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## E-Discovery Today: The Fault Lies Not In Our Rules . . .

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#### I. INTRODUCTION

*Those who are educated about the rules and creative in their use will save themselves, their clients and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that “the fault lies not in our rules, but in themselves.”<sup>1</sup>*

The Advisory Committee on the Federal Rules of Civil Procedure got it right when it recognized electronically stored information as a fundamental component of discovery. Electronic discovery has enhanced parties’

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<sup>1</sup> With apologies to WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

abilities to uncover the facts of the case. It serves a fundamental tenet of American jurisprudence, in that it permits cases to be resolved based on the merits—merits that have become increasingly hard to destroy or cloak. Unlike the paper shredder of days past, destroying evidence today requires a level of technological sophistication that few can master. The truth lives on in electronic format, in a complex, ramified trail that is not easily hidden. As a result, electronic discovery has brought about new levels of accountability in litigation. However, rather than being heralded, electronic discovery is relentlessly criticized, undermined by oft-repeated hyperbole, and rejected as a scourge by many practitioners and clients who refuse to take adequate responsibility for management of their information.

Less than four years after they became effective, the 2006 e-discovery amendments to the Federal Rules are under attack. We are told that our discovery system is “broken” and that electronic discovery is a “nightmare” and a “morass” and “[t]he bigger the case, the more the abuse and the bigger the nightmare.”<sup>2</sup> The Rules are even blamed for things they were never intended to address, like information preservation, which is primarily subject to common law rather than rule-based authority.<sup>3</sup> Based on unscientific surveys taken from the wrong polling sample,<sup>4</sup> we are asked to consider many dramatic and ill-conceived changes to our legal system, despite the fact that the prescription suggested in various permutations—less pretrial discovery—has been tried before and was ultimately and resoundingly rejected. Never before has the old adage been more applicable: those who do not learn from history are doomed to repeat it.

Less pretrial discovery, like the kind that existed before the enactment of the Federal Rules, led to long, meandering trials that clogged the courts, prevented the testing of unmeritorious cases with facts that might lead to settlement, and rewarded “gotcha” tactics over resolving cases on the merits. Yet, today, motivated parties gloss over the lessons of the past and continue to advocate for less pretrial discovery by tirelessly campaigning for limits on electronic discovery. Make no mistake, advocating for limits on electronic discovery is merely code for “less discovery” and, consequentially, concealment of the truth.

To be sure, discovery can be expensive and time consuming, and the fact that well over 90% of all information is now created and stored electronically is a factor in the expense and complexity of discovery in

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<sup>2</sup> AMERICAN COLLEGE OF TRIAL LAWYERS, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, at 2 (Mar. 11, 2009), <http://www.actl.com/AM/TemplateRedirect.cfm?template=/CM/ContentDisplay.cfm&ContentID=4053>.

<sup>3</sup> *Id.* at 12-14.

<sup>4</sup> *See infra* note 46 and accompanying text.

modern litigation. But the critics have it wrong: e-discovery is not the problem. One cannot simply ignore that most records are electronic, and therefore blame that fact for most of the perceived ills in our discovery system. And similarly, one cannot blame the 2006 rule amendments for recognizing that fact, and for addressing, head-on, issues that will not go away. Rather, attorneys and judges—many of whom admittedly face a steep learning curve—have to throw out the paper playbook and adapt to the digital world in which we live. Boxes are out, gigabytes are in. Highlighters are out, tagging is in. Making dozens of paper duplicates is out, linguistically analyzing email communication is in. Paper solutions will not solve electronic problems. We must use technology to review technology. We must eclipse our proto-digital past, and embrace the reality that discovery is just different now.

Are the 2006 Rules amendments perfect? They are not. Must the Rules be modified? Perhaps some tweaking is in order. But we submit that it is far too early, and the current data too flawed, inconsistent, or inconclusive to begin efforts to revise the Rules. In other words, give litigants, lawyers and judges time to catch up. Give the Rules a chance.

A recent survey conducted by the American College of Trial Lawyers (ACTL) and Institute for the Advancement of the American Legal System (IAALS) is one of the more prominent sources of criticism of the 2006 amendments, and the perceived need for reform. The ACTL and the IAALS suggest radical changes to the Federal Rules, including:

- (1) the replacement of “notice pleading” with fact-based pleading;
- (2) limitations on the scope of discovery (i.e., changes in the definition of “relevance”);
- (3) limitations on persons from whom discovery can be sought;
- (4) limitations on the types of discovery (e.g., only document discovery, not interrogatories);
- (5) numerical limitations (e.g., only 20 interrogatories or requests for admissions; only 50 hours of deposition time);
- (6) elimination of depositions of experts where their testimony is strictly limited to the contents of their written report;
- (7) limitations on the time available for discovery;
- (8) cost shifting/co-pay rules;
- (9) financial limitations on discovery; and
- (10) discovery budgets that are approved by the clients and the court.<sup>5</sup>

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<sup>5</sup> See *supra* note 2, at 5-6, 10-11.

Lawyers for Civil Justice, a national organization of corporate counsel and defense lawyers, has advanced a similar agenda.<sup>6</sup>

The proposed cure is far worse than the purported ills of electronic discovery. One cannot overstate the adverse effect that some of these proposals would have on our legal system. Our entire system of jurisprudence is based on adequate disclosure; take that card from the bottom of the pyramid, and we must be prepared to re-build the entire foundation of that system. Would summary judgment motions be a fair way of diverting cases from trial if, due to lack of pretrial discovery, the “real evidence” was only revealed at trial? Or worse, would it be fair if meritorious claims were prevented from reaching trial? Examples abound of how limiting pretrial discovery would impact other fundamental tenets of our legal system.

In many ways, adopting these suggestions would return us to the pre-1938 world that visionary legal scholars such as Roscoe Pound, Judge Charles Clark and Professor Edson Sunderland rejected. Rather than having a system based on an “open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits,”<sup>7</sup> these proposals would effect drastic changes in discovery at the expense of our core principles.

Discovery, including electronic discovery, and the facts it brings to light, is worth protecting. We suggest that there are less drastic alternatives to address the purported concerns of those who histrionically claim discovery is going to break the back of our justice system. These alternatives include:

- Increasing awareness and reliance on the proportionality standard embodied in Rule 26(b)(2)(C);
- Earlier and more active judicial management of cases;
- Increasing the level of cooperation among counsel;
- Taking advantage of Federal Rule of Evidence 502 and other creative solutions to reduce the cost of privilege review;
- Adopting new technology in the management and retrieval of records;

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<sup>6</sup> See *Defense Bar Calls for Changes to the Federal Rules of Civil Procedure: Meaningful Amendments Needed to Improve the Administration of Justice in the Federal Courts*, METROPOLITAN CORP. COUNS. MAG., Aug. 2010, at 24, available at <http://www.lfcj.com/articles.cfm?articleid=4> (last visited Feb. 22, 2011).

<sup>7</sup> See *Am. Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n*, 107 F.R.D. 258, 260 (N.D. Ill. 1985).

- Enhancing the level of attorney and judicial education regarding electronic discovery topics;
- Greater acceptance and use of sanctions to address and curtail discovery abuses.

These measures, discussed herein, working in conjunction with the present Rules, present a realistic opportunity to address the most serious problems without gutting the laudable gains that discovery has provided our legal system.

## II. STATE OF THE UNION

### A. *The Reality of Electronic Discovery and the Data Deluge*

There is no dispute that the discovery process in litigation today involves vast quantities of electronically stored information (“ESI”). Electronic discovery has grown over the past few decades as computers became standard fixtures in the corporate world, but it is largely during the last decade that litigators have seen discovery dominated by ESI, creating a veritable data deluge.<sup>8</sup> As of 2003, 92% of new information was stored on magnetic media (electronically stored), and only 0.01% of new information was on paper.<sup>9</sup> Discoverable information is now found not only on desktop computers and network servers, but on PDAs, smart cards, cell phones, thumb drives and backup tapes, as well as in bookmarked files, temporary files, activity logs, Facebook accounts, and text messages, to name just a few examples.<sup>10</sup> By 2011, the amount of digital data in existence will be ten times the amount in 2006.<sup>11</sup>

The rate of document propagation was limited when information was confined to paper format, but electronically stored information can be disseminated in vast quantities to thousands of people instantly, and the mere act of reading and editing this information creates exponentially more

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<sup>8</sup> See generally SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 39-57 (Thomson Reuters ed. 2009).

<sup>9</sup> Regents of the University of California, *How Much Information?*, UC BERKELEY SCHOOL OF INFORMATION, (2003), <http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/execsum.htm> (last visited Feb. 2, 2011) (7% of new information was stored on film, and 0.002% was stored on optical media); see also Patrick J. Burke & Daniel M. Kummer, *Controlling Discovery Costs*, LEGAL TIMES, Aug. 18, 2003, at 19 (“93 percent of business documents are created electronically; most are never printed”).

<sup>10</sup> James N. Dertouzos, et al., *The Legal and Economic Implications of Electronic Discovery: Options for Future Research*, 1-2 RAND Institute for Civil Justice (2008), available at [http://www.rand.org/pubs/occasional\\_papers/OP183](http://www.rand.org/pubs/occasional_papers/OP183).

<sup>11</sup> *The Diverse and Exploding Digital Universe*, IDC, Mar. 2008, 2, <http://www.emc.com/collatera/analyst-reports/diverse-exploding-digital-universe.pdf>.

data.<sup>12</sup> Today, a lawsuit between corporations may involve “more than one hundred million pages of discovery documents, requiring over twenty terabytes of server storage space.”<sup>13</sup>

The failure to address electronically stored information adequately in discovery today may constitute malpractice, as most businesses create much of their information electronically and do not convert the majority of their business records into paper in the ordinary course of business. Attorneys who do not adapt to this new reality will not survive in the evolving legal market,<sup>14</sup> and their failure to embrace and use the Federal Rules to conduct effective e-discovery not only disadvantages their clients, but also increases the burden on their adversaries and the courts, and most importantly, undermines the fair administration of justice.

*B. The Essential Role of Discovery in American Jurisprudence: Valuing Fair Resolution on the Merits Over Gamesmanship*

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, pretrial discovery was rare in U.S. courts.<sup>15</sup> Preparation for trial involved a series of formal pleadings upon which the opposing party was forced to rely for discovery, putting “a premium on gamesmanship at the expense of concealing critical facts until trial.”<sup>16</sup> The depositions available in the federal courts fell into narrowly defined categories, virtually unchanged since the Judiciary Act of 1789.<sup>17</sup> Lawyers often proceeded to trial with only the smallest amount of information about their opponent’s case.

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<sup>12</sup> *Id.* at 8.

<sup>13</sup> The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 356 (2009) (citing David M. Trubek, *et al.*, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89-90 (1983); Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, at \*21 (2004)).

<sup>14</sup> Ralph Losey, *Plato’s Cave: Why Most Lawyers Love Paper and Hate E-Discovery and What This Means to the Future of Legal Education*, “E-Discovery Team,” <http://e-discoveryteam.com/2009/08/11/platos-cave-why-most-lawyers-love-paper-and-hate-e-discovery-and-what-this-means-to-the-future-of-legal-education/> (last visited Feb. 6, 2011) (“Moreover, once the winds of change become obvious, law firms of the future will be forced to put the paper dinosaurs out to pasture well before their prime. That will be the only way they can survive, the only way to try to regain their standing. Early retirement may become mandatory, especially for trial lawyers, as they are no longer able to understand what is really going on.”).

<sup>15</sup> See 2 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE 2445-55 (1st ed. 1938); P.S. DYER-SMITH, FEDERAL EXAMINATIONS BEFORE TRIAL AND DEPOSITIONS PRACTICE AT HOME AND ABROAD § 58 (1939).

<sup>16</sup> *The Case for Cooperation*, *supra* note 13, at 346; see 6 JAMES WM. MOORE, ET AL., MOORE’S FEDERAL PRACTICE § 26.02 (3d. ed. 2008); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 28 (2007).

<sup>17</sup> In some jurisdictions, discovery before trial by means of deposition was obtained only on written interrogatories submitted with leave and approval of court. 1922 Mass. Acts 328. In others, discovery could be obtained only by means of an oral examination before a special master. See R.S.C., O. XXXI, Rule 1, Annual Practice (1928) 517 (Eng.).

