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ALLOCATING THE COSTS OF DISCOVERY: LESSONS LEARNED AT HOME AND ABROAD

BRITTANY K.T. KAUFFMAN

Director, *Rule One Initiative*

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IAALS—Institute for the Advancement of the American Legal System
John Moye Hall, 2060 South Gaylord Way, Denver, CO 80208
Phone: 303-871-6600
<http://iaals.du.edu>

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Rebecca Love Kourlis Executive Director

Brittany K.T. Kauffman Director, *Rule One Initiative*

Janet L. Drobinske Legal Assistant, *Rule One Initiative*



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IAALS, the Institute for the Advancement of the American Legal System, under its *Rule One Initiative* is dedicated to continuous improvement within the civil justice process, in order to make it more accessible, efficient, and accountable. We have focused much of our time and effort over the last seven years on ways to improve the effectiveness of discovery. In large part, this is because, as the world of information—including electronically stored information—expands, there is a corresponding expansion in potential discovery. And with the growth of discovery comes the challenge that litigants, attorneys, the courts, and rulemakers face in keeping that discovery reasonable and proportional. Along with time (and the corresponding delay), it is the cost of discovery that underscores the need for proportionality. Thus, understanding how the courts and the rulemakers have addressed the costs of discovery, including their allocation between the parties, provides important background and context for future recommendations. We do note that discovery cost allocation is not a placeholder for a “loser pays” system, which the United States is unlikely to adopt, but rather is a way of balancing and limiting discovery by shifting the cost of discovery to the person requesting it. This report reviews the laws in the United States and other countries and provides examples of, and analogies to, various cost allocation models. We look to the various approaches for commonalities and lessons that can be learned, both at home and abroad.

I. INTRODUCTION

In 1978, in the case of *Oppenheimer Fund, Inc. v. Sanders*, the Supreme Court restated the presumption in discovery that “the responding party must bear the expense of complying with discovery requests.”¹ Thus, the presumption in the United States, followed in most state and federal courts, is that the responding party pays for the expenses incurred in identifying, collecting, and producing documents in response to a discovery request. Nevertheless, there has been continued and increasing discussion about whether there should be changes to this presumption. Even in *Oppenheimer*, the Court recognized that, despite this presumption, courts can exercise their discretion under Rule 26(c) to grant orders protecting parties from “undue burden or expense,” including “orders conditioning discovery on the requesting party’s payment of the costs of discovery.”² Thus, this presumption has always included some recognition that there may be instances where the undue burden and expense that often plague discovery may warrant an alternate approach.

Today, discovery and its associated costs pose a greater challenge than ever for parties, attorneys, and the courts. Examples of the high costs of electronic discovery abound in the case

¹ 437 U.S. 340, 358 (1978).

² *Id.*

law. For example, in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, one of the parties estimated that production in response to a single document request, without sampling from select backup tapes, could cost as much as \$9.75 million.³ In large part, this is because of the increasing amount, and associated costs, of electronically stored information. Electronically stored information is not only wide-ranging, but it is now a fundamental and pervasive part of American life. Americans have shifted beyond paper—and even beyond personal computers—to using smart phones, tablets, social media, and the cloud. In 2000, 51% of households reported having a computer and 42% utilized internet at home, as compared to 76% and 72%, respectively, in 2011.⁴ In addition, in 2011, 27% of Americans, so called “high connectivity” individuals, were connected to the internet from multiple locations and multiple devices.⁵ When it comes to companies, electronically stored information is just as pervasive. E-mail is the most common form of communication in the business world, with the number of worldwide e-mail accounts growing to over 4.1 billion in 2014.⁶ And there is more of an intersection between companies and individuals than ever before. According to one survey in 2013, 41% of companies indicated a need to preserve or collect data from employee mobile devices due to litigation or investigations.⁷ That number rises to more than 50% for large companies.⁸

To understand how this impacts discovery costs, it is important to understand the way in which electronically stored information is different from more “conventional” forms of information storage, such as paper, photographic images, and microfilm. One of the most significant characteristics of electronically stored information is its sheer volume. It is this volume of information that has put such a strain on discovery. One of the reasons for this volume is that electronically stored information is easily and cheaply stored, and the amount of data that can be and is stored is growing on a daily basis. Electronically stored information also creates challenges because it can exist simultaneously in multiple forms, and in multiple locations. With the greater volume of data, in multiple forms across multiple locations, the more expensive and

³ 205 F.R.D. 421, 425 (S.D.N.Y. 2002). See *Wiginton v. CB Richard Ellis, Inc.*, 229 F.R.D. 568 (N.D. Ill. 2004) (asserting that the production at issue for all of its offices nationwide could “stretch into the millions of dollars”); see also *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 557-558 (W.D. Tenn. 2003) (estimating the costs of privilege review alone between \$16.5 and \$70 million).

⁴ THOM FILE, UNITED STATES CENSUS BUREAU, COMPUTER AND INTERNET USE IN THE UNITED STATES: POPULATION CHARACTERISTICS 1 (May 2013), available at <http://www.census.gov/prod/2013pubs/p20-569.pdf>.

⁵ *Id.* at 6.

⁶ See Sarah Radicati, The Radicati Group, Inc., Email Statistics Report, 2014-2018, available at <http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf>.

⁷ NORTON ROSE FULBRIGHT’S LITIGATION TRENDS SURVEY REPORT 35 (2014), available at <http://www.nortonrosefulbright.com/files/20140415-norton-rose-fulbrights-10th-annual-litigation-trends-115113.pdf>.

⁸ *Id.*

complex the search for relevant documents may be. Moreover, a significant amount of electronic information is also invisible, including the metadata that is associated with electronic documents. And while electronically stored information is searchable, and technology can be utilized to render the information intelligible in many different ways, electronically stored information can also be considered “not reasonably accessible” because of the cost and burden of obtaining this same information. This may be true because of another characteristic of electronically stored information—the fact that special software may be needed to access the underlying data. Where the necessary software becomes outdated, there may be additional costs and burdens associated with the production of the data.⁹ This highlights the challenge, discussed herein, with data that is considered “not reasonably accessible” because of the cost and burden of making the information intelligible.

The confluence of these unique characteristics of electronically stored information has resulted in an exponential increase in the amount of discoverable information, and a corresponding request by litigants to cast a much wider discovery net, all leading to a marked increase in the cost of electronic discovery compared to traditional paper discovery. Litigants spent \$2.79 billion on electronic discovery in 2007, which represents a 43% increase from 2006.¹⁰ As one commentator has put it, “[i]n the digital world, discovery is the same—but different. Bytes and bits can mean a lot of bucks.”¹¹ RAND recently examined the costs of collection, processing, and review to gain some insights about the relative costs and level of effort involved in electronic discovery. The case-study, which looked at a diverse set of very large companies from different industries, found that the major cost component, at 73%, was the task of reviewing documents for relevance, responsiveness, and privilege.¹² Collection consumed about 8%, while processing consumed about 19%.¹³ Given the high percentage of total costs attributable to review, the report noted this is an area that can be targeted for reduction in the costs of electronic discovery.¹⁴ At the same time, it is an important statistic for reference when talking about the allocation of discovery costs. While collection and processing costs may rise where data is inaccessible, the costs of attorney time in review will always constitute the bulk of the costs of production, and will thus constitute a significant component of the costs that a party may be seeking to reallocate.

⁹ See generally, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., NAVIGATING THE HAZARDS OF E-DISCOVERY: A MANUAL FOR JUDGES IN STATE COURTS ACROSS THE NATION 5-7 (2d ed. 2012).

¹⁰ Vlad Vainberg, *When Should Discovery Come With a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1533-34 (Apr. 2010).

¹¹ John M. Barkett, *Bytes, Bits and Bucks: Cost Shifting and Sanctions in E-Discovery*, 71 DEF. COUNS. J. 334, 354 (2004).

¹² NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY xiv (2012).

¹³ *Id.*

¹⁴ *Id.* at xvi.

Thus, litigation today proceeds in a world with much higher potential costs of discovery. Those facing litigation not only face the costs associated with hiring counsel, and filing papers with the court, but also the potentially expensive and burdensome requirement of responding to discovery requests. Increasingly, parties to litigation are raising the question of who has to pay for discovery. Predictably, defendants think that plaintiffs should bear a disproportionate part of the cost because they initiated the lawsuit; and plaintiffs tend to think that the costs should be allocated on the basis of ability to pay, with a disproportionate share falling to the more well-heeled party. As noted above, courts in this country begin this analysis with the expectation that the responding party will generally be required to bear its own expenses in responding to discovery requests. In certain situations, however, courts have departed from the presumption and shifted some or all of the costs to the requesting party. In addition, various rules schemes exist that reflect alternate cost allocation schemes.

Given that electronically stored information is here to stay, as are the associated challenges that it poses in litigation, what is the best course to follow to address the rising costs of discovery—for courts, for litigants, and for rulemakers? The following report surveys how courts have handled these challenges at the federal level, provides some examples of alternate approaches at the state level, and then looks abroad to see what we can learn from other countries that are struggling to meet these same challenges.

II. CASE LAW ON COST SHIFTING

A. EARLY APPROACHES TO COST SHIFTING

With the advent of electronic discovery and the increased costs of production, responding parties have more frequently argued against the traditional “producer pays” rule. Nevertheless, in the early cost shifting cases, many courts refused to hear such arguments about the burdens of production. In fact, prior to the year 2000, cost shifting decisions were rare.¹⁵ While some courts based their rejection of the argument on the assertion that the costs of such discovery were not onerous,¹⁶ other courts argued the producer should pay based on a “cost of doing business” argument.¹⁷

¹⁵ See Vainberg, *supra* note 10, at 1535 (identifying only two cases ordering cost shifting up to and including 2000).

¹⁶ See, e.g., *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 199 (D. Kan. 1996); *Haworth, Inc. v. Herman Miller, Inc.*, No. 1:92 CV 877, 1995 WL 465838 at *1 (W.D. Mich. Apr. 20, 1995).

¹⁷ See *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76-77 (1976); *In re Brand Name Prescription Drugs*, 1995 WL 360526 at *3 (N.D. Ill., June 5, 1995).

In a case from the 1970s, the court summed up the early rule that a private corporation cannot avoid producing documents based on allegations of impossibility:¹⁸

The defendant seeks to absolve itself of [the responsibility of production] by alleging the herculean effort which would be necessary to locate the documents. The defendant may not excuse itself from compliance with Rule 34, Fed. R. Civ. P., by utilizing a system of record-keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules.¹⁹

This approach dominated early cases in the vanguard of electronic discovery. Courts concluded that where a party utilized technology that results in electronic evidence, it must bear the resulting costs of production in litigation.²⁰

One of the earliest cases to consider cost shifting was *Bills v. Kennecott Corporation*.²¹ The court aptly recognized that, even in 1985, “from the largest corporations to the smallest families, people are utilizing computers to cut costs, improve production, enhance communications, store countless data and improve capabilities in every aspect of human and technological development.”²² The court also put a finger on the associated challenges of cost shifting, recognizing that while, in the past, responding parties were able to shift a majority of the costs of document production to the requesting party merely by making the records available for inspection, such an approach is not as available when dealing with electronically stored information.²³ In determining whether it was appropriate to shift costs to the requesting party, the court set forth four factors for consideration: 1) the total cost of production, 2) the relative expense and burden to each party, 3) whether the requesting party will be substantially burdened by the expense, and 4) whether the responding party is benefitted from producing the data.²⁴

¹⁸ *Kozlowski*, 73 F.R.D. at 76.

