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# Discoverability of Electronic Data under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for Not Reasonably Accessible Data

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# Discoverability of Electronic Data Under the Proposed Amendments to the Federal Rules of Civil Procedure: How Effective Are Proposed Protections for “Not Reasonably Accessible” Data?

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## INTRODUCTION

Consider the following scenario: a company involved in litigation receives a discovery request that requires searching through forty of its employees’ computers and restoring and searching nearly 1000 backup tapes.<sup>1</sup> Performing a search and restoration of this size and scope will take several weeks, maybe even months, and requires hiring a computer expert. The cost of searching for and restoring this electronic data<sup>2</sup> exceeds \$4 million, and this figure does not include attorney fees or the cost of reviewing the information for privilege. As outrageous as this amount sounds, it was what the court in *Medtronic Sofamor Danek, Inc. v. Michelson*<sup>3</sup> found the defendant’s discovery request would cost the plaintiff to produce.<sup>4</sup> The *Medtronic*

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1. Backup tapes are off-line storage devices maintained for disaster purposes. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

2. Documents and information are considered electronic if they are contained in mediums that can only be read by computers. THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS AND PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 1 [hereinafter THE SEDONA PRINCIPLES] (Jonathan M. Redgrave ed., Jan. 2004), at <http://www.thesedonaconference.org/miscFiles/SedonaPrinciples200401> (last visited Apr. 2, 2005) (on file with the North Carolina Law Review).

3. No. 01-2372-M1V, 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn. May 13, 2003) (action involving trade secrets, patents, and trade information).

4. *Id.* at \*28.

discovery request typifies the exorbitant costs and burdens associated with the discovery of electronic data, or e-discovery. The court's response to the request is likewise representative of how federal district courts have approached the problems of e-discovery.<sup>5</sup> After applying a balancing test, the court ordered Medtronic to bear the entire cost of searching the employees' computers for relevant information,<sup>6</sup> and ordered Medtronic to bear 70 percent of the cost of searching and restoring the backup tapes.<sup>7</sup> While shifting a percentage of the cost relieved Medtronic of some of the burden, this compromise also meant that Michelson was responsible for paying a portion of the production cost before he could have access to information he described as critical to his defense.<sup>8</sup>

In August 2004, the Civil Rules Advisory Committee (the "Committee") released a package of proposed amendments to the Federal Rules of Civil Procedure intended in part to address the cost and burden of e-discovery.<sup>9</sup> In an introductory comment, the Committee acknowledged that the federal discovery rules are not adequate to accommodate new forms of information technology, the discovery of which is more burdensome and costly than traditional paper discovery because of its "exponentially greater volume."<sup>10</sup> To alleviate the costs and burdens, the Committee proposed to add the

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5. See, e.g., *Wiginton v. CB Richard Ellis, Inc.*, No. 02 C 6832, 2004 U.S. Dist. LEXIS 15722, at \*31 (N.D. Ill. Aug. 9, 2004) (shifting 75 percent of the cost of e-discovery to the requesting party); *Multitechnology Servs., L.P. v. Verizon Southwest*, No. 4:02-CV-702-Y, 2004 U.S. Dist. LEXIS 12957, at \*5 (N.D. Tex. July 12, 2004) (requiring the parties to split the cost of e-discovery and classifying "the expense as court costs that can be recovered by the prevailing party"); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003) (shifting 25 percent of the cost of e-discovery to the requesting party).

6. *Medtronic*, 2003 U.S. Dist. LEXIS 8587, at \*34.

7. *Id.* at \*41.

8. *Id.* at \*16. Further, if Michelson wished to have additional backup tapes restored and searched, he would be responsible for paying the entire cost of production and the majority of the cost of Medtronic's relevance and privilege review. *Id.* at \*47-48.

9. Report of the Civil Rules Advisory Committee 1-2 (proposed May 17, 2004, revised August 3, 2004), at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> (last visited Apr. 3, 2005) (on file with the North Carolina Law Review). The package of proposals includes amendments to Rules 16, 26, 33, 34, 37, 45 and Form 35. In addition to addressing the cost and burden of e-discovery, the package of proposals also addresses early consideration of e-discovery issues, asserting privilege after production, applying Federal Rules of Civil Procedure 33 and 34 to electronically stored information, and limiting Federal Rule of Civil Procedure 37 sanctions for the loss of information resulting from the routine operation of computer systems. *Id.* at 5-6. The Civil Rules Advisory Committee accepted comments on the proposed amendments through February 15, 2005. See <http://www.uscourts.gov/rules/newrules1.html> (last visited Apr. 3, 2005) (on file with the North Carolina Law Review).

10. Report of the Civil Rules Advisory Committee, *supra* note 9, at 2-3.

following text to Federal Rule of Civil Procedure 26(b)(2):

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible.<sup>11</sup> On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.<sup>12</sup>

The amendment would relieve a party of producing electronic information identified as “not reasonably accessible,” provided that the requesting party cannot convince the court that the e-discovery should be ordered for “good cause.”<sup>13</sup> This proposal is significant because it makes a distinction between the discoverability of accessible data and “not reasonably accessible” data.<sup>14</sup> Under the current Rules,<sup>15</sup> most courts have determined that all electronic information is equally discoverable and do not consider whether the information is reasonably accessible.<sup>16</sup> This Comment argues that despite the protective language proposed for addition to Rule 26(b)(2), the amendment offers electronic data identified as not reasonably accessible no greater protection from discovery than the current version of the Rule provides because the good cause requirement in the proposed amendment is not strict enough. Protecting electronic data identified as not reasonably accessible is important to prevent the cost of e-discovery from becoming prohibitive. A weak good cause requirement would place too great a

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11. Proposed Amendments to the Federal Rules of Civil Procedure (proposed May 17, 2004, revised August 3, 2004), at <http://www.uscourts.gov/rules/comment2005/CVAug04.pdf> (on file with the North Carolina Law Review). “But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information.” *Id.* at 3.

12. *Id.* at 6.

13. *Id.* For a discussion of the definition of the terms “not reasonably accessible” and “good cause” see *infra* Section IV.

14. *Id.*

15. Rule 34 was amended in 1970 to provide for the production of “data compilations from which information can be readily obtained, if necessary, by the respondents through detection devices into reasonably usable form.” FED. R. CIV. P. 34(a).

16. See, e.g., *Simon Prop. Group, L.P. v. mySimon, Inc.*, 194 F.R.D. 639, 640 (S.D. Ind. 2000) (“[C]omputer records, including records that have been ‘deleted,’ are documents discoverable under FED. R. CIV. P. 34.”). But see *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.C. 2001) (“There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search . . .”).

burden on a litigant to produce electronic data identified as not reasonably accessible. This burden in turn could discourage the retention of data and could encourage requesting parties to use broad e-discovery requests as a means of compelling settlements.

This Comment identifies the problems associated with e-discovery, with an emphasis on the problem of the high cost of conducting e-discovery, and summarizes the current approach to e-discovery based on the present version of the Federal Rules of Civil Procedure and the existing case law. After examining some of the emerging trends and new approaches developing under the current Federal Rules of Civil Procedure, this Comment discusses the proposed amendment to Rule 26(b)(2). Based on this Comment's conclusion that the current language of the Committee Note accompanying the proposed amendment does not sufficiently protect discovery of electronic data identified as not reasonably accessible, this Comment recommends that the Committee consider strengthening the protection the amendment will provide. Strengthening may be accomplished by requiring a stricter analysis of what constitutes "good cause" to require discovery of electronic data that is not reasonably accessible, or by further delineating the categories of electronic data to distinguish between the discoverability of backup data (discoverable upon a showing of good cause) and deleted data (not discoverable unless the requesting party can show the data was deleted by the responding party in bad faith).

Before addressing the proposed amendment to Rule 26(b)(2), it is necessary to define e-discovery, illustrate the problem of the high cost of producing electronic data, and understand how e-discovery is presently conducted under the current Federal Rules of Civil Procedure and existing case law.

## I. DEFINING E-DISCOVERY AND THE PROBLEM OF HIGH PRODUCTION COSTS

The Committee recognized that e-discovery raises different issues than traditional discovery and that these issues require special rules of procedure.<sup>17</sup> The most apparent difference between e-discovery and traditional paper discovery is the medium at issue. *Moore's Federal Practice* draws four distinctions between traditional paper files and computer-based information.<sup>18</sup> The first and most

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17. See Report of the Civil Rules Advisory Committee, *supra* note 9, at 2–3.