Not only did the outcome of litigation often hinge on the ability of counsel to produce surprise evidence or to counter the tricks of their opponents, but the absence of meaningful discovery also created huge inefficiencies in case preparation. Lawyers in the pre-1938 era faced two equally unpalatable options when preparing for trial, described here by Edson Sunderland, primary author of the discovery provisions of the original Federal Rules:

If a lawyer undertakes so to prepare his case as to meet all the possible items of proof which his adversary may bring out at the trial, or to meet all the assertions and denials which his adversary has spread upon the record, much of his effort will inevitably be misdirected and will result only in futile expense. If, on the other hand, he restricts his preparation to such matters as he thinks his adversary will be likely to rely upon, he will run the risk of being a victim of surprise.<sup>18</sup>

Practitioners of the day also recognized that extremely limited discovery led to limited settlement possibilities, for it was only when the facts were revealed at trial that counsel could determine whether their client should have avoided the risk and expense associated with proceeding to trial by settling earlier. As Sunderland wrote:

[S]o long as each party is ignorant of what his opponent will be able to prove, their negotiations have nothing substantial to rest upon. Many a case would be settled, to the advantage of the parties and to the relief of the court, if the true situation could be disclosed before the trial begins.<sup>19</sup>

As a result, the courts were inundated with trials and severely burdened by the resulting monetary costs.<sup>20</sup>

The adoption of the Federal Rules of Civil Procedure in 1938 marked a fundamental turning point in American jurisprudence transforming litigation from a “cards-close-to-the-vest” approach to an “open-deck” policy.<sup>21</sup> The Federal Rules sought “to facilitate open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits and not shaped by surprise or like tactical

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<sup>18</sup> Edson R. Sunderland, *Scope and Method Of Discovery Before Trial*, 42 YALE L.J. 863, 864 (1933).

<sup>19</sup> *Id.* at 865.

<sup>20</sup> See Charles E. Clark & Harry Shulman, *Jury Trial In Civil Cases—A Study In Judicial Administration*, 43 YALE L.J. 867, 871 (1934) (noting that after a study of the Superior Court of New Haven County, sitting at New Haven, Connecticut—a trial court of general jurisdiction—it handled 38-130 jury trials each year from 1919 to 1930, spending, on average, 44 percent of their year in trial).

<sup>21</sup> *Am. Floral Servs.*, *supra* note 7, at 260.

stratagems.”<sup>22</sup> “[T]he liberalization of discovery beginning in 1938 with the adoption of the Federal Rules was designed to promote the resolution of disputes . . . based on facts underlying the claims and defenses with a minimum of court intervention, rather than on gamesmanship that prevented those facts from coming to light entirely, or at least far too late in the process to serve the fair and efficient administration of justice.”<sup>23</sup>

As expected *and* intended, the expanded scope of discovery under the Federal Rules not only promoted resolution on the merits over ambush advocacy, but also *conserved* judicial resources by facilitating a higher rate of settlements.<sup>24</sup> “[D]iscovery was designed . . . to narrow the issues for trial, to lead to the discovery of evidence, and to foster an exchange of information which may lead to an early settlement.”<sup>25</sup> While the Rules have been amended over time, the role of broad discovery in promoting settlement is no less important today than it was in 1938, “permitting each side to assess the strengths and weaknesses of their cases in advance, frequently making trials unnecessary because of informed settlement.”<sup>26</sup> It is also well-established that discovery encourages settlement from an economic perspective.<sup>27</sup>

Electronic discovery has already proven to be an extremely effective tool for uncovering critical evidence that would otherwise be concealed,

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<sup>22</sup> *Id.*; see also *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1346 (5th Cir. 1978).

<sup>23</sup> *The Case for Cooperation*, *supra* note 13, at 345.

<sup>24</sup> This effect was anticipated. “[T]he right of free and unlimited discovery before trial . . . [will] probably result in the disposition of much litigation without the need of trial.” Martin Conboy, *Depositions, Discovery and Summary Judgments, Address at the American Bar Association Annual Meeting* in 22 A.B.A.J. 881, 884 (1936); see also *Zolla v. Grand Rapids Store Equip. Corp.*, 46 F.2d 319, 319-20 (S.D.N.Y. 1931) (“In view of several illuminating experiences which I have had in cases pending in the English courts, I feel hospitable to every form of interlocutory discovery . . . . The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both the parties to learn the truth far enough ahead of the trial, not only to enable them to prepare for trial, but also to enable them to decide whether or not it may be futile to proceed to trial.”).

<sup>25</sup> *Westhemeco Ltd. v. N.H. Ins. Co.*, 82 F.R.D. 702, 710 (S.D.N.Y. 1979) (citation omitted).

<sup>26</sup> Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 716 (May 1998) (citing Edson R. Sunderland, *Improving the Administration of Civil Justice*, in 167 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 60-83 (1933); GEORGE RAGLAND, JR., *DISCOVERY BEFORE TRIAL* 17-18, 334 (1932)); see also *The Sedona Conference Cooperation Proclamation*, 10 SEDONA CONF. J. 331, 332 (2009); *The Case for Cooperation*, *supra* note 13, at 345; Bergstrom, *Inc. v. Glacier Bay, Inc.*, No. 08-50078, 2010 WL 257253, at \*2 (N.D. Ill. Jan. 22, 2010) (“There is a strong public policy in favor of settlement. Frank discussion and exchange of information is required to facilitate settlement.”).

<sup>27</sup> “A full exchange of the information . . . enabl[es] each party to form a more accurate, and generally therefore a more convergent, estimate of the likely [case] outcome.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 571 (6th ed. 2003); see also ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 203 (2003) (characterizing discovery similarly).

thus playing a vital role in the search for truth (and, not coincidentally, often inducing settlements as well).

Many significant cases today are won or lost by email, text messages, and instant messages. These kind of informal, quick communications are a gold mine of useful information. They often reveal what people were really thinking and doing, and contradict what they later say they were thinking and doing.<sup>28</sup>

E-mail, written in the seeming isolation of one's office, continues to contain a shocking level of candor. To recount just a few examples:

- In a case against UBS, the defendant's own emails revealed that UBS employees denigrated the investment-grade securities (sold to the plaintiff) as "crap" and "vomit."<sup>29</sup>
- In a Massachusetts case concerning the dangers of the anti-obesity drug combination Phen-Fen, the court admitted into evidence an email from a corporate executive asking, "can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem?"<sup>30</sup>
- Credit Suisse First Boston (CSFB) investment banker, Frank Quattrone, was convicted of obstructing investigations of CSFB's stock offerings. One critical piece of evidence was an email that Quattrone forwarded to CSFB employees, after learning of the investigation, instructing them that it was "[t]ime to clean up those files."<sup>31</sup>

As these cases demonstrate, electronic discovery has enhanced parties' ability to uncover the facts of the case. Electronic discovery serves the fundamental tenet of American jurisprudence in that it permits cases to be resolved based on their merits.

E-discovery is not just a fact of life—it is an extraordinarily valuable tool for culling the masses of data held by litigants to find the relevant and

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<sup>28</sup> Ralph Losey, *Email Wins Cases*, E-Discovery Team Blog (Jan. 2, 2010), <http://e-discoveryteam.com/?s=say+stupid+things> (last visited Feb. 6, 2011).

<sup>29</sup> Pursuit Partners, LLC v. UBS AG, 48 Conn. L. Rptr. 557 (Conn. Super. Ct. 2009).

<sup>30</sup> Skibniewski v. Am. Home Prods. Corp., No. 99-0842, 2004 WL 5628157, at \*2 (W.D. Mo. Apr. 1, 2004).

<sup>31</sup> *United States v. Quattrone*, 441 F.3d 153, 165 (2d Cir. 2006); *see also* *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 470 F. Supp. 2d 917, 925-26, *amended by* 470 F. Supp. 2d 931 (S.D. Ind. 2006) (noting "smoking gun" e-mail revealed evidence of judge tampering in Mexico); *Siemens Solar Indus. v. Atl. Richfield Co.*, No. 93-1126, 1994 WL 86368, at \*2 (S.D.N.Y. Mar. 16, 1994) (recounting the plaintiff's discovery of e-mails "reveal[ing] beyond peradventure" that the defendant praised its new product yet knew it "was not commercially viable").

significant needles buried in the haystack. Because ESI is different in nature from paper-based documents, e-discovery does raise new concerns and problems for which solutions need to be found. However, those problems can be solved without rule changes that would impose significant limits on discovery, and thereby, undermine the search for facts. The purpose of this paper is to highlight those solutions—some of which already exist and others of which are within reach—which, in conjunction with the present Rules, address the most serious problems attending e-discovery without sacrificing the quest for just resolution on the merits.

*C. The 2006 Amendments to the Federal Rules Were Designed to Address the Unique Issues Raised by Electronic Discovery*

In 2006, the Federal Rules were amended to address the unique aspects of electronic discovery, and “to assist courts and litigants in balancing the need for electronically stored information with the burdens that accompany obtaining it.”<sup>32</sup> The amended Rules “recognize some fundamental differences between paper-based document discovery and the discovery of electronically stored information, and they continue a trend that has become quite pronounced since the 1980s of expanding the role of judges in actively managing discovery to sharpen its focus, relieve its burdens, and reduce costs on litigants and the judicial system.”<sup>33</sup> However, it was widely recognized that the changes to the Rules were only one part of the solution; practitioners needed to evolve their thinking to keep abreast of the reality of ESI and electronic discovery. As authors George Paul and Jason Baron explain:

For complex cases involving vast amounts of information, the new federal rules mandate a change in the practice of law. Clearly, parties will need to act in a more sophisticated and transparent fashion to disclose electronically stored information in their possession . . . . [A] new way of thinking about the process of discovery is in order.<sup>34</sup>

While the litigation process may always be viewed by some as an opportunity to hide the ball until trial, the Federal Rules, since their

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<sup>32</sup> Jason Fliegel, *Electronic Discovery in Large Organizations*, 15 RICH. J.L. & TECH. 1, 7 (2009).

<sup>33</sup> Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, ¶ 7 (2006), available at <http://www.law.northwestern.edu/journals/njtip/v4/n2/3>; see also COMM. ON CT. ADMIN. & CASE MGMT., JUDICIAL CONFERENCE OF THE U.S., CIVIL LITIGATION MANAGEMENT MANUAL 8 (2001), available at [http://www.fjc.gov/public/home.nsf/autoframe?openform&url\\_1=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/814](http://www.fjc.gov/public/home.nsf/autoframe?openform&url_1=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/814).

<sup>34</sup> George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 10, 21 (2007), available at <http://law.richmond.edu/jolt/v13i3/article10.pdf>.

inception, have been intended to deter that type of conduct and place a premium on a fair resolution on the merits. The 2006 amendments are no different, and we should not give in to obstreperous pleas to return to the days of limited discovery and trial by fire, particularly when the Rules have facilitated the litigation process and practitioners' *real* experiences attest to that. A brief overview of several of the 2006 amendments illustrates the steps the Committee has taken to resolve issues raised by electronic discovery.

Rule 34(a) was amended to confirm that "discovery of electronically stored information stands on equal footing with discovery of paper documents."<sup>35</sup> The broad language of Rule 34(a)(1) allows a party to request any type of information that is stored electronically. The rule establishes that unless requested in another form, the producing party must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. The rule permits testing and sampling as well as inspection and copying of electronically stored information,<sup>36</sup> thus providing a mechanism for producing to limit the cost and burden of production.

Rule 26(f) was amended "to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference,"<sup>37</sup> including a discussion of the forms in which electronically stored information will be produced.<sup>38</sup> Like Rule 26(f), Rule 34(b) addresses the need to discuss the form in which electronically stored information will be produced.<sup>39</sup> Similarly, Rule 45 on subpoenas added several provisions directed at the form in which subpoenaed information must be produced.<sup>40</sup> These rules are directly responsive to the concerns of producing parties regarding the costs of production and the need to plan and budget appropriately.

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<sup>35</sup> FED. R. CIV. P. 34(a) advisory committee's notes.

<sup>36</sup> Rule 45 largely echoes Rule 34, applying its provisions related to electronically stored information to subpoenaed data.

<sup>37</sup> FED. R. CIV. P. 26(f) advisory committee's notes.

<sup>38</sup> FED. R. CIV. P. 26(f)(3)(C).

<sup>39</sup> FED. R. CIV. P. 34(b)(2)(D)-(E).

<sup>40</sup> *See, e.g.*, FED. R. CIV. P. 45(a)(1)(C) ("A subpoena may specify the form or forms in which electronically stored information is to be produced."); FED. R. CIV. P. 45(c)(2)(B) ("A person commanded to produce documents . . . may serve on the party or attorney designated in the subpoena a written objection to . . . producing electronically stored information in the form or forms requested."); FED. R. CIV. P. 45(d)(1)(B) ("*Form for Producing Electronically Stored Information Not Specified*. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."); FED. R. CIV. P. 45(d)(1)(C) ("*Electronically Stored Information Produced in Only One Form*. The person responding need not produce the same electronically stored information in more than one form.").

