agencies and other promoters relating to antitrust violations); *McPeck v. Ashcroft*, 202 F.R.D. 31, 31-32 (D.D.C. 2001) (explaining an individual plaintiff's requests for documents related to employment discrimination); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-0897, 1995 WL 360526, at *1 (N.D. Ill. June 15, 1995) (recounting requests by class action plaintiffs for documents from the corporate defendant); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 460 (D. Utah 1985) (describing the plaintiffs' requests for documents related to age-based employment discrimination). There are exceptions, of course. Sometimes the requesting party is a defendant. *See Coburn v. PN II, Inc.*, No. 07-00662, 2008 WL 879746, at *2 (D. Nev. Mar. 28, 2008) (authorizing cost shifting where the defendant former employer offered to pay for a forensic examination of the plaintiff's home computer); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 562 (W.D. Tenn. 2003) (ordering an individual defendant to bear some costs of the plaintiff's restoration of network backup tapes in a trade secrets case where the defendant

Judicial intervention into cost shifting is most necessary 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.²⁵ Because of this structural characteristic, the terms “requesting parties” and “plaintiffs” are used interchangeably throughout this Comment unless otherwise noted in the discussion of particular cases.²⁶

My survey reveals that although courts have not uniformly applied Rule 26(b)(2), there appears to have been a decline in cost-shifting orders following the 2006 e-discovery amendments.²⁷ Although the sample of cases in the survey may not necessarily be representative of all cost-shifting opinions,²⁸ I posit that cost shifting is likely rarer now because the amended Rules make reasonably inaccessible data presumptively undiscoverable²⁹ and also emphasize negotiation among parties, limiting the need for judicial intervention.³⁰

Part IV recognizes two troubling trends in cost-shifting cases: (1) the tendency of some courts to liberally shift costs in lieu of denying meritless discovery and (2) the possibility that wealthier parties' greater willingness to pay provides them with significantly upgraded access to discovery over poorer parties. It concludes that as discovery costs continue to spiral upwards, the optimal discovery paradigm would

had requested that the plaintiff produce network backup tapes). While a large portion of cost-shifting cases involve individuals litigating against corporations, some cost-shifting cases involve corporations on both sides. *See, e.g.,* Multitech. Servs., L.P. v. Verizon Sw., No. 02-0702, 2004 WL 1553480, at *1 (N.D. Tex. July 12, 2004) (describing the plaintiff corporation's requests for documents from the defendant corporation).

²⁵ This is most apparent in employment discrimination cases where the defendant employer maintains and produces most of the discovery. *See* Rodney A. Satterwhite & Matthew J. Quatrara, *Asymmetrical Warfare: The Cost of Electronic Discovery in Employment Litigation*, 14 RICH. J.L. & TECH. 9, ¶¶ 7-9, at 3-4 (2008), <http://jolt.richmond.edu/v14i3/article9.pdf> (describing systemic discovery concerns in employment litigation where the median settlement is only \$70,000 and the defendant employer is disproportionately responsible for restoring and producing the relevant discovery).

²⁶ Similarly, the terms “responding parties” and “defendants” are used interchangeably in the general text.

²⁷ *See infra* subsection III.B.3.

²⁸ *See supra* note 23 (discussing the limitations of the survey and describing its methodology).

²⁹ *See* FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”). The two-tiered discovery system created by Rule 26(b)(2)(B) is discussed in subsection III.B.1.

³⁰ *See* FED. R. CIV. P. 26(f) (“In conferring, the parties must consider the nature and basis of their claims . . . and develop a proposed discovery plan.”). This negotiation, which often occurs surrounding a discovery conference, is discussed in subsection III.B.3.

resort to cost shifting only when informational uncertainty makes the likelihood of uncovering critical information a very close call. The optimal approach would involve storage-tape sampling to determine the likelihood of uncovering relevant data,³¹ followed by a combination of the two-tiered discovery structure in amended Rule 26(b)(2), as well as the factors in the *Zubulake* test, to guide judges in determining when ordering both discovery and cost shifting is appropriate.

I. DEFINING THE PROBLEM: EARLY APPROACHES TO COST SHIFTING

In the mid-1990s, the traditional American paradigm of forcing each party to bear its own costs was undermined by one-sided and tremendous expenses associated with electronic discovery. As e-discovery became more common, the view that a producing party must automatically bear its associated expense as a cost of doing business became as outmoded as Commodore 64 computers. With individual plaintiffs able to coerce corporate defendants into settling because of the high cost of discovery, courts began developing fact-intensive balancing tests conditioning discovery on the requesting party's ability to pay for it.

A. *Electronic Discovery Expenses as a Cost of Doing Business*

When the Supreme Court reaffirmed the presumption that “the responding party must bear the expense of complying with discovery requests” in 1978,³² complex discovery typically entailed scores of young associates reviewing boxes of documents in corporate warehouses.³³ Respondents who made their paper records available for inspection were able to limit plaintiffs' fishing expeditions to the extent of the plaintiffs' available manpower.³⁴ Courts typically refused to shift

³¹ Sampling is the process of restoring only a small portion of backup tapes for review, typically at the responding party's expense, to better estimate the costs and likelihood of success of the entire requested production. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (“[B]y requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork.”).

³² *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978); *see also id.* (noting that the responding party may, however, “invoke the district court's discretion under Rule 26(c) to grant orders protecting him from ‘undue burden or expense’ in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery”).

³³ *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004) (stating that “warehouse” reviews kept the potential for fishing expeditions in check).

³⁴ In *Bills v. Kennecott Corp.*, the court presciently noted that

costs for expensive productions by stating that the defendants should have foreseen the cost when they chose to use expensive storage mechanisms: the so-called “cost of doing business” argument.³⁵ For example, in *Delozier v. First National Bank of Gatlinburg*, the defendant was ordered to pay for the photocopying of its records from microfilm because the defendant *elected* to save its records in that form.³⁶ In *Daewoo Electronics Co. v. United States*, the United States Court of International Trade held that “[t]he normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship.”³⁷ For the most part, courts did not even consider allocating costs.

Even when courts analyzed cost shifting prior to the mid-1990s, the result generally remained the same. One of the earliest cases to consider cost shifting was *Bills v. Kennecott Corp.*, an age discrimination action in which plaintiffs requested that their former employer provide printed computer records.³⁸ The defendant printed the data and moved the court for reimbursement of the \$5411 cost.³⁹ Recognizing that the advisory notes to Rule 26(c) provided “no guidance” on determining what type of discoverable computer-stored information constitutes an undue burden,⁴⁰ the court set forth four relevant factors: (1) the total cost of production; (2) “the relative expense and burden” to each party in obtaining the data; (3) whether the requesting party would be substantially burdened by the expense; and (4) whether the responding party would benefit in any way from product-

cost-shifting by means of simply producing volumes of records for inspection by the other side may be or may become a thing of the past in this computer age, [with] the only recourse [being] . . . a protective order under Rule 26(c) for undue expense or burden in order to shift the financial burden to the requesting party or to limit discovery.

108 F.R.D. 459, 462 (D. Utah 1985).

³⁵ See, e.g., *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) (holding that a defendant “may not excuse itself from compliance with Rule 34 . . . by utilizing a system of [nonelectronic] record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition” (citation omitted)).

³⁶ 109 F.R.D. 161, 164 (E.D. Tenn. 1986).

³⁷ 650 F. Supp. 1003, 1006 (Ct. Int’l Trade 1986).

³⁸ 108 F.R.D. at 460.

³⁹ *Id.*

⁴⁰ *Id.* at 462.

ing the data.⁴¹ With all four factors favoring the requesting party, the court declined the defendant's motion.⁴²

Although the *Bills* court stated that it was not promulgating an "ironclad formula,"⁴³ the four-factor test became the "golden rule" for courts evaluating the problem until the *Rowe* decision.⁴⁴ Despite its popularity, the *Bills* balancing test did not put an end to the "cost of doing business" argument. For example, in 1995, the Northern District of Illinois purported to apply the test in *In re Brand Name Prescription Drugs Antitrust Litigation*, but it focused heavily on the defendant's decision to store information on backup tapes as a reason to reject cost shifting.⁴⁵ While acknowledging that the \$50,000 to \$70,000 retrieval cost was "expensive," the court did "not believe that it is a burden that the Class Plaintiffs should bear, particularly where, as here, 'the costliness of the discovery procedure involved is . . . a product of the defendant's record-keeping scheme over which the [plaintiffs have] no control.'"⁴⁶ This view did not persist long. As typical discovery expenses rose into the hundreds of thousands of dollars, courts began to move past the "cost of doing business" position.

B. *The Rise of Electronic Discovery*

The rapid computerization of the 1990s quickly made "cost of doing business" decisions like *In re Brand Name Prescription Drugs* obsolete. By the year 2000, as storage space became cheaper, nearly one-third of electronically stored documents remained solely in electronic form.⁴⁷ Conventional warehouse productions, with their expenses limited by the manpower available to requesting parties to photocopy data, were replaced by computerized environments with low searching and copying costs but tremendous restoration and processing expenses.⁴⁸

⁴¹ *Id.* at 464.

⁴² *Id.*

⁴³ *Id.* at 463.

⁴⁴ See Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 282-83 (2000) (remarking that although the *Bills* court considered it "judicially imprudent" to apply identical factors in all situations, several cases prior to 2000 did just that (internal quotation marks omitted) (quoting *Bills*, 108 F.R.D. at 463)).

⁴⁵ No. 94-0897, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995).

⁴⁶ *Id.* (quoting *Delozier v. First Nat'l Bank of Gatlinburg*, 109 F.R.D. 161, 164 (E.D. Tenn. 1986)).

⁴⁷ See Giacobbe, *supra* note 44, at 259.

⁴⁸ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

As corporations implemented archival systems designed to recover lost data, they unwittingly provided plaintiffs with a fertile new source of potentially relevant documents, raising discovery costs immensely. Because discovery disproportionately burdened corporate defendants,⁴⁹ some plaintiffs began to strategically employ “weapons of mass discovery”⁵⁰ to force settlements.⁵¹ So long as a plaintiff could meet the minimal threshold requirements of Rule 26(b)(1) for the discoverability of information,⁵² it could present the defendant with a Hobson’s choice of funding prohibitively expensive discovery or settling the suit. For example, when plaintiffs suing a small company realized that it held about 115 backup tapes in a small warehouse, they strategically pushed the magistrate judge to grant their motion to compel, presenting a \$1.25 million price tag for the small company and resulting in an instant settlement.⁵³ In cases like this, the magistrate judge, whose authority is restricted to nondispositive actions,⁵⁴ could nevertheless effectively dispose of an action by granting an improvident discovery order.⁵⁵

According to the 2008 Socha-Gelbmann Electronic Discovery Survey Report, litigants spent \$2.79 billion on electronic discovery in

⁴⁹ See Satterwhite & Quatrara, *supra* note 25, ¶¶ 7–9, at 3–4 (noting the disparities in costs between employers and employees in employment litigation).

⁵⁰ See *Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure Before the Civil Rules Advisory Comm.* 4 (2005), available at <http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf> [hereinafter *Hearing*] (statement of Greg McCurdy, Senior Attorney, Microsoft Corporation) (referencing the term used by a member of the Florida plaintiffs’ bar).

⁵¹ *Id.* at 4, 11.

⁵² Rule 26(b)(1) permits parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense . . . [that is] reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1).

⁵³ *Hearing, supra* note 50, at 11 (statement of Greg McCurdy, Senior Attorney, Microsoft Corporation).

⁵⁴ The authority of a magistrate judge is broadly restricted:

[A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

28 U.S.C. § 636(b)(1)(A) (2006).

⁵⁵ District courts review magistrates’ discovery orders under the highly deferential clear error standard. See *id.*

2007, an increase of 43% over 2006.⁵⁶ An ongoing copyright infringement suit between software giants Oracle Corporation and SAP AG illustrates some of these expenses in practice.⁵⁷ The plaintiff, Oracle, requested discovery from 165 defendant custodians, which would have taken a year to produce and cost \$16.5 million in addition to *other* discovery from central repositories.⁵⁸ Relying on the proportionality provisions of Rule 26(b)(2)(C)(iii),⁵⁹ discussed in Part III, and Rule 1's overarching mandate to provide a "just, speedy, and inexpensive determination of every action and proceeding,"⁶⁰ the magistrate judge limited discovery to 120 custodians, reducing the defendant's estimated expense for this particular request to \$11.5 million without engaging in cost shifting.⁶¹ Though the multimillion-dollar expenses in the *Oracle* case represent a rather extreme example, electronic discovery undeniably became a pricey proposition over the last fifteen years, requiring careful management, including cost shifting by judges.

C. *The Move Toward Cost Shifting*

As it became clear that electronic discovery could not be treated exactly like traditional discovery, courts started balancing plaintiffs' legitimate requests for information with defendants' right not to be unduly burdened by discovery. The possibility of shifting costs in appropriate cases presented a nuanced solution to the inherent uncertainty of electronic discovery—that is, whether costly restoration was likely to lead to the discovery of relevant documents. Backup tapes save mirror images of the user's computer structure for catastrophic recovery purposes, but they are not designed to allow users to easily cull relevant documents.⁶² Because backup tapes are not indexed and

⁵⁶ See George Socha & Tom Gelbmann, *A Look at the 2008 Socha-Gelbmann Survey*, LAW TECH. NEWS, Aug. 2008, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423646479#>.

⁵⁷ See *Oracle Corp. v. SAP AG*, No. 07-01658 (N.D. Cal. July 3, 2008), available at <http://www.tnlawsuit.com/uploads/Order%20Re%20Scope%20of%20Discovery%20of%20Electronically%20Stored%20Information.pdf>.