¹⁹ *Id.*

²⁰ See *Daewoo Elec. Co. v. United States*, 650 F. Supp. 1003, 1006-07 (Ct. Int’l Trade 1986); *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2.

²¹ 108 F.R.D. 459, 460 (D. Utah 1985).

²² *Id.* at 462.

²³ *Id.*

²⁴ *Id.* at 464.

While the court did not shift costs in that case, the factors that were considered went on to become the predominant test utilized by courts in these early years.²⁵

B. THE DEVELOPMENT OF A MULTI-FACTOR APPROACH

Courts have moved past the “cost of doing business” argument as discovery expenses have risen and as computers and the use of technology are no longer seen as a choice.

McPeek v. Ashcroft

McPeek v. Ashcroft serves as a landmark case in reconsidering the rationale behind the traditional rule that the responding party must pay for the costs of production.²⁶ The case provides a careful analysis of the challenges posed by electronic discovery and the purpose of cost shifting. The court rejected the “cost of doing business” approach from earlier case law, recognizing that such an argument assumes an alternative, and that in today’s world, computers, networks, and backup tapes are a fact of modern business.²⁷ Instead, the court considered alternative approaches, ultimately adopting a “marginal utility” analysis to determine which party should bear the costs of electronic discovery. Under this approach, the more likely it is that the requested discovery contains information relevant to the claims or defenses, the fairer it is to make the responding party search at its own expense. The less likely, the more unjust.²⁸ In addition, the court recognized the importance of looking at the cost of production in relation to the amount at stake in the litigation. In the end, the court ordered the responding party to restore backup tapes for a specified period as an initial sample.²⁹

The marginal utility test does not explicitly consider the resources of the parties. Instead, it puts the question of whether the proposed discovery will lead to relevant data ahead of economic considerations. While such an approach eliminates marginally useless discovery, the *McPeek* court itself recognized the dangers of a straight marginal utility analysis. Thus, subsequent courts have supplemented this approach with the consideration of additional factors to curtail overbroad discovery.

Another early case to follow the marginal utility test is *Byers v. Illinois State Police*.³⁰ In *Byers*, a state police department had switched to a new e-mail system, which resulted in the department having to purchase the old system to access the requested e-mails. The magistrate judge

²⁵ See Vainberg, *supra* note 10, at 1532.

²⁶ 202 F.R.D. 31 (D.D.C. 2001).

²⁷ *Id.* at 33.

²⁸ *Id.* at 34.

²⁹ *Id.* at 34-35.

³⁰ No. 99 C 8105, 2002 WL 1264004, at *10-12 (N.D. Ill. June 3, 2002).

concluded the request “would impose a significant financial burden.”³¹ The court utilized the marginal utility test from *McPeck* as a basis for determining the appropriate allocation of costs. “The more likely it is that the archived e-mails contain relevant information, the fairer it is that the responding party bears the cost of production; the less likely it is, the more unjust it is to make that party bear the cost.”³² The court ultimately held that the requesting party had failed to show that the production of the archived e-mails would likely result in the discovery of relevant information, concluding that such discovery would be allowed only if they were willing to pay for a portion of the production.

While the marginal utility test has generally been supplanted by approaches in later cases, the concept remains an important aspect of the analysis of cost allocation.

Rowe Entertainment, Inc. v. William Morris Agency, Inc.

The next key case in the development of today’s cost shifting jurisprudence is *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*³³ The court rejected previous “bright line” tests and instead considered and outlined a multi-factor approach to evaluate the proposed discovery.

In *Rowe*, the plaintiff sought discovery of e-mails from the defendants’ backup tapes and hard drives. After concluding that the plaintiff had successfully demonstrated that the discovery sought was generally relevant, and determining that the expense of locating and extracting the responsive e-mails was substantial, the court proceeded to determine the extent to which the costs were “undue,” thus justifying allocation of the expenses to the plaintiff as the requesting party.³⁴ The court laid out various factors for consideration, including:

- (1) the specificity of the discovery requests,
- (2) the likelihood of discovering critical information,
- (3) the availability of such information from other sources,
- (4) the purposes for which the responding party maintains the requested data,
- (5) the relative benefit to the parties of obtaining the information,
- (6) the total cost associated with production,
- (7) the relative ability of each party to control costs and its incentive to do so, and
- (8) the resources available to each party.³⁵

³¹ *Id.* at *11.

³² *Id.* at *11.

³³ 205 F.R.D. 421 (S.D.N.Y. 2002).

³⁴ *Id.* at 428-29.

³⁵ *Id.* at 429.

Based on an analysis of all of these factors, the court ordered that the requesting party formulate and execute a search procedure on a mirror image of the hard drive, and bear all the associated costs. Defendants' counsel then had the opportunity to review the identified documents for confidentiality and privilege, consistent with the protective order in the case addressing issues of inadvertent waiver.³⁶ The court concluded that, to the extent the responding party wished to do a preproduction privilege review, it would be at the responding party's expense.³⁷

Subsequent courts have viewed the cost shifting analysis from *Rowe* as favoring cost shifting in close cases and failing to encourage sampling.³⁸ Others have argued the approach is incomplete and that it encourages the "mechanical counting of the factors."³⁹ Nevertheless, *Rowe* does set forth a protocol by which a requesting party can search through a mirror image of documents, selected for production by the responding party, after which the responding party can engage in review and lodge objections. In addition, the *Rowe* factors have been followed by numerous courts in their analysis of these issues. For example, in *Medtronic Sofamor Danek, Inc. v. Michelson*, the court analyzed the request for cost shifting under *Rowe*'s eight-factor approach, focusing in on the question of whether the cost was "undue."⁴⁰ The court ordered cost shifting of a portion of the costs for a set time period. In comparison, in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, the court relied on the factors from *Rowe* with the same result, but proposed a different solution to the issue of privilege review.⁴¹

C. THE SEMINAL CASE: *ZUBULAKE*

The court began the opinion in *Zubulake v. UBS Warburg LLC* with the observation that the "case provides a textbook example of the difficulty of balancing the competing needs of broad discovery and manageable costs."⁴² In fact, the case has gone on to become the textbook case on cost shifting.

In *Zubulake*, the plaintiff, in a suit against the defendant for gender discrimination and illegal retaliation, argued that key evidence was located in various e-mails that existed only on backup tapes and other archived media.⁴³ The defendant estimated that it would cost \$175,000 to restore the e-mails, exclusive of attorney review time. The court recognized the traditional rule that the responding party generally bears the burden of the cost of producing electronic evidence.

³⁶ *Id.* at 433.

³⁷ *Id.*

³⁸ *See, e.g., Zubulake v. UBS Warburg, LLC*, 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

³⁹ *See Vainberg, supra* note 10, at 1544.

⁴⁰ 229 F.R.D. 550, 553 (W.D. Tenn. 2003).

⁴¹ No. 99-3564, 2002 WL 246439, at *3-9 (E.D. La. Feb. 19, 2002)

⁴² 217 F.R.D. at 311.

⁴³ *Id.* at 311-12.

Nevertheless, the court recognized that the responding party may invoke the district court's discretion under Rule 26(c) to protect it from "undue burden or expense." Although both parties referred to and agreed that the eight-factor test from *Rowe* was an appropriate one for determining whether to shift costs, Judge Scheindlin in *Zubulake* concluded that the *Rowe* test inappropriately favors cost shifting, that it was incomplete, that the factors should not all be weighted equally, and that a full factual basis is required to support the analysis.⁴⁴ Instead of applying *Rowe*, Judge Scheindlin crafted a new three-step analysis.

The first step in the analysis is to determine whether something is accessible or inaccessible. To make this determination, the court must "thoroughly understand the responding party's computer system, both with respect to active and stored data."⁴⁵ For data stored in an accessible data format, the usual rules of discovery apply, and the responding party is responsible for the production. The court should "only" shift such costs in situations where the data is "relatively inaccessible, such as in backup tapes."⁴⁶

If the data is inaccessible, for the second step in the analysis, the respondent should restore and produce a representative sample to assess the costs and benefits of a full production. Since the "cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media."⁴⁷

Third, the *Zubulake* court set out seven factors "weighted in more-or-less the following 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.⁴⁸

Thus, under *Zubulake*, the question whether to shift costs is a function of whether the electronic evidence is "accessible" or "inaccessible." Where accessible, the responding party must pay.

⁴⁴ *Id.* at 321-324.

⁴⁵ *Id.* at 324.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

Where inaccessible, the responding party must produce a sample, after which the court will undertake the appropriate cost shifting analysis.

The court circled back to the actual allocation of costs in *Zubulake v. UBS Warburg LLC*, commonly referred to as *Zubulake III*.⁴⁹ This decision came after the responding party conducted the ordered sampling, at its own expense. The court allocated the remaining backup tape restoration costs between the parties, with 75% to be paid by the responding party and 25% to be paid by the requesting party. The court also addressed the question of which costs should be shifted. Judge Scheindlin noted that, “as a general rule, where cost-shifting is appropriate, only the costs of restoration and searching should be shifted,” while the responding party “should *always* bear the cost of reviewing and producing electronic data once it has been converted to an accessible form.”⁵⁰ The court recognized that the responding party has the “exclusive ability” to control the costs of review, as well as the extent to which the review is conducted (*i.e.* “from reading every word of every document to conducting a series of targeted key word searches”).⁵¹ In addition, the court keyed the costs that can be shifted to the cost shifting analysis itself—it is appropriate to shift the costs incurred in restoring the data to an accessible format. Once the data is restored and the responsive documents are located, cost shifting of the remaining review and production costs is inappropriate.⁵²

In a later case, *Xpedior Creditor Trust v. Credit Suisse First Boston (USA) Inc.*, Judge Scheindlin applied the *Zubulake* factors and did not shift the costs because the factors as a whole weighed against cost shifting.⁵³ Nevertheless, despite the *Zubulake* court’s criticism of *Rowe*’s liberal cost shifting analysis, most cases that have subsequently applied *Zubulake* have shifted some costs.⁵⁴

III. THE 2006 FEDERAL RULE AMENDMENTS

As noted above, prior to the 2006 amendments to the Federal Rules of Civil Procedure, courts looked to Rule 26(c) and Rule 37(a) for authority to shift discovery costs. Parties could ask the court for costs to be shifted when seeking a protective order to alleviate the burdens of discovery under Rule 26(c), or when a party moved to compel discovery under Rule 37(a). Under both approaches, the court can order discovery, deny discovery, and/or reallocate the costs as it deems appropriate. On December 1, 2006, amendments to the Federal Rules of Civil Procedure went into effect that incorporated “electronically stored information” into the rules and addressed a

⁴⁹ 216 F.R.D. 280 (S.D.N.Y. 2003).

⁵⁰ *Id.* at 290.

⁵¹ *Id.*

⁵² *Id.* at 291.

⁵³ 309 F. Supp.2d 459, 465-67 (S.D.N.Y. 2003).

