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A Modest Proposal for Human Limitations on Cyberdiscovery

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SYMPOSIUM ARTICLE

A MODEST PROPOSAL FOR HUMAN LIMITATIONS ON
CYBERDISCOVERY

*Richard Esenberg**

Abstract

Many lawyers, whether by training or disposition, have come to regard discovery as a process in which no stone is to be left unturned. With the advent of electronically stored information, the stones have become too numerous to account. Discovery rules that seek the perfection of preserving and producing all potentially pertinent information have become the enemy of the good. This article calls for a more pragmatic—and modest—approach.

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INTRODUCTION

I show my civil procedure students a video on electronically stored information (ESI) created by E-discovery experts Jason Baron and Ralph Losey.¹ The video, set to the type of pulsating electronic music normally heard prior to kickoff, sets forth a series of factoids about ESI: there will soon be more bytes of ESI than stars in the universe; it would take six million years to read each web page in the known universe; and we are awash in trillions of emails, tweets, text messages, and Google searches.²

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1. Jason R. Baron & Ralph E. Losey, *E-Discovery: Did You Know?*, YOUTUBE (Feb. 11, 2010), http://www.youtube.com/watch?v=bWbJWcsPp1M&feature=player_embedded.

2. *Id.*

The video also refers to studies showing that most of this information is never produced—and often not even thought of—in the discovery process.³ In fact, the most common forms of retrieval, such as Boolean keyword searches, find a relatively small percentage of “relevant” documents.⁴ Baron and Losey acknowledge that litigants now cannot “afford the whole truth” because of the difficulty they face sorting through billowing information, but Baron and Losey suggest (with, I hope and suspect, tongue-in-cheek) that this process may become easier in the “far future” with the advent of discovery conducted by artificial intelligence agents. The answer to the challenges of E-discovery, in other words, is the creation of E-lawyers.

The video is an engaging and well-done representation of an emerging genre in the litigation literature, which I prefer to call “Electronic Gothic.” It tends, unintentionally or otherwise, to frighten litigants and lawyers about the irresistible world of litigation holds, search protocols, document retention, records preservation, data recovery, data mining, metadata, and iterative multi-phase discovery. The video tales about sanctions for the loss or destruction of information that a party did not know it had, was (at least subjectively) unaware that it was obligated to keep, or had inadvertently deleted.

Baron and Losey’s prediction of the “far future” may be closer than we think,⁵ as law firms have formed E-discovery groups, and lawyers have fashioned careers as “E-discovery attorneys.” One such lawyer recently admonished law students to embrace their “inner geek,” saying, “If . . . you did not go to law school to work with computers and databases, then you might want to rethink being a litigator”⁶ Another prominent E-discovery expert pointed out that lawyers tend to be drawn to the profession as a result of a certain acuity in “liberal arts logical analysis”—the verbal and analytic skills that have traditionally been at the heart of the lawyerly craft. The profession, he suggested, thus needs to remake itself.

Absent a disaster that sends civilization back to the Stone Age, the digital life is here to stay and thus so too are the dilemmas inherent in the ever-mounting growth of E-discovery. The complexity of managing ESI in litigation is almost certain to ensue as the possibilities of what can be created and where it can be sent become increasingly robust. While some of these advances may aid in the management of E-discovery, it seems a

3. *Id.*

4. *Id.*

5. See Baron & Losey, *supra* note 1.

6. Alison A. Grounds, *Evolving Technology and Strategies in the Area of E-Discovery*, in ELECTRONIC RECORDS MANAGEMENT AND E-DISCOVERY: LEADING LAWYERS ON NAVIGATING RECENT TRENDS, UNDERSTANDING RULES AND REGULATIONS, AND IMPLEMENTING AN E-DISCOVERY STRATEGY 61 (Michaela Falls ed., Aspatore 2010), available at 2010 WL 3251514, at *14 (Aug. 2010).

safe bet, as Baron and Losey suggest,⁷ that the location and production of ESI is going to prove much harder before becoming appreciably easier. Yet I want to propose that the answer—even in the near term—is not to lament our inability to get at the “whole truth” and dream of robo-lawyers. Whether Baron and Losey are right in suggesting that we cannot afford “the whole truth,”⁸ it is beyond doubt that ESI cannot be treated like paper in discovery.