18. 7 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 37A.01[2] (3d ed, 2004).

significant of these distinctions is the “sheer magnitude of data” stored in computers.<sup>19</sup> An astounding 99.99 percent of information is generated in non-printed form.<sup>20</sup> In the year 2002, almost five exabytes of information was generated.<sup>21</sup> An exabyte is roughly the equivalent of 500,000 libraries the size of the Library of Congress.<sup>22</sup> Of the five exabytes produced in 2002, only 0.01 percent was stored in paper records, while nearly 92 percent was stored on magnetic media such as computer hard disks.<sup>23</sup> And the amount of information produced electronically continues to grow—between 1999 and 2002, new stored information grew by an estimated 30 percent.<sup>24</sup>

Second, a significant majority of documents created electronically are never converted into hard copy.<sup>25</sup> E-discovery is thus often the only means by which a party can access the information sought.

Third, computer-generated documents contain embedded data that does not appear in paper copies.<sup>26</sup> Referred to as metadata, this embedded data contains information such as the file creation date and when the file was last edited,<sup>27</sup> information which can be used as evidence to prove when a document was actually created or altered, and which computer user last accessed the file.

Fourth, electronic documents differ from paper documents because computer generated documents that have been “deleted” are, in most cases, not irretrievably lost.<sup>28</sup> There are two ways data can remain on a computer hard drive after the user has purposely deleted the files containing the data. First, many computer programs employ an automatic backup feature that saves files that are deleted

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19. *Id.*

20. Robert Douglas Brownstone, *Collaborative Navigation of the Stormy e-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at 6 (2004), at <http://law.richmond.edu/jolt/v10i5/article53.pdf> (citing Peter Lyman & Hal R. Varian, *How Much Information? 2003*, at 1, at [http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable\\_report.pdf](http://www.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf) (Oct. 30, 2003)) (on file with the North Carolina Law Review).

21. Stephen D. Williger and Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 RICH. J.L. & TECH. 52, at 6 (2004), at <http://law.richmond.edu/jolt/v10i5/article52.pdf> (citing Lyman, *How Much Information? 2003*, at 1) (on file with the North Carolina Law Review).

22. *Id.* at \*2, n.1 (“An ‘exabyte’ is a measure of the capacity of digital storage media that is . . . equal to 1,125,899,906,842,624 kilobytes . . .”).

23. *Id.* at \*2.

24. Lyman, *How Much Information? 2003*, at \*2.

25. MOORE, *supra* note 18, ¶ 37A.01[2].

26. *Id.*

27. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.446 (2004).

28. MOORE, *supra* note 18, ¶ 37A.01[2].

or accidentally lost.<sup>29</sup> This type of data is also referred to as “replicant data,” “temporary files,” or “file clones,” and remains on the hard drive after the original file is deleted.<sup>30</sup> Second, when a user deletes a file, the computer does not immediately erase the information, but instead marks as “not in use” the portions of the hard disk directory containing that file.<sup>31</sup> When the computer needs space to save new information, it will write over the space marked “not in use.” Until a new file is saved in place of the deleted file, however, the deleted file will remain on the hard drive.<sup>32</sup> Thus it is possible that, unknown to the user, all or a portion of a deleted file still remains on the computer hard drive long after it was deleted.<sup>33</sup>

In addition to remaining on the hard drive of a computer, deleted files can be retained on backup tapes.<sup>34</sup> Backup data is data that is stored off-line on tapes or disks and maintained for disaster purposes.<sup>35</sup> A backup tape takes a snapshot of all data that exists on a server at the time the backup is made.<sup>36</sup> A file which is subsequently deleted from the computer hard drive will be preserved on the backup tape.

To fully grasp the import of the proposed amendment to Rule 26(b)(2), it is necessary to understand the types of information courts currently deem discoverable. Electronic data is generally divided into two broad categories: that which is accessed in the ordinary course of business, and that which is not routinely retrieved or used for business purposes.<sup>37</sup> Data that is not routinely retrieved or used for business purposes includes metadata, data stored on backup tapes, “deleted” data, system data (information created and maintained by the computer itself, including documentation of the creation or deletion of files and directories and other maintenance functions) and residual data (data that “exists in bits and pieces throughout a computer hard

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29. Hon. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To the Task?*, 41 B.C. L. REV. 327, 336–37 (2000).

30. See *id.*

31. *Id.*

32. *Id.* This type of data is commonly referred to as “residual data.” See also Marnie H. Pulver, Note, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1380–83 (2000) (illustrating how a computer user can create seven discoverable copies of various versions of a file in less than twenty-four hours).

33. See Michael Marron, Comment, *Discoverability of “Deleted” E-Mail: Time for a Closer Examination*, 25 SEATTLE U. L. REV. 895, 907–08 (2002).

34. Scheindlin & Rabkin, *supra* note 29, at 337.

35. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 27, § 11.446.

36. See Scheindlin & Rabkin, *supra* note 29, at 337.

37. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 27, § 11.446.

drive").<sup>38</sup> Data that is accessible in the "ordinary course of business" refers to data to which a litigant would have access in the ordinary course of its day-to-day use of its computer systems.<sup>39</sup> Current law does not distinguish between these two categories of electronic data: both are deemed discoverable.

It is not difficult to appreciate how important data not accessed for business purposes can be for a litigant who is seeking production of information relevant to a claim. Often the information that is potentially most helpful to a litigant is located in a deleted file, metadata, or on a backup tape.<sup>40</sup> This statement is especially true for deleted electronic mail files, or e-mails. E-mail is an informal mode of communication that many people treat as they do conversations, discussing information they would not include in hard-copy documents.<sup>41</sup> There is therefore a greater chance that an e-mail, particularly a deleted one, will contain the "smoking gun" sought to prove one's claim.<sup>42</sup>

However, discovery of data not accessed for business purposes comes at a high cost. Take, for instance, the discovery of data stored on backup tapes.<sup>43</sup> Because backup tapes are not archives, but a

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38. *Id.*

39. Amendments to Civil Discovery Standards, at 6, at <http://www.abanet.org/litigation/documents/hod/ABA%20Final%20Revised%202004%20Amendments%20Civil%20Discovery%20Standards.doc> (August 2004) (on file with the North Carolina Law Review).

40. Consider, for instance, an employment discrimination claim where the plaintiff has the burden of proving that she was fired for inappropriate reasons. It is unlikely that the official company record would list an inappropriate reason for dismissal. Rather, the proof the plaintiff would need, assuming it exists, would more likely be found in a less formal record or communication, namely e-mail. Most e-mail is deleted soon after it is received, meaning the plaintiff would need access to either the deleted file or a backup tape containing a snapshot of the computer system taken before the file was deleted to prove her case. Alternatively, metadata could assist the plaintiff in showing that the contents of a particular file were subsequently altered, as proof that the previous contents were damaging to the defendant's case. For an example of a case where the proof the plaintiff needed to support her claim was only located in deleted files, see *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1051, 1058 (S.D. Cal. 1999) (ordering the creation of a mirror image of defendant's hard drive after plaintiff alleged the defendant was actively deleting e-mail communications that could be used as evidence against her).

41. Bahar Shariati, Note, Zubulake v. UBS Warburg: *Evidence that the Federal Rules of Civil Procedure Provide the Means for Determining Cost Allocation in Electronic Discovery Disputes?*, 49 VILL. L. REV. 393, 406 (2004) (citing Jonathan B. Ealy & Aaron M. Schutt, *What—If Anything—Is an E-mail? Applying Alaska's Civil Discovery Rules to E-mail Production*, 19 ALASKA L. REV. 119, 122 (2002)); Scott Sleek, *Good E-recordkeeping Saves You Money, Protects You from Liability*, DIGITAL DISCOVERY AND E-EVIDENCE, Dec. 2000, at 4).

42. See Scheindlin & Rabkin, *supra* note 29, at 329.

43. For an overview of the problems associated with searching a backup system, see



disaster recovery system,<sup>44</sup> the data is not organized for the retrieval of individual files.<sup>45</sup> They are sequential-access devices, so to access a particular block of data requires searching all of the preceding blocks of data.<sup>46</sup> Consequently, a party may have to search all of its backup tapes to locate a single file, the data for which could be spread across any number of tapes.<sup>47</sup> Before the data on a backup tape can be accessed, it must be restored to the system from which it was recorded.<sup>48</sup> Restoring a backup tape takes approximately six to twelve hours.<sup>49</sup> In *Wiginton v. CB Richard Ellis*,<sup>50</sup> the defendant company had 125 network servers, each of which was backed up on a daily, weekly, and monthly basis.<sup>51</sup> Restoring just the monthly backup tapes for all 125 servers for a twelve-month period would take an estimated 9,000 to 18,000 hours.<sup>52</sup> The restoration process is as costly as it is lengthy. The defendant in *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*<sup>53</sup> estimated that responding to the plaintiff's discovery request for e-mail messages would require a six-month search of 93 backup tapes at a cost of approximately \$6.2 million.<sup>54</sup> Additionally, since backup tapes are normally re-used and the data stored on them is overwritten, a party involved in litigation will have to purchase additional backup tapes to avoid overwriting data that may be related to the litigation.<sup>55</sup> For the defendant in *Wiginton*, preserving backup

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MOORE, *supra* note 18, ¶ 37A.32[2][e][i].