⁵⁴ *See Vainberg, supra* note 10, at 1554.

wide variety of issues related to the rise in its use and impact on discovery and production in litigation. The amendments include “Specific Limitations on Electronically Stored Information,” which sets up an analysis similar to that in *Zubulake*, limiting when discovery must be provided, and giving the court authority to specify the conditions for such discovery.⁵⁵

Under Rule 26(b)(2)(B), a party need not produce electronically stored information “from sources that the party identifies as not reasonably accessible because of undue burden or cost.” On either a motion to compel or for a protective order, if the responding party makes such a showing, the inaccessible data is presumptively undiscoverable. This presumption can be overcome by a showing of “good cause, considering the limitations of Rule 26(b)(2)(C).”⁵⁶

The Advisory Committee notes to the amendments recognize that while electronically stored information often makes it easier to locate and retrieve information, “some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.”⁵⁷ Under the federal rule, responding parties shall pay for the production of electronically stored information where it is relevant, not privileged, and reasonably accessible. Where the requesting party continues to request information from sources that are not reasonably accessible, and the parties cannot come to agreement regarding the production, the court (following sampling in appropriate cases) will make a good-cause determination regarding whether to allow such discovery.⁵⁸ Subject to the Rule 26(b)(2)(C) limitations, the Advisory Committee notes provide a list of factors to consider in making the good-cause assessment, which closely resemble the factors set forth in *Zubulake*.

Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely

⁵⁵ FED. R. CIV. P. 26(b)(2)(B).

⁵⁶ Rule 26(b)(2)(C) provides that, on motion or on its own:

[T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) 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.

⁵⁷ FED. R. CIV. P. 26(b)(2)(B) advisory committee’s note.

⁵⁸ *Id.*

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.⁵⁹

Given that they are listed in the notes rather than the rule, the factors are not binding. Nevertheless, they are highly informative and should be given weight in the analysis. As noted above, the good-cause inquiry is "coupled with the authority to set conditions for discovery."⁶⁰ Such conditions may include "payment by the requesting party or part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. 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 responding party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery."⁶¹

A. THE INTERPLAY OF *ZUBULAKE* AND THE AMENDMENTS: MOVING BEYOND ACCESSIBILITY

Rule 26(b)(2)(B) sets forth the presumption that the responding party need not produce information "that is not reasonably accessible because of undue burden or cost." Moreover, the rule provides an exception for good cause, with some guidance for deciding when there is good cause to warrant such production. In addition, the rule makes clear that the court has authority to set conditions for discovery, including the allocation of costs. However, there remains lingering ambiguity over whether the factors in the rules should be used to guide the cost shifting analysis, or whether courts should look to the prior analytical framework from the case law, including *Zubulake*, to guide this analysis once the court decides to allow such discovery under the rule.⁶² Some courts have applied the factors from the Advisory Committee notes, while others have applied the *Zubulake* balancing factors instead. In some cases, courts require the responding party to show that the requested info is "not reasonably accessible because of undue burden or cost," under the federal rules, subject to the definition of "accessible" from *Zubulake*. Under this approach, the requesting party must also show "good cause" for requiring the information.⁶³ In the end, case law following the 2006 amendments has not been uniform, in part because the Advisory Committee note does not explicitly say whether the listed factors are applicable to cost

⁵⁹ *Id.*

⁶⁰ FED. R. CIV. P. 26(b)(2)(B).

⁶¹ FED. R. CIV. P. 26(b)(2)(B) advisory committee's note.

⁶² See Vainberg, *supra* note 10, at 1561.

⁶³ FED. R. CIV. P. 26(b)(2)(B).

shifting, nor do they explain their intersection with the prior case law. Some courts apply the factors from the committee notes, while others continue to apply the *Zubulake* balancing factors despite that they are not identical tests.⁶⁴

In addition, as one commentator has noted, “considerable confusion still surrounds whether or not courts may grant cost-shifting requests predicated solely upon the undue burden of high costs associated with the retrieval and production of accessible data.”⁶⁵ *Zubulake* conditioned the finding of whether a request is unduly burdensome on whether the electronically stored information was in an accessible or inaccessible format. In comparison, Rule 26(b)(2)(B) 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.*”⁶⁶ The rules approach includes a time and expense component in the analysis of inaccessibility.⁶⁷ Thus, the formulation under the rules is arguably broader, allowing defendants to argue that the production is “not reasonably accessible” because it is too costly even where the information may be available from a purely technical standpoint.

Cases have split along these two lines—some holding to a strict interpretation of “accessible” based on the analysis in *Zubulake*, and others embracing a more liberal construction of “accessible.” In *Peskoff v. Faber*, for example, the court held to a strict construction, finding that “[t]he obvious negative corollary to this rule is that *accessible* data must be produced at the cost of the producing party; cost-shifting does not even become a possibility unless there is first a showing of inaccessibility. Thus, it cannot be argued that a party should ever be relieved of its obligation to produce accessible data merely because it may take time and effort to find what is necessary.”⁶⁸ In *W.E. Aubuchon Co. v. BeneFirst, LLC*, however, the court drew a distinction between *Zubulake* and the analysis under Rule 26(b)(2)(B).⁶⁹ The court found that the active servers in question were “accessible” under *Zubulake*’s technical definition of “accessibility,” but nevertheless concluded that the restoration costs made them “not reasonably accessible

⁶⁴ See generally Bradley T. Tennis, Cost-Shifting in Electronic Discovery, 119 YALE L.J. 1113, 1118 (2010) (recognizing that the committee notes include “the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources,” a factor not included in the *Zubulake* formulation).

⁶⁵ See Robert E. Altman & Benjamin Lewis, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 574 (2009).

⁶⁶ FED. R. CIV. P. 26(b)(2)(B) (emphasis added).

⁶⁷ See Tennis, *supra* note 64, at 1118.

⁶⁸ No. 04-526, 2007 WL 530096, at *4 (D.D.C. Feb. 21, 2007); see also *Canon U.S.A., Inc. v. S.A.M., Inc.*, No. 07-01201, 2008 WL 2522087, at *3 (E.D. La. June 20, 2008) (ordering defendant to hire and pay for a forensic computer specialist because the requested discovery was on an accessible server).

⁶⁹ 245 F.R.D. 38, 42-43 (D. Mass. 2007).

within the meaning of [Rule] 26(b)(2)(B).”⁷⁰ The same is true in *Ameriwood Industries, Inc. v. Liberman*, where the court concluded the defendants’ request for documents was not reasonable because of undue burden based solely on the volume of potentially responsive information.⁷¹ The Sedona Conference®’s Principle 13 similarly takes the position that “undue burden” does not turn solely on the technical accessibility of the requested information.⁷²

Moreover, there is some disagreement regarding which costs may be subject to cost shifting. Examples of categories of costs associated with the production of electronically stored information include review for relevance, privilege review, in-house information technology costs, format conversion, backup tape retrieval and restoration, expert assistance, printing costs, and actual production.⁷³ Some courts separate out those costs that are only incurred with electronically stored information—such as the costs of restoration, retrieval, and format conversion—for cost shifting.⁷⁴ While the RAND report makes clear that review costs constitute the majority of electronic discovery costs,⁷⁵ courts generally do not include the costs of reviewing data for privileged information, for responsiveness, or for preservation, and these remain the most controversial of costs for shifting.⁷⁶

In the end, cost shifting remains largely dependent upon the judge’s discretion in each case.⁷⁷ Interestingly, the comment to The Sedona Conference®’s Principle 13 argues that cost shifting is still separately available under Rule 26(b)(2)(C) and Rule 26(c).⁷⁸ Thus, even if Rule 26(b)(2)(B) and *Zubulake* were interpreted to apply to a more narrow definition of “accessibility,” the production of electronically stored information that is not reasonably accessible for reasons other than technology (*e.g.* as a result of volume, or the respective resources of the parties) may still warrant cost shifting.

⁷⁰ *Id.* at 43.

⁷¹ No. 4:06CV524, 2007 WL 496716, at *2 (E.D. Mo. Feb. 13, 2007).

⁷² See THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES: SECOND EDITION BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 67 (2007).

⁷³ See Altman & Lewis, *supra* note 65, at 572.

⁷⁴ *Id.* at 573.

⁷⁵ PACE & ZAKARAS, *supra* note 12, at xiv.

⁷⁶ See Sonia Salinas, *Electronic Discovery and Cost Shifting: Who Foots the Bill?*, Developments in the Law: Electronic Discovery, 38 Loy. L.A. L. Rev. 1639, 1662 (2005).; see also Rowe, 205 F.R.D. at 433 (concluding that the producing party “shall continue to be responsible for the expense of any review for privileged or confidential material”).

⁷⁷ See, *e.g.*, *Haka v. Lincoln County*, 246 F.R.D. 577, 578 (W.D. Wis. 2007) (where the court required the parties to split the costs of discovery 50/50 from an active hard drive at a total cost of an estimated \$27,000 in a \$100,000 case).

⁷⁸ See THE SEDONA CONFERENCE®, THE SEDONA PRINCIPLES, *supra* note 72, at 67.

IV. THE ALLOCATION OF DISCOVERY COSTS VIA § 1920

Parties have also sought to allocate the costs of electronic discovery under Federal Rule of Civil Procedure 54(d)(1) and 28 U.S.C. § 1920, with some success. Rule 54(d)(1) addresses costs, and provides that the prevailing party may recover its litigation costs, other than attorney's fees, unless a federal statute, the rules, or a court order provide otherwise. This broad rule is further defined by 28 U.S.C. § 1920, which addresses the taxation of costs and enumerates a list of costs that may be taxed, including “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.”⁷⁹ In 2008, Congress amended § 1920(4) to replace “copies of papers” with “copies of any materials.”⁸⁰ The change aimed “to permit taxing the costs associated with copying materials whether or not they are in paper form.”⁸¹ The question remains to what extent the costs of electronic discovery can be recovered under § 1920(4)'s reference to the “costs of making copies.” The cases reflect divergent approaches to the award of costs under this section, with the Supreme Court recently denying certiorari despite a circuit split,⁸² leaving the extent of recovery unsettled.⁸³

The Seventh Circuit addressed the award of costs under § 1920(4) in *Hecker v. Deere & Company* and affirmed the trial court's award of costs to the defendant for converting computer data into a readable format in response to the plaintiff's discovery requests.⁸⁴ The plaintiff's principal complaint was that such costs were improper because they were costs of “document selection.”⁸⁵ The court took a broader view of recovery under § 1920(4) and allowed the costs. Similarly, in *In re Ricoh Company, Ltd, Patent Litigation*, the Federal Circuit applied the regional circuit law, in that case Ninth Circuit law, in concluding that “the costs of producing a

⁷⁹ 28 U.S.C. § 1920(4).

⁸⁰ See generally *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 165 (2012); see also John M. Barkett, *Un-taxing E-Discovery Costs: Section 1920(4) After Race Tire Amer. Inc. and Taniguchi* (2012), available at <http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf>.

⁸¹ *Race Tires*, 674 F.3d at 165 (quoting JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 10 (Mar. 18, 2003)).

⁸² *Hoosier Race Tire Corp. v. Race Tires America, Inc.*, 133 S.Ct. 233 (2012).

⁸³ See *Race Tires*, 674 F.3d at 165-70; *In re Ricoh Co., Ltd. Patent Litigation*, 661 F.3d 1361 (Fed. Cir. 2011); *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); see generally Brendan M. Schulman & Samantha V. Ettari, *A New Avenue for E-Discovery Cost Recovery* (Feb. 21, 2013), available at <http://www.metrocorpounsel.com/articles/22430/new-avenue-e-discovery-cost-recovery>; Michael D. Berman,

Taxation of E-Discovery Costs Under 28 U.S.C. § 1920(4) after Taniguchi v. Kan Pacific Saipan (Aug. 12, 2012), available at <http://www.esi-mediation.com/taxation-of-e-discovery-costs-under-28-u-s-c-sec-19204-after-taniguchi-v-kan-pacific-saipan/>.

⁸⁴ 556 F.3d at 591.