But it is less obvious that much of the “truth” is really lost. The idea, undergirding much of discovery practice, that *any* information, which might conceivably be helpful to *any* issue, ought to be available for perusal is a notion that only lawyers could love. Other professions—doctors, engineers, scientists—have long had to accept the reality that a certain, fungible quantity of information will suffice as “enough” and live with the ensuing uncertainty. However, the notion of open discovery, self-interest (more discovery means more business), and the human fear of “missing something”⁹ seem to have made lawyers peculiarly resistant to the idea of “enough” information.¹⁰

While the growth of ESI is inevitable, it faces an unmovable limiting principle; that is, regardless how voluminous and dynamic electronic information may become, human beings stay blissfully limited in their capacity to process that information. As long as litigation remains an endeavor of mortals, the percentage of nonduplicative ESI that is in fact relevant to the “whole truth” is likely to remain rather limited. Aided by modern technology, people are increasingly reducing their thoughts (even random ones) to an electronic format. But only so much of this information can ever be used. Consequently, it is unlikely that all—or even a substantial part—will be either relevant to the object of litigation or necessary for the fair resolution of an underlying controversy.

The development of E-discovery principles and rules have been an effort to balance cost against the value of the information by utilizing the traditional discovery tools of judicial management—namely, ad hoc and factually-intensive balancing. This will continue to be necessary. But I want to suggest another paradigm. As ESI continues to proliferate,

7. See Baron & Losey, *supra* note 1.

8. *Id.*

9. Because ESI results in more human communication being recorded, it fuels the dream of the “smoking gun”—the idea that, in a fit of candor, ill-temper or frustration, someone will write something that becomes “money” for the requesting party. It is unclear, however, whether the ability to get at random thoughts that were previously unrecorded actually results in more accurate litigation outcomes.

10. See, e.g., LAWYERS FOR CIVIL JUSTICE ET AL., RESHAPING THE RULES OF CIVIL PROCEDURE FOR THE 21ST CENTURY: THE NEED FOR CLEAR, CONCISE, AND MEANINGFUL AMENDMENTS TO KEY RULES OF CIVIL PROCEDURE 30 (May 2, 2010), available at http://www.thefederation.org/documents/V60N3_WhitePaper.pdf (“Many attorneys believe that zealous advocacy requires extensive discovery.”).

organizations will have to find ways to retain and access information that is necessary to conduct business; that is, to sell and design *things*, to hire and fire people and to do all the other things that happen in the real world and often the subject of litigation.

There ought to be, at minimum, a strong presumption that the retention and retrieval policies created to manage this information, independent of the litigation process, are likely to catch almost all the information that is relevant within it.¹¹ Although this concept has found its way into the 2006 amendments to the Federal Rules of Civil Procedure and pertinent case law, there is still more work to be done.

I. ESI IS DIFFERENT

A. *The Challenges of ESI*

The digitalization of life has threatened to overwhelm the process of relatively unfettered, party-directed discovery. The challenges presented by the discovery of ESI may not be entirely “new,” but they are certainly “more.”¹² The electronic revolution has resulted in a substantial—indeed geometric—increase in matters committed to writing. What may have been communicated by phone or in person, or not communicated at all, may now be expressed in emails, text messages, tweets, etc. Efforts to retrieve information or records of the transmission of these communications that, in the past, were unlikely to have even been created are now memorialized in the records of search engines and the “metadata” of information systems.¹³ Human interactions and communications are now increasingly recorded somewhere. As two commentators recently observed:

11. Some suggest that normal record management systems should be either driven by—or framed with—E-discovery in mind. *See, e.g.*, *Capitol Records, Inc. v. MP3Tunes, LLC*, 261 F.R.D. 44, 51–52 (S.D.N.Y. 2009) (“The day undoubtedly will come when burden arguments based on a large organization’s lack of internal ediscovery [sic] software will be received about as well as the contention that a party should be spared from retrieving paper documents because it had filed them sequentially, but in no apparent groupings, in an effort to avoid the added expense of file folders or indices.”); Steven C. Bennett, *Records Management: The Next Frontier in E-Discovery?*, 41 TEX. TECH. L. REV. 519, 520 (2009) (arguing that records management can support the E-discovery process); Grounds, *supra* note 5, 2010 WL 3251514, at *12 (“I am seeing a trend where the makers of electronic records management systems are understanding that there needs to be an E-discovery component in their systems . . .”). My suggestion here is that it ought to be business necessity—and not the needs of litigation—that should drive records management.

12. One commentator notes that “E-discovery expenses of \$3,000,000 in just five months are fairly commonplace . . .” Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1000 (2002) (referencing, as an example, *Kentucky Speedway, LLC v. NASCAR, Inc.*, No. 05-138-WOB, 2006 WL 5097354 (E.D. Ky. Dec. 18, 2006)).

13. “Metadata” may identify who created the document, the date it was created, and when it was opened or edited. *See* Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens Associated with E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963, 968 (2008).

Information inflation reflects the fact that civilization has entered a new phase. Human beings are now integrated into reality quite differently than before. They can instantaneously write to millions. They engage in the real time writing of instant messages, wikis, blogs, and avatars. Accordingly, the flux of writing has grown exponentially, with resulting impact on cultural evolution. All this affects litigation. Vast quantities of new writing forms challenge the legal profession to exercise novel skills.¹⁴

This is the temptation of E-discovery: the notion that “somewhere” in that mass of information “someone” may have written “something” that will be relevant to the issues in litigation.

As more records are created, the possibility becomes far more likely for those documents not to just remain in existence “somewhere,” but rather often in multiple places. For instance, an electronic document can be repeatedly duplicated and transmitted to numerous recipients. Thus, it can be found in numerous “places”—not all of which are self-evident. The advent of “cloud computing” and applications like Google documents (or the simple fact that home computers may be put to business and professional use) raises the likelihood that certain documents may reside “out” of the responding organization.

The storage of electronic information, while expensive, is easier and less expensive than the retention of what have traditionally been much smaller quantities of paper records. These stored records can, moreover, often be searched electronically to identify some subset of at least potentially relevant materials. This, too, creates opportunities to find “something” that might advance a litigant’s cause.

But there are other aspects of ESI that confound these opportunities. Electronic data is dynamic. It can be altered—sometimes automatically and unintentionally—through the normal operation of the system that created it. Because there is a cost—both in dollars and system efficiencies—to retaining information, information may be automatically deleted or “overwritten.” While its deletion may not be irrevocable, it may make it relatively inaccessible—that it can be recovered only at great cost and effort.

We can go on: As the volume of information metastasizes, it surpasses the capacity of lawyers—and traditional electronic search methods—to review it all. This is true despite that ESI will generally have associated “metadata” that may provide information about when documents were created, altered, and transmitted. Deciphering that data (and even the documents themselves) may require an understanding—or even the use—

14. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 41 (2007), <http://law.richmond.edu/jolt/v13i3/article10.pdf>.

of the system on which they were created. Furthermore, as previously mentioned, ESI may be automatically deleted or altered; thus, the onset of litigation (or the apprehension of its potential) may require intervention to suspend those processes. Although notions of preserving relevant evidence—or sanctioning parties for spoliation—are not new, implementing these “litigation holds” is complicated and expensive,¹⁵ requiring an understanding of just where diffuse forms of information can be found and predicting what may be relevant to litigation in which the claims and defenses may be nascent, ill-defined, and imperfectly understood.

Finally, efforts to locate, preserve, and retrieve ESI are less transparent and straightforward than simply searching paper records. They require the application of expertise and can often result in complicated disputes about what can and cannot be readily obtained, leading to satellite litigation and “discovery about discovery.”¹⁶ This substantially increases the cost of discovery management and disputes. It requires software, consultants, and as noted earlier, attorneys specially versed in the nature of the game.