Rule 26(b)(2), addressing limitations on the frequency and extent of discovery, was amended “to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information.”<sup>41</sup> Accessing certain electronic data may be very efficient and cost-effective, but other electronic data may impose a large burden and cost to access.<sup>42</sup> In recognition of this potentially excessive burden, the Rule specifies that data not “reasonably accessible” need not be produced if doing so creates undue burden or cost.<sup>43</sup> This rule provides support to producing parties who have complained of the need to conduct endless searches and productions notwithstanding the associated costs, and the rule directly advises the requesting party of the potential limitations on anticipated production.

The parties also are directed in the 2006 amendment to Rule 26(f) to discuss issues of privilege or protection of trial preparation materials, which the Advisory Committee noted “often become more acute when discovery of electronically stored information is sought,” due to the volume of electronically stored information, informality of email communications, and issues surrounding metadata.<sup>44</sup> Coupled with the recently-adopted Rule 502 of the Federal Rules of Evidence, the amended Rule 26(f) provides producing parties with additional security and opportunity to plan and manage e-discovery. Critics who continue to dramatize this issue would be well-served to better manage data protected by the attorney-client privilege and/or work product doctrine by properly tagging and/or segregating such data at the time of its creation.

Rule 37(e) provides a limited safe harbor for “the routine alteration and deletion of information that attends ordinary use” of computer systems.<sup>45</sup> The new rule makes clear that sanctions should not be imposed for “failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.”<sup>46</sup> The Advisory Committee Notes provide guidance on the boundaries of “good faith” in this context.

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<sup>41</sup> FED. R. CIV. P. 26(b)(2) advisory committee’s note.

<sup>42</sup> *Id.*

<sup>43</sup> FED. R. CIV. P. 26(b)(2)(B).

<sup>44</sup> FED. R. CIV. P. (26)(f) advisory committee’s note.

<sup>45</sup> FED. R. CIV. P. 37 advisory committee’s note.

<sup>46</sup> FED. R. CIV. P. 37(e).

### III. THE CURRENT FEDERAL RULES ARE WORKING

#### A. *Although The Amended Rules Have Been In Effect for Only Three Years, the Available Evidence Shows the Rules Are Working*

The 2006 amendments are still relatively new, and they have not yet reached their full potential for effectiveness. In their short lifetime, however, the 2006 amendments—and the discovery tools they have spawned—have yielded considerable benefits. According to recent surveys, while there is some dissatisfaction with the current state of discovery and with the cost of e-discovery in particular, by no means is there a majority favoring additional amendments to the Federal Rules. Calls for radical reform are largely based on faulty or misinterpreted data<sup>47</sup> and the level of dissatisfaction among practitioners is often exaggerated.

Although some of the criticisms of today's civil justice system certainly have merit, the picture generally portrayed is incomplete and probably skewed. It is distorted by a lack of definition and empirical data, which generates rhetoric that often reflects ideology or economic self-interest. As a result, reliance on these assertions may well impair the ability of rulemakers and courts to reach

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<sup>47</sup> See, e.g., ACTL/IAALS Report. The survey of the ACTL Fellows that provided the basis for the ACTL/IAALS findings and recommendations was conducted in April-May, 2008, less than eighteen months after the 2006 e-discovery amendments became effective. See TASK FORCE ON DISCOVERY, THE AM. COLL. OF TRIAL LAWYERS & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 2 (2008), available at [http://www.actl.com/AM/Template.cfm?Section=Press\\_Releases&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm](http://www.actl.com/AM/Template.cfm?Section=Press_Releases&CONTENTID=3650&TEMPLATE=/CM/ContentDisplay.cfm). Perhaps even more significant, the survey respondents had an average of thirty-eight years of experience (not exactly the lawyers who serve in the trenches on the e-discovery issues and would be most informed about the effects of the 2006 rule amendments). See *id.* Then, because the respondents were determined to be younger and less experienced than the non-responders, 'certain responses'—presumably those of the older and more experienced respondents—were 'weighted' in the survey, thus casting serious doubt on the reliability of the reported results. See *id.* at app. A, at A-1. Finally, only about 40% of survey participants participated in complex commercial litigation, and fewer than 20% of them litigated primarily in federal courts. *Id.* at 2. In other words, if the ACTL and IAALS wanted to find out about the effectiveness of the 2006 rule amendments, they asked the wrong people for their views. Not surprisingly, when the Federal Judicial Center administered a similar survey to members of the Section of Litigation of the American Bar Association to obtain "a wider range of views than that provided by the ACTL survey," some of the results were radically different. For example, when asked whether the current Federal Rules "are conducive to meeting the three goals stated in Rule 1—to secure the just, speedy, and inexpensive determination of every action and proceeding," only approximately 35% of the ACTL respondents answered "yes," compared to approximately 62% of ABA members. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE 3, 5 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

dispassionate, reasoned conclusions as to what is needed. Moreover, the picture of how our federal civil system is functioning generally has been viewed in recent years through a lens trained on concerns voiced by defendants, with the other side of the litigation equation going largely ignored.<sup>48</sup>

Contrary to the claims of some critics, there is nothing close to a consensus about the need to amend the current Federal Rules, let alone *how* to amend them.

On December 11, 2009, the ABA Section of Litigation published its Member Survey on Civil Practice (the “ABA Survey”), in which approximately 3,300 respondents participated.<sup>49</sup> In May and June 2009, the Federal Judicial Center (“FJC”) conducted a survey (the “FJC Survey”) on discovery issues, including discovery activity related to ESI, case management, litigation costs, and more generally, the Federal Rules of Civil Procedure.<sup>50</sup> The FJC Survey generated responses from nearly 2,600 lawyers about their experiences in recently closed cases in federal court.<sup>51</sup> Both surveys show general recognition that the current Federal Rules are adequate to control the discovery excesses that occur in some cases.

In the ABA Survey, 63% of respondents agreed that the Federal Rules, as written, are “conducive to meeting the goal of reaching a ‘just, speedy, and inexpensive determination of every action,’” and about 61% of respondents said the Rules are adequate as written.<sup>52</sup> In contrast, about 25% said the Rules should be reviewed in their entirety and rewritten to address the needs of today’s litigation.<sup>53</sup> Just over half of respondents believe *minor* amendments are needed.<sup>54</sup>

Among all respondents, 82%, including 61% of plaintiffs’ lawyers, believe that discovery is too expensive.<sup>55</sup> Respondents, especially defense lawyers, agree that e-discovery increases the costs of litigation, contributes disproportionately to the increased cost of discovery, and is overly

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<sup>48</sup> Arthur R. Miller, Pleading and Pretrial Motions—What Would Judge Clark Do?, 28 (Apr. 12, 2009) (unpublished essay written for the Duke Conference), *available at* [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/\\$defaultview/B571D6B4A934E43F852576740057905C/\\$File/Arthur%20Miller,%20Pleading%20and%20Pretrial%20Motions,%20Revised%204.12.10.pdf?OpenElement](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/$defaultview/B571D6B4A934E43F852576740057905C/$File/Arthur%20Miller,%20Pleading%20and%20Pretrial%20Motions,%20Revised%204.12.10.pdf?OpenElement).

<sup>49</sup> ABA SECTION OF LITIGATION, MEMBER SURVEY ON CIVIL PRACTICE: FULL REPORT (American Bar Ass’n. 2009), <http://www.abanet.org/litigation/survey/docs/report-aba-report.pdf> [hereinafter “ABA Survey”].

<sup>50</sup> EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY (2009), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf).

<sup>51</sup> *See id.* at 77, 81.

<sup>52</sup> ABA Survey, *supra* note 49, at 7.

<sup>53</sup> *Id.* at 8.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 2.

burdensome.<sup>56</sup> However, “[d]espite claims of discovery abuse and cost, 61% of respondents believe that counsel do not typically request limitations on discovery under available mechanisms.”<sup>57</sup> So, again, the Rules provide certain sought-after protections, but in order to be effective, lawyers must be familiar with their applicability and use them where appropriate.

While the cost of discovery was identified as a problem, amending the Rules was *not* among the possible solutions on which the survey found general agreement. Those solutions included:

- Early case management by judges;
- Collaborative and professional conduct by lawyers;<sup>58</sup>
- Lawyers and judges could more often avail themselves of *existing means* to set limits on discovery that is unduly burdensome or costly; and
- Shorter times to disposition, perhaps by setting a trial date early in the case.

The ABA Survey further found that “[s]olutions that would cut back on e-discovery are likely to be controversial . . . . Respondents, especially plaintiff’s lawyers, agree that e-discovery has enhanced their ability to discover all relevant information.”<sup>59</sup>

In stark contrast to the alarmist rhetoric of some critics regarding exorbitant discovery costs,<sup>60</sup> the majority of attorneys in the FJC Survey responded that the costs of discovery were “just right” given the client’s stake in the litigation.<sup>61</sup> The FJC Survey, which focused on federal litigation—the very landscape in which the Federal Rules apply—found

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The ABA Section of Litigation has developed Guidelines for Conduct, also known as the Civility Standards.

See [http://www.americanbar.org/groups/litigation/policy/conduct\\_guidelines.html](http://www.americanbar.org/groups/litigation/policy/conduct_guidelines.html)

<sup>59</sup> ABASurvey, *supra* note 49, at 7.

<sup>60</sup> The Institute for the Advancement of the American Legal System’s *Electronic Discovery: A View from the Front Lines* reported that “[n]ow, e-discovery has penetrated even ‘midsize’ cases, potentially generating an average of \$3.5 million in litigation costs for a typical lawsuit.” *Electronic Discovery: A View from the Front Lines*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. [hereinafter “IAALS”], 25, available at <http://www.du.edu/legalinstitute/pubs/EDiscovery-FrontLines.pdf>. That figure surfaced again recently in testimony before the House Judiciary Committee. Gregory Katsas, Former Assistant Attorney General, Civil Division, Department of Justice, noted in written testimony about the effects of the federal pleading standard under *Twombly* and *Iqbal*. Federal Pleading Standards Under *Twombly* and *Iqbal* Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. (2009) (statement of Gregory G. Katsas, Partner Jones Day, Former Assistant Attorney General, Civil Division, Department of Justice), available at <http://judiciary.house.gov/hearings/pdf/Katsas091027.pdf>.

<sup>61</sup> FJC Survey at 28.

that the median cost, *including attorneys' fees*, was \$15,000 for plaintiffs and \$20,000 for defendants.<sup>62</sup> In the 5% of the cases where reported costs exceeded \$300,000, the amount in controversy in the litigation was \$5 million or higher.<sup>63</sup> These numbers reveal that even in the highest value cases, discovery costs still amounted to less than 10% of the damages sought.

The notion that e-discovery activities claim an increasing and disproportionate amount of an attorney's time is also misleading. Regardless of the amount of time consumed by discovery activities, the recent FJC Survey found that approximately 57% of plaintiff attorneys and 66.8% of defendant attorneys reported that discovery and disclosure had yielded "just the right amount" of information.<sup>64</sup>

In fact, much of the vociferous criticism reflects the state of e-discovery in state courts, where the evolution of good e-discovery practices and management lags behind the federal courts and the amended Rules do not govern. For example, fewer than 20% of respondents to the ACTL/IAALS survey litigate primarily in federal court.<sup>65</sup> Thus, any reliance on the ACTL/IAALS survey as somehow dispositive of whether the federal system is working effectively is completely misplaced.<sup>66</sup>

State court caseloads are considerably larger than federal court caseloads.<sup>67</sup> And, although states model their rules of civil procedure on the Federal Rules, there is significant variation that impedes effective and sensible e-discovery.<sup>68</sup> In New York, for example, a recent report noted that "[w]hile the Federal Rules of Civil Procedure . . . were amended in 2006 to address issues associated with ESI, New York law remains uncodified and largely undeveloped. The Legislature has not amended the Civil Practice Law and Rules (CPLR) and courts have issued a patchwork of not-always consistent ESI rulings."<sup>69</sup>

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<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 27.

<sup>65</sup> ACTL/IAALS Interim Report at 2.

<sup>66</sup> See also ACTL/IAALS Interim Report, *supra* note 47.

<sup>67</sup> E.g., Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts*, Social Science Research Network, 25 (June 28, 2006), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=912691](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=912691).

<sup>68</sup> See Conrad J. Jacoby, *E-Discovery Update: A Contrarian Retrospective on E-Discovery in 2007*, LLRX (Dec. 29, 2007), <http://www.llrx.com/columns/fios24.htm>; Fios, *E-Discovery Rules—Interpreting ESI from Federal to State Courts* (Nov. 11, 2008), <http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-article.aspx?id=451>.