⁸⁵ *Id.*

document electronically” can be recovered under § 1920(4).⁸⁶ The court found that the use of a third-party electronic database service was properly included in this category.⁸⁷

The Third Circuit took a much narrower view of the statute in 2012 in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*⁸⁸ In *Race Tires*, the Third Circuit limited taxation of electronic discovery costs to the conversion of native files, the scanning of documents, and the transferring of records from one format to another.⁸⁹ In doing so, the Third Circuit denied recovery of the various vendor services, concluding that not all activities “leading up to the actual production” of documents are taxable.⁹⁰ The court concluded that “[n]one of the steps that preceded the actual act of making copies in the pre-digital era would have been considered taxable. And that is because Congress did not authorize taxation of charges necessarily incurred to discharge discovery obligations. It allowed only for the taxation of the costs of making copies.”⁹¹ This result does not change just because some of these activities are performed by consultants with “technical expertise.” The court went on to acknowledge the presumption that the responding party must bear the expense of production costs, along with the district court’s discretion to shift costs, which is an entirely separate question. The court recognized that neither party “obtained a cost-shifting protection order. We are consequently limited to shifting only those costs explicitly enumerated in § 1920.”⁹²

Because the case law is not settled, there is some precedent for prevailing parties to argue for e-discovery costs under § 1920. Nevertheless, such recovery is likely limited, and parties should not plan for the recovery of substantial e-discovery costs at the end of the litigation under § 1920.

V. COST SHIFTING AT THE STATE LEVEL

Just as the majority of electronic discovery historically has been at the federal level,⁹³ the majority of action in the area of cost allocation has been in federal court. Nevertheless, it is clear electronically stored information has completely permeated our culture, and issues of electronic discovery have arrived in the state courts as well. The resulting challenges have caused several states to address the issue of cost shifting in different ways, either through procedural rules or in the case law.

⁸⁶ 661 F.3d at 1364-65.

⁸⁷ *Id.* 1364-66.

⁸⁸ 674 F.3d at 165-70.

⁸⁹ *Id.*

⁹⁰ *Id.* at 169.

⁹¹ *Id.*

⁹² *Id.* at 170-171.

⁹³ See, e.g., Corina Gerety, *Trial Bench Views: IAALS Report on Findings From a National Survey on Civil Procedure*, 32 PACE L. REV. 301, 304-05 (2012)

A. CALIFORNIA

California amended its California Code of Civil Procedure in 2009 to add various provisions related to the discovery of electronically stored information.⁹⁴ The new rules expressly incorporate reference to “electronically stored information,” and define it as “information that is stored in an electronic medium.”⁹⁵ The rules “provide that parties may inspect, copy, test and sample electronically stored information, make objections to its production, seek appropriate protective orders, and obtain electronically stored information from third parties.”⁹⁶

California Code of Civil Procedure 2031.280, added in 2004 and subsequently amended in 2009, governs the production of documents, including the form of such production. As to format, Section 2031.280(a) provides that “[a]ny documents produced in response to a demand for inspection, copying, testing, or sampling shall either be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand.” The amendments in 2009 did not change the applicable language in Section 2031.280(e), which addresses the costs of production. That section provides that, “[i]f necessary, the responding party at the reasonable expense of the demanding party shall, through detection devices, translate any data compilations included in the demand into reasonably usable form.”⁹⁷

While the responding party generally bears the burden of production in California, the language in Section 2031.280(a) opens the door to courts ordering the requesting party to bear the costs of producing data.⁹⁸ The California Court of Appeals considered the import of this language in *Toshiba America Electronic Components, Inc. v. Superior Court*.⁹⁹ In *Toshiba*, the defendant produced more than 20,000 pages of documents in response to a request for production that it described as “readily available,” but objected to the cost of producing e-mail correspondence stored on backup tapes.¹⁰⁰ The defendant argued that the plaintiff should share some or all of the costs. When the plaintiff refused and moved to compel production, the trial court granted the motion and ordered the defendant to produce all non-privileged e-mails from the backup tapes. On a writ of mandamus to the Court of Appeals, the primary issue was whether the language “at the reasonable expense of the demanding party” was a mandatory cost shifting provision or

⁹⁴ See Electronic Discovery Act, Assembly Bill No. 5 (June 29, 2009).

⁹⁵ CAL. CIV. PROC. CODE § 2016.020.

⁹⁶ Catherine Valerio Barrad & Robert Halland, *California’s Electronic Discovery Act Becomes Law*, 15-NOV ORANGE COUNTY LAW 18 (2009).

⁹⁷ CAL. CIV. PROC. CODE § 2031.280(e).

⁹⁸ See Barrad & Halland, *supra* note 96, at 18.

⁹⁹ 21 Cal. Rptr. 3d 532, 538 (Cal. Ct. App. 2004).

¹⁰⁰ *Id.* at 535.

whether the California Code merely permitted cost shifting.¹⁰¹ While the appellate court recognized the general rule that the responding party typically bears the expense of production, the court recognized that the statute shifts to the requesting party the reasonable expense of translating a data compilation into usable form when such a translation is necessary to obtain usable data.¹⁰² The court concluded that this case provided an example of a situation where the legislature meant for the requesting party to share in the costs of production, but also recognized that the determination of such an allocation, including reasonableness and necessity, is a factual matter that, when disputed, falls to the discretion of the trial court.¹⁰³

The California Court of Appeals had the opportunity to consider the statute again in 2013, in the unpublished decision *Robin Singh Educational Services, Inc. v. Blueprint Test Preparation, LLC*.¹⁰⁴ The court reiterated that the statute “addresses the issue of who bears the cost of making readable electronic information that the responding party has produced.”¹⁰⁵ While these decisions make clear that the California section provides for cost allocation in narrowly defined circumstances, they also note the court retains its broader “traditional discretion in discovery matters,” including the authority to “manage discovery and prevent misuse of discovery procedures.”¹⁰⁶

B. TEXAS AND MISSISSIPPI

The Texas Rules of Civil Procedure include provisions governing the production of electronic documents.¹⁰⁷ As a baseline, Texas Rule of Civil Procedure 196.6 provides that “the expense of producing items will be borne by the responding party and the expense of inspecting, testing, photographing, and copying items produced will be borne by the requesting party,” absent an order for “good cause.” Like California, however, the Texas rules include a provision for a different allocation in specific circumstances. Rule 196.4, which became effective in 1999, provides as follows:

To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that

¹⁰¹ *Id.* at 536.

¹⁰² *Id.* at 538-42.

¹⁰³ *Id.* at 540-41.

¹⁰⁴ No. B204775, 2013 WL 240273, at *26 (Cal. Ct. App. Feb. 20, 2013).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (quoting *Toshiba Am. Elec. Components v. Superior Court*, 21 Cal. Rptr.3d 532, 540 (Cal. Ct. App. 2004)).

¹⁰⁷ TEX. R. CIV. P. 196.4, 196.6.

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

Mississippi Rule of Civil Procedure 26(b)(5) was based on, and mirrors, the Texas provision.

The application of the Texas rule, and the steps to be taken by the parties and the court, were examined by the Texas Supreme Court in *In re Weekley Homes, L.P.*¹⁰⁸ When a party seeks the discovery of electronic information, and makes a specific request including specifying the form of production, the responding party must produce responsive documents that are reasonably available to it in the ordinary course of business. If the party cannot, through reasonable efforts, retrieve the requested information, it can file a motion. If the court determines that the documents are not reasonably available, but nevertheless determines that the benefits of production outweigh the burdens imposed and orders production, the court must order the responding party to pay the reasonable expenses of any extraordinary steps to retrieve or produce the information.¹⁰⁹ The Texas Supreme Court emphasized cooperation as a “fundamental tenet” of the Texas rules and noted that, prior to any discovery requests, the parties should communicate regarding their relevant systems so that agreements as to protocols can be reached.¹¹⁰

Thus, like California, Texas and Mississippi require that the responding party pay the costs of production when the requested electronically stored information is reasonably available in the ordinary course of business. Where extraordinary steps are required for the retrieval and production of documents, however, the costs associated with the retrieval are shifted to the requesting party.

C. NEW YORK

New York provides an example of a jurisdiction where the question of “which party pays the costs of document disclosure?” is not a settled one.¹¹¹ The Rules of the Commercial Division of

¹⁰⁸ 295 S.W.3d 309, 321-22 (2009).

¹⁰⁹ *Id.* at 321-22.

¹¹⁰ *Id.*

¹¹¹ See, e.g., Patrick M. Connors, *Which Party Pays the Costs of Document Disclosure?*, 29 PACE L. REV. 441 (2009); *U.S. Bank Nat’l Ass’n v. GreenPoint Mortgage Funding, Inc.*, 939 N.Y.2d 395, 398 (N.Y. App. Div. 2012).

the Supreme Court do not provide a clear answer, and the case law has only muddied the analysis. Prior to the advent of electronic discovery, the parties generally paid their respective costs of production, and judicial intervention was rarely necessary. For all the reasons discussed previously, however, the disclosure of electronically stored information has brought the issue of cost allocation to the forefront. The result has been a collection of inconsistent cases, with a recent decision in 2012 that suggests New York has moved in the direction of a default presumption that the responding party pays.

In *Lipco Elec. Corp. v. ASG Consulting Corp.*,¹¹² the court recognized and grappled with the challenges posed by electronic discovery. The court concluded that, based on cited New York case law, the “party seeking discovery must bear the cost of production of the items for which discovery is sought.”¹¹³ Thus, as of the decision in *Lipco*, “the analysis of whether electronic discovery should be permitted in New York is much simpler than it is in the federal courts. The court need only determine whether the material is discoverable and whether the party seeking the discovery is willing to bear the cost of production of the electronic material.”¹¹⁴

Despite the pronouncement in *Lipco*, the case law since 2004 has produced mixed results. For example, in 2010, the Commercial Division, Supreme Court, New York County, in *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, suggested that the rule that the requesting party pay for the costs of production stands “on more precarious footing” than the cases suggest, and held that the responding party must bear the cost of production.¹¹⁵ In 2010, on an appeal from a case ordering the responding party to pay for the costs of litigation, the court in *Response Personnel, Inc. v. Aschenbrenner* reversed and concluded that “requiring the [responding party] to bear the cost of the production imposes an undue burden on it, since, generally, the cost of production is borne by the party requesting the production, and the cost of creating electronic documents here would not have been inconsequential.”¹¹⁶

More recently, in 2012, the First Department appellate court addressed this issue and prior case law at length in *U.S. Bank National Association v. GreenPoint Mortgage Funding, Inc.*¹¹⁷ The court recognized that the courts that have “spoken on the issue of cost allocation have not done so with one voice.”¹¹⁸ The court concluded that “[w]e are now persuaded that the courts adopting the *Zubulake* standard are moving discovery, in all contexts, in the proper direction. *Zubulake*

¹¹² 798 N.Y.S.2d 345, 2004 N.Y. Slip. Op. at *9 (N.Y. Sup. Ct. 2004).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 895 N.Y.S.2d 643, 27 Misc.3d 1061, 1070 (N.Y. Sup. Ct. 2010).

¹¹⁶ 909 N.Y.S. 433, 434 (N.Y. App. Div. 2010).

¹¹⁷ *GreenPoint Mortgage Funding, Inc.*, 939 N.Y.2d 395 (N.Y. App. Div. 2012).