⁵⁸ *Id.* slip op. at 2.

⁵⁹ The Rule authorizes the court to limit the frequency or extent of discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the proposed discovery in resolving the issues."

⁶⁰ FED. R. CIV. P. 1.

⁶¹ *Oracle*, No. 07-01658, slip op. at 3.

⁶² See Ross Chaffin, Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 122 (2006)

do not capture documents created and deleted prior to the scheduled backup, typically neither party can prove that restoration would certainly lead to the production of relevant data. Cost shifting permits judges to deal with the uncertainty by accommodating plaintiffs who have good reason to believe that backup tapes contain crucial information while protecting defendants from financial hardship. Magistrate Judge James Francis, author of the influential *Rowe* cost-shifting analysis discussed in subsection II.B.1, has pointed out that when the judge is only forty percent certain that the restored information would be useful, shifting some costs is an improvement over simply granting or denying discovery altogether.⁶³

The move toward cost shifting began in the mid-1990s, with the *Manual for Complex Litigation* recommending it when parties “request production in a form that can be created only at substantial expense for additional programming.”⁶⁴ Despite this recommendation, e-discovery cost shifting prior to the year 2000 was rare.⁶⁵ Courts considered ordering it only when plaintiffs asked for permission to conduct forensic examinations of defendants’ computers at their own expense. By December 2006, however, at least eleven courts ordered the requesting parties to bear expenses, often over the latter’s vigorous objections to the allocation.⁶⁶ Cost shifting even found application in nonelectronic discovery cases.⁶⁷ The next Part details the advantages

(describing the large storage capacity of backup tapes and noting the high costs associated with their restoration).

⁶³ See James C. Francis IV, *Preservation, Production & Cost-Shifting in E-Discovery*, in ELECTRONIC DISCOVERY GUIDANCE 2008: WHAT CORPORATE AND OUTSIDE COUNSEL NEED TO KNOW 11, 19 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-783, 2008).

⁶⁴ MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.446 (1985).

⁶⁵ This Comment’s survey identified only two cases ordering cost shifting for electronic discovery up to and including the year 2000. See *Simon Prop. Group L.P. v. my-Simon, Inc.*, 194 F.R.D. 639, 641 (S.D. Ind. 2000) (permitting the plaintiff to search the defendant’s computers for deleted files at the plaintiff’s own cost); *Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (same).

⁶⁶ Cf. *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 574, 577 (N.D. Ill. 2004) (ordering the plaintiffs in an employment and gender discrimination case to pay 25% of the costs of restoring the defendant’s backup tapes, after a sample revealed a 4.5% to 6.5% responsive rate); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 479 (N.D. Cal. 2003) (directing corporate parties in an intellectual property suit to split costs for extracting source code from the defendant’s database).

⁶⁷ Although this Comment focuses strictly on e-discovery, it should be noted that the balancing tests developed for e-discovery, like the *Zubulake* test discussed in Section II.C, have been modified and used in nonelectronic discovery settings. See *Multitech. Servs., L.P. v. Verizon Sw., No. 02-0702*, 2004 WL 1553480, at *1-2 (N.D. Tex. July 12, 2004) (modifying the *Zubulake* factors and ordering cost shifting for nonelectronic interrogato-

and drawbacks of the multifactor cost-shifting tests developed by judges prior to the 2006 electronic discovery amendments.

II. COST-SHIFTING TESTS PRIOR TO THE 2006 E-DISCOVERY AMENDMENTS

Though courts generally appreciated the ability to shift costs as a way to resolve informational uncertainties, they had to determine when cost shifting would be appropriate and what percent of the expenses should be shared. Some courts eschewed multifactor analysis, considering instead whether a plaintiff's requests seemed to offend the spirit of Rule 1, which states that the intent and purpose of the Federal Rules of Civil Procedure is the "just, speedy, and inexpensive determination of every action."⁶⁸ For example, courts have cited Rule 1 to prohibit outright discovery that "would properly be characterized as a fishing expedition, causing needless expense and burden to all concerned"⁶⁹ and to refuse reimbursement of expenses incurred by parties in electronically converting files for their own litigation purposes.⁷⁰ Rule 26(c) authorizes judges, "for good cause, [to] issue an order to protect a party or person from . . . undue burden or expense, including . . . specifying terms . . . for the disclosure or discovery."⁷¹ Yet neither Rule 1 nor Rule 26(c) provides particular guidance on when cost shifting is appropriate. Under the 2000 amendments, Rule 26(b)(2)(iii) offered five factors to consider in weighing the "burden or expense of the proposed discovery" against its "likely benefit": "the needs of the case, the amount in controversy, the parties' resources,

ries); *see also* *UPS, Inc. v. Net, Inc.*, 222 F.R.D. 69, 71 (E.D.N.Y. 2004) ("Therefore, the Court finds that the maturation of Rule 26(b)(2) over several decades allows judges to use the limitations of Rule 26(b)(2) with increasing frequency and with an eye toward equity. This, undeniably, includes cost-shifting in [non-electronic] discovery.").

⁶⁸ FED. R. CIV. P. 1. *See generally* Mia Mazza, Emmalena K. Quesada & Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 1, ¶ 176, at 87 (2007), <http://jolt.richmond.edu/v13i3/article11.pdf> ("[L]itigants should be aggressive in invoking [Rule] 1 as a basis for the innovative use of search strategies and cost-shifting to increase efficiency and reduce costs across the board in discovery.").

⁶⁹ *N. River Ins. Co. v. Greater N.Y. Mut. Ins. Co.*, 872 F. Supp 1411, 1412 (E.D. Pa. 1995).

⁷⁰ *See In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 443 (D.N.J. 2002) (refusing to order the plaintiffs to reimburse half of the costs of the defendant's conversion of paper copies into electronic form when the defendants did so for their own use in litigation); *Hines v. Widnall*, 183 F.R.D. 596, 601 (N.D. Fla. 1998) ("[I]t is simply illogical to require plaintiffs to help defendant pay for something [defendant] did voluntarily.").

⁷¹ FED. R. CIV. P. 26(c)(1).

the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”⁷² These five factors, however, were intended to guide the court to limit the frequency or extent of discovery, which is a different question than when discovery should proceed *but with cost shifting*. Although some courts insisted that Rule 26(b)(2) sufficiently guided both discovery-production and cost-shifting decisions,⁷³ others applied three widely used tests prior to the 2006 e-discovery amendments: (1) a marginal utility test from *McPeek v. Ashcroft*,⁷⁴ (2) an eight-factor test from *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,⁷⁵ and (3) a seven-factor weighted test from *Zubulake v. UBS Warburg LLC*.⁷⁶

A. *The Marginal Utility Test*

Steven McPeek, an employee at the Department of Justice (DOJ), alleged that the DOJ failed to keep its prior sexual harassment settlement with him confidential and retaliated against him.⁷⁷ He prodded requests to have the DOJ search its backup tapes for data that might have been deleted by the DOJ’s computer users but preserved on the tapes.⁷⁸ Although he established that his supervisors used their computers for word processing and e-mail, McPeek presented no evidence that there were particularly relevant deleted e-mails likely to be recovered.⁷⁹

Magistrate Judge John Facciola began by dismissing the implication from *In re Brand Name Prescription Drugs* that restoring all backup tapes is necessary in every case and that the defendant should pay for

⁷² FED. R. CIV. P. 26(b)(2)(iii) (2000). Following the 2006 amendments, this proportionality test became a guide for evaluating whether parties showed “good cause” when requesting information that “is not reasonably accessible because of undue burden or cost.” For discussion of Rule 26(b)(2)(B) following the 2006 amendments, see Section III.B.

⁷³ See, e.g., *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003) (stating that in addition to the marginal utility, *Rowe*, and *Zubulake* tests, “it also can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records”).

⁷⁴ 202 F.R.D. 31, 34 (D.D.C. 2001).

⁷⁵ 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

⁷⁶ 217 F.R.D. 309, 320-23 (S.D.N.Y. 2003).

⁷⁷ *McPeek*, 202 F.R.D. at 32.

⁷⁸ *Id.*

⁷⁹ See *id.* at 33 (stating that there was only a “theoretical possibility” the tapes might contain something relevant to a claim or defense).

the restoration as a cost of its “choice to use computers.”⁸⁰ Judge Facciola proceeded,

A fairer approach borrows, by analogy, from the economic principle of “marginal utility.” The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is “at the margin.”⁸¹

Judge Facciola recognized that the marginal utility approach by itself does not involve economic considerations and stated that these considerations should also be analyzed to prevent defendants from shouldering an “undue burden.”⁸² Without elaborating on how the economic side of his test might be evaluated, however, Judge Facciola ordered the DOJ to restore one year worth of backup tapes and to detail its costs to help decide whether further searches were necessary.⁸³

Other courts followed *McPeck*'s marginal utility analysis and incremental approach. In *Byers v. Illinois State Police*, plaintiffs alleging employment discrimination demanded e-mails that could be recovered only by licensing and reprogramming the defendant's old e-mail program at a cost between \$20,000 and \$30,000.⁸⁴ The plaintiffs argued that the backup tapes would contain a particular racist e-mail substantiating their claims, but none of the persons they deposed confirmed the existence of the e-mail.⁸⁵ The court focused its inquiry on the plaintiffs' inability to establish the likelihood of uncovering relevant e-mails compared to the significant burden of the request and shifted all restoration costs to the plaintiffs.⁸⁶ The court appeared particularly exasperated that the plaintiffs requested eight years worth of e-mails rather than targeting the months leading up to the discrimination.⁸⁷ Complete cost shifting would provide plaintiffs with an “incentive to focus their requests.”⁸⁸

⁸⁰ *Id.* (internal quotation marks omitted).

⁸¹ *Id.* at 34.

⁸² *Id.*; *see also id.* (“If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single e-mail.”).

⁸³ *Id.* at 34-35.

⁸⁴ No. 99-8105, 2002 WL 1264004, at *11 (N.D. Ill. June 3, 2002).

⁸⁵ *Id.* at *11-12.

⁸⁶ *Id.*

⁸⁷ *Id.* at *12.

⁸⁸ *Id.*

In the \$30 million contract litigation *AAB Joint Venture v. United States*, the plaintiff contended that the defendant's policies called for the creation of certain relevant e-mails and other substantial documentation and that this information would likely exist in the defendant's backup tapes.⁸⁹ The defendant conceded that *some* relevant e-mails were presumably located on the backup tapes but balked at the \$85,000 to \$150,000 restoration cost⁹⁰ and argued that other allegedly pertinent documents likely did not exist on the backup tapes at all.⁹¹ Citing *McPeck*, the court ordered the defendant, at its own expense, to restore all of the pertinent e-mails because the costs of discovery were small compared to the potential damages and the likelihood of uncovering relevant information was high.⁹² Finding that the plaintiff had "provided no clear evidence to indicate that [the other] relevant documents [were] likely to be contained in the backup tapes,"⁹³ however, the court ordered only one-fourth of the other backup tapes produced.⁹⁴

In *Oxford House, Inc. v. City of Topeka, Kansas*, the plaintiffs requested restoration of the city's deleted e-mails from backup tapes that were recycled every six weeks.⁹⁵ Applying the marginal utility test, the court compared the "minimal" efficacy of finding relevant, non-overwritten information on these tapes with the prohibitive \$100,000 restoration cost.⁹⁶ The low marginal utility of conducting the discovery led the court to deny the plaintiff's motion to compel.⁹⁷

These cases evidence the advantages and drawbacks of the marginal utility test. The test does not explicitly consider the resources of the parties, and it subjugates economic considerations to the predominant question of whether the proposed discovery would be likely to reveal relevant data. If a plaintiff can make a strong showing that storage tapes would contain specific e-mails, as in *AAB Joint Venture*, the discovery will be ordered unless the cost is remarkably prohibitive.⁹⁸ Though this test is effective in precluding marginally worthless discov-

⁸⁹ 75 Fed. Cl. 432, 438, 442 (2007).

⁹⁰ *Id.* at 439.

⁹¹ *Id.* at 438.

⁹² *Id.* at 443.

⁹³ *Id.*

⁹⁴ *Id.* at 444.

⁹⁵ No. 06-4004, 2007 WL 1246200, at *3 (D. Kan. Apr. 27, 2007).

⁹⁶ *Id.* at *4-5.

⁹⁷ *Id.* at *5.

⁹⁸ See *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 438, 442-43 (2007) (ordering discovery of storage tapes that defendants conceded might have relevant information despite a \$150,000 restoration cost).

ery, it is not an effective *cost-shifting* test. Courts that purported to apply the *McPeek* test supplemented it with additional factors, such as the cost of discovery compared to potential damages⁹⁹ and the specificity of plaintiff's requests,¹⁰⁰ as a way to curtail overbroad discovery.

By failing to explicitly consider the parties' resources and economic costs, the test also diverges from the economic concept of marginal utility that it seeks to embody. Marginal utility theory envisions that a buyer and a seller arrive at a price at which each party believes it is subjectively obtaining more utility than is provided by the money or product it is giving up.¹⁰¹ Discovery is not a voluntary transaction, however; defendants typically receive no value from even small self-productions. Framing the issue as whether the litigation as a *whole* obtains some *objective* utility from the discovery of more documents at the expense of a single party contradicts marginal utility theory's emphasis on the preferences of the specific parties to the transaction. The marginal utility test does not focus on a particular party's ability to control costs or the relative benefit to the respondent in producing the data. These limitations help explain why Magistrate Judge James Francis in *Rowe*¹⁰² and District Judge Shira Scheindlin in *Zubulake*¹⁰³ adopted marginal utility—the likelihood of discovering critical information—as a relevant factor in their tests but supplemented it with additional factors.