44. See *Wiginton v. CB Richard Ellis*, No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128, at \*7 (N.D. Ill. Oct. 27, 2003) *costs and fees proceeding*, No. 02 C 6832, 2004 U.S. Dist. LEXIS 15722 (N.D. Ill. Aug. 9, 2004).

45. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319 (S.D.N.Y. 2003) (quoting Webopedia, at [http://news.webopedia.com/TERM/t/tape\\_drive.html](http://news.webopedia.com/TERM/t/tape_drive.html) (last visited Apr. 3, 2005) (on file with the North Carolina Law Review); Kenneth J. Withers, *Computer-Based Discovery in Federal Civil Litigation* (unpublished manuscript) at 15).

46. *Id.*

47. See *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 U.S. Dist. LEXIS 8587, at \*14 (W.D. Tenn. May 13, 2003).

48. MANUAL FOR COMPLEX LITIGATION (FOURTH), *supra* note 27, § 11.446.

49. See *Wiginton*, 2003 U.S. Dist. LEXIS 19128, at \*7.

50. No. 02 C 6832, 2003 U.S. Dist. LEXIS 19128 (N.D. Ill. Oct. 27, 2003).

51. *Id.* at \*6-7.

52. *Id.* at \*7-8.

53. 52 Fed. R. Serv. 3d (Callaghan) 168 (E.D. La. 2002), *available at* 2002 U.S. Dist. LEXIS 3196.

54. *Id.* at \*6.

55. See *Concord Boat Corp. v. Brunswick Corp.*, No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068, at \*16 (E.D. Ark. Sept. 3, 1997) (holding that once a complaint is filed, a litigant "is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request." (quoting *Turner v. Hudson Transit*, 142 F.R.D. 68, 72 (S.D.N.Y. 1991))).

tapes for 125 servers translated into a cost of \$12,500 per day to buy new backup tapes.<sup>56</sup> With most litigation lasting months to years, the costs can add up quickly.

While it is true that under some circumstances e-discovery is cheaper than traditional discovery, such as when the information sought is readily accessible and can be copied onto a disk, e-discovery generally presents a greater burden and cost than traditional discovery. For example, the defendants in *Jones v. Goord*<sup>57</sup> estimated the cost of searching their databases in response to a discovery request to be in excess of \$100,000.<sup>58</sup> Thus, even documents readily accessible as part of the ordinary course of business can constitute a great burden and present a high cost.<sup>59</sup>

The high costs associated with e-discovery have not affected the courts' position on the discoverability of electronic data.<sup>60</sup> Courts regularly require a party to search its backup tapes during discovery for deleted or archived files.<sup>61</sup> For example, in *Zhou v. Pittsburgh State University*,<sup>62</sup> a case involving employment discrimination, the plaintiff sought discovery of underlying computer-generated data used to create a table reflecting the salaries of music department faculty from 1996 to 2000.<sup>63</sup> The defendant produced a combination of computer-generated data and handwritten documents relating to the formulation of the salary tables for the years 1998 to 2000, but contended that it could not produce records from 1997 because its document retention policy only called for preserving documents for a period of five years.<sup>64</sup> In its response to a motion to compel the 1997 documents, the employer stated it could not "produce copies of documents that do not exist."<sup>65</sup> The court disagreed, reasoning that

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56. *Wiginton*, 2003 U.S. Dist. LEXIS 19128, at \*8.

57. No. 95 Civ 8026 (GEL), 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 16, 2002).

58. *Id.* at \*32. The court did not order discovery of the databases because it found that the risks and burdens to the defendants were not worth bearing based on entirely speculative benefits. *Id.* at \*48.

59. See Report of the Civil Rules Advisory Committee, *supra* note 9, at 2.

60. See, e.g., *In re Brand Name Prescription Drugs*, No. 94 C 897, 1995 WL 360526, at \*2 (N.D. Ill. June 13, 1995) ("[T]he mere fact that production of computerized data will result in a substantial expense is not a sufficient justification for imposing the costs of production on the requesting party.").

61. See, e.g., *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 465, 467 (S.D.N.Y. 2003) (holding that the defendant was required to search "off-line" backup tapes for requested data and was further required to pay for the cost of conducting the search).

62. No. 01-2493-KHV, 2003 U.S. Dist. LEXIS 6398 (D. Kan. Feb. 5, 2003).

63. *Id.* at \*1-2.

64. *Id.* at \*3.

65. *Id.* (quoting Defendant's Response to Plaintiff's Motion to Compel at 2 (doc.

Rule 34's definition of a discoverable document applies to deleted files and backup tapes.<sup>66</sup> The court ordered the employer to take reasonable steps to disclose any backup or archival tapes that would provide information about deleted electronic data.<sup>67</sup> The court did not define what taking "reasonable steps" entails, but ordered the defendant to disclose all data compilations, including those preserved only on backup tapes, or alternatively to show cause why it did not comply with the order and describe efforts made to comply with the order.<sup>68</sup> The court did not discuss the costs associated with searching a year's worth of backup tapes when formulating its order.

Under certain circumstances, courts also order the creation of a mirror image of a party's hard drive in order to search for deleted data for which no backup exists.<sup>69</sup> The court in *The Antioch Co. v. Scrapbook Borders, Inc.*,<sup>70</sup> ordered the creation of a mirror image of the defendant's computer equipment after determining that "deleted" data potentially relevant to the plaintiff's claims was being lost through the normal use of the computers.<sup>71</sup> Mirror imaging creates a copy of a computer hard drive that represents a snapshot of all of the computer's records, including all embedded, residual, and deleted data.<sup>72</sup> A benefit of creating a mirror image is that the retrieval process itself does not destroy information on the computer.<sup>73</sup> However, there are serious detriments associated with the mirror imaging process that require careful consideration by the court before ordering such intrusive discovery. A court order for the creation of a mirror image of a business's computer hard drives means the business loses several hours of productivity.<sup>74</sup> Creating mirror images also raises issues of privilege by potentially exposing confidential

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109)).

66. *Id.* at \*5-6.

67. *Id.*

68. *Id.* at \*6-7.

69. *See Playboy Enters., Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (ordering a mirror image of the defendant's computer hard drive to search for deleted e-mails only after determining that the need for the information outweighed the burden to the defendant, pursuant to the balancing factors of Rule 26(b)(2)).

70. 210 F.R.D. 645 (Minn. 2002).

71. *Id.* at 651-53. The court held that it would appoint a neutral computer expert to produce the mirror image in order to preserve privilege.

72. MOORE, *supra* note 18, ¶ 37A.32[3][c][ii][B].

73. *Id.*

74. *See id.* at ¶ 37A.32[3][c][ii][B]-[C] (citing *Playboy Enters. Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (mirror imaging process took approximately four to eight hours for each computer); *Alexander v. FBI*, 188 F.R.D. 111, 117 (D.D.C. 1998) (restoring one employee's archived "C" or "F" drive required about 265 hours and cost approximately \$15,675 in contractor's fees)).

documents.<sup>75</sup>

Privilege becomes an issue in situations where a party is required to turn over computer files to the opposing party.<sup>76</sup> This Comment, however, focuses on the problem of the high cost of e-discovery considered in light of the fact that a large percentage of information is stored electronically. As the next Section of this Comment illustrates, courts have worked to strike a balance between compelling e-discovery in situations where the potential for production of relevant information is high,<sup>77</sup> restricting e-discovery when the costs and burdens are not worth the possible benefits,<sup>78</sup> and shifting or sharing the costs of e-discovery where the circumstances call for a compromise.<sup>79</sup> Operating under the framework of the existing Federal Rules of Civil Procedure, courts' efforts to control e-discovery have met mixed results. The next Section of this Comment discusses the approaches currently taken by courts facing the issue of e-discovery.

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75. *See id.* at ¶ 37A.32[3][c][ii][D].

76. *See id.* at ¶ 37A.32[3][c].

77. *See, e.g.,* Zonoras v. General Motors Corp., No. C-3-94-161, 1996 WL 1671236, at \*3 (S.D. Ohio Oct. 17, 1996) (denying defendant's motion for a protective order upon a finding that "[u]nder the standard enunciated in Rule 26(b)(2)(iii) . . . the expense of the proposed discovery does *not* outweigh its likely benefit . . .").

78. *See, e.g.,* Toghiyany v. American Propane, Inc., 309 F.3d 1088, 1093 (8th Cir. 2002) (affirming district court's denial of defendant's motions to compel e-discovery); Fennell v. First Step Designs, Ltd., 83 F.3d 526, 533 (1st Cir. 1996) (denying plaintiff's Rule 56(f) motion for further discovery after affirming the finding of the district court that (1) reopening the discovery process would involve (a) substantial risks, such as confidentiality and privilege problems and (b) added costs from increased legal and expert fees; and (2) that the plaintiff "did not sufficiently set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist") (internal quotations omitted); Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 U.S. Dist. LEXIS 24068 (E.D. Ark. Sept. 3, 1997) (denying the plaintiff's request that the defendant search its backup tapes for deleted e-mails on the grounds that the recreation of the backup tapes would involve significant cost, the potential benefits from doing so were questionable, and thus the burdens outweighed the potential limited gains from a search of the tapes).