<sup>69</sup> JOINT COMM. ON ELECTRONIC DISCOVERY, ASS'N OF THE BAR OF THE CITY OF NEW YORK, EXPLOSION OF ELECTRONIC DISCOVERY IN ALL AREAS OF LITIG. NECESSITATES CHANGES IN CPLR, 2 (2009) (*footnote omitted*), available at <http://www.nycbar.org/pdf/report/uploads/20071732-ExplosionofElectronicDiscovery.pdf>. Even more recently, the New York state courts issued a report and recommendations on how the courts can "manage e-discovery in a more expert, efficient and cost-effective manner within the framework of existing law." The report

Many states have no rules governing ESI.<sup>70</sup> Judicial education poses a challenge as well; while the federal courts have created uniform programs for judges and offer direct education, the states continue to struggle in providing judges with the tools to ensure uniform electronic discovery practices.<sup>71</sup> These and other e-discovery problems in state courts have led some to decry the state of discovery in general without recognizing the great strides made under the uniform system of the Federal Rules.

Meanwhile, the “evidence” used to support calls for further amendment of the Federal Rules is exceedingly thin, and sometimes non-existent or outright misleading. For example, a recent article by J. Douglas Richards and John Vail in *Trial* magazine<sup>72</sup> observed that the radical changes proposed by the ACTL/IAALS Report, which include replacing notice pleading with fact-based pleading and sharply limiting discovery beyond a narrow set of “initial disclosures,” are not supported in the least by the survey from which the proposals supposedly arose. “In fact, in basic ways the general rule changes that the report proposes run contrary to the responses.”<sup>73</sup> After noting that the lack of objectivity in the ACTL/IAALS survey and report was telegraphed in the survey’s statement of purpose—to “identify and quantify the causes of delay and cost that afflict our civil justice system”<sup>74</sup>—Richards and Vail concluded that “[t]he survey provides no genuine support for any of the revisions to the rules that the final report suggests. On the contrary, the report’s distortion of the results underscores the absence of any compelling reason for the broad revisions to the federal rules that that IAALS and ACTL advocate.”<sup>75</sup> Paul Saunders, Chairperson of the ACTL Task Force that issued the report, has acknowledged that some

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recommends *not* that e-discovery be limited, and *not* that access to the courts be curtailed by heightened pleading requirements, but advocates, *inter alia*, increased transparency and information exchange among the parties, increased judicial involvement in e-discovery early in the case, and improved education and training for practitioners, i.e., measures similar to those endorsed by this paper for the improvement of e-discovery in the federal courts. THE NEW YORK STATE UNIFIED COURT SYS., ELECTRONIC DISCOVERY IN THE NEW YORK STATE COURTS 2 (2010), available at <http://www.courts.state.ny.us/courts/comdiv/PDFs/E-DiscoveryReport.pdf>.

<sup>70</sup> See Jacoby, *E-Discovery Update*, *supra* note 68. As of September 2009, 25 states have adopted electronic discovery procedural rules that draw on the 2006 amendments, and many of the remaining states are considering the issue. Webcast, 25 and Counting; State E-Discovery Rules Taking Shape (Fios, Inc. 2009), <http://www.fiosinc.com/e-discovery-knowledge-center/electronic-discovery-webcast.aspx?id=646>.

<sup>71</sup> See Jacoby, *E-Discovery Update*, *supra* note 68.

<sup>72</sup> J. Douglas Richards & John Vail, *Reflections: A Misguided Mission to Revamp the Rules*, *TRIAL*, Nov. 2009, at 52.

<sup>73</sup> *Id.* at 54. Commenting on the validity of the ACTL/IAALS Report, Professor Arthur Miller observed: “Asking for impressions about whether litigation is ‘too expensive’ or ‘takes too long’ is of little value as few, if any, attorneys would say it is ‘inexpensive’ or ‘not long enough.’” See Miller, *Pleading and Pretrial Motions*, *supra* note 48, at n.157.

<sup>74</sup> *Id.* at 52.

<sup>75</sup> *Id.* at 54.

of the changes advocated in the report are not supported by the survey results. In a recent interview, Saunders said:

[T]he Task Force did not see itself as being limited in our proposals to the results of the survey; we wanted to bring our own experience and our own judgment and ideas to the table *even if they conflicted with some of the results of the survey*. And that happened in a few cases.<sup>76</sup>

Professor Paul D. Carrington, who served as Reporter to the Advisory Committee on Civil Rules from 1985 to 1992, agrees that “the case has not been made for radical departure from the scheme established in 1938.”<sup>77</sup> Further, he writes, “the proposals [of the IAALS and ACTL], like the decisions of the [Supreme] Court in *Twombly* and *Iqbal* are derived not from observable reality but from a political ideology that is strongly favored by the Chamber of Commerce and is not in the longer term national interest.”<sup>78</sup>

This is not the first time that parties calling for discovery reform have found “support” in misinterpreted or inaccurate data. In the early 1980s, the political winds blew strongly in favor of “deregulation” of business. One form of deregulation sought by business interests was the rollback of legal procedural reforms enabling private citizens to more effectively pursue claims against major corporations.

It was said that the costs of litigation were disabling American businesses from competing in the global economy . . . . Complaints were heard about the delay and the excessive number of cases being filed. The latter protest was substantially dispelled by the available data on the growth in the civil dockets of the federal courts . . . . As Judge Jack Weinstein assessed the stated concerns of Business about case overload, they were a “weapon of perception, not substance.”<sup>79</sup>

In the early 1990s, the Council on Competitiveness, led by Vice President Dan Quayle, recommended various changes to the civil justice system to counteract the supposedly rising costs and frequency of litigation at the time. It was later shown that the “litigation explosion” did not, in fact, exist

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<sup>76</sup> Albert W. Driver, *Reforming the Rules of Civil Procedure: The ACTL Final Report*, THE METROPOLITAN CORPORATE COUNSEL, (N.J.) Mar. 2, 2010 (emphasis added) available at <http://www.metrocorpocounsel.com/current.php?artType=view&EntryNo=10725>.

<sup>77</sup> Paul D. Carrington, Politics and Civil Procedure Rulemaking 58 (Mar. 17, 2010) (unpublished essay written for the Duke Conference).

<sup>78</sup> Paul D. Carrington, Politics and Civil Procedure Rulemaking 55 (Jan. 25, 2010) (unpublished draft essay written for the Duke Conference).

<sup>79</sup> Carrington, *supra* note 77, at 8.

and the President of the ABA criticized the Vice President for “using discredited statistics to advance ill-founded views.”<sup>80</sup>

Learning from this history, we must be extremely cautious in responding to urgent calls for radical changes in the Federal Rules; the more urgent the calls and the more radical the changes, the more caution is due. There is no evidence at this time that significant amendments are needed, nor is there evidence of a consensus in favor of such amendments. Rather, the existing data suggests that the 2006 amendments are having their intended effects as litigants, lawyers, and judges learn how to use them effectively.

*B. The Current Rules Protect Against Overbroad or Overly Burdensome E-Discovery: The Importance of Proportionality*

Much of the current push to revise the Federal Rules is based on the faulty premise that the existing Rules permit virtually limitless discovery, unconstrained by the facts of the matter being litigated or the ability of the parties to bear the costs.<sup>81</sup> The reality is that the current Rules give the parties a framework in which to conduct controlled but effective e-discovery, and they give the courts explicit authority and direction to rein in e-discovery abuses when the parties are unable or unwilling to do so on their own. As Douglas Rogers explains, “Parties to litigation should not be hesitant to fight for reasonable restrictions on preservation and production. The Federal Rules of Civil Procedure allow for—and the intent behind them indeed call for—more restraints on discovery than many courts and parties recognize.”<sup>82</sup>

Such was not always the case; for more than four decades after the adoption of the Federal Rules in 1938, the scope of discovery only broadened despite unprecedented increases in volume resulting from technological advances, such as the office copier, and the growth of document-intensive litigation, in areas such as securities, products liability and employment discrimination.<sup>83</sup> However, beginning in the 1970s, there was rising criticism that discovery was “out of control,” that the process had become too expensive and burdensome. It has been observed that:

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<sup>80</sup> *Id.* at 29; see also Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 80-81, 87 n.42 (1993).

<sup>81</sup> See, e.g., Driver, *supra* note 76, at 6 (“current discovery rules have enabled . . . claimants to engage in extensive and often limitless discovery.”).

<sup>82</sup> Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, 81 (2008).

<sup>83</sup> Richard L. Marcus, *Introduction to SHIRA A. SCHEINDLIN & DANIEL J. CAPRA, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE 1, 2-3* (Thomson Reuters 2009).

[T]his clamor from the 1970s to the 1990s ... resembled much of the current clamor about electronic discovery, particularly in relation to paper discovery under Rule 34. Thus, lawyers that frequently had to respond to discovery requests (often representing defendants) asserted that their opponents were abusing discovery for tactical purposes. They said that dragnet discovery requests produced huge response costs but little or no actual evidence of importance; overbroad discovery could become a club to extract nuisance settlements. Lawyers that frequently sought information through discovery (often representing plaintiffs) reported that they had to make broad requests to obtain the information they really needed, and that responding parties often resisted proper discovery unjustifiably and/or resorted to “dump truck” practices, delivering enormous quantities of worthless material through which they had to sift to find the important information.<sup>84</sup>

In response to these grievances, amendments limiting the scope of discovery were adopted in 1980, 1983, 1993, and 2000. Several of these amendments are directly relevant to the handling of e-discovery: Rule 26(f), adopted in 1980, requires the parties to meet and confer early in the case to develop a discovery plan;<sup>85</sup> Rule 26(g), adopted in 1983, directs that an attorney signing a discovery request or response thereby certifies that it is proper under the Rules;<sup>86</sup> Rules 26(e)(1)(A) and 37(c)(1), amended in 1993, require timely supplementation of a discovery response or disclosure found to be incomplete or incorrect and provide for the availability of sanctions for failure to comply.<sup>87</sup>

Of the Federal Rules amendments limiting discovery, none was more important—or more relevant to the current e-discovery debate—than the adoption of the proportionality provisions now contained in Rule 26(b)(2)(C).<sup>88</sup> The former provision in Rule 26(a) stating that there should

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<sup>84</sup> *Id.* at 3-4.

<sup>85</sup> Note that when Fed. R. Civ. P. 26(f) was adopted in 1980, it allowed but did not require parties to meet and confer. The Rule was revised in 1993 to require litigants to meet in person and plan for discovery in all cases not exempted by local rule or special order. FED. R. CIV. P. 26(f) advisory committee’s note to 1993 amendment.

<sup>86</sup> See Marcus, *supra* note 83, at 5 (“Rule 26(g) . . . attracted little attention until the advent of electronic discovery, which heightened attention to the responsibilities of counsel.”); Mancía v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008) (providing a thorough analysis of Rule 26(g) and its application).

<sup>87</sup> Other limits placed on discovery since 1980 include, for example, presumptive limits on the number of interrogatories and the number and duration of depositions. See FED. R. CIV. P. 26(e)(1)(A); FED R. CIV. P. 37(c)(1).

<sup>88</sup> See Rogers, *supra* note 82, at 51 (“The Supreme Court adopted the proportionality rule to enable courts and parties to constrain excessive discovery. In light of the ESI explosion, Rule 26(b)(2)(C), used openly, is perhaps today, an even more important tool to restrain excessive discovery than it was in 1983.”).

be no limitation on the frequency of discovery absent a protective order was deleted, and new provisions were added to promote judicial limitation of discovery to avoid overuse or abuse.<sup>89</sup> Since being added to the Rules in 1983, the proportionality provisions have undergone various amendments designed, in part, to address concerns that the “information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression.”<sup>90</sup> In 2000, Rule 26(b)(1) was amended to explicitly state that all discovery is subject to the proportionality provisions of Rule 26(b)(2)(C).<sup>91</sup> The purpose of this change was to “emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery.”<sup>92</sup>

Current Rule 26(b)(2)(C) provides that that “the court *must* limit the frequency or extent of discovery” if:

1. the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
2. the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
3. the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.<sup>93</sup>

The adoption of these provisions represented a significant retreat from the “high water mark” of broad discovery in the 1970s.<sup>94</sup> The Reporter to the Advisory Committee in 1983 described this change as a “180-degree shift” in the treatment of overbroad discovery.<sup>95</sup>

Rule 26(b)(2)(C) particularizes the factors courts must consider in determining whether to limit discovery to ensure that it is proportional to the needs of the case and the resources of the parties. The proportionality rule mandates that “[j]udicial supervision of discovery . . . seek[s] to minimize its costs and inconvenience and to prevent improper uses of

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<sup>89</sup> FED. R. CIV. P. 26(a)-(b)(1).

<sup>90</sup> FED. R. CIV. P. 26 advisory committee’s note.

<sup>91</sup> FED. R. CIV. P. 26(b)(1), (2)(c).

<sup>92</sup> FED. R. CIV. P. 26 advisory committee’s note.