B. *The Rowe Test and Discovery Protocol*

A year after *McPeek v. Ashcroft*, Magistrate Judge James Francis of the Southern District of New York developed an eight-factor test that was “hailed as the ‘gold standard’ of cost allocation adjudication” before the *Zubulake* analysis supplanted it.¹⁰⁴ *Rowe Entertainment, Inc. v.*

⁹⁹ See, e.g., *id.*

¹⁰⁰ See, e.g., *Byers v. Ill. State Police*, No. 99-8105, 2002 WL 1264004, at *11-12 (N.D. Ill. June 3, 2002).

¹⁰¹ See generally Robert D. Cooter, *The Best Right Laws: Value Foundations of the Economic Analysis of Law*, 64 NOTRE DAME L. REV. 817 (1989) (advocating for a legal system premised on the concept of Pareto efficiency).

¹⁰² See *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 430 (S.D.N.Y. 2002) (adopting, from the *McPeek* marginal utility test, the likelihood of a successful search as its second factor).

¹⁰³ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323 (S.D.N.Y. 2003) (stating that the first two factors, (1) the extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources, “compris[e] the marginal utility test” and “are the most important”).

¹⁰⁴ Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 183 (2006).

William Morris Agency, Inc. also developed an accompanying discovery protocol whose plaintiff-friendly attributes raise additional concerns about cost shifting.

1. The Eight-Factor *Rowe* Test

In *Rowe*, black concert promoters contended that they were excluded from concerts with white bands through discriminatory and anticompetitive practices by booking agencies and other promoters.¹⁰⁵ As is common in discrimination¹⁰⁶ and antitrust¹⁰⁷ actions, the plaintiffs propounded sweeping discovery requests costing upwards of \$9.75 million for just one of the several defendants.¹⁰⁸ After finding that the type of e-mails sought was discoverable, Judge Francis set out a cost-shifting test premised on eight factors:

- (1) the specificity of the discovery requests;
- (2) the likelihood of discovering critical information;
- (3) the availability of such information from other sources;
- (4) the purposes for which the responding party maintains the requested data;
- (5) the relative benefit to the parties of obtaining the information;
- (6) the total cost associated with production;
- (7) the relative ability of each party to control costs and its incentive to do so; and
- (8) the resources available to each party.¹⁰⁹

The first factor seeks to penalize overbroad requests when a party does not identify any specific factual issue that the discovery would

¹⁰⁵ *Rowe*, 205 F.R.D. at 423.

¹⁰⁶ In the employment context, plaintiffs will typically prove discrimination using indirect evidence, which necessitates reviewing broad collections of e-mails to piece together discriminatory intent. *See, e.g.*, *Hoffman v. Caterpillar, Inc.*, 256 F.3d 568, 576 (7th Cir. 2001) (“Direct evidence cases . . . are very rare in the employment discrimination context because employers are generally very careful to avoid statements that suggest discriminatory intent—whether their true intentions are discriminatory or not.”).

¹⁰⁷ *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (“[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” (citation omitted)).

¹⁰⁸ *See Rowe*, 205 F.R.D. at 425 (explaining the potential cost to William Morris Agency, Inc. of cataloging, restoring, and processing e-mails if the e-mails on all back-up tapes needed to be produced).

¹⁰⁹ *Id.* at 429.

help to prove. The next factor comes from *McPeck*'s marginal utility test. The third factor shifts costs when "equivalent information either has already been made available or is accessible in a different format at less expense," and is typically relevant when plaintiffs request electronic conversion of documents given to them in hard copy.¹¹⁰

The fourth factor, the purposes for which the responding party maintains the requested data, is curious. Ironically, after criticizing the "cost of doing business" argument advanced in *Daewoo Electronics Co. v. United States*,¹¹¹ Judge Francis cited the case to establish a distinction between files kept for a business purpose (weighing against cost shifting) and those maintained strictly for disaster-recovery purposes (favoring cost shifting).¹¹²

The fifth factor seeks to maintain costs with the defendant when the restoration would bring her technical advantages—such as spurring her to create a program that she could use to search her data in the future—or litigation advantages (e.g., if there is a high likelihood that the restored files would help her own claims and defenses).¹¹³ The total cost of the production, the sixth factor, is somewhat vague as a stand-alone factor. Judge Francis cited¹¹⁴ cases finding that a substantial burden existed for expenditures of \$16,000,¹¹⁵ \$5000,¹¹⁶ and even \$1680.¹¹⁷

The seventh factor, the ability of each party to control costs, has a structural quirk causing it to lean toward cost shifting in nearly every case. Plaintiffs arguing that a defendant's cost estimates are inflated typically offer less expensive alternatives in order to win the sixth factor. They are then seen as being better able to control costs, however,

¹¹⁰ *Id.* at 430 (citing *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94-2120, 1996 WL 22976 (S.D.N.Y. Jan. 23, 1996)).

¹¹¹ *See supra* text accompanying note 37.

¹¹² *See Rowe*, 205 F.R.D. at 430-31 ("If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense . . . [but] a party that happens to retain vestigial data for no current business purpose, but only in a case of an emergency . . . should not be put to the expense of producing it." (citation omitted)).

¹¹³ *See id.* at 431 (concluding that "[w]here the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party").

¹¹⁴ *See id.*

¹¹⁵ *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 361-62 (1978) (finding that "a threshold expense of \$16,000 . . . hardly can be viewed as an insubstantial burden" on a defendant whose assets exceeded \$500 million).

¹¹⁶ *See Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,294, at 76,345 (S.D.N.Y. 1996).

¹¹⁷ *See id.*

and lose the seventh factor, as the plaintiffs did in *Rowe*.¹¹⁸ Plaintiffs are also nearly always deemed to be in the best position to incrementally “calibrate their discovery based on the information obtained from initial sampling” and decide whether further searches would be justified.¹¹⁹

The last factor improves on the marginal utility test by inquiring into each party’s ability to pay, even if the costs are modest in absolute terms.¹²⁰ Without specifying whether any one factor is more important than another, Judge Francis found that, in the case under his consideration, the results tipped heavily toward shifting all the recovery costs to the plaintiffs.¹²¹

Courts substantively applied The *Rowe* analysis in at least three other cases.¹²² The most important pattern evident from the cases is that mechanical application of the test skewed the result toward cost shifting.¹²³ Indeed, all of the reported decisions identified through this Comment’s survey that applied the *Rowe* test shifted costs. As pointed out by commentators,

[I]n many instances, at least four factors—the purposes of retention, benefit to the parties, total costs, and ability to control costs—will favor the responding party. If courts simply conduct an absolute comparison of the eight *Rowe* factors, the responding party [would] need to attain

¹¹⁸ See *Rowe*, 205 F.R.D. at 431-32 (“The plaintiffs have professed an ability to limit the costs of discovery of e-mails to a much greater extent than defendants. Of course, this factor alone does not dictate cost-shifting; the defendants could be required to pay the bill for the less expensive methodologies proposed by the plaintiffs.”).

¹¹⁹ *Id.* at 432.

¹²⁰ See *id.* (noting that without cost shifting, the cost of production could outstrip one party’s resources).

¹²¹ *Id.*

¹²² See *Computer Assocs. Int’l, Inc. v. Quest Software, Inc.*, No. 02-4721, 2003 WL 21277129, at *1-2 (N.D. Ill. June 3, 2003) (declining to shift costs for the defendant’s privilege review prior to disclosure of redacted image devices to the plaintiffs); *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 553-58 (W.D. Tenn. 2003) (shifting costs for restoration of those storage tapes least likely to contain relevant information); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439, at *6-7 (E.D. La. Feb. 19, 2002) (shifting all costs to the requesting party and adopting the *Rowe* analysis); see also *In re Livent, Inc. Noteholders Sec. Litig.*, No. 98-7161, 2003 WL 23254, at *3 (S.D.N.Y. Jan. 2, 2003) (“[T]he attorneys should read Magistrate Judge Francis’s opinion in [*Rowe*]. Then Deloitte and plaintiffs should confer, in person or by telephone, and discuss the eight factors listed in that opinion.” (citation omitted)).

¹²³ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003) (“Indeed, of the handful of reported opinions that apply *Rowe* or some modification thereof, *all of them* have ordered the cost of discovery to be shifted to the requesting party.”).

just one more factor to shift the costs to the requesting party.¹²⁴

Often, the first or second factor tipped the scales. Courts saw the plaintiff's requests as too broad,¹²⁵ or the plaintiff failed to prove that the backup tapes contained some reasonably high percentage of relevant e-mails.¹²⁶ Interestingly, all of the judges that have applied *Rowe* have held the third factor—the resources available to each party—to be neutral, without extended discussion.¹²⁷ In fact, the *Rowe* court itself did not provide any record of the specific assets and resources available to plaintiffs and defendants.

In addition to criticizing *Rowe* for favoring cost shifting in close calls where the traditional presumption against cost shifting should instead prevail, some courts have also faulted the *Rowe* test for being incomplete, encouraging mechanical counting of the factors, and failing to guide the courts toward developing a full factual record through sampling.¹²⁸ In the influential *Zubulake* decision, Judge Shira Scheindlin of the Southern District of New York pointed out that the test also improperly omitted two factors specified in the then-controlling Rule 26(b)(2)(iii) language under the 2000 amendments: the amount in controversy and the importance of the issues at stake in the litigation.¹²⁹ Judge Scheindlin also contended that *Rowe*'s fourth factor, the purposes for retaining the data, had little relevance to the accessibility and cost of ESI.¹³⁰

The *Rowe* test spurred two trends common to other cost-shifting tests: a lack of uniformity in application and an increased willingness by courts to order potentially irrelevant and costly discovery supplemented by cost shifting. The *Medtronic* decision symbolizes both trends. In this trade secrets case, the defendant moved for production by the plaintiff of nearly 1000 backup tapes, seeking e-mails that the plaintiff

¹²⁴ ADAM I. COHEN & DAVID J. LENDER, ELECTRONIC DISCOVERY: LAW AND PRACTICE § 5.05(C), at 5-30 (2010).

¹²⁵ See, e.g., *Medtronic*, 229 F.R.D. at 554-55 (“Michelson has not specifically limited his requests by date, despite his apparent understanding that tapes from 1997 to 2000 are those most likely to reveal the electronic mail he seeks . . . [T]his factor weighs in favor of Michelson bearing part of the production cost.”).

¹²⁶ See, e.g., *Murphy Oil*, 2002 WL 246439, at *5 (noting that without evidence that “the e-mails are likely to be a gold mine,” the mere inference that e-mails may reflect more candor than hard-copy documents suggests that the marginal value of searching e-mails on backup tapes was modest at best (internal quotation marks omitted) (quoting *Rowe*, 205 F.R.D. at 430)).

¹²⁷ See, e.g., *Medtronic*, 229 F.R.D. at 558.

¹²⁸ See, e.g., *Zubulake*, 217 F.R.D. at 320 (discussing the *Rowe* test's drawbacks).

¹²⁹ *Id.* at 321; see also FED. R. CIV. P. 26(b)(2)(iii) (2000).

¹³⁰ *Zubulake*, 217 F.R.D. at 321-22.

conceded may have existed on some post-1997 tapes.¹³¹ The expense was estimated as being in “the range of several million” dollars, which represented about two percent of the amount at issue in the suit.¹³²

The court began by determining that the requesting party, Michelson, failed the specificity and marginal utility factors. Michelson asked for information prior to 1997, “despite his apparent understanding that tapes from 1997 to 2000 are those most likely to reveal the electronic mail he seeks.”¹³³ Michelson could identify only seven relevant pages out of a million pages previously produced, diminishing the likelihood of finding many relevant e-mails.¹³⁴ Thus far, the court’s analysis appears straightforward. During its evaluation of the fourth *Rowe* factor, which is intended to shift costs if the backup tapes were intended only for disaster recovery, however, the court applied *McPeck*’s marginal utility test.¹³⁵ The court implied that if there were a showing that the backup tapes contained relevant information, *this factor itself* would count *against* cost shifting.¹³⁶ This doubled the effect of *Rowe*’s second factor, which incorporates the marginal utility test. The court also curiously determined that both parties would benefit from obtaining the information, although the producing party asserted “that it has not yet searched the backup tapes for litigation-related data and, because of the expense involved, would be unlikely to do so unless compelled by court order.”¹³⁷

Finding that cost shifting was generally appropriate in the case, the court determined the amount based on the dates of the tapes. For data on one set of tapes from 1997 to 2002, the requesting party had to pay forty percent of the restoration costs.¹³⁸ Another set of tapes from 1997 through the production date would be disclosed upon Michelson’s payment of all restoration costs, as well as all of the opposing party’s re-

¹³¹ *Medtronic*, 229 F.R.D. at 553.

¹³² *Id.* at 558.

¹³³ *Id.* at 554-55.

¹³⁴ *Id.* at 555.

¹³⁵ *See id.* at 557 (“Because Michelson has made no showing that the entire spectrum of backup tapes will contain information relevant [to] the cause’s claims or defenses, this factor weighs in favor of shifting production costs to Michelson, the requesting party.”).