¹¹⁸ *Id.* at 398-99.

presents the most practical framework for allocating all costs in discovery, including document production and searching for, retrieving and producing [electronically stored information].”¹¹⁹ The court also noted that “the adoption of the *Zubulake* standard is consistent with the long-standing rule in New York that the expenses incurred in connection with disclosure are to be paid by the respective producing parties and said expenses may be taxed as disbursements by the prevailing litigant.”¹²⁰

D. WISCONSIN

Wisconsin provides an example of an alternate approach to the incorporation of cost allocation into state procedural rules. Wisconsin Statute Section 804.01 includes a general provision governing discovery, including provisions specifically related to the discovery of electronically stored information. Section 804.01(2)(e) includes limitations regarding the discovery of electronically stored information, including a requirement that the parties meet and confer before serving a request for production of documents or before responding to an interrogatory by producing electronically stored information. The rules specify subjects for discussion at the meet and confer, including the cost of the proposed discovery of electronically stored information and the extent to which it can be limited. This section was included in 2010 “as a measure to manage the costs of discovery of electronically stored information,” with recognition that if “the parties confer before embarking on such discovery, they may reduce the ultimate cost.”¹²¹ The Judicial Council’s notes recognize that parties may not always reach consensus on how best to manage electronic discovery. The rules therefore confer authority on the court to intervene. “In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and benefits of discovery. . . . It is also appropriate to consider the factors specified in the Advisory Committee notes to Fed. R. Civ. P. 26(b)(2)(B).” Thus, Wisconsin has chosen to address the goal of keeping down the costs of electronic discovery by requiring the parties to confer early to discuss the subjects on which discovery is needed, the possibility of phasing discovery, preservation, form of production, privilege, the use of a court referee or other e-discovery expert, and costs.¹²²

¹¹⁹ *Id.* at 399.

¹²⁰ *Id.* at 400.

¹²¹ WIS. STAT. ANN. § 804.01(2)(3) judicial council note – 2010.

¹²² See generally Timothy D. Edwards, *E-Discovery: Who Pays?*, 85-OCT WIS. LAW. 12 (2012).

VI. LOOKING BEYOND THE UNITED STATES: WHAT WE CAN LEARN FROM COST ALLOCATION ABROAD

Looking outside our own borders can offer some relevant insights and perspectives on the issue of cost allocation. While our system is unique in many ways, and the issue of shifting discovery costs under the current legal landscape is uniquely American, nevertheless comparisons with the respective approaches and rules from other countries are valuable. Such comparisons reveal common problems, suggest a spectrum of solutions, and highlight trends in terms of how other countries are dealing with the rise of discovery costs as a result of ever-expanding electronically stored information.

A. THE UNITED STATES IN CONTEXT

As scholars, lawyers, clients, and rulemakers consider how best to manage discovery costs going forward, including the question of how such costs should be allocated, it is useful to understand where the United States fits in terms of the world's overall approach to costs and fees. Historically, comparative law scholars have thought about cost and fee allocation in “quasi Shakespearean terms: ‘to shift or not to shift?’”¹²³ Thus, the world is divided between those countries that follow “the English rule” and shift the winner's litigation costs to the loser such that the “loser pays,” and those countries that follow “the American rule,” wherein each side bears its own costs. A recent study of cost and fee allocation across the world, however, found that this is a “hopelessly simplistic as well as virtually useless” dichotomy.¹²⁴ In fact, countries around the globe approach cost and fee allocation in a variety of ways, such that the reality is much more nuanced and complex. There is actually a broad spectrum of approaches around the world. Where the United States falls on this continuum, and how best to allocate expenses in the United States, comes down to who bears the burden of the expenses, the kinds of expenses that are imposed, and whether the costs are imposed in whole or in part. By plotting out such a continuum, rulemakers can think more strategically about where the United States falls and should fall, both today and in the future.

On one side, there are systems that shift nearly all costs to the losing party; in the middle, there are jurisdictions that shift substantial costs and fees, but not all; and on the other side, there are jurisdictions where a much smaller portion of the winner's costs are recoverable. Moreover, these costs are generally shifted at the end of the litigation. When considered in this spectrum, England, contrary to commonly held assumptions, does not fall within those countries that shift

¹²³ Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis*, 11 IUS GENTIUM 3, 9 (2012).

¹²⁴ *Id.* at 9.

the majority of costs to the loser.¹²⁵ Instead, England and many of the other countries of the British Commonwealth tradition (including Australia, Canada, Wales, and New Zealand) partially shift costs.¹²⁶ These partial shifting countries have a few similar characteristics: 1) the “loser pays” principle is not a categorical rule, but rather a “general guideline, basic expectation, and usual practical outcome;” 2) implementation of the principle is largely left to judicial discretion; and 3) in most cases, as a result of this discretion, the result is only partial cost shifting.¹²⁷

The United States falls by itself in the “minor shifting” category, as it generally rejects the “loser pays” principle, although cost shifting still does occur on a much smaller scale. Court costs are routinely shifted to the losing party, but such costs are typically a fraction of the overall costs of litigation. In contrast, attorney fees can be very high, and typically these are not shifted to the loser. Nevertheless, there are a significant number of federal and state statutory rules that do provide for attorney fee shifting. As of 1993, there were reportedly over 200 federal statutes and almost 2,000 state statutes providing for shifting of attorney’s fees.¹²⁸ Such rules are most commonly found in the area of antitrust and civil rights cases, but there are also examples under the Securities Laws and in the area of patent law.¹²⁹ To our knowledge, there is no empirical study that examines whether litigation is encouraged, discouraged, or not fundamentally impacted by statutory attorney fee shifting provisions.¹³⁰

Another important aspect to consider is the rate of settlement. In many jurisdictions, and particularly in common law jurisdictions, the reality is that the preponderance of all litigation ends in settlement. Even in the non-common law countries, settlement plays an important role and rates can still rise above 50%.¹³¹ The prevailing expectations regarding cost shifting clearly play a part in the settlement negotiations, since parties settle their cases “in the shadow” of the courthouse; however, the reality is that courts seldom impose cost shifting except in pretrial settings because cases do not mature all the way through verdict and judgment. The practical effect is that, despite the large number of different cost allocation schemes, the “American rule”

¹²⁵ *Id.* at 12.

¹²⁶ *Id.* at 13.

¹²⁷ *Id.* at 13.

¹²⁸ John F. Vargo, *The American Rule of Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1588 (1993).

¹²⁹ *Id.*

¹³⁰ See Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does The Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1949-50 (2002).

¹³¹ Reimann, *supra* note 123, at 19.

of each side paying for its own costs of litigation (including discovery costs) is actually the prevailing experience in a large number of the cases around the world.¹³²

In considering cost allocation, it is also important to be clear about which expenses are shifted. One scholar has divided the costs of private litigation into three categories: court costs, attorney fees, and the expenses of gathering evidence.¹³³ As noted above, court costs, while generally paid by the losing party in the United States, are relatively minor in comparison to the overall costs of litigation. In contrast, attorney fees can be significant. Attorney fees are also unique because they pose the additional challenge of determining the amount of the fees. In some systems, lawyer fees are set by schedule in advance and the amount is clear. Under many other schemes, however, lawyer fees can vary greatly based on the market. Although the latter system results in a much more complex analysis when it comes to cost allocation, with the possibility of second stage litigation solely on the reasonableness of reimbursable fees, nevertheless the current trend around the world is toward leaving the determination of attorney fees to the market.¹³⁴

Putting aside attorney fees, there is a third category of expenses: the expenses of gathering evidence. All of the civil law systems impose the costs of gathering evidence on the loser.¹³⁵ The impact of such shifting is generally relatively low, however, as the associated costs of gathering evidence in these countries are not nearly as great as they are in the United States. Fact gathering is largely performed by, or at the direction of, the judge, with the court doing the majority of the work (*e.g.* interviewing witnesses, ordering documents, inspecting sites).¹³⁶ In addition, any other expenses related to evidence are low (*e.g.*, witness fees), as they do not have common law style discovery.¹³⁷ In comparison, in common law jurisdictions, the costs of evidence gathering are much more significant, because attorneys are more expensive, evidence is gathered by both sides rather than a single judge, and expert costs are higher.¹³⁸ The variable benefits or costs of such a system go far beyond the narrow scope of this report. Suffice it to say that an inquisitor judge, which is the prototype in civil law jurisdictions, may handle litigation in a less costly way, but a way that likely is inconsistent with our adversarial system.

The United States stands apart from the rest of the world in the area of the expenses of gathering evidence for several reasons. In addition to the fact that the United States does not shift expenses to the loser, the expenses of discovery are much larger. Fact gathering in the United States is

¹³² *Id.* at 19.

¹³³ *Id.* at 23.

¹³⁴ *Id.* at 25-31.

¹³⁵ *Id.* at 31.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 32.

more expensive and expansive than anywhere else in the world.¹³⁹ While trial comes in as the number one cost category in litigation, discovery is the next most expensive category.¹⁴⁰ Furthermore, given the very low percentage of cases that actually go to trial in the United States, discovery in *practice* is the most expensive item in litigation. For both sides, the result is that discovery costs in the United States pose a huge burden on both parties. “After all, like *all* other systems, the US-American regime makes the loser pay for court costs; like at least *some* other systems, it normally does not shift attorney fees; but like *no* other system, it makes each party pay for virtually all its own expenses of fact gathering regardless of outcome, and these expenses are normally very high.”¹⁴¹

Putting the United States in context, what this highlights are several challenges in the United States with regard to cost shifting. In civil law systems, lawyer fees are much lower and more predictable, and thus a party can generally predict the amount that will be imposed on the loser with some accuracy.¹⁴² In contrast, the vast majority of common law systems, including the United States, leave attorney fee pricing to the market and determine the amount of fees shifted through judicial discretion, leaving costs much less predictable and the chance for extremely high costs much greater.¹⁴³

B. CANADA

Canada is known for being a reform-minded country, and this is particularly true in the area of civil justice reform and electronic discovery. As a result, it provides a useful example for comparison and lessons to be learned. As in other comparison countries, Canada’s case law in the area of electronic discovery is not nearly as developed as it is in the United States.¹⁴⁴ That said, the various rule schemes generally recognize the inclusion of electronically stored information in discovery, and there are examples from the case law of allocation of discovery costs to the requesting party. In addition, there is guidance for practitioners in Canada wrestling with these issues, including The Sedona Conference®’s Sedona Canada Principles¹⁴⁵ and the

¹³⁹ *Id.* at 33.

¹⁴⁰ See, e.g., Paula L. Hannaford-Agor *et al.* Nat’l Ctr. for State Courts, *Estimating the Cost of Civil Litigation*, 20 Court Statistics Project, Caseload Highlights (2013).

¹⁴¹ Reimann, *supra* note 123, at 33.

¹⁴² *Id.* at 55.

¹⁴³ *Id.*

¹⁴⁴ Helen Bergman Moure, Brett Harrison David A. Marquez-Lechuga, & Gavin Foggo, *E-Discovery Around the World*, 21 NO. 1 PRAC. LITIGATOR 41, 55 (2010)

¹⁴⁵ THE SEDONA CONFERENCE®, THE SEDONA CANADA PRINCIPLES ADDRESSING ELECTRONIC DISCOVERY: A PROJECT OF THE SEDONA CONFERENCE® WORKING GROUP 7 SEDONA CANADA (Jan. 2008) (hereinafter “SEDONA CANADA PRINCIPLES”), available at <https://thesedonaconference.org/publication/The%20Sedona%20Canada%20Principles>.