B. Responding to the Challenges

Of course, these problems have not gone unnoticed and unaddressed. In 2004, a group of prominent jurists, practitioners, and academics announced

15. One commentator describes the process as follows:

A litigation hold consists of several components that must be implemented in a timely manner. The time element is extremely important when dealing with electronically stored information because such information can be destroyed or modified in the usual course of a company's business and a computer system's routine operations. A litigation hold must be customized to the anticipated litigation, depending on the nature and scope of the claims; however, a number of different procedures and records should be included in most cases. First, notice of the litigation hold should be provided to all relevant employees to preserve information. Second, a plan establishing how relevant electronically stored information will be retrieved and preserved must be created. Third, notice (and records of such notice) directing record custodians to suspend the destruction of relevant information should be maintained. Fourth, a record identifying what evidence has been preserved should be created. Fifth, monitoring procedures to ensure employees are utilizing the litigation hold should be implemented. Sixth, notification (and records of such notification) regarding the termination of the hold when litigation is no longer anticipated should be maintained.

DeBono, *supra* note 13, at 987–88 (citations omitted).

16. Paul W. Grimm et al., *Discovery About Discovery: Does the Attorney-Client Privilege Protect All Attorney-Client Communications Relating to the Preservation of Potentially Relevant Information?*, 37 U. BALT. L. REV. 413, 426 (2008) (“Parties are permitted to inquire into an opponent’s efforts to preserve relevant information through interrogatories and in depositions directed to the opposing client.”).

(and then subsequently revised) the Sedona Principles.¹⁷ These fourteen principles seek to balance the need for discovery of ESI against its cost and unique challenges. They create a duty to preserve information but not one that requires a party to take “every conceivable step”¹⁸ or preserve “deleted, shadowed, fragmented, or residual”¹⁹ information absent a showing of special need and relevance. In ordering discovery, courts should balance “cost, burden[,] and need,” while considering the “nature of the litigation and the amount in controversy.”²⁰ The primary (but apparently not exclusive) focus of E-discovery should be on “active data and information” as opposed to disaster recovery back-up tapes and other sources that are not reasonably accessible.²¹ Cost-shifting from the responding to the requesting party can happen on satisfaction of a multi-factor test.²² One commentator recently extolled the “enduring relevance” of the Principles.

In a now-famous series of opinions from the case of *Zubulake v. UBS Warburg LLC*,²³ Judge Shira A. Scheindlin attempted a similar balance in the context of employment litigation involving the preservation and production of a large volume of emails.²⁴ The decisions, now a staple of most civil procedure textbooks, largely track the Sedona Principles, yet adopt a modified framework, calling for a level of discovery and burden that is just right. The *Zubulake* series repeated the now well-accepted notion that “the universe of discoverable material has expanded exponentially” and “discovery is not just about uncovering the truth, but also about how much of the truth parties can afford to disinter.”²⁵ The cases recognized a seven-factor test for shifting the cost of discovery.²⁶

17. THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 60–66 (Jonathan M. Redgrave et al. eds., 2d ed. 2007), available at http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf (explaining that unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent an agreement between the parties or an order of the court).

18. *Id.* at 28.

19. *Id.* at 49.

20. *Id.* at 17.

21. *Id.* at 45.

22. *Id.* at 67.

23. *Zubulake I*, 217 F.R.D. 309 (S.D.N.Y. 2003).

24. *Id.* at 311, 313.

25. *Id.* at 311 (citing *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002)).

26. *Id.* at 324. The factors are:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each

But this cost shifting, at least in Judge Scheindlin's view, should not apply to readily accessible ESI, the normal rules of discovery should apply.²⁷ The decisions made clear that a party must implement a "litigation hold" on ESI once it is on notice—that is, the party knows or should know—that the information may be relevant to current or future litigation:

Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes . . . , which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible . . . , then such tapes *would* likely be subject to the litigation hold.²⁸

In a later decision, the *Zubalake* court further elaborated the specific requirements necessitated under these circumstances: "First, counsel must issue a 'litigation hold' . . . whenever litigation is reasonably anticipated . . ." ²⁹ Counsel also has a continuing duty to remind employees that the litigation hold is still in effect.³⁰ "Second, counsel should communicate . . . with 'key players'" and remind them of the duty to preserve.³¹ Further, "counsel must become fully familiar with her client's document retention policies . . ." ³² "Finally, counsel should instruct all employees to produce . . . [all] relevant active files" and ensure the evidence is "stored in a safe place" to avoid intentional or inadvertent destruction of potentially relevant data.³³ "Once counsel takes these steps . . . , a party is fully on notice of its discovery obligations."³⁴

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 obtaining the information.