¹³⁶ *Id.*

¹³⁷ *Id.* Curiously, the court concluded “that the parties will equally benefit from the electronic discovery, and this factor does not sway the cost-shifting analysis in favor of either party.” *Id.*

¹³⁸ *Id.* at 560-61.

levance review expenses and half of its privilege-review expenses.¹³⁹ Michelson could obtain a third set of tapes created on or before December 31, 1996, by paying one hundred percent of the recovery, relevance-review, and privilege-review costs.¹⁴⁰ Thus, although Michelson himself conceded that there would be little relevant information on the 1996 tape, he was permitted to probe its contents simply by reimbursing the defendant's expenses. Decisions like *Medtronic* illustrate the troublesome pattern of courts ordering discovery accompanied by cost shifting when perhaps no discovery should be ordered at all.¹⁴¹

2. The Plaintiff-Friendly *Rowe* Discovery Protocol

Although primarily known for its cost-shifting analysis, the *Rowe* decision also provided an influential (and plaintiff-friendly) discovery protocol. Under this protocol, (1) the plaintiffs designate a forensic expert subject to the defendant's objections and a confidentiality order; (2) the expert creates a mirror image of the backup tapes; (3) the plaintiffs formulate a search procedure to which the defendants may object; (4) the plaintiffs' lawyers or their experts conduct the searches and review them on an "attorneys' eyes only" basis, which does not constitute any waiver of privilege or confidentiality; (5) the plaintiffs provide hard-copy e-mails that they consider material to the defendants, after which point the defendants pay their own costs for electronically converting or modifying the information; and (6) the defendants review the selected pool of documents and lodge confidentiality and privilege objections.¹⁴² Alternatively, a defendant can review its database at its own expense; remove privileged, confidential, and irrelevant files; and produce a redacted mirror image to the plaintiffs, after which the remaining process would continue from step three.¹⁴³

This protocol, cited approvingly in at least two cases,¹⁴⁴ eliminates the defendant's previous Hobson's choice of paying for restoration or

¹³⁹ *Id.* at 562.

¹⁴⁰ *Id.*

¹⁴¹ *See infra* Part IV (discussing the optimal cost-shifting framework).

¹⁴² *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 433 (S.D.N.Y. 2002).

¹⁴³ *Id.*

¹⁴⁴ *See Gambale v. Deutsche Bank AG*, No. 02-4791, 2002 WL 31655326, at *1 (S.D.N.Y. Nov. 21, 2002) (adopting a slightly modified *Rowe* protocol but leaving it open for further modification upon agreement of both parties); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. 99-3564, 2002 WL 246439, at *4-10 (E.D. La. Feb. 19, 2002) (shifting all costs to the requesting party and adopting the *Rowe* protocol). *But see Cognex Corp. v. Electro Scientific Indus., Inc.*, No. 01-10287, 2002 WL 32309413, at *3-

settling the case, but it replaces it with another one: giving the plaintiff unfettered access to storage tapes containing the entirety of the defendant's business records, or paying for the restoration itself in order to redact confidential information.¹⁴⁵ The advantages to the requesting parties, who are typically plaintiffs, are apparent. A wealthy plaintiff would eagerly volunteer to pay the expenses if it meant getting access to the defendant's entire business and e-mail records, thereby getting a firsthand look at any documents that the defendant may later claw back as privileged. Although plaintiffs would not be able to use those documents at trial or be able to secure a subject-matter waiver, they would benefit from knowing the opposite side's strategies and business records. And the defendant, in undertaking its own privilege review of the immense amount of data, would still run the risk of missing important documents and effecting a subject-matter waiver.¹⁴⁶

It would certainly be possible for a court to craft a more neutral discovery order permitting defendants to hire their own experts, review the documents first, produce only relevant nonprivileged documents to the plaintiffs, and be reimbursed for the entire technical restoration costs and attorney review times.¹⁴⁷ Allowing the plaintiff's expert to serve at the direction of the defendant would also remove some privacy worries.¹⁴⁸ None of the cases surveyed for this Comment actually followed this type of more defendant-friendly protocol. The

5 (D. Mass. July 2, 2002) (citing the *Rowe* decision for its "detailed discussion" of protocol but declining to compel discovery and stating that if the court were to do so, it would permit defendants to review their own production for privilege prior to production at the plaintiff's cost).

¹⁴⁵ See *Murphy Oil*, 2002 WL 246439, at *6-8 (noting that a defendant should be able to assert privilege—and pay for the privilege review—without having to bear the initial cost of production).

¹⁴⁶ Counsel reviewing millions of pages typically relies on search terms and keywords, which can miss important information. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-57 (D. Md. 2008) (holding that the producing party waived attorney-client privilege for 165 inadvertently produced documents, despite screening the production through seventy different keyword searches, because counsel failed to conduct additional quality assurance).

¹⁴⁷ See *Cognex*, 2002 WL 32309413, at *3 (citing the possibility of crafting such an order in response to the plaintiff's willingness to pay costs, but declining to order discovery because of the small likelihood of uncovering important relevant evidence).

¹⁴⁸ This protocol could, of course, become susceptible to abuse from the defendant's side. In *Henry v. Quicken Loans, Inc.*, the plaintiffs agreed to pay for an expert acting at the defendant's direction to recover the defendant's files. No. 04-40346, 2008 WL 474127, at *1 (E.D. Mich. Feb. 15, 2008). When the defendants modified the list of search terms beyond their agreement with the plaintiffs and ran up the expert's bill, they became responsible for paying the additional charges. *Id.* at *5-6.

closest examples are *Playboy Enterprises, Inc. v. Welles*,¹⁴⁹ *Simon Property Group L.P. v. mySimon, Inc.*,¹⁵⁰ and *Coburn v. PN II, Inc.*,¹⁵¹ three cases in which an expert, acting as an agent of the court, recovered the responding party's information and provided it to respondent's counsel, who ran her own searches and produced relevant information.¹⁵² Given that the plaintiff-friendly *Rowe* protocol emerged after the more defendant-friendly *Playboy* protocol, it appears that liberalized cost shifting in *Rowe* also brought tactical protocol advantages to the plaintiffs.

C. *The Zubulake Test*

Laura Zubulake, a UBS sales director, was fired two months after filing an Equal Employment Opportunity Commission complaint.¹⁵³ She sued UBS for gender discrimination and retaliation, and she propounded a discovery request for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff."¹⁵⁴ UBS initially produced 100 pages of e-mails, which Zubulake demonstrated were incomplete because she herself had provided approximately 450 pages of e-mail correspondence.¹⁵⁵ In what Judge Shira Scheindlin termed "a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs," Zubulake requested backup-tape recovery costing approximately \$175,000 in order to uncover evidence that might lead to a verdict upwards of \$13 million.¹⁵⁶

Judge Scheindlin, then a member of the Advisory Committee on Civil Rules, took the opportunity to fill in gaps left in the previous cost-shifting tests, beginning with the previously unanswered threshold question of when it would even be appropriate to conduct a cost-shifting analysis. Judge Scheindlin stated that "cost-shifting [under Rule 26(c)] should be considered *only* when electronic discovery imposes an 'undue burden or expense' on the responding party."¹⁵⁷ Looking to the then-controlling Rule 26(b)(2)(iii) language under

¹⁴⁹ 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

¹⁵⁰ 194 F.R.D. 639 (S.D. Ind. 2000).

¹⁵¹ No. 07-00662, 2008 WL 879746 (D. Nev. Mar. 28, 2008).

¹⁵² *Id.* at *4-5; *Simon Property*, 194 F.R.D. at 641; *Playboy*, 60 F. Supp. 2d at 1055.

¹⁵³ *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 312 (S.D.N.Y. 2003).

¹⁵⁴ *Id.* (alteration in original) (internal quotation marks omitted) (quoting the plaintiff's request for production).

¹⁵⁵ *Id.* at 313.

¹⁵⁶ *Id.* at 311-12 & n.9.

¹⁵⁷ *Id.* at 318 (quoting FED. R. CIV. P. 26(c)).

the 2000 amendments, Judge Scheindlin noted that the burden of discovery is “‘undue’ when it ‘outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.’”¹⁵⁸ Moving beyond the text of the Rules, Judge Scheindlin found that “whether production of documents is unduly burdensome or expensive turns primarily on whether it is kept in an *accessible or inaccessible* format,” which itself “turns largely on the media on which it is stored.”¹⁵⁹ Inaccessible media comprises backup tapes and deleted data existing in clusters on hard-drive space that has not yet been overwritten.¹⁶⁰

After criticizing the *Rowe* test for favoring cost shifting and failing to encourage sampling,¹⁶¹ Judge Scheindlin developed a new analytical framework weighing seven factors in descending order:

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; and
7. The relative benefits to the parties of obtaining the information.¹⁶²

Cautioning that the test should not be applied in “check-list” fashion, Judge Scheindlin placed the most weight on the first two factors, which were derived from the marginal utility test.¹⁶³ The next three factors addressed the expense of the production. Judge Scheindlin noted that the sixth factor, measuring the importance of the litigation for the broader public, will rarely come into play.¹⁶⁴ When it does,

¹⁵⁸ *Id.* (quoting FED. R. CIV. P. 26(b)(2)(iii) (2000)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 318-20.

¹⁶¹ *See supra* text accompanying notes 128-30.

¹⁶² *Zubulake*, 217 F.R.D. at 322.

¹⁶³ *Id.* at 322-23.

¹⁶⁴ *Id.* at 323. Courts applying *Zubulake* thus far have held that employment discrimination, manipulation of the securities market, and intellectual property disputes do not raise important public issues.

however, it can predominate over others.¹⁶⁵ The last factor is the “least important because it is fair to presume that the response to a discovery request generally benefits the requesting party.”¹⁶⁶ When the production also benefits the responding party, however, this factor weighs against cost shifting.¹⁶⁷

Judge Scheindlin stressed the importance of sampling, first seen in *McPeck*, to develop a factual record that would support a more informed application of the test.¹⁶⁸ To that end, UBS was ordered to produce all responsive e-mails from its accessible active space and all e-mails from any five inaccessible backup tapes selected by Zubulake.¹⁶⁹ The sampling revealed 1541 e-mails, of which 600 were deemed nonprivileged and responsive to Zubulake’s request.¹⁷⁰

In her opinion following the sampling, Judge Scheindlin applied her cost-shifting test.¹⁷¹ The marginal utility factors tipped slightly against cost shifting because a full 68 of the 600 e-mails produced in the sample demonstrated a “hostile relationship” between the plaintiff and her supervisor, although none evidenced direct gender discrimination.¹⁷² The economic factors also leaned against cost shifting. The cost of the remaining production, \$165,955, was dwarfed by Zubulake’s potential recovery, which ranged from \$1.27 million to \$19.23 million, depending on which party’s estimate was correct.¹⁷³ Judge Scheindlin found, however, that the relative ability of each party to control costs in this case—a factor that invariably favored cost shifting in the *Rowe* decisions—was neutral because the sample did not allow Zubulake to reduce her already-targeted search list.¹⁷⁴ Analyzing the importance of the issues at stake in the litigation, Judge Scheindlin stated that employment discrimination litigation is not sufficiently important to tip the factor one way or another. Lastly, as is typically the

¹⁶⁵ *Id.* Judge Scheindlin suggested this factor might be triggered by “toxic tort class actions, environmental actions, so-called ‘impact’ or social reform litigation, cases involving criminal conduct, or cases implicating important legal or constitutional questions.” *Id.* at 321.

¹⁶⁶ *Id.* at 323.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 323-24.

¹⁶⁹ *Id.* at 324.

¹⁷⁰ *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 282 (S.D.N.Y. 2003).

¹⁷¹ *Id.* at 284-91.

¹⁷² *Id.* at 285-86.

¹⁷³ *Id.* at 287-88.

¹⁷⁴ *Id.* at 288.

case, Zubulake would benefit more from the production than the producing party would.¹⁷⁵

Interestingly, although *only* the last—and “least important”—factor favored cost shifting, Judge Scheindlin ordered Zubulake to pay twenty-five percent of the remaining restoration costs.¹⁷⁶ She reasoned that the factors cutting against cost shifting did so “only slightly” and that the plaintiff “[had] not been able to show that there [was] indispensable evidence on those backup tapes.”¹⁷⁷ Unlike previous cost-shifting opinions, Judge Scheindlin’s decision explained what determined the *amount* shifted: after beginning with the presumption that the responding party pays its own costs, the amount of cost shifting should correlate to the extent of speculation that the search would be successful, although the “analysis of [the test’s other] factors does inform the exercise of discretion.”¹⁷⁸

The “watershed” *Zubulake* decision quickly became regarded as the “most thorough treatment of cost-shifting under federal law.”¹⁷⁹ The test was applied without modifications in at least three cases,¹⁸⁰ modified slightly in two,¹⁸¹ and even used in some nonelectronic discovery contexts.¹⁸² *Zubulake* was also successful in prompting more courts to use sampling in order to determine whether the plaintiff

¹⁷⁵ *Id.* at 289.

¹⁷⁶ *Id.* at 289 & n.75 (internal quotation marks omitted) (quoting *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323 (S.D.N.Y. 2003)).

¹⁷⁷ *Id.* at 289.

¹⁷⁸ *Id.*

¹⁷⁹ Mazza, *supra* note 68, ¶ 101, at 51.

¹⁸⁰ See *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 602-03 (E.D. Wis. 2004) (ordering a sampling of backup tapes prior to full analysis); *OpenTV v. Liberate Techs.*, 219 F.R.D. 474, 479 (N.D. Cal. 2003) (ordering fifty-percent cost shifting when factors four and seven favored cost shifting); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 466-67 (S.D.N.Y. 2003) (ordering the defendant to pay its own costs when it could benefit from the production in other litigation).