79. *See, e.g.,* Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) (ordering the cost of e-discovery to be shared between the parties, with the responding party bearing the burden of 75 percent of the cost); Wiginton v. CB Richard Ellis, Inc., No. 02 C 6832, 2004 U.S. Dist. LEXIS 15722, at \*31 (N.D. Ill. Aug. 9, 2004) (shifting 75 percent of the cost of e-discovery to the requesting party); Multitechnology Servs., L.P. v. Verizon Southwest, No. 4:02-CV-702-Y, 2004 U.S. Dist. LEXIS 12957, at \*5 (N.D. Tex. July 12, 2004) (ordering the parties to evenly shoulder the expense of e-discovery); Medtronic Sofamor Danek, Inc. v. Michelson, No. 01-2373-MIV, 2003 U.S. Dist. LEXIS 8587, at \*53 (W.D. Tenn. May 13, 2003) (shifting some of the cost of e-discovery to the requesting party).

## II. E-DISCOVERY UNDER THE CURRENT RULES AND EXISTING CASE LAW

Under the current version of the Federal Rules of Civil Procedure, all discoverable information, including electronic information that is not reasonably accessible, is subject to the limitations set out in Rule 26(b)(2),<sup>80</sup> which states:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.<sup>81</sup>

A responding party, therefore, can object to any discovery request (traditional or e-discovery) on the grounds laid out in Rule 26(b)(2)(i), (ii), and (iii). In response to an objection, the court can, among other options, compel discovery, deny the discovery request, shift the cost of discovery to the requesting party, or order the parties to share the cost of discovery.<sup>82</sup> Litigants have filed Rule 26(c)

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80. FED. R. CIV. P. 26(b)(1) (2004) ("All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).").

81. FED. R. CIV. P. 26(b)(2).

82. FED. R. CIV. P. 26(c) reads:

Upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as

motions for protective orders to preclude e-discovery with varying results.<sup>83</sup> The trend of the case law has been to compel e-discovery, though many courts seek to alleviate the burden on the responding party by shifting all or a portion of the cost of discovery.<sup>84</sup>

Cases are rarely appealed on the basis of discovery errors, so there is little precedent to guide district courts grappling with the problem of e-discovery. As a result, courts have developed different approaches to determine whether to shift the cost of production.<sup>85</sup> There are four main approaches utilized by courts: (1) the cost-based approach; (2) the marginal utility approach; (3) the *Rowe* test; and (4) the *Zubulake* factors.<sup>86</sup>

The cost-based approach advocates charging the costs of e-discovery to the requesting party.<sup>87</sup> The theory is based on market economics—an individual will pay a fair value for what he seeks.<sup>88</sup> The argument is that charging the requesting party ensures that the requesting party will only ask for what is needed, thereby reducing the scope and size of some discovery requests.<sup>89</sup> This approach has not been embraced by the courts. While some courts have allocated the total cost of e-discovery to the requesting party, those courts did not cite the cost-based approach as their reason for so doing.<sup>90</sup> Courts

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directed by the court.

FED. R. CIV. P. 26(c).

83. *Compare* *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 460 (D. Utah 1985) (denying defendant's Rule 26(c) motion and compelling e-discovery), *with* *Toghiyany v. Amerigas Propane, Inc.*, 309 F.3d 1088, 1093 (8th Cir. 2002) (affirming district court's denial of defendant's motions to compel e-discovery), *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 289 (S.D.N.Y. 2003) (ordering the cost of e-discovery to be shared between the parties, with the responding party bearing the burden of 75 percent of the cost), *and* *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 433 (S.D.N.Y. 2002) (shifting the cost of e-discovery to the plaintiff upon a finding that a majority of the factors in a balancing test tipped in favor of shifting the cost).

84. *See, e.g., Wiginton*, 2004 U.S. Dist. LEXIS 15722, at \*31 (shifting 75 percent of the cost of e-discovery to the requesting party); *Multitechnology Servs., L.P. v. Verizon Southwest*, No. 4:02-CV-702-Y, 2004 U.S. Dist. LEXIS 12957, at \*5 (N.D. Tex. July 12, 2004) (ordering the parties to "evenly shoulder" the expense of e-discovery).

85. As discussed, while courts can suppress or compel discovery under Rule 26(c), most courts opt for the middle ground of shifting all or a portion of the cost of discovery.

86. *Williger & Wilson*, *supra* note 21, at 6–12.

87. *Id.* at 6.

88. *Pulver*, Note, *supra* note 32, at 1398 (citing *PUBLILIUS SYRUS* (1st Cent. B.C.), *reprinted in* WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 95 (7th ed. 1998) ("Everything is worth what [the] purchaser will pay for it.")).

89. *Williger & Wilson*, *supra* note 21, at 6.

90. *See, e.g., Byers v. Ill. State Police*, 53 Fed. R. Serv. 3d (West) 740, 754–57 (N.D. Ill. 2002) (shifting the cost of discovery to the requesting party based upon an application of the *Rowe* test).

have rejected the cost-based approach for two reasons: it does not take into account the fact that in some cases the production of electronic media is cheaper than the production of paper-based documents; and it ignores the presumption established by the Federal Rules of Civil Procedure that the responding party pays for the cost of production.<sup>91</sup>

The court in *McPeck v. Ashcroft*<sup>92</sup> adopted the marginal utility approach and held that “[t]he more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense.”<sup>93</sup> The court rejected the two extremes of always keeping the cost with the responding party and always shifting the cost to the requesting party. It felt that making the responding party pay all the costs creates a disincentive for the requesting party to limit the scope of its request,<sup>94</sup> whereas always shifting the costs to the requesting party means that at times the requesting party will have to pay to search computer records for relevant information when it would not be required to pay for the same search of a paper depository.<sup>95</sup> Thus, under the marginal utility test, a court can order a test run, or limited search of backup tapes, to gauge the likelihood that the backup tapes contain relevant information and allocate the costs of e-discovery accordingly.<sup>96</sup>

The Southern District of New York in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*<sup>97</sup> likewise felt that a bright-line rule favoring either extreme had considerable shortcomings but favored a

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91. See *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 601 (E.D.Wis. 2004); *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 320 (S.D.N.Y. 2003).

92. 202 F.R.D. 31 (D.D.C. 2001).

93. *Id.* at 34.

94. *Id.* at 33–34. The court explained:

The one judicial rationale that has emerged is that producing backup tapes is a cost of doing business in the computer age. But, that assumes an alternative. It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens? Furthermore, making the producing party pay for all costs of restoration as a cost of its “choice” to use computers creates a disincentive for the requesting party to demand anything less than all of the tapes. American lawyers engaged in discovery have never been accused of asking for too little. . . . They hardly need any more encouragement to demand as much as they can from their opponent.

*Id.*

95. *Id.* The court also objected to the cost-based approach because it is not well suited to application when a government agency is involved.

96. See *Williger & Wilson*, *supra* note 21, at 7.

97. 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

more detailed factor test to *McPeck*'s limited approach.<sup>98</sup> The court adopted a balancing approach that takes into consideration eight factors:

(1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data; (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.<sup>99</sup>

Each factor is to be weighed to determine whether shifting the cost to the requesting party would be appropriate. If the majority of the factors favor cost shifting, then all or a portion of the costs of e-discovery should be shifted to the requesting party.<sup>100</sup> The *Rowe* test became the "gold standard for courts resolving electronic discovery disputes,"<sup>101</sup> with five courts following the *Rowe* test or some slight variation therein.<sup>102</sup>

In *Zubulake v. UBS Warburg LLC*,<sup>103</sup> the court found fault with the *Rowe* test for several reasons: it omits two of the factors outlined in Rule 26(b)(2)(iii) to be considered when evaluating a motion for a protective order;<sup>104</sup> its fourth factor (the purposes for retaining the data) is nonessential because it has no direct impact on the accessibility of electronic information; it gives equal weight to all of the factors when certain factors should predominate; and it favors cost-shifting, which is contrary to the presumption that the

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

99. *Id.* at 429.