Id. Not much is excluded.

27. *Zubulake v. UBS Warburg LLC (Zubulake III)*, 216 F.R.D. 280, 291 (S.D.N.Y. 2003).

28. *Zubulake v. UBS Warburg LLC (Zubulake IV)*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (internal parentheticals omitted). An exception applies if the company can identify employee documents that are stored on backup tapes. If that is the case, the tapes should be preserved if the information contained on those tapes is not otherwise available. *Id.*

29. *Zubulake v. UBS Warburg LLC (Zubulake V)*, 229 F.R.D. 422, 433 (S.D.N.Y. 2004).

30. *Id.* at 434.

31. *Id.* at 433–34 (S.D.N.Y. 2004).

32. *Id.* at 432.

33. *Id.* at 434.

34. *Id.* at 439.

Zubulake and other similar cases are certainly helpful, but drawing lessons from reported decisions still remains difficult. The cases are fact-intensive, and the pertinent facts are highly technical. For example: in a recent opinion by Judge Scheindlin, subtitled “*Zubulake Revisited*,” it takes forty pages to describe the E-discovery malfeasance of the plaintiff.³⁵ A recent article describing E-discovery cases since 2006 offers relatively little guidance beyond the commonplace. Having read its summaries of approximately 150 cases, one knows little that is new. That is not a criticism of the article or the cases. It is not clear that more guidance is readily found.

In 2006, the Federal Rules of Civil Procedure were amended to address the problems presented by ESI. Pursuant to amended Rule 26(b), ESI need not be produced from sources that the responding party has identified as not reasonably accessible because of undue burden or cost subject to judicial review. Courts may limit discovery if it is unreasonably cumulative or duplicative or can be obtained from another source that is more convenient, less burdensome or expensive.³⁶ They may also restrict discovery if the seeking party has had ample opportunity to obtain the information or if the burden or expense of 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 discovery in resolving the issues.”³⁷ By case law, although not rule, parties are required to take reasonable steps to preserve ESI when they “know or should know” of the potential relevance to litigation. Rule 37(e) of the Federal Rules of Civil Procedure provides that “absent extraordinary circumstances, a court may not impose sanctions” when ESI is lost “as a result of the routine, good faith operation of an electronic information system.”³⁸

35. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010).

36. FED. R. CIV. P. 26(b)(2)(C)(i).

37. *Id.* at 26(b)(2)(C)(iii).

38. *Id.* at 37(e).

C. *The Inadequacy of the Response*

All of this is eminently reasonable but, it would seem, not particularly effective. The standard for implementing a litigation hold is, for example, an invitation for an argument. It does little to define what must be held or how prescient the holding party must prove to be. Whether something is “reasonably accessible” is undefined, as is the “routine, good faith operation” of an information system.³⁹ Of course, all legal standards are more or less underdetermined, but the vague nature of these standards may be more problematic in the context of discovery. This is largely a result of the fact that discovery is—and must largely remain—a process largely managed by the parties and one in which judicial intervention is difficult due to the nascent and ill-defined nature of the issues to be tried and the complex and technical nature of ESI.

When judicial intervention does become necessary, Judges must assess such claims by evaluating the burden, need, and proportionality of proposed discovery with incomplete knowledge of the claims and defenses. The complexity of evaluating competing claims about the nature of the information sought and the cost of obtaining it may require the equivalent of a small (or not so small) trial—something difficult to do in the context of motion practice. Thus, the best way to avoid a premature (and perhaps incorrect) decision is often to err on the side of permitting discovery.