Ontario Task Force on the Discovery Process’s Guidelines for the Discovery of Electronic Documents.¹⁴⁶ Because “electronically stored information is rapidly becoming a feature of even the most routine of civil cases as well as cases in family and criminal litigation” in Canada, and “[t]he cost of dealing with e-discovery issues in some cases exceeds the amount in issue,” it serves as a useful comparison jurisdiction.¹⁴⁷

I. BACKGROUND

Canada’s legal system is primarily founded on English common law, with the exception of the Province of Quebec, which operates under civil law. The individual provincial and territorial authorities possess great autonomy to enact their own laws and regulations, and as a result, guidance and approaches vary across the provinces and territories. The rules for the production of documents are codified by each province’s rules of civil procedure or rules of court.¹⁴⁸ Nevertheless, while the rules may be distinct, generalizations can be drawn regarding discovery and the treatment of costs in Canada.

The rules typically include a requirement to produce documents related to matters at issue, and include a definition of “document” that either explicitly includes “electronic” documents, or broadly includes documents “in any format,” thus sweeping in electronic documents.¹⁴⁹ For example, as in federal court in the United States, the definition of “document” is a broad one in Ontario, and includes “data and information in electronic form,”¹⁵⁰ such as “meta-data,” “residual data,” and “replicant data.”¹⁵¹ Canadian civil procedure rules differ from the United States in that there is an affirmative duty to produce potentially relevant documents, whereas, in the United States, there are only limited instances and rules in which a party is required to produce documents without a specific request from the other side.¹⁵² Setting aside Quebec, where there is not a general duty to produce relevant documents, the parties must each produce an affidavit or list of relevant documents or records that are or have been in their possession, power, or control.¹⁵³ These discovery obligations require parties to identify, locate, and review records for relevance and privilege.¹⁵⁴

¹⁴⁶ TASK FORCE ON THE DISCOVERY PROCESS IN ONTARIO, GUIDELINES FOR THE DISCOVERY OF ELECTRONIC DOCUMENTS IN ONTARIO (2005) (hereinafter “ONTARIO GUIDELINES”), *available at* http://www.oba.org/en/pdf_newsletter/E-discoveryguidelines.pdf.

¹⁴⁷ *See* THE SEDONA CONFERENCE®, SEDONA CANADA PRINCIPLES, *supra* note 145, at Foreword.

¹⁴⁸ *See id.* at 1.

¹⁴⁹ *See id.*

¹⁵⁰ Ontario, *Rules of Civil Procedure*, Rule 30.01(1)(a).

¹⁵¹ ONTARIO GUIDELINES, *supra* note 146, at 5.

¹⁵² THE SEDONA CONFERENCE®, SEDONA CANADA PRINCIPLES, *supra* note 145, at 8.

¹⁵³ *Id.* at 8; *see also* Bradley J. Freedman, *Discovery of Electronic Records Under Canadian Law—A Practical*

There have also been recent amendments incorporating the concept of proportionality into the rules throughout Canada. For example, in 2010, new *Supreme Court Civil Rules* went into effect in British Columbia, with the goal of modifying the allocation of judicial resources “in a manner proportional to the value, complexity and importance of each case.”¹⁵⁵ The new rules flow from the recommendations of the Civil Justice Reform Working Group, which issued a report in November 2006 titled *Effective and Affordable Civil Justice*.¹⁵⁶ One of the “most significant conclusions” of the Working Group was that “excessive document production is responsible for much of the delay and expense in civil proceedings” and that the old model of discovery was “no longer workable in the context of proliferating electronic information and the increase in complexity of modern litigation.”¹⁵⁷ The Working Group recommended, and the new rules implement, a process that is more proportionate to the value, complexity, and importance of the cases.¹⁵⁸ Ontario has likewise seen recent changes to its rules, including major changes to the manner in which discovery is conducted. The new rules require that discovery be conducted according to a “discovery plan,” which must be agreed upon by the parties and include the intended scope of discovery, information concerning timing and costs, the manner of disclosure, and “any other information intended to result in the expeditious and cost-effective completion of the discovery process in a manner that is proportionate to the importance and complexity of the action.”¹⁵⁹ As noted above, the rules require the parties to consider the Sedona Canada Principles, which place an emphasis on proportionality.¹⁶⁰

Production costs during discovery are generally treated in a similar manner as in the United States, with the responding party bearing the costs of collection, review, and production, and the requesting party bearing the costs of copying the production.¹⁶¹ Canada differs in its approach to the treatment of costs at the end of the case, however, as Canada has a “loser pays” system. Thus, the unsuccessful litigant at the end of the litigation will be responsible for the successful party’s expenses. Because of this approach, the parties are expected to bear their own costs of

Guide, 18 I.P.J. 59, 64 (2004).

¹⁵⁴ See Freedman, *supra* note 153, at 70.

¹⁵⁵ See E-news from Alexander Holburn Beaudin & Lang LLP, *The New British Columbia Supreme Court Civil Rules 1* (Sept. 2009), available at http://www.ahbl.ca/wp-content/uploads/2012/05/The_New_BC_Supreme_Court_Civil_Rules-Tim_Outerbridge-September2009.pdf.

¹⁵⁶ EFFECTIVE AND AFFORDABLE CIVIL JUSTICE: REPORT OF THE CIVIL JUSTICE REFORM WORKING GROUP TO THE JUSTICE REVIEW TASK FORCE (2006), available at http://www.bcjusticereview.org/working_groups/civil_justice/cjrwg_report_11_06.pdf.

¹⁵⁷ See E-news from Alexander Holburn Beaudin & Lang LLP, *supra* note 155, at 1.

¹⁵⁸ See EFFECTIVE AND AFFORDABLE CIVIL JUSTICE, *supra* note 156, at vi, 18.

¹⁵⁹ Ontario, *Rules of Civil Procedure*, Rule 29.1.03(3).

¹⁶⁰ Rule 29.1.03(4).

¹⁶¹ Moure et al., *supra* note 144, at 55; see THE SEDONA CONFERENCE®, SEDONA CANADA PRINCIPLES, *supra* note 145, at 7.

production, at least on an interim basis.¹⁶² Upon conclusion of the litigation, the “fair and reasonable” costs will be recovered by the successful party,¹⁶³ leaving cost shifting orders during discovery far less common than in the United States, where the issue of shifting such costs arises primarily during discovery.¹⁶⁴

II. ALLOCATION OF COSTS IN DISCOVERY

Ontario’s Task Force on the Discovery Process has developed a “best practices” manual to address the discovery of electronic documents, including the issue of costs.¹⁶⁵ Principle 13 of those Guidelines on costs summarizes Canada’s approach.

In general, consistent with the rules regarding production of paper documents, pending any final disposition of the proceeding, the interim costs of preservation, retrieval, review and production of electronic documents will be borne by the party producing them. The other party will, similarly, be required to incur the cost of making a copy, for its own use, of the resulting productions. However, in special circumstances, it may be appropriate for the parties to arrive at a different allocation of costs on an interim basis, by agreement or court order.¹⁶⁶

The discussion related to Principle 13 recognizes the traditional rule that the responding party pays for all costs associated with document production, with the requesting party being responsible for costs of copying. “Any other cost-shifting occurs at the end of the litigation, at which time the unsuccessful party may be required to contribute, in whole or in part, towards the costs (fees and disbursements) of the successful party.”¹⁶⁷ The related commentary recognizes that e-discovery costs can be significant, and urges parties to control such costs through agreement. In particular, the rule cautions that “if they are ultimately unsuccessful, these parties may then be responsible for a significant portion of these e-discovery costs.”¹⁶⁸ Thus, Canada has the

¹⁶² *Doucet v. Spielo Manufacturing Inc.*, [2012] NBQB 324 (providing an example of the responding party bearing the costs of production until the close of litigation, at which point the responding party was successful and received reimbursement for the costs of such production).

¹⁶³ See, e.g., *Harris v. Leikin Group Inc.*, [2011] ONSC 5474 (fixing costs to an amount that is “fair and reasonable for an unsuccessful party to pay in the particular circumstances, rather than an amount fixed by actual costs incurred by the successful litigant”); Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 QUEEN’S L.J. 113, 123 (2010).

¹⁶⁴ See generally OLEH HRYCKO, ELECTRONIC DISCOVERY IN CANADA: BEST PRACTICES AND GUIDELINES 172 (2007).

¹⁶⁵ See ONTARIO GUIDELINES, *supra* note 146, at 1.

¹⁶⁶ *Id.* at 16-17 (Principle 13).

¹⁶⁷ *Id.* at 17.

¹⁶⁸ *Id.* at 17.

potential added incentive to keep costs manageable because of the possibility of bearing the costs of discovery as the losing party at the end of the litigation.

The traditional approach is reflected in the case law, and *Gamble v. MGI Securities, Inc.*,¹⁶⁹ and *GRI Simulations Inc. v. Oceaneering International Inc.*,¹⁷⁰ provide useful examples. In *Gamble*, the court refused the responding defendant's request for cost sharing and instead imposed upon the defendant the initial and interim costs of production pending the final outcome of the action.¹⁷¹ The court did consider various factors in ruling against a reallocation of costs, including: that the evidence as to the costs of production was unsatisfactory, the failure of the responding party to consult and cooperate with the requesting party regarding the search parameters, the accessibility of the documents, the overbroad nature of the search, and the overall strength of the claim.¹⁷² Similarly, in *GRI*, the responding party sought a court order that the requesting party bears some of the production costs. Citing the traditional rule that the "cost of producing documents is usually borne by the producing party with the ultimate determination of the issue reserved for decisions on costs at the conclusion of the litigation," the court held there was no reason to depart from such an approach.¹⁷³ The court recognized that the costs were not "undue or unreasonable" under the circumstances, the requested documents were not irrelevant, and the responding party was a "multimillion dollar international company" that could afford to bear the costs of the production in the interim.¹⁷⁴

Despite the traditional rule, the advent of electronic discovery has opened the door for a different approach. The Sedona Canada Principles have played a key role in providing guidance in Canada, and are specifically referenced in the Ontario *Rules of Civil Procedure*, Rule 29.1.03(4), which states that the parties must consult and have regard for the guidelines when preparing the discovery plan. The commentary to Sedona Canada's Principle 12 recognizes that "restoring deleted data, disaster recovery tapes, residual data, or legacy systems may involve extraordinary efforts or resources," and that, in such cases, "requiring the producing party to fund the significant costs associated with restoring such data may be unfair, and may hinder the party's ability to litigate the dispute on the merits."¹⁷⁵ Thus, the commentary goes on to note that "it is generally appropriate that the party requesting such extraordinary efforts should bear, at least on

¹⁶⁹ [2011] ONSC 2705.

¹⁷⁰ [2010] NLTD 85.

¹⁷¹ *Gamble*, [2011] ONSC 2705, ¶ 27.

¹⁷² *Id.* at ¶¶ 30-33.

¹⁷³ *GRI Simulations*, [2010] NLTD 85, ¶ 66.

¹⁷⁴ *Id.* at ¶ 66; *see also Cholakis v. Cholakis*, [2000] M.J. No. 6, 44 C.P.C. (4th) 162 (Man. Q.B.) (holding the responding party responsible for the costs of production, but recognizing that the costs might be recoverable at a later point in the litigation).