<sup>93</sup> FED. R. CIV. P. 26(b)(2)(C)(i)-(iii) (emphasis added).

<sup>94</sup> Marcus, *supra* note 83, at 2.

<sup>95</sup> Arthur R. Miller, *The August 1983 Amendments to the Federal Rules of Civil Procedure* 33 (Federal Judicial Center 1984), available at [http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/\\$file/1983amnds.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/1983amnds.pdf/$file/1983amnds.pdf).

discovery requests,” while still allowing parties to obtain the discovery necessary to litigate the case.<sup>96</sup>

Although Rule 26(b)(2)(C) provides that a court may limit discovery *sua sponte*, as a practical matter, parties must generally resolve discovery disputes through the meet and confer process or, if such negotiation is unsuccessful, resort to motion practice. In this regard, the proportionality rule provides litigants with factors to consider in undertaking such negotiations.

Despite concerns about increasingly burdensome discovery, the proportionality rule has been underused.<sup>97</sup> According to the ABA Survey, lawyers do not typically request limitations on discovery under any of the mechanisms currently provided by the Federal Rules.<sup>98</sup> This may indicate that parties are indeed successfully negotiating discovery disputes rather than seeking judicial intervention.

The proportionality rule contained in Rule 26(b)(2)(C) provides courts and litigants a powerful tool to address concerns of unduly burdensome electronic discovery. This tool need not be used solely in the context of discovery disputes that become the subject of motion practice but, rather, can serve counsel as they meet and confer and seek to formulate a fair discovery plan.

### *C. There Has Been A Quantum Leap In The Development Of E-Discovery Law Since The 2006 Amendments*

Groups advocating *now* for more restrictive discovery rules cite a lack of guidance from the courts on the application of existing provisions.<sup>99</sup> However, the current Rules, which only took effect in December 2006, have barely had an opportunity to gel, let alone demonstrate their effectiveness.

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<sup>96</sup> *Metavante Corp. v. Emigrant Sav. Bank*, No. 05-1221, 2008 U.S. Dist. LEXIS 89584, at \*20 (E.D. Wis. Oct. 24, 2008) (quoting *Societe Nationale Industrielle Aerospatiale v. United States D. Ct.*, 482 U.S. 522, 546 (1987)).

<sup>97</sup> FED. R. CIV. P. 26 advisory committee’s notes (“The Committee has been told repeatedly that courts have not implemented these limitations with the vigor that was contemplated.”); see also Ronald J. Hedges, *Case Management and E-Discovery: Perfect Together*, DIGITAL DISCOVERY & E-EVIDENCE, July 1, 2009 at 3 (“Unfortunately, proportionality does not appear to be utilized often enough either by courts or parties.”); Lee Rosenthal, *From Rules of Procedure to How Lawyers Litigate: Twixt the Cup and the Lip*, 87 DENV. U. L. REV. 227, 238 (2010) (“Since 1983, the Federal Rules have provided a wealth of opportunities for judges, on their own or on a party’s motion, to supervise discovery in order to control toward proportionality. . . . Yet complaints of judicial disengagement persist and abound. Such disengagement is widely viewed as resulting in disproportionate discovery, with the unjustified costs and delays that it brings.”)

<sup>98</sup> ABA Survey, *supra* note 49, at 2-3.

<sup>99</sup> IAALS, *Electronic Discovery: A View From The Front Lines*, 2, 7 (2008) (describing existing e-discovery case law as “thin, inconsistent and frequently outdated” and “[i]ndeed, there is very little case law interpreting the new rules and a near void of e-discovery case law in general.”).

In contrast, additional rule changes would necessarily create new uncertainties.

In fact, judicial guidance has arrived and the body of e-discovery case law interpreting the current Rules is undergoing a natural and robust evolution. The Federal Judicial Center website includes a summary of more than 250 federal court decisions providing substantive guidance on e-discovery issued between December 1, 2006 and July 31, 2009.<sup>100</sup> Meanwhile, the law firm K&L Gates maintains a database containing over 1,000 state and federal electronic discovery cases.<sup>101</sup>

In a mid-year 2009 review of e-discovery cases, Gibson, Dunn & Crutcher noted that “[a] notable decrease in the number of cases involving disputes over the format of e-discovery productions suggests that standards and uniformity are developing and becoming commonly understood and utilized.”<sup>102</sup> The survey further observed that many of the 2009 cases provide greater clarity regarding the duty to preserve relevant data, and the consequences of failing to do so. Collectively, these results demonstrate that the system is working—though perhaps too slowly for some critics.

Acceleration in the development of e-discovery case law since the 2006 Federal Rules amendments also can be observed statistically (if imperfectly) through Westlaw database searches. In a 2008 report, the Rand Institute for Civil Justice reported: “Despite all the concern expressed over e-discovery, there currently exist few legal standards to help provide benchmarks for litigants.”<sup>103</sup> According to Rand, a Westlaw search in December 2006 for the phrase “*electronic discovery*” or the phrases “*electronically stored information, electronic document, computer data, electronic data, electronic record, electronic production or electronic format* within 100 words of *discover*” yielded only 92 federal court decisions.<sup>104</sup> Today, that same search yields 420 federal cases.<sup>105</sup>

A Westlaw search for cases discussing undue burden or expense in relation to electronically stored information<sup>106</sup> yields the following results

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<sup>100</sup> Kenneth J. Withers, THE SEDONA CONFERENCE, FEDERAL COURT DECISIONS INVOLVING ELECTRONIC DISCOVERY, DECEMBER 1, 2006-JULY 31, 2009 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/EDis0919.pdf/\\$file/EDis0919.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/EDis0919.pdf/$file/EDis0919.pdf).

<sup>101</sup> K&L Gates, <https://extranet1.klgates.com/ediscovery/> (last visited Feb. 22, 2011).

<sup>102</sup> Gibson Dunn, <http://www.gibsondunn.com/publications/pages/2009Mid-YearUpdateonE-DiscoveryCases.aspx> (last visited Feb. 5, 2011).

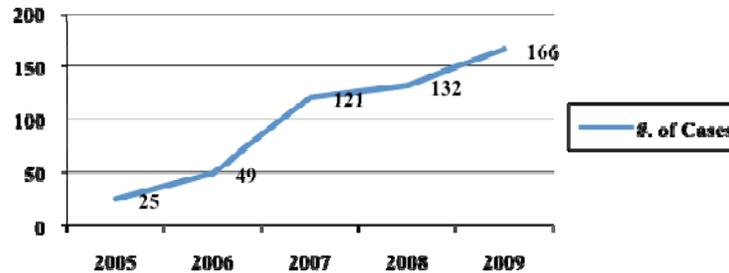
<sup>103</sup> Dertouzos, *et al.*, *supra* note 10, at 7.

<sup>104</sup> *Id.*

<sup>105</sup> As of March 23, 2010 (Westlaw).

<sup>106</sup> A search with the terms “electron! /2 stored data document” and “burden! /2 expense! undu!” retrieves any case containing the word “electronic” or “electronically” within two words of “stored” or “data” or “document” and also containing the word “burden” or “burdensome” within two words of “expense” or “expensive” or “undue” or “unduly.”

by year:



These statistics indicate that the 2006 Federal Rule amendments are gaining traction, as the courts more frequently weigh the costs and burdens of e-discovery relative to the benefits of the requested discovery in each given case. While the reported cases, of course, highlight only situations in which the system of party-driven discovery has failed, the growing body of e-discovery jurisprudence reveals both the flexibility and efficacy of the courts in solving these disputes under the current Rules.<sup>107</sup> Meanwhile, the paucity of appellate opinions addressing e-discovery issues strongly suggests that parties and the district courts are getting it right.<sup>108</sup>

#### *D. Use of Pretrial Conferences and Scheduling Orders is Increasing*

Rule 16, governing pretrial conferences and scheduling orders, provides the court with an early opportunity to set the course of e-discovery. The rule was amended in 2006 “to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation.”<sup>109</sup> Sanctions may be imposed on a party or attorney who is “substantially unprepared to participate—or does not participate in good faith—in the conference.”<sup>110</sup> As a practical matter, Rule 16 emphasizes the importance of the parties’ obligation under Rule 26(f) to meet and confer in good faith regarding e-discovery (among other subjects),

<sup>107</sup> It is worth noting that, historically, few judicial opinions resolving discovery disputes were published since those opinions were generally not case outcome-determinative. Currently, the negligible cost of publishing opinions electronically (for example, via Westlaw or LexisNexis) results in much more efficient dissemination of opinions relating to e-discovery. Accordingly, the increase in the number of judicial opinions should not be interpreted to suggest that the system is failing, but rather that judges are publishing their opinions to give clarity to the rules.

<sup>108</sup> Since January 1, 2007, there have been only seventeen reported appellate cases reviewing e-discovery sanctions decisions. See Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010). Of those, only five reversed the lower court’s ruling.

<sup>109</sup> FED. R. CIV. P. 16 advisory committee’s notes.

<sup>110</sup> FED. R. CIV. P. 16(f)(1)(B).

as the parties are required jointly to submit a discovery plan after the meet-and-confer and before the Rule 16 conference.

In the 2009 FJC Survey regarding recently closed civil cases, approximately 75% of respondents reported that the court had adopted a discovery plan.<sup>111</sup> In contrast, an IAALS study of federal cases terminated between October 1, 2005 and September 30, 2006 found that only 46% of the case dockets showed evidence of a scheduling order, notation of a scheduling conference, or both.<sup>112</sup> Although the cases in the IAALS survey predated the 2006 amendments, one of the notable findings was that early discussion and resolution of discovery issues was an important factor in reducing overall case length.<sup>113</sup> Among respondents to the ABA Survey, more than half believe that Rule 16 conferences help to identify and narrow issues in a case.<sup>114</sup>

The increased use of pretrial conferences since the 2006 amendments appears also to have resulted in fewer discovery-related sanctions being imposed by the courts:

[P]rior to the [2006 amendments], judges granted sanctions in about 65% of the cases in which a party moved for sanctions. Since the amendments took effect, it appears that figure has dropped to about 50%. Based on his observations, Thomas Y. Allman, a member of the Sedona Conference Steering Committee, credited the early improvement to parties successfully engaging in pre-trial conferences.<sup>115</sup>

Thus, it appears that, in this regard, the 2006 amendments are having their intended effect. Litigants are meeting and conferring, and resolving discovery issues; courts are more frequently adopting discovery plans. These are surely signs of progress in the ongoing efforts to control e-discovery costs and reduce the frequency and scope of e-discovery-related disputes.

#### *E. Courts Employ the Federal Rules to Protect Against Unduly Burdensome or Intrusive Searches*

The Federal Rules, as currently written, provide both mechanisms and standards for parties and the courts to establish e-discovery boundaries

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<sup>111</sup> Lee, *supra* note 50, at 11-12.

<sup>112</sup> IAALS, *Civil Case Processing in the Federal District Courts: A 21st Century Analysis* at 2, 4 (2009) available at <http://www.du.edu/legalinstitute/publications2009.html>.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> ABA Survey, *supra* note 49, at 11.

<sup>115</sup> Rachel Hytken, *Electronic Discovery: To What Extent do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 886 (2008).

appropriate to the case at hand. In general, where the issue is whether or not to order production of requested ESI—assuming that the requested discovery is relevant and not privileged—the court will weigh the cost and burden of the requested discovery against the likely benefit given the circumstances of the case (much as it would for non-ESI discovery) pursuant to the proportionality provisions of Rule 26(b)(2)(C) or other existing Rules.<sup>116</sup> As one court summarized, “the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and taking into account society’s interest in furthering the truth seeking function in the particular case before the court.”<sup>117</sup> A survey of recent cases illustrates the myriad approaches available to judges under the current Rules to control the scope of e-discovery while permitting the parties to obtain relevant evidence. Courts can parse and, if necessary, alter e-discovery requests to strike a fair balance.<sup>118</sup>

In assessing the burden on a producing party, courts also consider the intrusiveness of the proposed data collection and the confidentiality of the information sought. The Advisory Committee Notes to the 2006 amendments caution that while Rule 34(a) authorizes the copying, sampling, or testing of ESI, “issues of burden and intrusiveness . . . can be addressed under Rules 26(b)(2) and 26(c) . . . . Courts should guard against undue intrusiveness resulting from inspecting or testing” of electronic information systems.<sup>119</sup> Thus, courts are generally reluctant to allow a party direct access to its adversary’s database.<sup>120</sup>

These and other opinions since the enactment of the 2006 amendments clearly demonstrate that courts have become attuned to the issues attendant to discovery of ESI and are increasingly attentive to monitoring the process.

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<sup>116</sup> See *supra* Part III.B.; see also FED. R. CIV. P. 26(b)(2)(B), 26(c); FED. R. CIV. P. 45.