The standard of Rule 26(b)(2)(C)(iii)—the balancing of cost and burden proportionately⁴⁰—may be the principle by which most disputes regarding the scope of discovery are resolved. That rule and its associated principles all contemplate relatively unrestrained balancing of multiple factors. In essence, although no relevant factors are excluded, no particular result is mandated. While it is difficult to formulate specific legal rules that will do much more under such complex circumstances, multi-faceted and ambiguous balancing in response to complicated and expensive questions provide little guidance. Standards that call for things that are “reasonable” and prohibit that which is “undue” are no better than admonitions to do “right.” A seven-part test for anything permits almost any result.

While some have endorsed—or at least accepted—the notion of judge as manager,⁴¹ it is hard to imagine, especially given the volume of litigation, that discovery could work as anything other than a process that is

39. *Id.*

40. See, e.g., Thomas Y. Allman, *The “Two-Tiered” Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH. J.L. & TECH. 7, 14 (2008), <http://law.richmond.edu/jolt/v14i3/article7.pdf> (explaining how the “good cause” requirements of rule 26(b)(2)(B), when combined with the balancing required by 26(b)(2)(C), create a “substantial hurdle to discovery”).

41. See Symposium, *Ethics and Professionalism in the Digital Age*, 60 MERCER L. REV. 863, 887 (2009) (declaring that “the role of the judge is in the process of extraordinary transformation because of E-discovery”).

largely party managed. There is simply too much litigation and too much information for judges or special masters to become involved in more than a fraction of cases. Management of the process by the parties works best if there are rules that effectively provide relatively clear direction, or both sides have comparable incentives driving them within a realm of “reasonable behavior.” In cases in which both parties are more or less equally subject to the costs and burdens of electronic discovery, each side can expect the other to be just as aggressive or reasonable as it has been. This form of mutually assured destruction may discipline the parties and temper the discovery “arms race.” But, in cases of asymmetrical information, namely, those in which the bulk of information (particularly ESI) resides with one party, incentives diverge. Here the burden of responding to discovery is largely borne by one side, and there are fewer incentives to act with self-discipline.

Even when we do move to judicial management, judges must assess such claims or evaluate the burden, need and proportionality of proposed discovery with incomplete knowledge of the claims and defenses. The rules require parties to confer, and a mantra of the E-discovery industry is to call for “collaborative” discovery. Nevertheless, parties famously disagree about the value of their cases and the extent of the burden that they are asking another to assume. However they agree on the principle of proportionality, that agreement is swamped by radically different perceptions of the amount at stake and the likelihood of recovery. The complexity of evaluating competing claims about highly technical information may require the equivalent of a small (or not so small) trial—something difficult to do in the context of motion practice and pretrial management. The best way to avoid a premature (and perhaps incorrect) decision—or to avoid the whole mess altogether—is to err on the side of permitting discovery.

D. *The Implications of Inadequacy*

If the only implication of these inadequacies was increased costs of discovery, that would be bad enough. But increasing the cost of litigation, particularly in the context of a system with at least some form of notice pleading, changes the dynamics of the litigation process and the calculus surrounding the management of litigation risk. The ability to assert a colorable claim, i.e., one that can survive a motion to dismiss and trigger the process of discovery, is an asset. Because it costs something—and often quite a lot—to make such a claim go away, and litigation risk can rarely be dismissed—whatever increases the cost of the process increases the value of that asset. This materially alters the settlement calculus.

II. ANOTHER RESPONSE

A. A Modest Presumption

The rules ought to be amended to strengthen the presumption—begun with the 2006 amendments—that adherence to retention and retrieval policies that are adopted outside the context of litigation and consistently applied ought to be the measure of a party’s obligation to maintain and produce ESI. The idea, not unrelated to Rule 34’s longstanding option to produce records as they are kept in the ordinary course of business,⁴² is rooted in the idea that most organizations formulate such policies in good faith and, in fact, probably cannot know in advance whether the retention of information will hurt or help their litigation prospects. Questions of how much ESI to keep, where to keep it, and how to get it are generally determined by the need to have access to information necessary to do business. Policies are presumably adopted in a way that will permit access to records that one needs to address the design and performance of products, the management of employees and other aspects of the business that are likely to become the subject of litigation. If that is the case, most relevant information will remain accessible under such generally applicable and neutrally-framed policies.