100. *See id.*

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

102. *See Wiginton v. CB Richard Ellis, Inc.*, No. 02-CV-C6832, 2004 U.S. Dist. LEXIS 15722, at \*13-15 (N.D. Ill. Aug. 9, 2004); *Computer Assocs. Int'l, Inc. v. Quest Software, Inc.*, 56 Fed. R. Serv. 3d (West) 401, 402 (N.D. Ill. 2003); *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373-M1V, 2003 U.S. Dist. LEXIS 8587, at \*9-11 (W.D. Tenn. May 13, 2003); *Byers v. Ill. State Police*, 53 Fed. R. Serv. 3d (West) 740, 754 (N.D. Ill. 2002); *Gambale v. Deutsche Bank AG*, No. 02 Civ. 4791 (HB) (DFE), 2002 U.S. Dist. LEXIS 2293, at \*2 (S.D.N.Y. Nov. 19, 2002); *In re Bristol-Myers Squibb Sec. Litig.*, 205 F.R.D. 437, 442-43 (D.N.J. 2002); *In re Livent, Inc. Noteholders Sec. Litig.*, No. 98 Civ. 7161 (VM) (DFE), 2002 U.S. Dist. LEXIS 26446, at \*9-10 (S.D.N.Y. Dec. 31, 2002); *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, 52 Fed. R. Serv. 3d (West) 168, 172-74 (E.D. La. 2002).

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

104. The omitted factors are: (1) the amount in controversy and (2) the importance of the issues at stake in the litigation. FED. R. CIV. P. 26(b)(2)(iii).



responding party should bear the burden of discovery.<sup>105</sup> The court developed a new test based loosely on the *Rowe* test:

(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 of 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.<sup>106</sup>

Unlike the cost-benefit analysis, the marginal utility approach, and the *Rowe* test, the *Zubulake* factors bring the cost-shifting analysis closer in line with the limitations of Rule 26(b)(2)(i), (ii), and (iii). According to *Zubulake*, cost-shifting should not be considered in every e-discovery case, but only in cases where the court finds the cost of production to be an undue burden or expense.<sup>107</sup> Whether the production is an undue burden or expense depends on the accessibility of the data.<sup>108</sup> *Zubulake* recognizes five categories of data: (1) active, online data, such as active hard drives; (2) near-line data, referring to a robotic library that houses removable media; (3) offline storage and archives, which are removable disks and tapes; (4) backup tapes, which store compressed data; and (5) erased, fragmented, or damaged data.<sup>109</sup> If the data is on backup tapes or is erased, fragmented, or damaged, then the court should employ the *Zubulake* factors to determine if all or part of the cost should be shifted to the requesting party.<sup>110</sup> While it is too soon to tell whether *Zubulake* has replaced *Rowe* as the “gold standard,” a majority of the courts addressing cost shifting since *Zubulake* was decided have used its factors to make the determination.<sup>111</sup>

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105. See *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 602 (E.D. Wis. 2004); *Zubulake*, 217 F.R.D. at 320–21.

106. *Zubulake*, 217 F.R.D. at 322.

107. See *id.* at 318.

108. *Id.*

109. *Id.* at 318–20.

110. *Id.* at 324.

111. See *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 602–03 (E.D. Wis. 2004); *Multitechnology Servs., L.P. v. Verizon Southwest*, No. 4:02-CV-702-Y, 2004 U.S. Dist. LEXIS 12957, at \*5 (N.D. Tex. July 12, 2004); *Xpedior Creditor Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp.2d 459, 465–67 (S.D.N.Y. 2003). But see *Wiginton v. CB Richard Ellis, Inc.*, No. 02-C6832, 2004 U.S. Dist. LEXIS 15722, at \*13 (N.D. Ill. Aug. 9, 2004) (modifying the *Zubulake* factors by adding a factor considering the

In light of Rule 34's language that electronic data compilations are discoverable, all of the case law approaches treat electronic data that is not accessible in the course of business as discoverable.<sup>112</sup> However, it is evident from the opinions that the courts recognize the unique costs and burdens associated with e-discovery. Courts are routinely exercising one of the only options currently available to alleviate that burden by shifting and sharing the costs of e-discovery.

Some states and legal institutions have advocated alternative solutions to the approaches taken by the courts. While these alternative approaches were formed based upon the current version of the Federal Rules of Civil Procedure, it is helpful to examine them to understand what options were available to the Committee in drafting the proposed amendment.

### III. EMERGING TRENDS AND NEW PRACTICES UNDER THE CURRENT RULES

Dissatisfied with the current trend of the case law, and in the absence of changes to the Federal Rules of Civil Procedure, some states and local districts have adopted local rules imposing limitations on e-discovery. Texas, Mississippi, and California have recognized the need to differentiate between the discoverability of electronic data accessible in the course of business from data that is not accessible in the course of business.<sup>113</sup>

Texas Rule of Civil Procedure 196.4 states that a responding party has the duty to produce all responsive electronic data that "is reasonably available to the responding party in its ordinary course of business."<sup>114</sup> If the responding party is not able to retrieve the requested information using "reasonable efforts," then it can object to complying with the rules.<sup>115</sup> A court can order the responding party to comply with the request, but if a court so orders, then "the

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importance of the requested discovery to resolve the issues of the litigation).

112. See *supra* note 16 and accompanying text.

113. See TEX. R. CIV. P. 196.4 (2004); MISS. RULE CIV. P. 26(b)(5) (2004); CAL. CIV. PROC. CODE § 2017(e) (2004). Some district courts have also promulgated rules related to e-discovery. See U.S. DIST. CT. ARK. L.R. 26.1(4) (2004); U.S. DIST. CT. N.J. L.CIV.R. 26.1(d) (2004); U.S. DIST. CT. WYO. CIV. R. 26.1(d) (2004); Electronic Discovery Guidelines for the Kansas District Courts, at <http://www.ksd.uscourts.gov/attorney/electronicdiscoveryguidelines.pdf> (last visited Apr. 3, 2005) (on file with the North Carolina Law Review); Default Standard for Discovery of Electronic Documents ("E-Discovery") for the Delaware District Courts, at <http://www.ded.uscourts.gov/Announce/HotPage21.htm> (last visited Jan. 12, 2005) (on file with the North Carolina Law Review).

114. TEX. R. CIV. P. 196.4 (2004).

115. *Id.*

court *must* also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”<sup>116</sup>

In sum, Texas’s rule creates two bright-line rules. First, it distinguishes between electronic data that is available in the ordinary course of business (discoverable) and that which is not reasonably available (discoverable only pursuant to a court order). Second, it mandates that the requesting party pay for the production of unavailable electronic data.

Mississippi’s rule is identical to Texas’s with the exception of one key word. Instead of mandating that a court must order the requesting party to pay the reasonable expense of retrieving and producing unavailable electronic data, Mississippi Rule of Civil Procedure 26(b)(5) states that “the court *may* also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.”<sup>117</sup> Thus, in contrast to Texas, Mississippi’s variation allows for court discretion in assigning the costs of electronic discovery.

California only allows discovery to be conducted in electronic media upon the express finding of the court that the orders meet all of the following criteria:

(A) They promote cost-effective and efficient discovery or motions relating thereto. (B) They do not impose or require undue expenditures of time or money. (C) They do not create an undue economic burden or hardship on any person. (D) They promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to the litigants. (E) They do not require parties or counsel to purchase exceptional or unnecessary services, hardware, or software.<sup>118</sup>

If an e-discovery request does not meet the requirements listed, then the request shall be denied. This approach is in contrast to Texas and Mississippi, both because the restrictions are not limited to inaccessible data, and because it does not provide for shifting the costs.

Both the Sedona Conference and the American Bar Association have published e-discovery guidelines that address the discoverability

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116. *Id.* (emphasis added).

117. MISS. R. CIV. P. 26(b)(5) (emphasis added).

118. CAL. CIV. PROC. CODE § 2017(e)(2) (2004).

of electronic data. The Sedona Principles, developed by a working group of the Sedona Conference,<sup>119</sup> are fourteen guidelines that address the unique challenges that e-discovery poses.<sup>120</sup> They are intended to complement the Federal Rules of Civil Procedure.<sup>121</sup> Of particular interest are Principles 8 and 9. Principle 8 states:

The primary source of electronic data and documents for production should be active data and information purposefully stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.<sup>122</sup>

Principle 9 states, “[A]bsent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.”<sup>123</sup> The Sedona Principles distinguish between the discoverability of backup tapes and deleted electronic data. According to the Sedona Principles, information stored on backup tapes is discoverable, subject to the considerations of Rule 26(b)(2)(iii), but deleted data is not discoverable “[a]bsent a showing of special need and relevance . . . .”<sup>124</sup>

The American Bar Association first published civil discovery standards in 1999 and revised them in 2004.<sup>125</sup> Standard 29(b)(iii) formerly stated “[t]he discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information,” and went further to say that the responding party generally should not have to incur any undue burden or expense in producing the electronic information.<sup>126</sup> In place of this language, the amended Standard 29(b) lists sixteen

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119. See [http://www.thesedonaconference.org/aboutus\\_html](http://www.thesedonaconference.org/aboutus_html) for information about the Sedona Conference (last visited Apr. 3, 2005) (on file with the North Carolina Law Review).