<sup>117</sup> *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 681 (7th Cir. 2002) (internal quotations omitted).

<sup>118</sup> For example, in *Major Tours, Inc. v. Colorel*, where the requested production from backup tapes would have cost \$1.5 million, the court held that the documents were not reasonably accessible and the requesting party had not shown good cause to require the search. No. 05-3091, 2009 WL 3446761, at \*6-7 (D.N.J. Oct. 20, 2009). However, the court struck a different balance with regard to two specific subsets of back-up tapes based on the dates of creation and the likelihood that the tapes might contain relevant, non-duplicative data. The court ordered that, for one subset, the costs of retrieval would be shared equally between the parties and for a second subset, plaintiffs would pay all retrieval costs including the cost of defendants’ relevancy and privilege review. *Id.* In *FSP Stallion 1, LLC v. Luce*, the court, citing Rule 26(b)(2)(c), held that a request for production of ESI in native format with all metadata intact created an undue burden and instead ordered production of TIFF files with specified metadata fields. No. 08-1155, 2009 WL 2177107, at \*4-5 (D. Nev. July 21, 2009).

<sup>119</sup> FED. R. CIV. P. 34 advisory committee’s note.

<sup>120</sup> See, e.g., *SEC v. Strauss*, No. 09-4150, 2009 WL 3459204 (S.D.N.Y. Oct. 28, 2009); see also *Mirbeau of Geneva Lake LLC v. City of Lake Geneva*, No. 08-693, 2009 WL 3347101 (E.D. Wis. Oct. 15, 2009).

*F. Courts Utilize a Broad Array of Techniques Under the Current Rules to Manage and Resolve Discovery Disputes*

When parties are unable to resolve e-discovery issues on their own, courts utilize an ever-widening variety of tools and techniques under the current Rules to reduce the costs and delays engendered by discovery disputes. Judge Paul Grimm has observed “[u]nder Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court’s own imagination.”<sup>121</sup>

Among other things, courts are demanding cooperation and early discussion of ESI issues to facilitate cost reductions. Reviewing only cases reported in 2009, one finds the following examples:

- Court orders further cooperation and disclosure;<sup>122</sup>
- Court propounds questions to parties on e-discovery details;<sup>123</sup>
- Cost-shifting;<sup>124</sup>
- Court orders hiring of independent expert;<sup>125</sup>
- Court limits custodians and/or search terms;<sup>126</sup>
- Court requires alternative procedures prior to parties filing motions;<sup>127</sup>

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<sup>121</sup> *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 219 F.R.D. 93, 98-99 (D. Md. 2003).

<sup>122</sup> *In re Application of Operadora*, Nos. 09-383, 08-136, 2009 WL 2435750 (M.D. Fla. May 28, 2009); *see also* *Spieker v. Quest Cherokee, LLC*, No. 07-1225, 2009 WL 2168892 (D. Kan. July 21, 2009); *Dunkin’ Donuts Franchised Rests., L.L.C. v. Grand Cent. Donuts, Inc.*, No. 07-4027, 2009 WL 1750348 (E.D.N.Y. June 19, 2009); *Lapin v. Goldman, Sachs & Co.*, No. 04-2236, 2009 WL 222788 (S.D.N.Y. Jan. 23, 2009).

<sup>123</sup> *Newman v. Borders, Inc.*, 257 F.R.D. 1 (D.D.C. 2009); *see also* *Covad Commc’ns Co. v. Revonet, Inc.*, 258 F.R.D. 5 (D.D.C. 2009).

<sup>124</sup> *Laethem Equip. Co. v. Deere & Co.*, 261 F.R.D. 127 (E.D. Mich. 2009); *see also* *Surplus Source Group, LLC v. Mid Am. Engine, Inc.*, No. 08-049, 2009 WL 961207 (E.D. Tex. Apr. 8, 2009).

<sup>125</sup> *Bank of Mongolia v. M & P Global Fin. Servs, Inc.*, 258 F.R.D. 514 (S.D. Fla. 2009); *see also* *Maggette v. BL Dev. Corp.*, Nos. 07-181, 182, 2009 WL 4346062 (N.D. Miss. Nov. 24, 2009).

<sup>126</sup> *In re Zurn Pex Plumbing Prods. Liab. Litig.*, MDL No. 08-1958, 2009 U.S. Dist. LEXIS 47636 (D. Minn. June 5, 2009).

<sup>127</sup> *Sanders v. Kohler Co.*, No. 08-222, 2009 WL 4067265, at \*3 (E.D. Ark. Nov. 20, 2009) (“If counsel have any further discovery problems, which they are unable to resolve among themselves, they *must not* file any more motions to compel. *Instead, they must immediately notify the Court,*

- Court orders Rule 30(b)(6) deposition;<sup>128</sup>
- Court limits privilege log requirements.<sup>129</sup>

Collectively, these cases demonstrate that the current Federal Rules provide the authority and flexibility for courts to effectively manage and resolve e-discovery disputes when the parties are unable to do so on their own. Moreover, there is widespread agreement that judicial involvement in discovery reduces the cost and burden of discovery. In the ABA Survey, 60% of plaintiffs' lawyers and 75% of defendants' and mixed-practice lawyers agreed that early judicial intervention helps to limit discovery.<sup>130</sup> Such an approach is consistent with that contemplated by the drafters of the Federal Rules.<sup>131</sup>

### *G. The Seventh Circuit Pilot Program*

The Seventh Circuit Electronic Discovery Pilot Program (hereinafter "Pilot Program")<sup>132</sup> illustrates one approach to "fine-tuning" e-discovery within the framework of the current Federal Rules.<sup>133</sup> The Pilot Program, comprising a set of "Principles Relating to the Discovery of Electronically Stored Information" ("Principles") and a "Standing Order" designed to implement the Principles, "was developed as a result of (a) continuing comments by business leaders and practicing attorneys, regarding the need for reform of the civil justice pretrial discovery process in the United States, (b) the release of the [ACTL/IAALS Report], and (c) The Sedona Conference® Cooperation Proclamation."<sup>134</sup> According to its statement of

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*by telephone, of the problem and the Court will resolve the matter, forthwith.*") (emphasis in original).

<sup>128</sup> Starbucks Corp. v. ADT Sec. Servs., Inc., No. 08-900, 2009 WL 4730798 (W.D. Wash. Apr. 30, 2009).

<sup>129</sup> *In re Motor Fuel Temperature Sales Practices Litig.*, No. 07-1840, 2009 WL 959491 (D. Kan. Apr. 3, 2009).

<sup>130</sup> See ABA Survey, *supra* note 49, at 11.

<sup>131</sup> See, e.g., FED. R. CIV. P. 26 advisory committee's note ("The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.").

<sup>132</sup> SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM—PHASE ONE (2010), available at <http://www.ilcd.uscourts.gov/Statement%20-%20Phase%20One.pdf> [hereinafter "7th Cir. E-Discovery Pilot Program"].

<sup>133</sup> Another approach is illustrated by D. Md., SUGGESTED PROTOCOL FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1 (2007), available at <http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf> ("The purpose of this Suggested Protocol for Discovery of Electronically Stored Information (the 'Protocol') is to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention.").

<sup>134</sup> 7th Cir. E-Discovery Pilot Program, *supra* note 132, at 7. The Pilot Program is scheduled to run in phases with the first phase completed on May 1, 2010. *Id.* Phase Two of the Pilot Program

purpose, the Pilot Program was created to address “the rising burden and cost of discovery in litigation in the United States brought on primarily by the use of electronically stored information (“ESI”) in today’s electronic world.”<sup>135</sup>

The cornerstone of the Pilot Program is early and informal communication between parties regarding issues relating to the storage, preservation, and discovery of ESI, as well as paper discovery—already an existing requirement under FED. R. CIV. P. 26(f)(2).<sup>136</sup> The Pilot Program Principles closely track *The Sedona Conference® Cooperation Proclamation*, focusing in large part upon cooperation between the parties to resolve common issues related to e-discovery.<sup>137</sup>

The Principles address common issues such as the scope of preservation, including that counsel are to confer prior to engaging in information exchanges regarding preservation and collection efforts.<sup>138</sup> Additionally, the Principles include some practice tools to assist practitioners in navigating the e-discovery process, including designating certain categories of information as “generally . . . not discoverable,” thus requiring counsel to confer before requesting those categories of information.<sup>139</sup> The Principles also require parties to identify ESI and “make a good faith effort to agree on the format(s) for production,” as well as, “discuss cost sharing for optical character recognition (OCR) or other upgrades of paper documents or non-text-searchable electronic images that may be contemplated by each party.”<sup>140</sup> Significantly, the principles of the Pilot Program provide for the imposition of sanctions for the failure to cooperate and participate in good faith in the “meet and confer” process.<sup>141</sup> In the event a dispute over discovery arises during the meet and confer process, the Pilot Program requires the appointment of an e-discovery liaison to handle the resolution.<sup>142</sup>

In sum, the Pilot Program is a guide for practitioners to *comply with* the 2006 amendments and meet the rising judicial expectations that practitioners will be knowledgeable both about the Federal Rules and the

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will then run from June 2010 to May 2011, when the E-Discovery Committee will formally present its findings and issue its final Principles. *Id.*

<sup>135</sup> *Id.* at 7.

<sup>136</sup> *Id.* at 9 (citing FED. R. CIV. P.). The principles of the Pilot Program include the application of Rule 26(b)(2)(C)’s proportionality principles when formulating a discovery plan. *Id.* at 11 (citing FED. R. CIV. P.).

<sup>137</sup> *Id.* at 9 (discussing Sedona Conference, *supra* note 26, at 332).

<sup>138</sup> *Id.* at 14, Principle 2.04 (Scope of Preservation).

<sup>139</sup> *Id.* at 14-15.

<sup>140</sup> *Id.* at 15-16, Principle 2.06 (Production Format).

<sup>141</sup> *Id.* at 11-12, Principle 2.01 (Duty to Meet and Confer on Discovery and to Identify Disputes for Early Resolution).

<sup>142</sup> *Id.* at 12-13, Principle 2.02 (E-Discovery Liaison(s)).

benefits of cooperative discovery.<sup>143</sup> This type of program may prove to be a valuable tool in fostering the “just, speedy and inexpensive” resolution of disputes intended by the Federal Rules.<sup>144</sup>

#### IV. CONTROLLING E-DISCOVERY COSTS UNDER THE CURRENT FEDERAL RULES

Under the current Federal Rules, litigating parties and counsel have a multitude of strategies and techniques available to reduce costs across all phases of e-discovery including preservation, collection, relevance review, privilege review, and production. Some of these mechanisms are embodied in the Rules themselves (e.g., clawback agreements under Rules 26(b)(5)(B) and 16(b)(3)(B)(iv)), some are natural outgrowths of the Rules (e.g., cooperative agreements limiting the scope of preservation or production), and others are outside of the Rules altogether (e.g., improved corporate records management).

##### A. *Enhanced Cooperation Holds the Greatest Potential to Control Costs and Burdens of E-Discovery*

##### 1. The Cooperation Required by the Federal Rules and Rules of Professional Conduct is a Starting Point

Cooperation between litigants has been a foundation of the Federal Rules governing discovery since their adoption in 1938.<sup>145</sup> Rules 1, 26, and 37 are the primary Rules embodying the expectation of cooperation in discovery.<sup>146</sup> As Judge Grimm wrote in the *Mancia* case:

It cannot seriously be disputed that compliance with the “spirit and purposes” of these discovery rules [FED. R. CIV. P. 26 through 37] requires cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation. Counsel cannot “behave responsively” during discovery unless they do both, which requires cooperation rather than contrariety, communication rather than confrontation.<sup>147</sup>

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<sup>143</sup> See *infra* Parts IV(A), (F).

<sup>144</sup> FED. R. CIV. P. 1.

<sup>145</sup> “A careful analysis of the Federal Rules of Civil Procedure demonstrates that the Rules both promote and assume cooperation in discovery between litigating parties throughout the litigation.” *The Case for Cooperation*, *supra* note 13, at 348-49.

<sup>146</sup> *Id.* For a detailed analysis of the cooperation component of these rules, see Steven S. Gensler, *A Bull’s-Eye View of Cooperation in Discovery*, 10 SEDONA CONF. J. 363 (2009).

<sup>147</sup> *Mancia*, 253 F.R.D. at 357-58.

Rules of professional conduct, such as the duty to expedite litigation and the duties of candor to the court and fairness to the opposing party,<sup>148</sup> also require attorneys to cooperate in discovery.