¹⁷⁵ THE SEDONA CONFERENCE®, SEDONA CANADA PRINCIPLES, *supra* note 145, at 39.

an interim basis, all or part of the costs of doing so.”¹⁷⁶ The commentary does not limit such shifting to inaccessible data, noting that in Canada “the costs of producing accessible electronically stored information may be shifted in certain circumstances.”¹⁷⁷

While there have been just a few cases implementing this alternate approach, there are some examples of courts shifting the costs of discovery mid-case. In *Barker v. Barker*,¹⁷⁸ the court ordered that the costs of putting paper documents into electronic format, including scanning and coding, be shared by the parties, given that both parties would benefit from the conversion and that it would make the production much more efficient. In *Warman v. National Post Company*,¹⁷⁹ the Master looked for guidance from England and the United States in how best to achieve proportionality, including the IAALS and ACTL Task Force on Discovery and Civil Justice Final Report,¹⁸⁰ the amendments to the Federal Rules of Civil Procedure, the Sedona Canada Principles, and American jurisprudence in the area of cost shifting. The Master denied broad access to a hard drive, but agreed to a limited forensic examination, with the costs to be paid initially by the defendant seeking the production, and with the ultimate responsibility for the costs left to the discretion of the trial judge.¹⁸¹

There is some support for cost shifting in the rules as well. While Canadian civil procedure rules do not directly address cost allocation associated with discovery, there are some procedural rules that do excuse parties from their production obligations.¹⁸² Another opening for such cost shifting can be found in the Ontario Guidelines. Principles 3 and 4 of the Guidelines recognize that the primary source of electronic documents will be active data, and parties will not normally be required to search for, review, or produce residual or replicant data, or other material that is not accessible except through use of forensic means.¹⁸³ The guidelines recognize that “it is neither reasonable nor feasible to require that litigants immediately or always canvass all

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 40.

¹⁷⁸ [2007] CanLII 13700 (ON S.C.).

¹⁷⁹ [2010] ONSC 3670.

¹⁸⁰ AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (rev. ed. 2009), available at http://iaals.du.edu/images/wygwam/documents/publications/ACTL-IAALS_Final_Report_rev_8-4-10.pdf.

¹⁸¹ See also *Bank of Montreal v. 3D Properties Inc.*, [1993] S.J. No. 279 (QL), 111 Sask. 53 (Q.B.) (where the court held the requesting party responsible for the costs incurred by the responding party in searching for and reviewing documents for relevance and privilege, as well as reproduction).

¹⁸² Freedman, *supra* note 153, at 70; see, e.g. British Columbia *Rules of Court* Rule 26(1.2); *Federal Court Rules* Rule 230. Where rules provide exceptions to a party’s production obligations, the practical result is that parties may argue for shifting the costs associated with any resulting discovery.

¹⁸³ ONTARIO GUIDELINES, *supra* note 146, at 10-11 (Principles 3-4).

potential sources of electronic documents in the course of locating, preserving, and producing them in the discovery process.”¹⁸⁴

III. TAKE-AWAYS

Canada’s fee regime was implemented at a time when litigation costs were more proportionate to the amount at stake in the litigation. Unfortunately, the costs of litigation in Canada have risen dramatically, in part because of the advent of electronic discovery. Today, in Canada as in the United States, the costs of litigation can quickly exceed the value of the case.¹⁸⁵ In addition, under Canada’s “loser pays” system, litigants face the risk of paying their own legal costs and at least a portion of the opposing party’s.¹⁸⁶ The recoverable costs include fixed fees plus reasonable disbursements.¹⁸⁷ “It is not intended that the successful party receive full indemnification of those fees and disbursements which it would be charged by its counsel.”¹⁸⁸ Thus, when determining the amount of adverse party costs that the losing party must pay, most cost awards include only partial indemnity, ranging from 40% to 75% of a successful party’s actual, reasonable legal bill.¹⁸⁹ Nonetheless, while cost shifting has been recognized as an option, and employed in a handful of cases, the usual practice remains that the Canadian courts reserve the matters for the end of the litigation, and thus cost shifting cases remain rare.¹⁹⁰

One of the reasons that such case law may be rare is the focus in Canada on proportionality in discovery. While it is too early to determine the impact of recent rule changes focused on this concept, the cases suggest that courts are much more likely to work with the parties to address production issues and achieve proportionality rather than analyze the case in terms of the allocation of costs.

This involvement and discretion of the court is also significant in another way. Canada’s fee regime is defined by the wide discretion of the Canadian courts in determining cost awards. The courts determine which party pays for what costs at the conclusion of the litigation. While some courts look to prior precedents, many do not. Nor do they follow a predetermined mathematical formula.¹⁹¹ Thus, there is no consistent approach to cost awards and it is difficult to estimate the

¹⁸⁴ *Id.* at 10 (Principle 3).

¹⁸⁵ *See* Knutsen, *supra* note 162, at 113.

¹⁸⁶ *See id.* at 114-15.

¹⁸⁷ *See* Court of Queen’s Bench Cost Manual, Costs Between Parties: Recoverable Costs of Litigation 8 (Sept. 29, 2010), available at <http://www.albertacourts.ab.ca/cs/reviewoffice/CBP-Intro.pdf>.

¹⁸⁸ *Id.*

¹⁸⁹ *See* Knutsen, *supra* note 162, at 122-23.

¹⁹⁰ *See* HRYCKO, *supra* note 164, at 175.

¹⁹¹ Knutsen, *supra* note 162, at 127-28.

costs of litigation at the beginning of a case.¹⁹² One scholar has argued that this fee regime—based on what is “fair and reasonable,” with the unknowable factor of the other party’s behavior and the court’s discretion—has led to a highly unpredictable cost system.¹⁹³ Moreover, the determination of the final cost award is a time-consuming process and adds additional litigation—including time and resources—over the appropriate amount of fees and costs.

A final take-away is that the court and the parties do not approach the process with the expectation that 100% of the costs will be shifted, either to the requester if there is an argument about shifting discovery costs, or to the loser at the conclusion of a case. The goal is to provide significant assistance in meeting the successfully party’s legal costs, but not to make the costs so high that they are out of reach for the losing party.¹⁹⁴ Thus, “courts try to ensure that the award is not so high as to put the price of litigation beyond a litigant’s reach, by keeping it within the range of what a losing party would reasonably expect to pay in the circumstances.”¹⁹⁵ Because Canada has a system where it is likely that the attorney fees and final costs will be allocated amongst the parties by some percentage, it is not surprising that we see the same approach of discretion and partial indemnity taken in the discovery context.

C. ENGLAND

England provides another example of a jurisdiction that has recognized the important role that costs play in civil litigation. Following on the heels of significant reforms in the late 1990s initiated by Lord Woolf,¹⁹⁶ Lord Rupert Jackson was appointed to conduct a review of the rules and principles governing the costs of civil litigation in England, and to make recommendations “in order to promote access to justice at proportionate cost.”¹⁹⁷ Lord Justice Jackson recognized that such a task required a review of civil procedure far beyond the cost rules, and his recommendations have had similar widespread impact.

¹⁹² *Id.* at 118.

¹⁹³ *See id.* at 113, 132-34, 158.

¹⁹⁴ *See id.* at 123.

¹⁹⁵ *See id.* at 128.

¹⁹⁶ *See generally* RIGHT HONOURABLE LORD WOOLF, ACCESS TO JUSTICE: INTERIM REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1995).

¹⁹⁷ RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT VOL. I Foreword (May 2009) (hereinafter “JACKSON PRELIMINARY REPORT VOL. I”), available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-23/Amicus%20brief/AnnexOJacksonvolume1.pdf>.

I. BACKGROUND

Disclosures have historically played a very important role in civil litigation in England. One of the goals of Lord Woolf's reforms was to decrease the extent of the disclosures and make them more proportional.¹⁹⁸ Disclosures included documents that supported or were adverse to a party's case, but also "any documents which had an indirect bearing on the issues in that they could lead to a 'train of inquiry' that could produce relevant information."¹⁹⁹ One of the most significant changes that resulted from the Woolf reforms was to make standard disclosures much narrower. As a result of the Woolf reforms, the disclosure test was modified to be one based on proportionality, balancing probative usefulness with cost and effort.²⁰⁰ The Civil Procedure Rules ("CPR") no longer provided an automatic right to disclosure. Instead, such an obligation arose only if, and to the extent, directed by the court.²⁰¹ The general rule was that an order to give disclosure was an order to provide standard disclosures, which requires a party to conduct a reasonable search and disclose the documents upon which the party relies, including those that are adverse.²⁰² While the extent of disclosures was narrowed following the Woolf reforms, there remained increasing concern regarding the escalating costs of discovery, with the sentiment being that the reforms did a better job in addressing the issue of delay than lowering costs.²⁰³

Thus, Lord Justice Jackson undertook a massive *Review of Civil Litigation Costs* wherein he marshalled evidence, identified the issues for consideration, and made recommendations for reform.²⁰⁴ In his examination of costs, Lord Justice Jackson found that in practice the parties continued to disclose the broader category of documents.²⁰⁵ He recognized that disclosures continued to generate huge costs, and recommended that instead of standard disclosures being the norm, the court should have a "menu of orders" from which to choose, to tailor discovery and

¹⁹⁸ See Andrew Higgins, *Open Door Disclosure in Civil Litigation*, INT'L J. OF EVID. & P. 309 (2012).

¹⁹⁹ RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: PRELIMINARY REPORT VOL. II 390 (May 2009) (hereinafter "JACKSON PRELIMINARY REPORT VOL. II"), available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>

²⁰⁰ *Id.* at 389.

²⁰¹ *Id.* at 388.

²⁰² *Id.*

²⁰³ See Jay Tidmarsh, Jackson, Jotwell: Courts Law (Feb. 17, 2014), available at <http://courtslaw.jotwell.com/jackson/>.

²⁰⁴ RIGHT HONOURABLE LORD JUSTICE JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT (Dec. 2009) (hereinafter "JACKSON FINAL REPORT"), available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>. Lord Justice Jackson marshalled much of the relevant evidence during Phase I of his Costs Review and set that evidence out in his Preliminary Report, which was published in two volumes in May, 2009. See JACKSON PRELIMINARY REPORT VOL. I, *supra* note 197.; JACKSON PRELIMINARY REPORT VOL. II, *supra* note 198.

²⁰⁵ JACKSON PRELIMINARY REPORT VOL. II, *supra* note 198, at 390.

keep it proportional.²⁰⁶ CPR Rule 31.5 now sets out a procedure which is to be followed at the first case management conference that includes the parties serving a report prior to the conference regarding the existence of relevant documents and an estimate of related costs.

For all the reasons that electronically stored information has raised complex and challenging issues for discovery in the United States, so too has it raised challenges for England's system of disclosures.²⁰⁷ England has recognized the special challenges associated with the increase in electronically stored information, and the resulting impact on disclosures, adopting a Practice Direction for the disclosure of electronic documents in 2010.²⁰⁸ The Practice Direction supplements CPR Part 31, and recognizes that Rule 31.4 has a broad definition of "document" that extends to electronic documents. The Practice Direction notes that its purpose "is to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner." Under the Practice Direction, prior to the first case management conference, the parties and their legal representatives must meet and discuss a number of items, including "the basis of charging for or sharing the cost of the provision of Electronic Documents, and whether any arrangements for charging or sharing of costs are final or are subject to re-allocation in accordance with any order for costs subsequently made."²⁰⁹

II. ALLOCATION OF DISCOVERY COSTS

Along with the advent of electronically stored information, so too in England has there been a dramatic increase in litigation over costs.²¹⁰ The Honourable Justice Cresswell in 2004 chaired a working party set up to investigate and make recommendations in response to the challenges that have resulted from the increase in electronically stored information, and how the current civil rules on disclosure would apply to electronic documents.²¹¹ With regard to the costs of disclosing electronic documents, the Cresswell Report recognized that there is "little doubt" that costs of disclosure rise where electronic documents are involved, and that the courts have wide discretion to address the issue of costs under the rules. The Cresswell report poignantly summed up the

²⁰⁶ See Lord Justice Jackson, *Paper for the Civil Justice Council Conference on 21st March 2014* at 9, available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/CJC/Publications/CJC+papers/Jackson+LJ+paper+CJC+conference+21+March+2014.pdf> (last visited on August 15, 2014).