To be sure, the current federal rules *permit* courts to limit E-discovery to documents resident in these systems, and, at least on its face, Federal Rule of Evidence 26(b) creates a presumption against the discovery of ESI that is not reasonably accessible.⁴³ But it may be well to make clear that, absent extraordinary circumstances, a party is required to produce only that ESI stored in the active systems maintained by the party in the ordinary course of business. What I am suggesting is a bit of a paradigm shift: Perhaps we need be less concerned with whether the discovery of ESI fails beyond a pale of acceptable burden and cost, and more concerned with whether the information sought can be found within a set of sources most likely to contain relevant records and can be accessed in a way that a party’s normal records management system permits.

An example of such an approach is reflected in an amendment to Rule 26 proposed by certain defense bar organizations in a white paper presented in a recent conference on civil litigation at Duke University Law School. This approach specifies that certain categories of ESI that are not available in the ordinary course of business need not be produced:

42. FED. R. CIV. P. 34(b)(2)(E)(i) states, “A party must produce documents as they are kept in the usual course of business”

43. FED. R. CIV. P. 26(b)(2)(B) (“A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost.”).

(B) *Specific Limitations on Electronically Stored Information.*

(i) A party need not provide discovery of the following categories of electronically stored information . . . absent a showing by the receiving party of substantial need and good cause, subject to the proportionality assessment pursuant to Rule 26(b)(2)(C):

(a) deleted, slack, fragmented, or other data only accessible by forensics;

(b) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(c) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(d) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(e) information whose retrieval cannot be accomplished without substantial additional programming, or without transforming it into another form before search and retrieval can be achieved;

(f) backup data that are substantially duplicative of data that are more accessible elsewhere;

(g) physically damaged media;

(h) legacy data remaining from obsolete systems that is unintelligible on successor systems; or

(i) any other data that are not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost and that on motion to compel discovery or for a protective order, if any, the party from whom discovery of such information is sought shows is not reasonably accessible because of undue burden or cost.⁴⁴

The proposed amendment provides additional guidance for both parties and courts and, importantly, roots that guidance in deference to systems established to conduct business. It retains current language requiring that, under certain circumstances, a party seeking to withhold information that might otherwise be discoverable must demonstrate that it is not reasonably accessible due to undue burden and cost. However, it makes clear that certain specified sources of information need not be searched or produced

44. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 9, at 25–26 (alteration in original).

without such a showing, including information whose retrieval would require substantial additional programming or transformation or which cannot be obtained in the ordinary course of business. Although the proposed amendment does not unambiguously establish “active” ESI under a generally-applicable retention policy as the entire universe for E-discovery, the recognition that most relevant documents are likely to be found within accessible records under such policies informs its restrictions on the scope of discovery.

This will not obviate the need for litigation holds. The fact of litigation or its reasonable anticipation may affect the need to retain ESI, and parties ought to remain under an obligation to preserve potential ESI once litigation has been commenced or can be reasonably anticipated. An amendment proposed by the white paper⁴⁵ delivered at Duke calls for parallel restrictions on the type of ESI that must be preserved, once again providing more particular guidance that reflects a judgment about where potentially-relevant information is most likely to be found:

(2) *Specific Limitations on Electronically Stored Information*

Absent court order demonstrating that the requesting party has (1) a substantial need for discovery of the electronically stored information requested and (2) preservation is subject to the limitations of Rule 26(h)(1), a party need not preserve the following categories of electronically stored information:

(A) deleted, slack, fragmented, or other data only accessible by forensics;

(B) random access memory (RAM), temp files, or other ephemeral data that are difficult to preserve without disabling the operating system;

(C) on-line access data such as temporary internet files, history, cache, cookies, and the like;

(D) data in metadata fields that are frequently updated automatically, such as last-opened dates;

(E) information whose retrieval cannot be accomplished without substantial additional programming, or without transferring it into another form before search and retrieval can be achieved;

(F) backup data that are substantially duplicative of data that are more accessible elsewhere;

45. *Id.*

- (G) physically damaged media;
- (H) legacy data remaining from obsolete systems that is unintelligible on successor systems; or
- (I) any other data that are not available to the producing party in the ordinary course of business.⁴⁶

It is certainly possible that the exclusion of these sources of information from preservation and production will eliminate some information that might be relevant to litigation. It is less clear that they will render the results less accurate.