120. See THE SEDONA PRINCIPLES, *supra* note 2, at i.

121. See *id.* at 1.

122. *Id.* at i.

123. *Id.*

124. *Id.*

125. Amendments to Civil Discovery Standards, at <http://www.abanet.org/litigation/documents/hod/ABA%20Final%20Revised%202004%20Amendments%20Civil%20Discovery%20Standards.doc> (August 2004) (on file with the North Carolina Law Review).

126. *Id.* at 7.

factors that the court should consider when ruling on a motion to compel or protect against e-discovery, or when allocating the costs of e-discovery.<sup>127</sup> Included in these factors are many of the same principles evident in the *Rowe* test and the *Zubulake* factors.<sup>128</sup>

An examination of the state rules and recommendations of the Sedona Conference and the ABA do not establish a common trend, as each attempts to resolve the problems associated with e-discovery in a different manner. Texas and Mississippi distinguish between the discoverability of data that is or is not accessible in the ordinary course of business, making the discoverability of the latter contingent upon the payment of the expense of production by the requesting party. The Sedona Conference also distinguishes between types of data, recommending that backup tapes be discoverable pursuant to the limitations of Rule 26(b)(2)(iii) and that deleted data be discoverable upon a showing of special need and relevance. In contrast, California's Rule and the ABA Standards apply to all e-discovery, whether the data is accessible or not. California conditions discoverability on a consideration of the economic burden and related factors, while the ABA adopts and expands the existing case law factors test from *Zubulake* and *Rowe*. However, the proliferation of rules and suggestions that differ from the approach taken by the current Rules of Civil Procedure and the case law interpreting them indicates that the current Rules do not supply a satisfactory remedy to e-discovery issues. This implication underscores the need for the amendment to Federal Rule of Civil Procedure 26(b)(2) to change the way the courts have handled e-discovery.

Having discussed the problem of the high cost of production associated with e-discovery, the current approach to e-discovery under the existing Federal Rules of Civil Procedure and case law, and the new trends emerging in the production of electronic data, this Comment now addresses the proposed amendment to the Rule 26(b)(2).

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127. *Id.* at 5–7.

128. *See id.* Standard 29(b)(iii) factors include considerations of the burden and expense of discovery, the availability of the information from alternate sources, the scope of the discovery request, the extent to which production would affect the normal operations of the responding party, whether the requesting party has offered to pay discovery expenses, the relative ability of the party to control discovery costs, and whether the responding party stores electronic data in a format designed to make discovery impracticable or needlessly costly or burdensome.

#### IV. EXAMINING THE PROPOSED AMENDMENT TO FEDERAL RULE OF CIVIL PROCEDURE 26(B)(2)

The proposed amendment to Rule 26(b)(2) purports to make it more difficult for a party to request discovery of data that the Rule terms “not reasonably accessible.” The benefits of such a rule are evident. As e-discovery becomes increasingly prevalent, a rule precluding the discovery of electronic data that is “not reasonably accessible” would help keep discovery costs from building to a point where litigation is no longer a feasible option for many parties. However, the way that the Civil Rules Advisory Committee defines the key term “good cause” in Rule 26(b)(2) creates an exception that effectively undermines the purpose of the Rule.

The Civil Rules Advisory Committee proposes the following language be added to existing Rule 26(b)(2):

A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.<sup>129</sup>

The new language contains two key terms that require further explanation and definition: “not reasonably accessible” and “good cause.” The Committee Note explains that electronically stored information that can only be located and retrieved with substantial effort and expense will ordinarily not be considered reasonably accessible.<sup>130</sup> The Note lists as examples information stored only for disaster-recovery purposes, “legacy” data retained in obsolete systems, and information that was deleted and is only retrievable using expensive forensic techniques.<sup>131</sup> Thus, the Note defines what constitutes data that is not reasonably accessible by the level of cost and burden required to retrieve it. The determination is not based on whether the party routinely accesses the information in the ordinary

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129. Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 11, at 6.

130. *Id.* at 11.

131. *Id.* Legacy data refers to data archives in retired computer systems that require search engines that are no longer available. Legacy data is incompatible with newer computer systems, and must be retrieved from retired models at great expense. MOORE, *supra* note 18, ¶¶ 37A.04[3], 37A.04[5][e].

course of business.<sup>132</sup> Whether the data is accessible in the ordinary course of business will necessarily affect the level of the cost and burden required to retrieve it. But the Note focuses on the cost and burden of retrieving electronic data, and not its categorization as data not reasonably accessible in the ordinary course of business, as the basis for the definition of data that is not reasonably accessible.

The Committee's definition of information not reasonably accessible is designed to be more flexible and forward-looking than the old definition if data not routinely accessed in the ordinary course of business. It recognizes that the determination of whether data is reasonably accessible depends on the particular circumstances, and that the definition of what is reasonably accessible may change as technology develops.<sup>133</sup> For practical purposes, data that is not reasonably accessible because of the cost associated with retrieving it and data that is not accessed in the course of business will presently encompass the same types of data. But the underlying difference in the definitions will become apparent as technology develops. It is probable that in the near future data that is not accessed in the ordinary course of business will be relatively cheap to retrieve using new technology. Where this is the case, the rationale for protecting data not accessed in the ordinary course of business disappears. Thus, the Committee's definition is an improvement over the former case law definition of what constitutes non-accessible data because it better reflects the purpose of the delineation.

Under the proposed amendment to Rule 26(b)(2), data that is identified as reasonably accessible (data that can be accessed without expending substantial effort or incurring substantial expense) is discoverable, but it is still possible that the limitations listed in the current Rule 26(b)(2)(i), (ii), and (iii) may apply.<sup>134</sup> So, under the new formulation of Rule 26(b)(2), a court can even now issue a Rule 26(c) protective order for reasonably accessible data if the court determines that the limitations listed in Rule 26(b)(2)(i), (ii), and (iii) apply to the discovery request.<sup>135</sup> The proposed amendment to the Rule does not alter the limits of discoverability of accessible data.

However, the proposed amendment does purport to limit the discoverability of electronic data identified as not reasonably

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132. *Id.* at 12. The Committee's definition of data that is not reasonably accessible thus does not include all of the types of data not used for business purposes, namely metadata and systems data.

133. *Id.*

134. *Id.* at 13.

135. *See supra* note 81 and accompanying text.

accessible. When a party demonstrates that the information sought is not reasonably accessible, the court can either deny the discovery request, or the court can order the discovery, provided the requesting party shows good cause.<sup>136</sup> The Note describes the good-cause analysis as "balanc[ing] the requesting party's need for the information against the burden on the responding party,"<sup>137</sup> and states further that "[c]ourts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(i), (ii), and (iii) . . . in deciding when and whether the effort involved in obtaining such information is warranted."<sup>138</sup>

This explanation of the good-cause analysis poses a problem. The proposed amendment to the Rule is designed to provide protection against the discovery of electronic data that is not reasonably accessible. A requesting party should only be allowed to compel discovery of this category of data if it demonstrates good cause, which should represent a standard greater than the protections Rule 26(b)(2)(i), (ii), and (iii) currently affords. But the Note accompanying the amended Rule defines the good-cause analysis as tracking the considerations listed in Rule 26(b)(2)(i), (ii), and (iii). If courts interpret this amended Rule as not providing any additional protection against the discovery of electronic data that is not reasonably accessible, then the amendment will have accomplished nothing.

It is important to note that the Committee's explanation of the terms "not reasonably accessible" and "good cause" appears in the Note accompanying the Rule, and the Note does not carry the force of law.<sup>139</sup> However, despite their diminished authority, the Note has had a considerable impact on the courts' interpretation of the Rules. The federal courts cite to the Committee Note when explaining the reasoning for their holdings.<sup>140</sup> The Supreme Court has also cited to

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136. See Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 11, at 11.

137. *Id.*

138. *Id.* at 11-12.

139. STEPHEN C. YAZELL, *FEDERAL RULES OF CIVIL PROCEDURE WITH SELECTED STATUTES AND CASES*—2003 xvi (Aspen Publishers 2003) ("[T]hese notes often serve the same function for the Rules that legislative history does for statutes.").