²⁰⁷ See *Digicel (St. Lucia) Ltd. v. Cable & Wireless Plc.*, No. HC07C01917, 2008 WL 4698881, at ¶¶ 38, 45 (High Ct. Chancery Oct. 23, 2008), [2008] EWHC 2522 (Ch).

²⁰⁸ Practice Direction 31B—Disclosure of Electronic Documents (2010).

²⁰⁹ *Id.* at ¶ 9(7).

²¹⁰ JACKSON PRELIMINARY REPORT VOL. I, *supra* note 197, at 27.

²¹¹ ELECTRONIC DISCLOSURE: A REPORT OF A WORKING PARTY CHAIRED BY THE HONOURABLE MR. JUSTICE CRESSWELL at 3, available at <http://uk.practicallaw.com/9-205-8103?q=&qp=&qo=&qe=>.

issues in a series of questions, illustrating that the same issues plague electronic discovery regardless of country:

How should these costs be dealt with? Should the scope of the search for electronic documents be limited by reason of the likely cost even though this may result in relevant documents not being disclosed? Should the requesting party bear the cost of a detailed search of back-up data or residual data, even though the difficulties in searching are caused by the producing party's electronic systems? Alternatively, should the issue of costs be left until the results of the search show whether it produced relevant documents, or until the trial?²¹²

The Cresswell Report concluded that “[t]hese are issues which Judges will have to decide in individual cases, applying CPR r.44.3.”²¹³ The report went on to note that where substantial costs are incurred, “we consider that in appropriate cases, at the conclusion of the trial (or earlier if appropriate), Judges should give separate consideration as to the costs incurred in relation to electronic disclosure and who should pay those costs, having regard to the reasonableness and proportionality of the disclosure requested and given, the relevance of the disclosure given or ordered to be given to the issues in the case presented at trial, and the conduct of the parties generally in relation to disclosure.”²¹⁴

The key focus of Lord Justice Jackson's report was on costs, and a number of new rules were implemented to “promote access to justice at proportionate cost.”²¹⁵ Historically, a distinctive feature in England and Wales was that they had full “cost shifting,” such that a successful litigant can expect to recover their full reasonable costs.²¹⁶ This stood in contrast to Canada and many other jurisdictions that have a “loser pays” system, but in which most litigants do not expect to recover all of their costs. The Jackson reforms resulted in a shifted focus on keeping the costs in litigation proportional, with teeth given to this goal by restricting the recoverability of costs at the end of the litigation.²¹⁷ Now under the rules, a losing party must generally pay the fees for the successful party based on what the other party budgeted.²¹⁸ Costs are considered proportionate “if they bear a reasonable relationship to”:

(a) the sums in issue in the proceedings;

²¹² *Id.* at 39.

²¹³ *Id.*

²¹⁴ *Id.* at 39-40.

²¹⁵ JACKSON PRELIMINARY REPORT VOL. II, *supra* note 198, at Foreword.

²¹⁶ *Id.* at 468.

²¹⁷ *See* Tidmarsh, *supra* note 203.

²¹⁸ *See id.*

- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance.²¹⁹

Another important aspect of redefining expectations is being clear in the rules themselves that “proportionality trumps necessity.”²²⁰ Rule 44.3 provides that, in an assessment on the standard basis, “[c]osts which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred”²²¹ Thus, even where costs are reasonable, the standard of proportionality will trump and determine whether such costs will be allowed.

The Jackson reforms also introduced the concept of cost management.²²² In his final report, Lord Justice Jackson noted that “One of the points that was impressed upon me during the Costs Review was that judges should take a more robust approach to case management, to ensure that (realistic) timetables are observed and that costs are kept proportionate. Case management can and should be an effective tool for cost control.” Lord Justice Jackson took this one step further and recognized that “cost management” is a critical adjunct to case management. While Lord Justice Jackson noted that clients are increasingly demanding budgets from their lawyers, he recognized that this isn’t enough to get a full picture of the potential costs of the litigation given the “loser pays” model. New cost management rules have been implemented that allow the court to manage the procedural steps taken and the costs that are incurred by the party so as to achieve a just and proportional result.²²³ At an early point in the litigation, the parties must prepare and exchange budgets detailing the expenses that they expect to incur in the litigation.²²⁴ These budgets must also be filed with the court, and where a party fails to do so, the budget will be considered to comprise only the applicable court fees.²²⁵ If the parties disagree regarding their respective budgets, the court may enter an order determining the appropriate budgets. While the lawyers are not bound by the budgets, and can bill more hours than budgeted, the budget provides the presumptive amount that will be awarded to the successful party upon disposition,

²¹⁹ Senior Courts of England and Wales, County Courts, England and Wales, The Civil Procedure (Amendment) Rules 2013, CPR Rule 44.3(5) (hereinafter “CPR Rule ____”).

²²⁰ Jackson, *Paper for the Civil Justice Council*, *supra* note 206, at 7.

²²¹ CPR Rule 44.3(2)(a).

²²² See JACKSON FINAL REPORT, *supra* note 204, at xxiii. Lord Justice Jackson recommended a number of measures to enhance the court’s “role and approach” to case management, including 1) allocating cases to judges who have relevant expertise, ensuring a case remains with a single judge, standardizing case management directions, and ensuring that case management conferences are used efficiently and cost effectively. *Id.*

²²³ See Jackson, *Paper for the Civil Justice Council*, *supra* note 206, at 8; see generally CPR Rules 3.12 to 3.18.

²²⁴ See CPR Rule 3.13.

²²⁵ See CPR Rule 3.14.

under England’s “loser pays” rule.²²⁶ The court has discretion in determining the costs that are payable at the end of the litigation,²²⁷ although any standard assessment of costs must be reasonable in amount and proportionate to the matters in issue.²²⁸

The rules provide guidance, including factors to be taken into account in deciding the amount of costs:

- (a) the conduct of all the parties, including in particular –
 - (i) conduct before, as well as during, the proceedings; and
 - (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
- (b) the amount or value of any money or property involved;
- (c) the importance of the matter to all parties;
- (d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
- (e) the skill, effort, specialized knowledge and responsibility involved;
- (f) the time spent on the case;
- (g) the place where and the circumstances in which work or any part of it was done; and
- (h) the receiving party’s last approved or agreed budget.²²⁹

In the first reported case in England to address electronic disclosure, the court grappled with the issues of expensive electronic disclosures following the failure of the parties to have any discussions regarding how electronic discovery should proceed.²³⁰ With regard to demands for restoration of backup tapes, the court required the parties to work cooperatively and made it clear that the parties should come to the court if there was a dispute. The court contemplated giving the task of backup tape restoration to the requesting party to carry out the restoration, along with a corresponding shifting of the associated costs to the requesting party.²³¹ Because the parties had not put forth such an option, the court merely noted it as a possibility, “worthy of attention in another case.”²³² The court emphasized the importance of proportionality, particularly in the area of electronic discovery. “[T]he rules do not require that no stone be left unturned. This may mean

²²⁶ See Tidmarsh, *supra* note 203.

²²⁷ CPR Rule 44.2.

²²⁸ CPR Rule 44.3.

²²⁹ CPR Rule 44.4(3).

²³⁰ See *Digicel*, 2008 WL 4698881, at ¶ 45.

²³¹ See *id.*

²³² See *id.*

that a relevant document, even a ‘smoking gun’ is not found. This attitude is justified by considerations of proportionality.”²³³

III. TAKE-AWAYS

What gives Lord Justice Jackson’s reforms teeth is clearly the “loser pays” system, which provides incentive for the parties to work together to develop cost budgets and to stick to them. Nevertheless, there are still lessons to be learned from England’s experience.

England has recognized the strain of rising costs on the civil justice system and has taken significant steps to curb these costs. England has shifted from a system where costs are analyzed at the end of the case, to one in which the judges are actively engaged in cost management throughout the litigation. Parties are expected to work together cooperatively to determine an appropriate and proportional level of discovery, along with a corresponding cost budget. This cooperation and cost budgeting is not merely a recommended practice. Rather, these are key elements upon which the remaining process is built.

The court is similarly expected to play a key role. While judges have always been involved in cost assessment at the end of the case, the new rules pull judges in to the analysis of costs at the beginning of the case, through the cost budgeting process. Thus, in addition to the importance of the budgets for cost assessment at the end of the case, the budgets link case management to cost management throughout the litigation, such that the court must recognize and consider the cost implications of the various procedural steps.²³⁴

VII. CONCLUSION

As in most other areas of the law, there are no easy answers to the questions posed in this report. Whether costs should be shifted or not is, in the first instance, one of policy, not law. In the United States, the policy decisions in the past were relatively clear and narrow. Each party was responsible for bearing its own costs of litigation, except for very limited cost recovery for a successful litigant at the end of the case. The other major exception related to attorney fees when provided by statute.

As discovery has become more and more expensive, and with the advent of electronically stored information and all of the challenges it has brought to bear, courts have wrestled with the appropriateness of shifting the cost of that discovery to the requesting party. That struggle has

²³³ *See id.*

²³⁴ *See Jackson, Paper for the Civil Justice Council, supra note 206, at 9.*

not been confined to the United States, but has spilled over into other countries—even countries that traditionally approached the question with a very different presumption than ours.

Across all of the cases and rules that seek to develop a fair formula or a fair approach, there are commonalities. One of the key takeaways is the importance of proportionality. Proportionality has become the axis around which the efforts to limit the expanding costs of civil litigation have rotated, both in the United States and abroad. This is true of cost shifting as well. As litigants, attorneys, courts, and rulemakers look at the allocation of the costs of discovery, the inquiry cannot solely be focused on who pays. The extent to which the requested discovery is reasonable and proportional must also be considered. If not, the risk is that the costs will merely be shifted without a corresponding step toward making discovery more efficient and less costly—for both parties.

Historically, there has been the underlying premise in the United States that all parties to a lawsuit bear the responsibility of producing at their own cost at least the critical information within their possession that bears upon the lawsuit. Where the questions start to arise is when a party is asked to produce more than the party believes to be reasonable. In *Zubulake*, the idea of reasonableness turned on technical “accessibility.” As technology changes, however, technical accessibility can no longer be a driver in what is considered reasonable. This has already been borne out in the case law. The question of whether the information is accessible is no longer the dividing line, both because more and more information is easily accessible and, correspondingly, because even though accessible, the information sought may or may not need to be produced when measured against proportionality.

There is a tension between the recognition that judges have the authority to and should determine cost shifting matters on a case-by-case basis, and the recognition that settled expectations and consistency actually serve a purpose—particularly in settlement negotiations. Different jurisdictions have tipped that balance in different ways. Lessons can be learned from jurisdictions abroad, where the courts spend a significant amount of judicial resources determining the recovery of costs at the end of the litigation. Given the existing pressures on judicial resources in the United States, it is important to consider how best to address costs so as not to create a system where every step in the case has to be litigated twice: once to address the merits and once to address the fee and cost allocation. Over time, courts and rulemakers seem to prefer an approach that requires the parties to meet and confer, to cooperate, and/or to develop a discovery budget at the outset. That approach then sets the parameters for what is reasonable, and guides cost shifting through the case and even at the end. Thus, as the United States considers cost allocation proposals, this research would suggest: 1) proportionality is the key and should be built into any determinations of cost allocation; 2) a discovery budget, submitted by

each party early in the case, can be pivotal in judicial cost management and any cost allocation; and 3) absent a discovery budget, cost allocation can still occur but may be uncertain because of shifting standards and may itself be expensive to implement.