The drafters of the 2006 e-discovery amendments built on this pre-existing obligation, amending Rule 26(f) to “direct the parties to discuss discovery of electronically stored information during their discovery-planning conference.”<sup>149</sup> As The Sedona Conference<sup>®</sup> aptly points out, “the explosion of ESI has made the development of parameters to guide cooperation in discovery more essential than ever.”<sup>150</sup> The importance of cooperation under the 2006 amendments has been expressly noted:

[T]he ESI Rules tie the tools for restraints on discovery to increased disclosure between the opposing parties and increased judicial supervision of discovery. Parties to litigation proceed at their own risk if they disregard either branch of the “bargain:” (1) tools to enforce balanced preservation/discovery and (2) greater transparency in preservation/discovery.<sup>151</sup>

One often-overlooked aspect of e-discovery is that, while the written Rules set out the *minimum acceptable level* of cooperation among parties, they can also open the door for much broader and deeper collaborative efforts. By fully engaging in cooperative discovery, counsel can forge a better, faster, and cheaper e-discovery process, maximizing the benefits to all parties in the case. For example, the parties may agree on the sources of information to be preserved or searched; number and/or identities of custodians whose data will be preserved and/or collected; topics for discovery; time periods for which discovery will be sought; search terms and methodologies to be employed to identify responsive data; and the format(s) in which document production will be made.<sup>152</sup> The parties may further discuss and agree on protocols that unlock some of the massive efficiencies of e-discovery, such as methods for searching and sorting data, or the de-duplication of data sets.

It is important to remember that cooperation does not entail merely volunteering data or information, or disclosing the weaknesses of one’s position. Nor does it make an attorney less of an advocate for his client’s interests. Rather, it requires “early, candid, and ongoing exchanges between counsel.”<sup>153</sup> The parties may not be able to reach agreement on everything, but they will educate each other through an iterative process

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<sup>148</sup> See MODEL RULES OF PROF’L CONDUCT R. 3.2, 3.4 (2009).

<sup>149</sup> FED. R. CIV. P. 26(f) advisory committee’s note.

<sup>150</sup> The Sedona Conference, *The Case for Cooperation*, 10 SEDONA CONF. J. 339, 342 (2009).

<sup>151</sup> Rogers, *supra* note 82, at 81.

<sup>152</sup> See 2006 Advisory Committee Notes.

<sup>153</sup> *Id.*

that will ultimately clarify what they do and do not know, and the issues on which they can and cannot agree. This process will isolate any genuine disputes that may exist between the parties, which can then be presented to the court for resolution, thus reducing the burden on the courts and the parties alike.

## 2. Tiered Discovery as an Example of Cooperation

One way in which parties can reduce the volume of information exchanged in discovery and the associated costs is to reach an agreement as to tiered discovery. This approach would incorporate a schedule whereby certain tranches of information would be produced in sequence, and, in some instances, subject to the satisfaction of certain thresholds. For example, counsel for the parties might agree to initiate discovery with the production of information from the files of a set number of custodians, departments, or both, with subsequent productions of other information from other custodians or departments to be permitted only if certain showings are made.

Of course, to reach such an agreement, counsel for the parties must be vested with sufficient information to enable counsel to negotiate such a compromise. This is particularly critical because each case is unique and thus specifics are important. In order to accrue such information, counsel for the parties must first gather information about their respective clients' information systems and the likely sources of information and then be willing to engage in open dialogue with the adversary to formulate an informed discovery plan. This is the intent of the Rule 26(f) meet and confer requirement, and it pushes the parties to consider the proportionality concerns associated with a particular request.

## 3. Courts Encourage And Assist Those Engaging in Enhanced Cooperation

As e-discovery law continues to evolve, the courts are encouraging parties to act "in a manner consistent with the spirit of cooperation, openness, and candor owed to fellow litigants and the court and called for in modern discovery."<sup>154</sup> Several courts, citing *The Sedona Conference® Cooperation Proclamation*, have recently restated that "the best solution in the entire area of electronic discovery is cooperation among counsel."<sup>155</sup>

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<sup>154</sup> *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 891 (8th Cir. 2009).

<sup>155</sup> *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009); *see also* *Technical Sales Assocs., Inc. v. Ohio Star Forge Co.*, No. 07-11745, 2009 WL 728520, at \*4 (E.D. Mich. Mar. 19, 2009); *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 415 (S.D.N.Y. 2009); *see generally* Ralph C. Losey, *Mancia v. Mayflower Begins a Pilgrimage to the New World of Cooperation*, 10 SEDONA CONF. J. 377 (2009).

Courts are ever more willing to assist lawyers who are not getting reciprocal cooperation from their adversaries. Judge Scheindlin described the attitude of judges in the Southern District of New York this way:

In our court, for example, many judges don't even allow discovery motions. We just say, "Come in and tell us about it," or, "Write a three-page letter." If we catch this early—if a lawyer comes in early and says, "I'm not getting cooperation. I'm trying to work together to get a search-term protocol. I'm trying to get him to identify the sources on which data is maintained, and he's not doing it,"—if you come and tell me, I will take care of it quickly. It will be a quick ruling from the bench to make it happen.

....

... [I]f you would come in and say, "We need help. We need the court's intervention"—when we wrote these new rules, that was the hope, that we would have more court intervention in supervising the discovery process . . . . I think most of us would do it very rapidly and very informally.<sup>156</sup>

As practitioners become more confident that judges will respond in this manner, e-discovery problems will be addressed earlier and more effectively. No rule change is needed; prompt and informed action and communication are the keys.

Many judges recognize that costly and avoidable problems result when cooperation is not achieved, or in some cases, even attempted. Judges have repeatedly, and with mounting frustration, handled these situations by ordering litigants to cooperate, as contemplated by the Federal Rules. As Magistrate Judge John Facciola observed: "Counsel should become aware of the perceptible trend in the case law that insists that counsel genuinely attempt to resolve discovery disputes."<sup>157</sup>

In *S.E.C. v. Collins & Aikman Corp.*,<sup>158</sup> a defendant made a 54-category request to the SEC in a large securities case. The SEC responded by producing "1.7 million documents (10.6 million pages) maintained in thirty-six separate Concordance databases - many of which use different metadata protocols."<sup>159</sup> Judge Scheindlin ruled that the SEC's response amounted to avoidance of meaningful disclosure and admonished all parties to meet their obligations under the Federal Rules:

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<sup>156</sup> Panel Discussion, *Sanctions in Electronic Discovery Cases: Views from the Judges*, 78 FORDHAM L. REV. 1, 33 (2009).

<sup>157</sup> *Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 n. 3 (D.D.C. 2009).

<sup>158</sup> *Collins & Aikman Corp.*, 256 F.R.D. at 406-07.

<sup>159</sup> *Id.* at 407.

With few exceptions, Rule 26(f) requires the parties to hold a conference and prepare a discovery plan . . . . Had this been accomplished, the Court might not now be required to intervene in this particular dispute. I also draw the parties' attention to the recently issued Sedona Conference Cooperation Proclamation, which urges parties to work in a cooperative rather than an adversarial manner to resolve discovery issues in order to stem the rising monetary costs of discovery disputes.<sup>160</sup>

The Court emphasized that even where a litigant feels burdened by a broad request, that litigant is still obliged to communicate and cooperate.

In *Mancia v. Mayflower Textile Services Co.*,<sup>161</sup> the plaintiffs propounded overly broad discovery requests, and the defendants responded with boilerplate, non-substantive responses; neither side attempted to cooperate or communicate—resulting in a costly discovery dispute that could have been mitigated through cooperation. Judge Grimm noted that counsel for defendants likely violated Rule 26(g) by failing to make a “reasonable inquiry” before objecting to the discovery requests.<sup>162</sup> The Court directed the attorneys to meet and attempt to reach resolution by cooperation, including an agreement on a range of damages that were likely if the plaintiff were to prevail, in order to establish a budget for discovery in the case.<sup>163</sup>

Taken together, these cases demonstrate that enhanced cooperation among parties—beyond the level of cooperation mandated by the Federal Rules—is the most powerful tool available to reduce the costs and burdens of e-discovery. Those who hold fast to the outdated notion that adversarial discovery is the only way to litigate are clinging to the railing of a sinking ship.

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<sup>160</sup> *Id.* at 414-15 (internal quotations and citations omitted).

<sup>161</sup> *Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354 (D. Md. 2008).

<sup>162</sup> *Id.* at 364.

<sup>163</sup> *Id.* at 364-65; *see also* *Aguilar v. Immigration & Customs Enforcement Div. of U.S. Dep't. of Homeland Sec.*, 255 F.R.D. 350, 364 (S.D.N.Y. 2008) (“This lawsuit demonstrates why it is so important that parties fully discuss their ESI early in the evolution of a case. Had that been done . . . the parties might have been able to work out many, if not all, of their differences without court involvement or additional expense, thereby furthering the ‘just, speedy, and inexpensive determination’ of this case.”) (citation omitted); *Gipson v. Sw. Bell Tel. Co.*, No. 08-2017, slip op. at 1-2 (D. Kan. Dec. 23, 2008) (“As of the date of the discovery conference, more than 115 motions and 462 docket entries had been filed in this case, even though the case has been on file for less than a year. Many of the motions filed have addressed matters that the Court would have expected the parties to be able to resolve without judicial involvement . . . . To help the parties and counsel understand their discovery obligations, counsel are directed to read The Sedona Conference Cooperation Proclamation.”).

*B. Reducing the Cost of Document Review*

According to a recent study, “as much as 75 to 90 percent of additional costs attributable to e-discovery are due to increases in attorney billings for ‘eyes-on’ review of electronic documents.”<sup>164</sup> Clearly, reducing attorney review time—whether for initial relevance review or secondary privilege review—can have a huge impact on overall e-discovery costs. The 2006 amendments addressed this issue with the adoption of Rule 26(b)(5)(B), which establishes a procedure for a party to assert a claim of attorney-client privilege or work product protection after the allegedly protected information has been produced in discovery.<sup>165</sup> The Advisory Committee acknowledged:

Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege . . . .

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming.<sup>166</sup>

Under Rule 26, the scope and cost of privilege review can be substantially reduced with the use of “clawback” or “quick peek” agreements or other mechanisms to which the parties agree.<sup>167</sup> However, while Rule 26(b)(5)(B) provided a procedural framework for such agreements, its utility was limited by the fact that these agreements could provide protection against waiver only as to the parties to that particular litigation.<sup>168</sup> In addition, a lack of uniformity in the federal courts as to the conditions giving rise to waiver, and the scope of any waiver, created additional risk to parties attempting to utilize cost-saving strategies under the new rule.<sup>169</sup>

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<sup>164</sup> Dertouzos, *et al.*, *The Legal and Economic Implications of Electronic Discovery*, *supra* note 10, at 3.

<sup>165</sup> FED. R. CIV. P. 26(b)(5)(B).

<sup>166</sup> FED. R. CIV. P. 26(b)(5)(B) advisory committee’s notes.

<sup>167</sup> Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, *supra* note 33, at 201-02.

<sup>168</sup> *Id.* at 201.

<sup>169</sup> *Id.*

C. *Using Federal Rule of Evidence 502 to Reduce Privilege Review Costs*

The outcry concerning the large volume and costs of e-discovery had great resonance prior to the enactment of Federal Rule of Evidence 502 in September 2008. While advances in search technology had made document review for relevance simpler and cheaper,<sup>170</sup> at least at the “first pass” level, the risk of inadvertent waiver of attorney-client privilege and work product protection still impelled many attorneys to opt for “eyes-on” review of every document.<sup>171</sup> Senator Specter, co-sponsor of the rule change in the Senate, neatly summarized the effect of the prior law:

Current law on attorney-client privilege and work product is responsible in large part for the rising costs of discovery—especially electronic discovery. Right now, it is far too easy to inadvertently lose—or “waive” the privilege. A single inadvertently disclosed document can result in waiving the privilege not only as to what was produced, but as to all documents on the same subject matter. In some courts, a waiver may be found even if the producing party took reasonable steps to avoid disclosure. Such waivers will not just affect the case in which the accidental disclosure is made, but will also impact other cases filed subsequently in State or Federal courts.<sup>172</sup>

The costs associated with conducting this manual review in a world of ever-growing documents were often astronomical. Senator Patrick Leahy, another co-sponsor of the rule change in the Senate, estimated that “[b]illions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privilege materials.”<sup>173</sup> Moreover, the lack of uniformity and predictability among the federal courts prevented parties from fashioning creative extrajudicial solutions to this problem, such as quick peek and clawback agreements.<sup>174</sup>

Federal Rule of Evidence 502 was designed expressly to address these problems, and it indeed created a sea-change in privilege and work product law.<sup>175</sup> For example, whereas federal courts previously applied different standards in deciding when a privilege disclosure constituted subject matter

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<sup>170</sup> See discussion *infra* Part IV.D.

<sup>171</sup> Patrick L. Oot, *The Protective Order Toolkit: Protecting Privilege with Federal Rule of Evidence 502*, 10 SEDONA CONF. J. 237, 237-38 (2009).