¹⁸¹ See *Quinby v. WestLB AG*, 245 F.R.D. 94, 104 (S.D.N.Y. 2006) (applying the *Zubulake* analysis only to those inaccessible documents that the defendant should have reasonably foreseen would be discoverable prior to committing them to backup tapes, and shifting thirty percent of the costs); *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (considering the importance of the requested discovery in resolving the issues of the litigation, in addition to the *Zubulake* factors).

¹⁸² See *Multitech. Servs., L.P. v. Verizon Sw., No. 02-0702*, 2004 WL 1553480, at *1-2 (N.D. Tex. July 12, 2004) (applying a modified six-factor *Zubulake* test for interrogatory answers).

met the marginal utility factors and whether the defendant credibly argued that the costs were too high.¹⁸³

This success did not come without some criticism. Some commentators critiqued the theoretical predominance of the first two factors, arguing that even a narrowly tailored request might be so expensive as to dwarf the total amount of recovery, especially in employment litigation.¹⁸⁴ Speaking five years after the *Zubulake* decision, Judge Francis remained “resistant to the hierarchy approach because [of] fear . . . that the factor at the top of the hierarchy will almost always wash out the other factors.”¹⁸⁵

But the concern that plaintiffs might overwhelmingly force expensive restorations on defendants as long as they present some likelihood of finding relevant files has not been borne out in practice. In *Zubulake* itself, the plaintiff was ordered to reimburse 25% of UBS’s expenses despite the fact that 58.1% of the e-mails in the representative sample were relevant, including 68 e-mails that the plaintiff identified as “highly relevant.”¹⁸⁶ Similarly, in another opinion applying the *Zubulake* test, *OpenTV v. Liberate Technologies*, the plaintiff was required to pay fifty percent of the costs although “the requested source code [was] highly likely to contain relevant information and [was] unavailable from another source.”¹⁸⁷ In that case, the court transferred costs despite finding that *only* factors four (the similar resources of the parties)¹⁸⁸ and seven (plaintiff’s greater benefit from data)¹⁸⁹ weighed in favor of that move. Although Judge Scheindlin warned that her test “cannot be mechanically applied at the risk of losing sight of its pur-

¹⁸³ See, e.g., *Hagemeyer*, 222 F.R.D. at 603 (restricting protective orders to instances where sampling reveals that the request “truly threatens” to be an undue burden); *Wiginton*, 229 F.R.D. at 569 (using sampling to determine the likelihood of finding incriminating e-mails and, thus, of determining the distribution of discovery costs).

¹⁸⁴ See Satterwhite & Quatrara, *supra* note 25, ¶ 14, at 6 (criticizing the *Zubulake* test in the employment litigation context).

¹⁸⁵ Francis, *supra* note 63, at 18.

¹⁸⁶ *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 282, 285-86 (S.D.N.Y. 2003); see also *id.* (agreeing with the plaintiff that the e-mails were relevant in telling “a compelling story of the dysfunctional atmosphere” at UBS but finding that none showed *direct* evidence of gender discrimination).

¹⁸⁷ 219 F.R.D. 474, 478-79 (N.D. Cal. 2003).

¹⁸⁸ See *id.* at 478 (noting that, unlike in *Zubulake*, the plaintiff was a large corporation able to fund costs).

¹⁸⁹ Although the court determined that the plaintiff would benefit more from the requested source code, it admitted that the code could also support the defendant’s noninfringement arguments. *Id.* at 479.

pose,”¹⁹⁰ startling results like *OpenTV* indicate that the *Zubulake* analysis did not bring predictability to the field.

Other critics contended that *Zubulake*'s presumption against cost shifting in close calls would allow “the pendulum to swing too far in the opposite direction,” particularly in employment discrimination disputes.¹⁹¹ Practitioner Rodney Satterwhite warned that “[w]hen the majority of the factors deemed most important are inherently adverse to the employer, even *assuming* good-faith discovery practices on the part of the plaintiff, the potential impact on litigation is significant and dangerous.”¹⁹² Plaintiffs acting in bad faith, moreover, would once again be able to resort to weapons of mass discovery in their quest to force settlements.

But the reported decisions in this Comment's survey suggest that despite criticizing *Rowe*'s liberal cost shifting, the *Zubulake* test did not substantially decrease the practice.¹⁹³ In fact, in all but one of the cases applying *Zubulake*, some costs *were* shifted to the plaintiff. The one outlier, *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, adjudicated by Judge Scheindlin, involved the unusual circumstance of a defendant who would benefit from the restoration of its documents in a related litigation.¹⁹⁴ The primary difference between the *Xpedior* and *Zubulake* analyses was that both parties equally benefited from the restoration in *Xpedior*, while only the plaintiff did so in *Zubulake*. This difference in the “least important factor” produced wildly divergent results: imposing \$41,488 out of a total \$165,955 in expenses on individual plaintiff Laura Zubulake¹⁹⁵ but protecting a corporate plaintiff from cost shifting of any portion of its demanded \$400,000 discovery.¹⁹⁶ These opinions demonstrate the inherently fluid and imprecise application of any cost-shifting test, even by the tests' creators.

No decisions applying *Zubulake* in this Comment's survey denied the requesting party's discovery requests, even when there was a very

¹⁹⁰ *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 323 (S.D.N.Y. 2003).

¹⁹¹ Satterwhite & Quatrara, *supra* note 25, ¶ 19, at 9.

¹⁹² *Id.*

¹⁹³ See cases discussed *supra* notes 180-82.

¹⁹⁴ See 309 F. Supp. 2d 459, 466-67 (S.D.N.Y. 2003) (“This may be the rare case where both parties benefit from production. Although *Xpedior* obviously benefits more . . . CSFB would have been required to restore many of the same systems in connection with its production obligations in [related litigation]. This factor therefore is neutral.”).

¹⁹⁵ *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 283, 289 (S.D.N.Y. 2003).

¹⁹⁶ *Xpedior*, 309 F. Supp. 2d at 466-67.

small likelihood that relevant data would be restored.¹⁹⁷ Therefore, like the *Rowe* test, *Zubulake* did not reduce tremendous discovery costs; it merely redistributed them. Its most enduring legacy did not become apparent until 2006, when Rule 26(b)(2) created the two-tiered discovery system premised on accessible and inaccessible data.

III. RULE 26(B)(2) AND THE 2006 E-DISCOVERY AMENDMENTS

The cost-shifting tests described in Part II helped to ascertain whether the responding party showed “good cause” under Rule 26(c) to obtain a protective order. Several judges, including Judge Scheindlin, stated that “good cause” could *also* be shown by demonstrating that the plaintiff’s request ran “afoul of the Rule 26(b)(2) proportionality test.”¹⁹⁸ Through amendments in 2000 and 2006, Rule 26(b)(2) became increasingly important in guiding cost-shifting analyses and has arguably displaced the other tests.¹⁹⁹ The following Section details Rule 26(b)(2)’s impact on cost-shifting analysis before and after the amendments and concludes that although the 2006 electronic discovery amendments did not bring uniformity to the field of cost-shifting decisions, they helped decrease the practice of cost shifting.

A. Rule 26(b)(2) Prior to the 2006 Amendments

The last major change to Rule 26 prior to the 2006 amendments occurred in 2000. Faced with the prospect of rising discovery costs due to the explosion in e-discovery, the Advisory Committee on Civil Rules successfully proposed an amendment to Rule 26(b)(1), which had permitted discovery relevant to any “subject matter involved in

¹⁹⁷ See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 575, 577 (N.D. Ill. 2004) (compelling discovery with 75% of the costs shifted on plaintiff when sampling revealed that the number of relevant e-mails would be “substantially lower than 4.5%”).

¹⁹⁸ *Zubulake*, 216 F.R.D. at 283; see also *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 98 (D. Md. 2003) (stating that, in addition to the marginal utility, *Rowe*, and *Zubulake* tests, “it also can be argued with some force that the Rule 26(b)(2) balancing factors are all that is needed to allow a court to reach a fair result when considering the scope of discovery of electronic records”).

¹⁹⁹ See FED. R. CIV. P. 26(b)(2)(iii) (2000) (permitting judges to limit the frequency or extent of discovery by weighing the “burden or expense of the proposed discovery [against] its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues”). Following the 2006 amendments, this proportionality test became a guide for evaluating whether parties showed “good cause” when requesting information that “is not reasonably accessible because of undue burden or cost.” FED. R. CIV. P. 26(b)(2)(B); see also *infra* Section III.B.

the [pending] action” only if the requesting party showed “good cause.”²⁰⁰ The Committee also added a sentence to Rule 26(b)(1) “calling attention to the limitations of subdivisions (b)(2)(i), (ii), and (iii) . . . to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”²⁰¹ This cross-reference was needed because courts had “not implemented these limitations with the vigor that was contemplated.”²⁰² Subdivision (b)(2)(iii) instructed judges to limit the frequency or extent of discovery by weighing the “burden or expense of the proposed discovery” against its “likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.”²⁰³

The reminder to control excessive discovery worked in a way perhaps unintended by the Advisory Committee. Whereas few courts ordered cost shifting under Rule 26(b)(2) prior to 2000,²⁰⁴ the practice became more common following the adoption of the 2000 amendments.²⁰⁵ Courts were particularly likely to order discovery and to shift costs for forensic recovery of deleted files from active hard-drive space for which the requesting party offered to pay.²⁰⁶ Some courts even came to expect the plaintiff to offer to pay for particularly burdensome discovery.²⁰⁷ They did not, however, deny many more expensive discovery

²⁰⁰ FED. R. CIV. P. 26(b)(1) (2000) advisory committee’s note to 2000 amendments; *see also id.* (“The good-cause standard warranting broader discovery is meant to be flexible.”).

²⁰¹ *Id.*; *see also* FED. R. CIV. P. 26(b)(1) (2000) (“All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).”).

²⁰² FED. R. CIV. P. 26(b)(1) (2000) advisory committee’s note to 2000 amendments.

²⁰³ FED. R. CIV. P. 26(b)(1) (2000).

²⁰⁴ *See supra* note 65 and accompanying text (finding only two decisions ordering e-discovery cost shifting prior to 2000, in both of which the requesting party offered to pay).

²⁰⁵ *See supra* note 23 (finding that, in a survey of twenty-eight cases between 2000 and 2006, courts ordered cost shifting on a requesting party at least eleven times, and on eight of these occasions the requesting party contested the order).

²⁰⁶ *See, e.g.,* Antioch Co. v. Scrapbook Borders, Inc., 210 F.R.D. 645, 653-54 (D. Minn. 2002) (permitting the plaintiff to search the defendant’s computers for deleted files at the plaintiff’s own expense); Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (same); Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (same).

²⁰⁷ *See, e.g.,* Cook v. Deloitte & Touche, LLP, No. 03-3926, 2005 WL 2429422, at *16 (S.D.N.Y. Sept. 30, 2005) (declining the plaintiff’s request for additional information from the defendant’s accessible electronic personnel database because he did not

requests altogether, at least in the decisions identified in this Comment's survey.²⁰⁸ Instead, it appears some judges relied on cost shifting as a tool that allowed them to permit more discovery with less guilt.²⁰⁹

B. *The 2006 Electronic Discovery Amendments*

The amendments to Rules 16, 26, 33, 34, 37, and 45 that became effective on December 1, 2006, addressed electronic discovery.²¹⁰ As the culmination of a decade-long Discovery Project by the Judicial Conference Advisory Committee on Rules of Civil Procedure,²¹¹ the amendments sought to reduce the expense of e-discovery on producing parties, offer enduring technology-neutral guidance to judges on ESI, and bring some measure of uniformity to disparate pockets of common law in many areas, including cost shifting.²¹² New Rule 26(b)(2) created a two-tiered system of discovery that made inaccessible data presumptively undiscoverable.²¹³ The presumption could be overcome by a showing of "good cause."²¹⁴ "Good cause" analysis involved balancing seven factors listed in Rule 26(b)(2)'s advisory note—factors that courts also began applying to cost-shifting determinations.²¹⁵

provide sufficient evidence that the relevant files had not been previously produced, "nor [did] he volunteer[] to foot the bill for doing so").

²⁰⁸ This observation is limited to the cases in my survey, whose methodology is described *supra* note 23. Since the Westlaw search was intended to locate decisions discussing cost shifting, the search may have excluded many cases in which judges did in fact reject expensive discovery and did not even comment on possible cost shifting. A comprehensive survey of all electronic discovery decisions would be necessary to identify such a trend.

²⁰⁹ See *supra* Part II (describing courts' willingness to order discovery in combination with cost shifting). A notable exception to this trend is evident in *Cognex Corp. v. Electro Scientific Indus., Inc.*, No. 01-10287, 2002 WL 32309413 (D. Mass. July 2, 2002). The court denied discovery despite the plaintiff's willingness to pay and warned that "[a]t some point, the adversary system needs to say 'enough is enough' and recognize that the costs of seeking every relevant piece of discovery is [sic] not reasonable. This concept is reflected in Rule 26 itself and made express in the Comments thereto." *Id.* at *5.

²¹⁰ See, e.g., COMM. ON RULES OF PRACTICE AND PROCEDURE, SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 22 (2005) (describing the proposed amendments to Rules 16, 26, 33, 34, 37, and 45 and revisions to Form 35 as relating to "Discovery of Electronically Stored Information").

²¹¹ See generally Richard Marcus, Essay, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1 (2004) (situating the e-discovery amendments within the broader history of the discovery revolution).

²¹² See Rachel Hytken, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 881-84 (2008).

²¹³ FED. R. CIV. P. 26(b)(2)(B).

²¹⁴ *Id.*

²¹⁵ See *infra* subsections III.B.2-.3.