140. See, e.g., *Shores v. Ark. Valley Envrtl. & Utility Auth.*, No. 77-G-0604-S, 1980 U.S. Dist. LEXIS 10979, at \*7-8 (N.D. Ala. Mar. 28, 1980) (relying on the comments of the Advisory Committee in the Federal Rules of Civil Procedure to determine the circumstances required to maintain a class action and stating, "[i]t is unfortunate that the comments of the Advisory Committee are not printed in the usual printed copies of the rules themselves. There is a paucity of Advisory Committee comment in the printed text of the rules available to this court. . . . The court considers these comments to be entirely



the Committee Note, as it did in *Bankers Trust Company v. Mallis*.<sup>141</sup> In fact, the presumption that the responding party must pay for the cost of production is not written in the Rules themselves.<sup>142</sup> Rather, this belief originates from the Committee Note to the 1970 Amendment to Rule 34, and was subsequently adopted by the federal courts and became case law.<sup>143</sup> The Supreme Court confirmed this presumption in *Oppenheimer Fund, Inc. v. Sanders*,<sup>144</sup> where the Court analogized to the discovery rules in allowing the production of electronically stored information and assigning the burden of the cost of production to the responding party.<sup>145</sup> Further, the federal courts relied on the Committee Note to the 1970 Amendment to Rule 34 to clarify that Rule 34's language providing for the production of "data compilations from which information can be readily . . . translated" encompassed electronic data compilations.<sup>146</sup> The Note accompanying the proposed amendment to Rule 26 is likely, then, to determine the courts' interpretation of the phrases "not reasonably accessible" and "good cause."

While the text of the Note accompanying the proposed amendment to Rule 26 indicates that the Civil Rules Advisory Committee established a good-cause analysis that affords no more protection than the current Rule allows, this conclusion is contradictory with the amending of the rule itself. The very fact that the Committee added the phrase "good cause" indicates that it envisioned a higher standard of protection for data that is not

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dispositive of this contention of defendants.").

141. 435 U.S. 381, 384–85 (1978) (per curiam) (citing the Advisory Committee Notes to the 1963 amendment of Rule 58 to clarify the intention of the Rule's separate document requirement).

142. See Shariati, *supra* note 41, at 409.

143. See *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1136 (S.D. Tex. 1976); Shariati, *supra* note 41, at 409–10, n.77 (citing Federal Rule of Civil Procedure 34 advisory committee's notes, reprinted in WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 188 (revised ed. 2003) (1970 Amendment)).

144. 437 U.S. 340 (1978).

145. *Id.* at 355–56, 358 (stating that the presumption under the discovery rules is "that the responding party must bear the expense of complying with discovery requests," but noting that the district court has the discretion to grant an order protecting the responding party from "undue burden or expense").

146. See FED. R. CIV. P. 34 (2004); FED. R. CIV. P. 34 (2004) advisory committee's notes, reprinted in WEST'S FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 188 (revised ed. 2003) (1970 Amendment); *Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652 (Minn. 2002) ("As the Advisory Committee Notes to Rule 34, Federal Rules of Civil Procedure make clear, discovery of 'documents' 'applies to electronic data compilations from which information can be obtained only with the use of detection devices.'").

reasonably accessible. In *Schlagenhauf v. Holder*,<sup>147</sup> the Supreme Court addressed the use of the phrase “good cause” in a different context and recognized that adding “good cause” to the Federal Rules of Civil Procedure indicates that a higher standard must be employed, as otherwise the requirement of good cause would be meaningless.<sup>148</sup> Yet, the Committee Note directs courts conducting a good-cause analysis to the case law established in *Zubulake v. UBS Warburg LLC*,<sup>149</sup> *Rowe Entertainment, Inc. v. William Morris Agency*,<sup>150</sup> and *McPeck v. Ashcroft*<sup>151</sup> as examples of how to properly apply a good-cause analysis.<sup>152</sup> While those cases dealt with the discovery of electronic data that would be considered “not reasonably accessible” under the new formulation of the Rule, the courts used the framework of Rule 26(b)(2)(i), (ii), and (iii) to guide their decisions and did not apply a good-cause standard.

There are at least two main reasons it is important to distinguish between the discoverability of accessible data and not reasonably accessible data. First, as time passes, the amount of data that is not reasonably accessible (in particular, backup data) will continue to accumulate, raising the potential cost and burden of e-discovery. This issue poses a particular problem to businesses, almost all of whom maintain disaster backup tapes of their records.<sup>153</sup>

Second, as the amount of electronic data grows, it will become increasingly clear that the current remedy of shifting and sharing the costs of discovery is not a cure at all, but merely a band-aid. The costs will continue to rise and, whether they are borne by the responding party, the requesting party, or are shared between the two, they will reach a prohibitive level and discourage litigation. It is happening now, as under the current interpretation of Rule 34, all

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147. 379 U.S. 104 (1964).

148. *Id.* at 118 (“The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26(b). Thus, by adding the words ‘... good cause ...,’ the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules.”) (quoting *Guilford Nat’l Bank v. So. Ry. Co.*, 297 F.2d 921, 924 (4th Cir. 1962)).

149. 217 F.R.D. 309 (S.D.N.Y. 2003).

150. 205 F.R.D. 421 (S.D.N.Y. 2002).

151. 202 F.R.D. 31 (D.D.C. 2001).

152. Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 11, at 14. The Committee Note cites *Zubulake*, *Rowe* and *McPeck* only as examples, and does not imply that these cases are the only cases on point.

153. One solution to this problem could be for businesses to maintain information retention policies that call for the destruction of backup tapes after a reasonable period of time.

electronic information is equally discoverable. Plaintiffs are forcing defendants to settle by submitting discovery requests so broad that the cost to the defendants of complying is greater than the cost of the settlement.<sup>154</sup>

The need to distinguish between the discoverability of accessible data and not reasonably accessible data is not satisfied by the proposed amendment to Rule 26(b)(2). This Comment proposes two alternative solutions for the Committee's consideration.

#### V. PROPOSALS FOR STRENGTHENING THE GOOD-CAUSE ANALYSIS

The proposed amendment to Rule 26(b)(2) should provide a heightened level of protection to electronic data identified as not reasonably accessible. Under the Committee Note's interpretation of good cause, data that is not reasonably accessible is afforded no greater protection from discovery than is currently available to all forms of discovery under Rule 26(b)(2)(i), (ii) and (iii). As the case law, state rules, and recommendations of the Sedona Conference and the ABA illustrate, there are many ways to achieve such heightened protection. There are two potential solutions that merit consideration by the Committee.

First, the Committee could change the Note's description of the good-cause analysis and distinguish it from the analysis performed for all discovery pursuant to Rule 26(b)(2)(i), (ii), and (iii). The Committee is wrong to equate the good-cause analysis with the existing analysis conducted under Rule 26(b)(2)(i), (ii), and (iii). If the good-cause analysis were stricter than the current restrictions, as the Rule's language implies that it should be, it would provide the necessary protection for data that is not reasonably accessible. The Note should make it clear that the good-cause standard exceeds that of the current limitations, perhaps borrowing the language of the Sedona Conference and requiring a showing of "special need and relevance."<sup>155</sup>

It is not suggested that the Committee should spell out what would constitute good cause. That determination necessarily depends upon the facts and circumstances of each case and is the responsibility of the courts. Other applications of the good-cause standard in the Federal Rules of Civil Procedure have relied on court interpretation

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154. Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 267-68 (2000).

155. See *supra* note 123 and accompanying text.

to develop the meaning of the phrase.<sup>156</sup> But the Committee should use more stringent language to describe the good-cause analysis to signal to the courts that the analysis requires a stronger showing of need than that required for Rule 26(b)(2)(i), (ii), and (iii).

Second, the Committee could adopt a new definition of electronic data that is “not reasonably accessible.” Instead of treating backup data, legacy data, and deleted data the same, the Rule could further distinguish among them. Under this formulation, there would be three categories of electronic data: accessible data, which would be discoverable subject only to the limitations of Rule 26(b)(2)(i), (ii), and (iii); backup and legacy data, which would be discoverable only upon a showing of good cause (with the good-cause analysis being stricter than that of Rule 26(b)(2)(i), (ii), and (iii)); and deleted data, which is never discoverable unless the requesting party can show that the responding party intentionally deleted files to avoid discovery.<sup>157</sup> In balancing the competing considerations of the need of the requesting party to have the information and the burden on the responding party to produce it, it is difficult to advocate any bright-line rule that disallows the discovery of any type of data. This difficulty is likely the reason no authority has advocated protecting all forms of data considered not reasonably accessible from discovery. However, it is possible to afford this protection to deleted data, because it can be argued that deleted electronic data should be treated in the same manner as discarded traditional discovery materials. There is no precedent requiring litigants to go to great lengths and expense to locate and reconstruct paper evidence that was thrown away. Additionally, an examination of the language of Rule 34 shows that it provides for the production of “data compilations from which information can be readily translated.”<sup>158</sup> Deleted data cannot be readily translated—it must be reconstructed using expensive technology.<sup>159</sup> This formulation of the Rule protects

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156. See, e.g., *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789–90 (1st Cir. 1988) (citing the case law definition of Rule 26(c)’s good-cause requirement).

157. This recommendation is similar to the recommendations outlined by the Sedona Conference in Principles 8 and 9. See *supra* Section IV. The distinction between the recommendations of the Sedona Conference and the recommendation in this Comment is the standard required for discovery—the Sedona Conference advocates a Rule 26(b)(2)(iii) standard for backup tapes and a “special need and relevance” standard for deleted data. In contrast, this Comment recommends a Rule 26(b)(2)(iii) standard for accessible data, a “good cause” (special need and relevance) standard for backup tapes, and no discovery of deleted data absent a finding of bad faith on the part of the responding party.