The amendments proposed at Duke also modify Rule 37(e) to make clear that sanctions may not be imposed for the failure to preserve ESI in the absence of a finding of willful conduct.⁴⁷ This expansion of the rule's safe harbor provision places the emphasis on normally-followed retention and retrieval procedures. The difficulty, however, is that sanctions for failure to preserve documents generally contain some presumption that the lost information would have helped the requesting party or hurt the party who has failed to produce it. But, in the absence of some finding of willfulness, that presumption is unwarranted. Although a responding party might certainly be required to restore the cost of recovering lost ESI, further sanctions as a consequence of negligence are problematic, at least in the absence of some information about whether lost ESI would have helped or hurt the responding party.

B. *Cost Allocation*

The amendments proposed by the defense bar accomplish additional useful objectives, such as limiting the number of document requests and the sources that can be searched.⁴⁸ Nevertheless, limitation of the universe of ESI that must be preserved and produced won't resolve all of the special challenges presented by E-discovery. Even active data systems maintained by parties in the ordinary course of business may produce enormous quantities of information. Presumably, parties will create methods of retrieving pertinent information for business purposes that balance the needs of that information with the cost of retrieval. Those systems ought to be treated as presumptively sufficient.

But most regularly-maintained databases are subject to some form of keyword or other electronic search that will, even without duplicates, result in mass quantities of information that will be exceedingly expensive—or even stretch human capacities—to review. Perhaps the best solution to this

46. *Id.* at 36–37.

47. *Id.* at 38.

48. I am old enough to have been a seasoned litigator when courts began to limit—and rather arbitrarily at that—the number of interrogatories and both the number and length of depositions. How, we wondered, could the search for truth be continued? It turns out we managed quite well.

problem is to place the cost of discovery with the requesting party. Internalization of externalized costs is generally thought to lead to greater, rather than less, efficiency. Perhaps the best way to ensure that the cost of discovery is proportional to what is at stake is to ask whether the party seeking it—the one who is presumably in the best position to know—is willing to pay for it.⁴⁹

While this may be thought to burden the ability of less wealthy litigants to pursue a claim, the investment of substantial resources into litigation on behalf of non-wealthy parties thought by counsel to have a meritorious claim is quite common in a variety of contexts and has not materially impeded the pursuit of claims.

Although these costs would presumably be taxable upon resolution of the case on the merits, very few cases are resolved on the merits. To be sure, the fact that the cost of discovery is potentially taxable would affect the settlement calculus and indirectly discipline discovery. But a more direct impact would require these costs to be paid at the time that they are incurred. While this might lead to pretrial satellite litigation over the reasonableness of those costs, this seems more manageable and predictable than the more amorphous standards that currently control. It would involve the rather straightforward question of what undertaking a particular task has or will cost and not an assessment of whether, at some point in the future after underdeveloped issues become clear, it will have been “worth it.”

CONCLUSION

I close with a story from my young days as a lawyer. Rising to begin the introduction of my rebuttal case in a trial to the bench, the judge looked down at me and said, “Now, Mr. Esenberg, you do what you need to do. But first ask yourself if anything you are about to do proves anything that hasn't been proven four times already, because I'm ready to rule.” I sat down, learning an important lesson of trial advocacy: when to stop.

“When to stop” E-discovery is a difficult question. My modest suggestion is that lawyers take their cue from the ways in which such information is managed in the “real world.” The electronic revolution has enabled many wonderful possibilities, but in litigation and elsewhere, we ought not to allow our desire for the perfect become the enemy of the good.

49. A full consideration of this idea is beyond the scope of this paper.