1. The Two-Tiered System

Amended Rule 26(b)(2) borrowed heavily from Judge Scheindlin's two-tiered discovery system, which made data production hinge on whether the data source was reasonably accessible. Rule 26(b)(2)(B) provides, "A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."²¹⁶ Reasonably accessible relevant data fall in the first tier and must be produced. If the producing party can demonstrate, however, that the data sought are not reasonably accessible, the data are presumptively undiscoverable.²¹⁷ The burden then shifts to the requesting party to overcome that presumption by showing "good cause, considering the limitations of Rule 26(b)(2)(C)."²¹⁸

New Rule 26(b)(2)(C)(iii) replicates the old proportionality test from Rule 26(b)(2)(iii) and limits discovery to circumstances in which the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the proposed discovery in resolving the issues."²¹⁹

There is one key difference between the two-tiered systems in *Zubulake* and Rule 26(b)(2). *Zubulake* conditioned the finding of "whether production of documents is unduly burdensome or expensive . . . primarily on whether it is kept in an accessible or inaccessible format."²²⁰ Judge Scheindlin described three types of accessible media: (1) active, online data on hard drives, (2) near-line data that consist of robotic storage devices that are quickly searchable, and (3) off-line storage and archives like a removable optical disk.²²¹ Inaccessible data, in Judge Scheindlin's view, consisted of sequential-access storage

²¹⁶ FED. R. CIV. P. 26(b)(2)(B).

²¹⁷ Although under the new Rule defendants could still incorrectly designate information as inaccessible or deliberately convert it to inaccessible form, the amendment was deemed an improvement over prior practice (in which defendants simply ignored the discovery requests) by requiring the responding party to identify the sources of potentially responsive information that it is not searching or producing because of cost. See ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, PROPOSED RULE AMENDMENTS OF SIGNIFICANT INTEREST 5 (2005), available at http://www.uscourts.gov/rules/supct1105/Controversial_Report.pdf.

²¹⁸ FED. R. CIV. P. 26(b)(2)(B).

²¹⁹ *Id.* 26(b)(2)(C).

²²⁰ *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (emphasis omitted).

²²¹ *Id.* at 318-19.

devices that are not amenable to individual-document searches, like backup tapes, and erased, fragmented, or damaged data available for recovery on clusters of active space that have not been overwritten.²²²

Rule 26(b)(2)(B), on the other hand, provides that a “party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible *because of undue burden or cost.*”²²³ This formulation recognizes that a poor individual defendant might still be unduly burdened even when she is called to restore information from active hard-drive space rather than more expensive backup tapes. Rule 26(b)(2) and its advisory notes do not reference particular media that are more likely to present an undue expense.²²⁴ In fact, proposals to denote backup tapes as reasonably inaccessible sources were rejected in order to keep the amendments open to technological progress.²²⁵

It is important not to overstate the difference between the *Zubulake* formulation and the amended Federal Rules. During interviews following the *Zubulake* case, Judge Scheindlin explained that her emphasis on media types was only meant to provide general guidelines as to what types of media typically present an undue burden, permitting exceptions.²²⁶

Whether intended or not, however, the surface distinction between *Zubulake* and Rule 26(b)(2) has led to divergent treatment by the courts. In *W.E. Aubuchon Co. v. BeneFirst, LLC*, the court noted that although active servers are considered “accessible” under Judge Scheindlin’s approach, the restoration cost in that particular case made them “not reasonably accessible within the meaning of [Rule] 26(b)(2)(B).”²²⁷ Other judges have adhered to *Zubulake*’s bright-line

²²² *Id.* at 319-20.

²²³ FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

²²⁴ See FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments (“It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information.”).

²²⁵ See, e.g., *Hearing, supra* note 50, at 32-34 (testimony of Joan Feldman, Computer Forensics, Inc.) (addressing concerns over identifying backup tapes as inherently inaccessible).

²²⁶ See *Ten Tips for Electronic Discovery: A Special Interview with Judge Shira A. Scheindlin*, ACC DOCKET, Jan. 2005, at 56, 70-72 (stating that her one oft-quoted and criticized sentence from *Zubulake*, “[a] court should consider cost shifting only when electronic data is relatively inaccessible, such as in backup tapes,” should be read in context with other language in the opinion restating the broad Rule 26(b)(2) references to “undue burden”).

²²⁷ 245 F.R.D. 38, 42-43 (D. Mass. 2007); see also *id.* (“In this case, the records sought by the Plaintiffs are stored on a server used by BeneFirst in Pembroke[,] Massa-

definition of accessible and inaccessible documents even after the 2006 amendments. In *Canon U.S.A., Inc. v. S.A.M., Inc.*, the court cited Rule 26(b)(2)'s "undue burden" language but proceeded to assert that "[m]achine-readable data, such as active, online, near-line, or off-line data in storage or archives are accessible; however, backup tapes and erased, fragmented, or damaged data is not accessible."²²⁸ The court ordered the defendant to hire a forensic expert at the defendant's own expense because "the requested discovery is retained on a server, and therefore accessible."²²⁹ No factual record was developed of the cost to hire such an expert and whether that cost would present an undue burden.

Cost-shifting tests prior to the 2006 amendments sought to reduce discovery expenses by discouraging plaintiffs from making overbroad requests.²³⁰ As discussed in Part II, these efforts had little effect on wealthy plaintiffs. Moreover, courts' willingness to grant meritless discovery *in combination with* cost shifting likely increased discovery costs altogether.²³¹ By presumptively prohibiting the production of data from costly inaccessible sources, the two-tiered system created by Rule 26(b)(2) lowered discovery costs rather than redistribute them. For this reason, this Comment argues in Part IV that the optimal cost-shifting analysis must take into account the new two-tiered system.

2. The Advisory Note to Rule 26(b)(2)

Amended Rule 26(b)(2) instructs that data which are not reasonably accessible because of cost should not be *produced* absent a showing of good cause.²³² To help determine whether good cause exists, the rule's advisory note introduces seven relevant factors:

- (1) the specificity of the discovery request;

chusetts, which is clearly an accessible format. However, because of BeneFirst's method of storage and lack of an indexing system, it will be extremely costly to retrieve the requested data.").

²²⁸ No. 07-01201, 2008 WL 2522087, at *3 (E.D. La. June 20, 2008).

²²⁹ *Id.* at *5.

²³⁰ *See, e.g.*, *Byers v. Ill. State Police*, No. 99-8105, 2002 WL 1264004, at *11-12 (N.D. Ill. June 3, 2002) (finding that cost shifting would provide plaintiffs with an "incentive to focus their requests").

²³¹ For example, a responding party "protected" via cost shifting would still have to spend thousands of dollars on reviewing for privilege a production that, in the absence of cost shifting, may not have been ordered discoverable in the first place. *See supra* text accompanying notes 144-46 (discussing the "Hobson's choice" presented by the *Rowe* discovery protocol).

²³² FED. R. CIV. P. 26(b)(2)(B).

- (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 on more easily accessed sources;
- (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources;
- (5) predictions as to the importance and usefulness of the further information;
- (6) the importance of the issues at stake in the litigation; and
- (7) the parties' resources.²³³

The advisory note does not suggest any particular weighing of the new factors. Though some practitioners viewed the factors as “almost identical” to the *Zubulake* standard,²³⁴ perhaps because of Judge Scheindlin’s presence on the Advisory Committee when this Rule was developed, a closer look at the factors tells a more nuanced story. Factors two, four, and six are nearly verbatim from *Zubulake*. Factors one and seven borrow from *Rowe*. Factor five, the importance and usefulness of the requested data, is imported from *Wiginton v. CB Richard Ellis, Inc.*²³⁵ Finally, factor three introduces a new, quasi-punitive measure favoring cost shifting when a responding party converts accessible data into inaccessible formats after discovery obligations arise. Although the advisory note significantly borrows from *Rowe* and *Zubulake*, it does not replicate all of the previous tests’ factors. Gone is the *Rowe* consideration of the purposes for which parties maintain data. The advisory note also does not reference two joint *Rowe* and *Zubulake* factors: the relative ability of each party to control costs and the relative benefits to the parties of obtaining the information.

The fact that Rule 26(b)(2) does not reference cost shifting, and that the seven factors in its advisory note are significantly different from the *Rowe* and *Zubulake* tests, raises a question: are the seven “good cause” criteria in the advisory notes intended to guide cost-shifting determinations? The advisory note suggests that its factors are as applicable to cost shifting as they are to compelling discovery. It

²³³ FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

²³⁴ See, e.g., Daniel R. Murray et al., *Taking a Byte Out of Discovery: How the Properties of Electronically Stored Information Have Shaped E-Discovery Rules*, 41 UCC L.J. 35, 47 n.17 (2008).

²³⁵ See *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568, 572-73 (N.D. Ill. 2004) (adding formally “the importance of the requested discovery in resolving the issues of the litigation” to the *Zubulake* factors).

reminds judges that “the good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. . . . The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.”²³⁶ The advisory note further instructs that “[a] requesting party’s willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party’s burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.”²³⁷

The advisory note’s reference to judges’ authority to set cost-shifting conditions suggests that its factors may be applicable to cost-shifting analysis. On the other hand, it can be read as merely reminding judges that this tool exists but leaving in place prior analytical frameworks like *Rowe* and *Zubulake* to guide cost shifting *after* the decision to order discovery is made. This ambiguity has carried over in practice, with some courts applying the advisory-note factors only for the threshold inquiry of whether good cause is shown to order the production of inaccessible data, and others applying the factors to cost shifting as well.²³⁸

3. Trends from Practice

Subject to the methodology and limitations of the survey described previously,²³⁹ the following trends are evident in cases decided after the 2006 amendments. Some courts expect the seven factors in the advisory note to Rule 26(b)(2) to guide cost-shifting decisions exclusively.²⁴⁰

²³⁶ FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

²³⁷ *Id.*

²³⁸ *See infra* subsection III.B.3.

²³⁹ *See supra* note 23. It is important to qualify once again that the findings of this study are limited by the availability of cost-shifting decisions on the Westlaw service and by chosen searching methodologies. Conclusions based on the roughly sixty-five cost-shifting decisions identified in the survey may not necessarily be representative of the broad pool of all magistrate and district court opinions and orders. Some qualitative and, to a lesser degree, quantitative trends can nonetheless be discerned from the decisions on Westlaw.

²⁴⁰ *See, e.g.,* Best Buy Stores, L.P. v. Developers Diversified Realty Corp., 247 F.R.D. 567, 570-71 (D. Minn. 2007) (analyzing the seven factors and holding that the requesting party, who did not argue that documents were uniquely available from the respondent’s database, did not show good cause in light of the undue burden presented by a \$124,000 restoration cost); W.E. Aubuchon Co. v. BeneFirst, LLC, 245 F.R.D. 38, 41, 44-45 (D. Mass. 2007) (holding that when the plaintiffs reduced their original request and demonstrated that the requested data would be important and would not be avail-

Thus, in at least one case, a district judge reversed a magistrate judge's order that plaintiffs pay for restoring defendants' data because it was not apparent from the record that the magistrate engaged in the Rule 26(b)(2)(B) analysis of whether the requested information was not reasonably accessible because of undue burden.²⁴¹ Other courts focus on the proportionality test of Rule 26(b)(2)(C)(iii).²⁴² They state that the proper analysis involves balancing "the likelihood that restored documents will prove relevant to the instant litigation with whether the cost of restoration places an undue burden on Defendant," as provided in Rule 26(b)(2)(C)(iii).²⁴³ These courts explicitly refer to the five proportionality factors in Rule 26(b)(2)(C)(iii) as "cost-shifting" factors.²⁴⁴

Others still separate "good cause" production analyses from cost-shifting determinations. In *In re Veeco Instruments, Inc. Securities Litigation*, the plaintiff requested e-mails from backup tapes with production costing up to \$124,000.²⁴⁵ The court applied the seven-factor test from the advisory note to Rule 26 to determine that plaintiff had met the good cause standard and ordered defendant to produce discovery.²⁴⁶ It noted that it would conduct a cost-shifting analysis based on *Zubulake* after the production, when the defendant itemized the costs incurred.²⁴⁷ And in *Parkdale America, LLC v. Travelers Casualty & Surety Company of America, Inc.*, the court ordered production at the respondent's expense but suggested that the parties negotiate cost shifting while reserving the court's ability to apportion costs in the future by applying the *Zubulake* factors.²⁴⁸

able from other sources, they presented sufficient "good cause" to order discovery costing \$80,000 without reimbursement).

²⁴¹ See *Pipefitters Local No. 636 Pension Fund v. Mercer Human Res. Consulting, Inc.*, No. 05-74326, 2007 WL 2080365, at *2 (E.D. Mich. July 19, 2007).

²⁴² See FED. R. CIV. P. 26(b)(2)(C)(iii) (authorizing the court to "limit the frequency or extent of discovery . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues").

²⁴³ See *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 443 (2007); see also *id.* at 443-44 (ordering restoration of one-fourth of e-mail backup tapes for sampling at an estimated cost of \$21,000 to \$37,000, which the court considered small in comparison to the \$30 million of claims at issue).

²⁴⁴ *Semsroth v. City of Wichita*, 239 F.R.D. 630, 638 (D. Kan. 2006); see also *id.* (concluding that due to limited expense and the plaintiffs' inability to pay, the backup tapes should be considered "reasonably accessible" (internal quotation marks omitted)).

²⁴⁵ No. 05-1695, 2007 WL 983987, at *1 (S.D.N.Y. Apr. 2, 2007).

²⁴⁶ *Id.*

²⁴⁷ *Id.* at *2.