158. FED. R. CIV. P. 34 (2004).

159. New technology may reduce the costs of reconstructing deleted data, but even if it

against discovery abuse. If the requesting party can show the court that the responding party intentionally deleted data to avoid its discovery, then the court could order that discovery be had or impose sanctions on the responding party.<sup>160</sup>

There are several arguments in favor of a bright-line rule either completely prohibiting discovery of a category of electronic data or allowing unqualified discovery of all electronic data. These arguments, which are at odds with this Comment's second proposal, ought to be addressed.

The first argument advocates a bright-line rule that precludes discovery of deleted electronic data. There are two justifications in support of this approach. First, some critics of e-discovery have argued that some electronic data that is not reasonably accessible, in particular deleted data, should never be discoverable under any condition. These critics argue that for traditional paper discovery, the Rules do not require a litigant to search for or restore discarded information, yet the current interpretation of the Rules regarding e-discovery requires just such an effort.<sup>161</sup>

Second, a similar argument contends that deleted files should be treated as discarded, undiscoverable, irrelevant ideas to ensure that the free exchange of ideas is not impeded.<sup>162</sup> The casual and private nature of computer files and e-mail correspondence encourages the expression of ideas and allows the author to delete those ideas that are irrelevant, or just imperfect.<sup>163</sup> To allow discovery of deleted files could curtail the use of e-mail as a vehicle for sharing ideas out of fear that a rejected idea might look like more.<sup>164</sup>

However, an unconditional exclusion of deleted electronic data

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ceases to be cost prohibitive, the other arguments for protecting deleted data are still valid.

160. Rule 37 provides the authority for a court to sanction a party for failure to comply with a discovery order. FED. R. CIV. P. 37.

161. Marron, *supra* note 33, at 897-98 ("[T]he current rules are the equivalent of requiring a litigant to first dig through their garbage for huge amounts of shredded and discarded paper correspondence and then expend considerable resources to repair the letters and documents found.").

162. Hon. James M. Rosenbaum, *In Defense of the DELETE Key*, 3 GREEN BAG 2d 393, 394 (2000) ("The fallacy in the 'truth' of the recovered e-mail or computer file is that it might just have been a bad idea, properly rejected, and consigned to an imperfectly labeled wastebasket. The problem is that on the computer's hard drive, it looks like more.").

163. *Id.*

164. *Id.* ("In some ways, the greater risk in the preservation and discovery of computerized material lies in the knowledge that things will not be expressed, and ideas will not be exchanged, out of a pernicious—but valid—fear that their mere expression will be judged tantamount to the act.").

from the discovery process is not a satisfactory solution. Proponents of this approach neglect to consider the likely result if the Rules were to preclude all discovery of deleted data. A rule excluding discovery of all deleted data would encourage the purposeful deletion, in bad faith, of electronic files a litigant or potential litigant wishes to protect from discovery.

In contrast, other commentators argue in favor of a bright-line rule that states that no electronic data should be protected from discovery, notwithstanding the cost associated with producing it. Advocates of this approach point to three justifications for their view. First, proponents of this approach argue that producing electronic data is a foreseeable cost of business. This argument was employed by an Illinois District Court in *In re Brand Name Prescription Drugs*.<sup>165</sup> It was also soundly refuted by the D.C. District Court in *McPeck v. Ashcroft*,<sup>166</sup> which noted that the cost of business argument assumes that businesses have an alternative to storing data on backup tapes.<sup>167</sup>

Second, proponents of allowing discovery of all electronic data argue that a rule that provides heightened protection of data that is not reasonably accessible will encourage parties to delete information to avoid its discovery. But this argument does not take into account two considerations. First, litigants are not at liberty to delete anything they wish. Once a party is on notice that litigation may arise, it is under a duty to preserve all information related to the litigation.<sup>168</sup> Failure to preserve information results in sanctions.<sup>169</sup> Further, individuals and especially businesses are often required to keep certain types of information for a period of time established by law.<sup>170</sup> Second, there is nothing in the current Rule that would prevent a party from permanently deleting information before the

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165. See No. 94 C 897, 1995 U.S. Dist. LEXIS 8281, at \*5 (N.D. Ill. June 13, 1995) (“[I]f a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary foreseeable risk.”).

166. 202 F.R.D. 31 (D.D.C. 2001).

167. See *supra* note 94.

168. See, e.g., *Banco Latino v. Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999) (“A litigant is under a duty to preserve evidence which it knows, or reasonably should know, is relevant in an action.”); MOORE, *supra* note 18, ¶ 37A-33.

169. See, e.g., *Banco Latino*, 53 F. Supp. 2d at 1277 (“Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence.”); MOORE, *supra* note 18, ¶ 37A-36.

170. See, e.g., 40 C.F.R. § 169.2 (2004) (mandating that all producers of pesticides keep records regarding the pesticides for a period of two years).

business is on notice of litigation.<sup>171</sup> One could even argue that the current Rule encourages permanent deletion more so than the amended Rule would, because under the current Rule a party is more likely to have to produce “deleted” data.

Finally, commentators advocate allowing discovery of all electronic data on the simple premise that all potential evidence should be available for disclosure. But allowing this breadth of discovery means accepting a system of discovery that is cost-prohibitive, even though it has a low rate of error.<sup>172</sup>

The cost of retrieving backup data and deleted data has become crippling for all parties. To advocate discovery of all data based on the premise that it is a cost of doing business will preclude the option of litigation for many who cannot afford it. It is better to limit the “cost of doing business” argument to situations where the responding party produces the information for its own defense. That is, the retrieval of data that is not reasonably accessible should only be a foreseeable cost of business when it benefits the business. If the business does not need the information for its defense, it should not necessarily have to pay for its production. In fact, the Committee Note for the proposed amendment to Rule 26(b)(2) makes clear that if the responding party has accessed the requested data, it cannot avoid producing the data by arguing that it incurred substantial expense in accessing it.<sup>173</sup>

This Comment proposes a solution of further delineating the categories of electronic data, which avoids the shortcomings of both of these absolute positions. By imposing a bad faith limitation, the solution protects against purposeful deletion of data to avoid discovery. And limiting the discovery of deleted electronic data to situations where the requesting party can show that the responding party intentionally deleted files to avoid discovery helps ensure that the cost of e-discovery does not rise to such a level as to foreclose the option of litigation.

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171. Software products such as the aptly named Evidence Eliminator™ remove “deleted” data from a computer hard drive permanently. See Evidence Eliminator, at [www.evidence-eliminator.com](http://www.evidence-eliminator.com) (last visited Apr. 3, 2005) (on file with the North Carolina Law Review).

172. Cf. Geoffrey P. Miller, *The Legal-Economic Analysis of Comparative Civil Procedure*, 45 AM. J. COMP. L. 905, 906 (1997) (asserting, from the standpoint of welfare economics, that the ideal discovery model is one at the efficient middle ground between the options of high costs and low error versus low costs and high error).

173. Proposed Amendments to the Federal Rules of Civil Procedure, *supra* note 11, at 13.

## CONCLUSION

The effect of having a good-cause standard that is no more stringent than the existing limitations of Rule 26(b)(2)(i), (ii), and (iii) is to negate the distinction between the discoverability of electronic data that is accessible and that which is not reasonably accessible. Said differently, employing a weak good-cause standard renders useless the amendment to Rule 26(b)(2) limiting the discoverability of not reasonably accessible electronic data. Preserving this distinction between accessible data and not reasonably accessible data is vital if the Committee seeks to reduce the prohibitive costs of conducting e-discovery. As this Comment illustrates, it is necessary to reduce the costs of e-discovery to keep it from restricting access to litigation as a means of resolving disputes.

To ensure that "not reasonably accessible" data is protected from discovery except in situations of special need, the Committee should revise the Note accompanying the proposed amendment to Rule 26(b)(2) to include language that encourages the courts to develop a good-cause standard stricter than the existing restrictions laid out in Rule 26(b)(2)(i), (ii), and (iii). In addition, the Committee ought to consider further delineating electronic data into three categories: that which is accessible and thus discoverable, that which is not reasonably accessible and thus discoverable only upon a showing of good cause, and that which is deleted, which is not discoverable except upon a showing that the responding party intentionally deleted information to avoid discovery. If the Committee were to adopt these suggestions, it would accomplish its goal of protecting electronic data that is not reasonably accessible from discovery while preserving the purpose of the discovery rules to allow for production of evidence relevant to a litigant's claim or defense.

SARAH A. L. PHILLIPS<sup>174</sup>

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174. The author thanks James P. McLoughlin, Jr., of Moore & Van Allen, PLLC for inspiring the topic of this Comment.