²⁴⁸ No. 06-0078, 2007 WL 4165247, at *13-14 (W.D.N.C. Nov. 19, 2007).

Other courts encouraged continual negotiation between parties to resolve discovery issues, providing voice to the 2006 amendments' emphasis on mutual resolution of e-discovery issues in the Rule 26(f) conference.²⁴⁹ For example, as one court instructed, "To the extent that any Party requests data that is not readily accessible, the Parties shall comply with the Federal Rules of Civil Procedure in determining whether the inaccessible data is to be produced and which Party will bear what portion of the costs of production, if any"²⁵⁰ The court also ordered the parties to confer about inaccessible ESI prior to seeking judicial assistance.²⁵¹

Courts and parties have continued to be innovative in their cost-shifting analyses. In an employment lawsuit, *Sterle v. Elizabeth Arden, Inc.*, the court entered a conditional cost-shifting order agreed upon by the parties.²⁵² If the plaintiff uncovered any of seven specific sales-performance reports in the defendants' computer records, the defendants would bear the costs of the inspection; otherwise the costs would shift to the plaintiff.²⁵³

As more cases began to implicate individual litigants' home computers, which the requesting parties offered to search on their own dime, courts struggled over how to account for privacy in the Rule 26(b)(2) analysis.²⁵⁴ At least one court ordered cost shifting based on broad concepts of fairness and equity as opposed to any formal balancing test or concerns about accessibility. In *Haka v. Lincoln County*, the example in the Introduction to this Comment, the plaintiff requested electronic documents from his former employer's hard drive at a cost of approximately \$49,000, not including attorney review time.²⁵⁵ The court appeared to accept the defendant's estimate that the plaintiff's potential recovery in the case would be "significantly less" than \$100,000.²⁵⁶ Neither party could prove exactly what evi-

²⁴⁹ See FED. R. CIV. P. 26(f) (requiring parties to "discuss any issues about preserving discoverable information" at their initial conference).

²⁵⁰ *In re Seroquel Prods. Liab. Litig.*, No. 1769, 2007 WL 219989, at *5 (M.D. Fla. Jan. 26, 2007).

²⁵¹ *Id.*

²⁵² No. 06-01584, 2008 WL 961216, at *2 (D. Conn. Apr. 9, 2008).

²⁵³ *Id.*

²⁵⁴ See, e.g., *Orrell v. Motorcarparts of Am., Inc.*, No. 06-0418, 2007 WL 4287750, at *7-8 (W.D.N.C. Dec. 5, 2007) (authorizing the defendant to an employment discrimination suit to conduct a forensic examination of the plaintiff's home computer at the defendant's expense because the plaintiff had given inconsistent testimony about how she preserved files on her home computer).

²⁵⁵ 246 F.R.D. 577, 578 (W.D. Wis. 2007).

²⁵⁶ *Id.* at 578-79.

dence the hard drives would contain. The court framed the question simply, “[I]s it worth it to spend tens of thousands of dollars to explore ESI that might reveal a smoking gun but is equally likely to reveal nothing much?”²⁵⁷ Without applying any formal balancing test, the judge stated that “fairness and efficiency” should require the parties to split the costs evenly.²⁵⁸

Haka demonstrates that even with more guidance from the Rules, cost shifting remains largely dependent on each judge’s discretion. Analytically, the result in *Haka* is hard to justify. The discovery was from active hard-drive space that, at least under *Zubulake*, would be deemed accessible. The court did not conclude that the \$27,000 cost would be a particularly undue hardship for the defendant county. The court ordered a plaintiff, whom it described as “a wage-earner with minimal resources,” to pay at least \$13,500 for discovery sought from accessible hard-drive space in a case where total recovery would likely be under \$100,000.²⁵⁹ Although the plaintiff ultimately “swallowed hard” and proceeded with discovery, the decision was economically taxing.²⁶⁰

It should not be very surprising that courts have not uniformly analyzed cost shifting, even in the wake of the 2006 amendments. As discussed above, the new Rule 26(b)(2) and its advisory note do not explicitly state that its factors are applicable to cost shifting and should prevail over the *Zubulake*, *Rowe*, or marginal utility tests. Even had the Rules Committee done so, magistrate judges who confront fact-intensive inquiries in an area lacking many published decisions would likely develop differing interpretations of Rule 26(b)(2). This is in part because of the dearth of binding appellate decisions on the topic. Very few courts of appeal address discovery decisions generally, and even fewer have the opportunity to provide meaningful guidance on cost shifting.²⁶¹ Because discovery decisions are reviewed under an abuse of discretion standard,²⁶² appellate courts typically defer to whatever formula was adopted by the lower court.²⁶³

²⁵⁷ *Id.* at 579.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 578-79.

²⁶⁰ Brian Formella, a partner at the law firm of Anderson, O’Brien, Bertz, Skrenes & Golla, which represented the plaintiff, graciously provided information on the plaintiff’s decision in a telephone interview on December 19, 2008.

²⁶¹ See Blakley, *supra* note 11, at 40 (praising the amended rules for providing guidance in an area where there is little appellate authority).

²⁶² *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 359 (1978).

²⁶³ See, e.g., *Spears v. City of Indianapolis*, 74 F.3d 153, 158 (7th Cir. 1996) (affirming summarily the lower court’s order on cost shifting because “[t]he timing of the

Yet while the amended Rules have not brought uniformity, this Comment's survey suggests that in the wake of their adoption, courts have become more skeptical of cost shifting. They are more likely to shift costs only when the requesting party volunteers to bear them²⁶⁴ or when the request is made of nonparties.²⁶⁵ Judges also increasingly scrutinize the responding party's attempts to use cost shifting as a shield. Courts have refused to shift costs when defendants have failed to adequately inform the court about the precise difficulties and costs of restoring data,²⁶⁶ have precipitated the forensic issue in question by failing to preserve ESI,²⁶⁷ or have engaged in deceptive discovery tactics.²⁶⁸ Cost shifting has become quite rare. In fact, when those decisions in which the requesting party did not offer to pay for discovery are excluded from the thirty-five cases addressing cost shifting post-

subpoenas, the wealth of materials sought—with the whiff of a fishing expedition apparent—and the privileged nature of many of the documents provided a sound basis for the court to order reimbursement under [Rules 45(c) and 26(c)]”).

²⁶⁴ See, e.g., *Thielen v. Buongiorno USA, Inc.*, No. 06-0016, 2007 WL 465680, at *3 (W.D. Mich. Feb. 8, 2007) (permitting the defendant company, which was sued for fraudulently enrolling the plaintiff in a cell-phone text-messaging subscription service, to image the plaintiff's home computer at the defendant's cost to determine whether the plaintiff had ever heard of the defendant's service or subscribed to it on the Internet).

²⁶⁵ See *Guy Chem. Co. v. Romaco AG*, 243 F.R.D. 310, 312-13 (N.D. Ind. 2007) (shifting the \$7200 subpoena-compliance cost to the requesting party without formal analysis because the respondent was a nonparty).

²⁶⁶ See *Mikron Indus., Inc. v. Hurd Windows & Doors, Inc.*, No. 07-0532, 2008 WL 1805727, at *2 (W.D. Wash. Apr. 21, 2008) (denying cost shifting because the defendants had not informed the court about the number of backup tapes to be searched, the different methods the defendants use to store electronic information, the defendants' electronic-document-retention policies, the overlap in information between backup tapes and more accessible formats, and the extent to which the defendants had searched ESI that remained accessible); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 219 F.R.D. 93, 99 (D. Md. 2003) (“[Defendant's] failure to provide . . . information needed to analyze the Rule 26(b)(2) cost-benefit factors . . . predictably, resulted in rulings that the Plaintiffs' motions were meritorious.”).

²⁶⁷ See *Peskoff v. Faber*, 251 F.R.D. 59, 62-63 (D.D.C. 2008) (“This is a problem of Mr. Faber's own making and, consequently, the expense and burden of the forensic examination can hardly be described as ‘undue.’”); *Benton v. Dlorah, Inc.*, No. 06-2488, 2007 WL 3231431, at *1, *3 (D. Kan. Oct. 30, 2007) (ordering the plaintiff in a discrimination suit who deleted relevant e-mails from her computer to make the computer available for restoration).

²⁶⁸ See, e.g., *Wachtel v. Guardian Life Ins. Co.*, 239 F.R.D. 376, 387 (D.N.J. 2006) (“Defendants now assert that compliance with this Court's orders will cost them millions of dollars and take months to complete. Although the cost of compliance is indeed high, Defendants have litigated this case without regard to cost when it has been in their interest to do so. The cost Defendants must now incur is a direct result of non-compliant and deceptive discovery tactics and disregard of court orders throughout the course of discovery.”).

December 1, 2006, only one contested cost-shifting order remains: *Haka v. Lincoln County*.

Provided that additional surveys support the conclusion that cost-shifting orders have decreased, the next question is *why*? There are too few cases in the sample to discern the reason for the decrease, but it is reasonable to posit two grounds. First, Rule 26(b)(2)'s presumption against discovery of reasonably inaccessible data might have knocked out some marginal "compromise cases" when in the past judges ordered discovery accompanied by cost shifting. Second, parties may have become more effective in negotiating electronic discovery issues without judicial intervention. This result is specifically encouraged by new Rule 26(f), which requires parties to "discuss any issues about preserving discoverable information" at their initial conference.²⁶⁹ In some cases, courts explicitly ordered parties to negotiate cost shifting, pointing them to various factors in *Zubulake* and Rule 26(b)(2).²⁷⁰ In others, the parties likely reached mutual understandings about electronic discovery in their Rule 26(f) conference.

Thus, while district courts have not uniformly interpreted the electronic discovery amendments, the amendments appear to have swung the pendulum back from the liberalized cost shifting previously practiced by courts employing the marginal utility, *Rowe*, and *Zubulake* tests.

IV. REACHING EQUILIBRIUM: WHAT IS THE OPTIMAL COST-SHIFTING PARADIGM?

Bright-line approaches to cost shifting have not gained significant traction, despite their potential advantages in promoting uniformity, predictability, and administrability. As has been clear since the late 1990s, letting corporate defendants bear their electronic discovery expenses as a cost of doing business²⁷¹ ignores the ubiquitous nature of computers in our society. In laying out his rationale for the marginal utility test,²⁷² Magistrate Judge Facciola ridiculed the "cost of doing business" argument:

It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server,

²⁶⁹ FED. R. CIV. P. 26(f)(2).

²⁷⁰ See *supra* notes 249-51 and accompanying text.

²⁷¹ A primary example of this practice is presented in *In re Brand Name Prescription Drugs Antitrust Litigation*. See No. 94-0897, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (holding that the defendant should pay the cost of electronic discovery because the defendant chose the very electronic storage method that made it so costly).

²⁷² See *supra* Section II.A.

which, in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens?²⁷³

With corporations universally backing up their files thanks to cheap storage, the underlying assumption that parties only save particularly useful records has broken down.²⁷⁴ The absence of any kind of cost shifting would encourage requesting parties to begin discovery with overbroad and highly costly document requests, both as a strategic method to coerce settlements and, less calculatingly, to uncover as much information as possible regardless of the cost.²⁷⁵

As the *Rowe*, *Zubulake*, and Rule 26(b)(2) tests illustrate, courts have come a long way from considering bright-line approaches to cost shifting. The question today is not whether costs should *ever* be shared, but rather how often. Some commentators argue that expansive cost shifting is a necessary solution to rising e-discovery costs. Commentators Martin Redish and Marnie Pulver both advocate for presumptive cost-shifting models for inaccessible data.²⁷⁶ They correctly argue that such a model would incentivize requesting parties to tailor their discovery to the most pertinent documents and minimize costs. In 2004, the Sedona Conference Institute recommended that “[i]f the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.”²⁷⁷ Texas Rule of Civil Procedure 196.4 went one

²⁷³ *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001).

²⁷⁴ *See Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (“Information is retained not because it is expected to be used, but because there is no compelling reason to discard it.”).

²⁷⁵ *See McPeck*, 202 F.R.D. at 33-34 (“American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need. They hardly need any more encouragement to demand as much as they can from their opponent.”).

²⁷⁶ *See* Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 569-70 (2001) (proposing that the requesting party could overcome the presumption by showing an inability to pay costs); Marnie H. Pulver, Note, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1410 (2000) (arguing that forcing the requesting party to internalize discovery costs would “trim abusive discovery requests”). Since these proposals came years prior to the 2006 e-discovery amendments, it is not clear whether the authors would advocate for presumptive cost shifting *in addition to* or *in place of* presumptive nondiscovery of inaccessible data per Rule 26(b)(2)(B).

²⁷⁷ SEDONA CONFERENCE WORKING GROUP ON BEST PRACTICES FOR ELEC. DOCUMENT RETENTION & PROD., *THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION* 44

step further, mandating cost shifting if the responding party “cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested.”²⁷⁸ In 2006, some practitioners urged the Advisory Committee to adopt this standard in order to disincentivize abusive plaintiffs.²⁷⁹ Judge Francis further pointed out that liberalized cost shifting provides a welcome compromise for judges needing to make discovery determinations under informational uncertainty.²⁸⁰ The plaintiff, in turn, can add credibility to her effort to locate the smoking-gun e-mail by taking financial responsibility for the search.

Despite these appealing considerations, cost shifting should rarely be granted. In addition to being antithetical to the traditional rule that parties bear their own costs,²⁸¹ a presumptive cost-shifting rule would not reduce the entire burden on producing parties, who would still have to search and review restored data for privilege.²⁸² In fact, if a presumptive cost-shifting model encouraged judges to grant discovery in cases where they otherwise would not, the burden on the defendant to review scores of restored documents could outweigh the savings from the technical restoration. It would also undermine the efforts of the amended Rules to limit the overall cost of discovery.

A pay-per-view approach would additionally disincentivize some corporate defendants from innovating and maintaining cost-efficient storage, hoping instead that the high costs of backup restoration would thwart plaintiffs’ requests. More fundamentally, the traditional presumption that parties pay their costs is meant to protect plaintiffs with meritorious claims from being priced out of the discovery system. Individual plaintiffs in employment discrimination suits, making up a

(2004), available at <http://www.thesedonaconference.org/content/miscFiles/SedonaPrinciples200401.pdf> (italics omitted). These recommendations were made in 2004, when cost shifting was arguably at its peak.

²⁷⁸ TEX. R. CIV. P. 196.4 (1999).

²⁷⁹ See, e.g., Letter of John H. Martin, Thompson & Knight LLP, to Peter G. McCabe, Sec’y of the Comm. on Rules & Practice & Procedure, Admin. Office of the U.S. Courts (Jan. 10, 2005), available at <http://www.uscourts.gov/rules/e-discovery/04-CV-055.pdf> (“The rules for electronic discovery should be fair to both plaintiffs and defendants, and should address the significant and burdensome costs that arise when the rules are manipulated by an abusive litigant.”).

²⁸⁰ See Francis, *supra* note 63, at 19.

²⁸¹ See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978) (“Under [discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests . . .”).

²⁸² See *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C. 2001) (describing the costs to a government agency of diverting its employees to conduct the searches).

large portion of cost-shifting cases, typically are far poorer than the corporate defendants; liberalized cost shifting would exacerbate this disadvantage.²⁸³ If the cost-shifting presumption could be overcome by a plaintiff's lack of resources, as recommended by Redish,²⁸⁴ then the adjudication of that question would involve many of the same administrative costs as multifactor tests.

The "reasonable efforts" Texas Rule, depending on how it is interpreted by individual judges, could shift costs for all but the most basic e-mail searches on hard drives. The Sedona Proposal would shield from discovery nearly all archival systems that are not accessed by the employer on a "regular basis," regardless of accessibility and cost, which is a vague standard that likely goes too far in preventing meritorious discovery. It would also encourage employers to quickly move data from online systems to storage tapes in order to attempt to protect it from discovery.

Judge Francis is correct that there are situations in which a nuanced cost-shifting decision is a better result than prohibiting discovery altogether or sticking the defendant with the entire bill. There is a danger, however, that courts might overuse the tool and order discovery with cost shifting in situations where the factual record is not well developed, as Judge Scheindlin observed had been occurring in practice,²⁸⁵ or where the discovery truly represents a costly fishing expedition, regardless of who pays. Without conducting interviews of judges who order cost shifting, it is impossible to say with certainty how those judges would rule if cost shifting were unavailable. There is good reason to believe that, in at least some cases, the ability to transfer costs led to ordering discovery that would otherwise have been denied.²⁸⁶ In this sense, while cost shifting may at first glance appear to be an anti-plaintiff measure, in practice it may actually be harming defendants,

²⁸³ See sources cited *supra* note 24.

²⁸⁴ See Redish, *supra* note 276, at 608-18 (discussing the suggestion that courts use a "conditional cost-shifting" analysis in allocating discovery costs).

²⁸⁵ See *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003).

²⁸⁶ Judge Francis has voiced this concern:

Let me tell you why I think you can't know at the outset whether the cost shifting is favorable to the producing party or favorable to the requesting party. That is because you can't know what the judge would have done in the absence of the ability to shift costs. If the judge simply would have denied the discovery, then the availability of cost shifting is favorable to the requesting party, because at least now it is in a position to get its hands on it.

Francis, *supra* note 63, at 18.

who are forced to open up their storage systems and incur the costs of reviewing thousands of documents for privilege prior to production.²⁸⁷

Finally, granting access to the respondent's computer systems at the plaintiff's own cost—the electronic equivalent of open warehouse discovery—would not be a viable solution. Unlike paper filing systems that maintain some segregation for confidential files, opening responding parties' computer systems “would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.”²⁸⁸ As described in subsection II.B.2, cost shifting has also brought a plaintiff-friendly discovery protocol. In *Rowe* and *Murphy*, plaintiffs were given all of the defendant's files, reviewed them, and then provided those they considered relevant *back to the respondents*. Though this protocol has become less common in recent cases, it represents a significant danger to defendants' privacy and confidentiality.

In several of the cases discussed above, a party obtained access to another party's storage systems by *offering* to pay for access.²⁸⁹ Though a plaintiff's willingness to pay resolves the defendant's financial burden (particularly when the defendant is reimbursed for its attorney review time), courts should still scrutinize whether discovery is necessary in such cases. Wealthier plaintiffs should not get substantially broader access to discovery than poorer ones. The advisory note to Rule 26(b)(2), however, encourages this result: “A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.”²⁹⁰

It is important to recognize that the problem of electronic discovery is not just that it is expensive. Part of the problem is that it is also ubiquitous. Companies and individuals alike now maintain nearly all of their sensitive and confidential information electronically, including medical records, financial records, correspondence with attorneys,

²⁸⁷ See *supra* notes 144-46, 231, and accompanying text.

²⁸⁸ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446, at 80 (2007); see also *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 444 n.19 (2007) (“The Court concludes that granting Plaintiff access to hard drives would be unworkable given the inability of Defendant to protect privileged documents.”). But see *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 433 (S.D.N.Y. 2002) (granting the plaintiff access to the defendant's computer systems and select documents the plaintiff believed would be relevant).

²⁸⁹ See sources cited *supra* note 23.

²⁹⁰ FED. R. CIV. P. 26(b)(2) advisory committee's note to 2006 amendments.

personal diaries, and family photographs. In the pre-ESI era, it would have been difficult to imagine a court ordering any attorney to rummage through a defendant's personal home, but now, virtual invasions of defendants' personal computers are increasingly common.²⁹¹ When one party's willingness to pay opens a treasure trove of potentially confidential, personal, and irrelevant information, the "protected" respondent is still damaged.

In *Cognex Corp. v. Electro Scientific Industries, Inc.*, District Judge Reginald Lindsay acknowledged that the plaintiff's willingness to pay for discovery made the production question a "close call."²⁹² Judge Lindsay nevertheless denied the request, noting that the defendant, who had already conducted an extensive search for relevant documents, did not consciously delete documents from active space, making it unlikely that they would *only* be preserved on backup tapes.²⁹³ Judge Lindsay appeared disturbed with the prospect of permitting discovery based largely on the plaintiff's ability to pay:

There is something inconsistent with our notions of fairness to allow one party to obtain a heightened level of discovery because it is willing to pay for it. There are limits on the number of depositions and interrogatories even though more might well produce relevant information. There is no exception to those limitations based upon one party's willingness to pay. The sense of fairness underpinning our system of justice will not be enhanced by the courts participating in giving strategic advantage to those with deeper pockets.²⁹⁴

Expressing his frustration with the system in practice, Judge Lindsay wrote, "At some point, the adversary system needs to say 'enough is enough' and recognize that the costs of seeking *every* relevant piece of discovery is not reasonable."²⁹⁵ To the extent that the two-tiered system allows limited discovery of inaccessible information regardless of the requesting party's willingness to pay for the restoration, the 2006 amendments may represent the turning point Judge Lindsay advocated.

²⁹¹ See, e.g., *Cenveo Corp. v. Slater*, No. 06-2632, 2007 WL 442387, at *1-3 (E.D. Pa. Jan. 31, 2007) (authorizing review of a former employee's personal computers); *Frees, Inc. v. McMillian*, No. 05-1979, 2007 WL 184889, at *3 (W.D. La. Jan. 22, 2007) (same); *Ameriwood Indus., Inc. v. Liberman*, No. 06-0524, 2006 WL 3825291, at *3, 5-6 (E.D. Mo. Dec. 27, 2006) (permitting the imaging and review of a former employee's home computer upon an allegation by the former employer that the defendant stored the company's proprietary information on the home computer).

²⁹² No. 01-10287, 2002 WL 32309413, at *4 (D. Mass. July 2, 2002).

²⁹³ *Id.* at *5.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

Courts should not shy away from denying expensive production of barely relevant discovery from storage. The advisory note to Rule 26(b)(2) effectively incorporates the marginal utility test from *McPeck v. Ashcroft* by including as a relevant factor “the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.”²⁹⁶ This factor should be paramount in the threshold inquiry of whether any discovery at all is appropriate, before moving to the question of cost shifting. By way of example, in *McPeck*, the court rejected the plaintiff’s request for additional sampling of three out of four backup tapes, noting that although “[t]here is a theoretical possibility that such data exists on backup tapes,” the court “reject[s] the notion that the mere possibility that data exists justifies forcing the government to search backup tapes irrespective of the cost.”²⁹⁷ The production decision also hinged on marginal utility in *In re General Instrument Corporate Securities Litigation*, where after obtaining 110,000 pages of discovery and initially indicating satisfaction with the disclosures, the plaintiff requested additional e-mails from backup tapes.²⁹⁸ The court denied the production, even though the technical costs were not unduly expensive, because the limited value from the additional documents was outweighed by the defendants’ review costs.²⁹⁹

The *Medtronic* case described in subsection II.B.1 should serve as a warning to courts enamored with cost shifting.³⁰⁰ There, the court permitted the plaintiff to discover a set of older backup tapes unlikely to contain relevant e-mails so long as the plaintiff paid one hundred percent of the recovery, relevance-review, and privilege-review costs.³⁰¹ But if those tapes were so marginally relevant that they justified reimbursement of restoration *and* full attorney-review costs, then they should not have been produced at all. Under the new Rule 26(b)(2)(B) framework, the court should simply conclude that the plaintiff has not shown appropriate “good cause” to warrant discovery.³⁰²

Taken together, the above concerns point to an optimal paradigm in which costly discovery should be ordered only when it passes the

²⁹⁶ FED. R. CIV. P. 26(b)(2) advisory committee’s note to 2006 amendments.

²⁹⁷ 212 F.R.D. 33, 35 (D.D.C. 2003).

²⁹⁸ See No. 96-1129, 1999 WL 1072507, at *6 (N.D. Ill. Nov. 18, 1999).

²⁹⁹ *Id.*

³⁰⁰ See *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 553-58 (W.D. Tenn. 2003); see also *supra* notes 131-40 and accompanying text.

³⁰¹ 229 F.R.D. at 562.

³⁰² See FED. R. CIV. P. 26(b)(2)(B).

marginal utility test, with cost shifting reserved for exceptionally close calls. Recall that marginal utility weighs the benefit of discovering relevant evidence against the costs to all the parties. Cost shifting does not alter the sum of the expenses for the litigation as a whole; it merely redistributes it between the parties. It can, however, help reduce uncertainty in cases in which the likelihood of success is speculative by encouraging the requesting party to conduct the cheapest and most effective search. In an ideal scenario, this would reduce costs substantially enough that the discovery passes the marginal utility test.

So which analytical framework would be the most effective in this system? As described above, the problem with the *Rowe* and *Zubulake* tests in practice was that by making cost shifting their primary consideration, they generally took it as a given that discovery would be ordered in the first place.³⁰³ The “compromise” of ordering discovery plus reimbursement led to a liberalized cost-shifting paradigm in which parties were producing marginally relevant information at great expense. Conversely, the problem with the two-tiered discovery system in Rule 26(b)(2) and the seven factors in the advisory note is that they focus primarily on permitting or prohibiting discovery and do not speak to the cost-shifting analysis. Understanding the flaws of the judicial tests and Rule 26(b)(2) leads one to a natural two-step solution that emphasizes the strengths of each method.

A court should first decide whether discovery is appropriate and only then consider cost shifting. This approach would begin by analyzing under Rule 26(b)(2) and its advisory note whether the information sought is not reasonably accessible because it creates an undue burden and, if so, whether the requesting party demonstrated good cause for why the discovery is appropriate. The marginal utility of uncovering additional information should be the key factor courts use in this determination. Sampling will provide critical, nonspeculative estimates of both the ultimate expense and the likelihood of finding important documents.

After the good cause inquiry is completed, in most circumstances courts should not have to resort to a cost-shifting analysis. Either the discovery is ordered or it is not. But when the marginal utility inquiry is a particularly close call, courts can consider shifting costs in order to incentivize the most cost-efficient production. When properly applied, the *Zubulake* test, which places the most weight on marginal util-

³⁰³ See, e.g., *supra* note 197 and accompanying text.

ity factors but also considers the economic resources of the parties and the total cost of the production, is best suited for this analysis.³⁰⁴

CONCLUSION

The rise and fall in cost shifting over the last decade is perhaps best explained as a judicial knee-jerk reaction to the explosion in electronic discovery expenses. At its height, the cost-shifting paradigm and plaintiff-friendly cost-shifting protocol undermined three goals of the judicial system: efficient administration of justice (including protections against overbroad discovery), uniformity, and fair access to the discovery process regardless of a party's wealth. Although the 2006 electronic discovery amendments have not brought much uniformity to cost shifting, they appear to have restricted cost shifting to more appropriate cases. Forcing a requesting party to pay for the responding party's expenses should be considered an extraordinary remedy employed only after sampling, when the requesting party demonstrates a real, nonspeculative likelihood that the discovery would lead to relevant evidence but the cost is prohibitive. The puzzling *Ha-ka* decision from this Comment's Introduction stands as an outlier in the postamendment milieu; one can only hope that it remains so.

³⁰⁴ See *supra* Section II.C.