<sup>172</sup> S. REP. NO. 110-264, at 2 (2008), reprinted in 2008 U.S.C.C.A.N. 1305, 1306.

<sup>173</sup> *Id.*

<sup>174</sup> See Martin R. Lueck & Patrick M. Arenz, *Federal Rule of Evidence 502(d) and Compelled Quick Peek Productions*, 10 SEDONA CONF. J. 229, 229-30 (2009); see also Jessica Wang, *Nonwaiver Agreements After Federal Rule of Evidence 502: A Glance at Quick-Peek and Clawback Agreements*, 56 UCLA L. REV. 1835, 1842-44 (2009).

<sup>175</sup> See S. REP. NO. 110-264; Oot, *supra* note 171, at 239-41.

waiver, FRE 502 creates a uniform rule limiting subject matter waiver only to instances where “(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together.”<sup>176</sup> Similarly, FRE 502 creates a uniform approach to inadvertent waiver, providing that there is no waiver where (1) disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.”<sup>177</sup> Finally, FRE 502 ensures that a court’s order regarding privilege is binding as to the entire world and authorizes the court to incorporate quick peek and claw-back agreements into its order.<sup>178</sup>

This important change in privilege law created by Rule 502 will, in time, benefit all litigants. With the protection against inadvertent waiver provided by the rule, search technology will reduce the cost of privilege review as it has for relevance review.<sup>179</sup> In fact, it has been estimated that the use of Fed. R. Evid. 502 could reduce the cost of privilege review by as much as 80% in some cases.<sup>180</sup> Moreover, there are several examples of creative protocols that, in addition to Fed. R. Evid. 502, may solve many of the vexing and costly problems associated with privilege review. For example, in a recent law review article, two of the leading commentators on electronic discovery issues suggest that in most cases, the parties can dispense with the traditional document-by-document privilege log in favor of a new approach that relies on the cooperation of counsel and active supervision by the court.<sup>181</sup> Through cooperation, counsel will seek to agree on categories of information that can be eliminated from any privilege review because the information is clearly privileged or clearly not privileged. Next, the parties will attempt to agree on categories of information that must be reviewed. Privilege claims will then be made and, if challenged, initially assessed based on a sample of documents from each category. Next, a detailed description of the withheld information

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<sup>176</sup> FED. R. EVID. 502(a)(1)-(3).

<sup>177</sup> FED. R. EVID. 502(b)(1)-(3).

<sup>178</sup> FED. R. EVID. 502(d).

<sup>179</sup> See discussion *infra* Part IV.D; see also MICHELE C.S. LANGE & KRISTIN M. NIMSGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW NOW 193-205 (2d ed. 2009); Anne Kershaw, *Automated Document Review Proves Its Reliability*, 5 DIGITAL DISCOVERY & E-EVIDENCE 11, 10-11 (2005), available at <http://www.ediscoveryinstitute.org/pubs/AutoDocumentReviewReliability.pdf>; see also eDiscovery Institute, Inc., *Comparison of Auto-Categorization with Human Review*, <http://www.ediscoveryinstitute.org/pubs/ComparisionAutoCategorization.pdf> (last visited Aug. 27, 2010).

<sup>180</sup> Comments of Daniel Capra in *Managing Electronic Discovery: Views From The Judges*, 76 FORDHAM L. REV. 1, 28 (Oct. 2007).

<sup>181</sup> Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19 (2010).

remaining in dispute would be provided so that the scope of *in camera* review is minimized. Finally, counsel would prepare a detailed privilege log reflecting only the documents ultimately withheld, greatly reducing the time and expense required.

The parties in a pending large antitrust case designed another protocol that greatly reduced the burden and delay associated with privilege review. In that case, counsel designed a privilege protocol utilizing search terms to identify documents that are likely to be privileged. For text-searchable documents containing the names of corporate or outside counsel and certain Boolean identifiers (such as (advice or advise) /5 (attorney\* or counsel or lawyer\*)), the protocol allows producing parties to avoid manual review, and instead, requires only that they prepare an automated privilege log (populated with agreed-upon metadata). The protocol allows the requesting party to challenge suspicious entries on the automated privilege log (thereby causing manual privilege review and logging). The protocol was successful in dramatically reducing the need for manual review.

Clearly, further rule change is not necessary so soon after the introduction of Rule 502. The effects of the rule have yet to be felt. Rather, what is needed is a change in attorney practices regarding the creation and protection of privileged communications and privilege review, and a willingness of courts to issue protective orders encouraging the use of new technologies as a counter-balance to the increased volume of documents in the digital age. Lawyers, of course, must protect the privilege from the outset and craft solutions to insure its ongoing protection.

#### *D. Developing Technologies Are Reducing The Cost of Document Review*

Those who complain about the high cost of electronic discovery often overlook the cost *savings* associated with e-discovery. Gone are the days (and travel expenses) when lawyers spent months in document warehouses reviewing and coding paper documents. Instead of the weeks or months (and associated expenses) it would take for lawyers and paralegals to objectively code a large set of documents, coding is now done instantly with the push of a button by utilizing metadata embedded within ESI. Thus, collection and review of electronic documents is a great deal more efficient than the processing of paper documents.<sup>182</sup> In minutes, millions of documents can be searched and organized using keywords or concepts, or sorted by custodian, recipient, date, or any of dozens of other metadata

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<sup>182</sup> See, e.g., FED. R. CIV. P. 26(b)(2) advisory committee's note, ("Electronic storage systems often make it easier to locate and retrieve information.").

fields.<sup>183</sup> The cost to process and review a production of 1.5 million pages of paper has been estimated at \$3.3 million. The cost to process and review the same production, using a combination of electronic tools and human review, would be approximately \$356,000, an 89% reduction.<sup>184</sup>

The cost of attorney review has always been the single most expensive component of discovery. By using e-discovery techniques, advanced work flows, and the power of modern computers to compile and manage very large data collections, the cost of attorney review can be greatly reduced. However, evidence shows that even current, proven tools for reducing document review costs are shockingly underutilized.

A recent study published by the eDiscovery Institute . . . shows that, despite the technical ability to suppress or consolidate duplicates within an electronic document population, chances are about 50:50 that your outside counsel fails to take advantage of this technology, opting instead to doublebill for reviewing unnecessary duplicates for privilege, confidentiality and relevance. The study shows that, on average, law firms that do not consolidate duplicates across custodians are reviewing 27 percent more records than needed, and in some cases 60 percent or more, raising serious ethical issues involving conflicts of interest and technical competency.<sup>185</sup>

Cost-saving options abound in the current e-discovery environment. Documents can be loaded onto a review platform and hosted on a secured internet site that enables document review to be performed from any location and, thus, allows for the use of in-house or less expensive outsourced attorneys from alternative locations. Computer-assisted culling can eliminate huge groups of documents from the review process. For example, documents that do not meet keyword or date range criteria can be removed from the review set with a few keystrokes. No longer does every document need “eyes-on” attorney review.

More recently, next generation review tools are utilizing content analytics to group documents by topic, resulting in much more efficient and accurate attorney review. Other tools use small sets of human-coded

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<sup>183</sup> See The Sedona Conference, *The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 18 SEDONA CONF. J. 1 (2007) (providing an in-depth review of search and retrieval tools and methodologies).

<sup>184</sup> Chris Paskach & Vince Walden, *Document Analytics Allow Attorneys to be Attorneys*, DIGITAL DISCOVERY & E-EVIDENCE Aug. 2005, at 10, available at <http://www.scribd.com/doc/17862171/DDE-Document-Analytics-Allow-Attorneys-to-be-Attorneys>.

<sup>185</sup> Patrick Oot, Joe Howie & Anne Kershaw, *Ethics and E-Discovery Review*, THE JOURNAL OF THE ASS'N OF CORP. COUNSEL, Jan./Feb. 2010, 46-47 (footnote omitted) (citing Report on Kershaw-Howie Survey of E-Discovery Providers Pertaining to Deduping Strategies, Electronic Discovery Institute (2009)).

documents as exemplars to code large document collections in seconds. Still other tools eliminate duplicate and near-duplicate documents from datasets, resulting in estimated savings of 30% to 40% of review costs.

A number of legal service providers recently have begun offering various forms of automated tools that promise to significantly reduce the number of electronic documents to be manually reviewed by extracting the documents most likely to be responsive to a discovery request, and leaving the remainder unselected and unreviewed. Given the huge explosion in the cost of complying with e-discovery requests, tools that reasonably and appropriately enable a party to safely and substantially reduce the amount of ESI that must be reviewed by humans should be embraced by all interested parties—plaintiffs, defendants, the courts, and government agencies.<sup>186</sup>

The future promises even more advanced tools.<sup>187</sup>

While there is always resistance to new technologies displacing human effort, those objections will fade as the technologies become more familiar and are scientifically validated. For example, a 2009 study comparing the relative accuracy of human review against computerized review for relevance concluded that “[o]n every measure, the performance of the two computer systems was at least as accurate . . . as that of a human re-review.”<sup>188</sup>

Increasingly sophisticated and defensible analytic tools enable litigants to identify unstructured, unmanaged data most likely to be relevant to a given matter. With this knowledge, parties can more accurately evaluate cases early in the litigation cycle and significantly reduce the volume of documents to be collected and reviewed.

Litigators who plan to use keywords to initially limit the volume of ESI to be later searched and reviewed for relevant documents would be better served by considering utilizing early case assessment software to evaluate the efficacy of the keywords selected. These tools allow the user to process all of the data at a much lower cost and then run the keywords themselves as many times as necessary

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<sup>186</sup> *The Sedona Conference Commentary on Achieving Quality in the E-Discovery Process* (May 2009) (footnote omitted).

<sup>187</sup> “[A] feature-rich set of new information retrieval methods are being discussed in the academic literature and employed in selected real-world contexts, and thus may soon be on the horizon for use in future litigation. Such techniques make exhaustive use of various forms of metadata, and are referred to by various umbrella terms, including social networking analysis, links analysis, visualization techniques, and cognitive information behavior.” Paul & Baron, *supra* note 16, at n.115.

<sup>188</sup> Herbert L. Roitblat, Anne Kershaw & Patrick Oot, *Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review*, 61 J. AM. SOC. INFO. SCI. & TECH., (2010) at 70, 79.

without additional cost to determine whether the keywords sufficiently removed irrelevant ESI. Moreover, this software allows a user who is negotiating with the other side regarding keywords to check whether the opponent's proposed keywords remove enough irrelevant ESI before agreeing to them. Arguably, if government counsel had utilized this type of software before agreeing to 400 keywords in the *In re Fannie Mae Litigation*, then counsel may have realized at an earlier date that such a large keyword search would require what became an impossible review of 660,000 documents by the previously stipulated to deadlines, ending in a contempt citation being affirmed on appeal.<sup>189</sup>

In a well-known study of discovery costs, Dupont released the following calculations:

Findings for legal discovery for nine key cases:

- Total # pages reviewed: 75,450,000
- Total #pages responsive: 11,040,000
- Total %pages past retention period: 50%
- Unnecessary review fees: \$11,961,000 USD at review cost of between 20-80 cents/page<sup>190</sup>

These findings did not take into consideration the non-litigation costs of over-retention, such as increased data storage expense and privacy/security risks.

Using these techniques, parties can drastically reduce the corpus of data requiring attorney review. Where once armies of contract attorneys were often utilized to review 100% of the collected documents, by using culling techniques and other tools available to law firms and corporations today, fewer attorneys need only review as little as 20% to 30% of the total documents initially collected. Huge cost-savings can be achieved—but only by parties who are up to speed on the use, and the limits, of developing technologies.

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<sup>189</sup> Ronni D. Solomon & Jason R. Baron, *Bake Offs, Demos & Kicking the Tires: A Practical Litigator's Brief Guide to Evaluating Early Case Assessment Software & Search & Review Tools*, The Sedona Conference Institute, 2009, at 4, available at <http://www.umiacs.umd.edu/~oard/teaching/708x/spring09/Bakeoffs.FINAL.pdf>.

<sup>190</sup> IBM Corp., *Building Blocks for Compliance—IBM FileNet*, at 38-39 (2007), available at [ftp://ftp.software.ibm.com/software/data/ECM/Bro/IBM\\_Filenet\\_Building\\_Blocks\\_for\\_Compliance.pdf](ftp://ftp.software.ibm.com/software/data/ECM/Bro/IBM_Filenet_Building_Blocks_for_Compliance.pdf).

*E. E-Discovery Cost and Risk Can Be Controlled With Improved Records Management and Litigation Preparedness*

The volume and variety of ESI that organizations contend with is not created by opposing parties in litigation. The costs and risks of e-discovery in litigation are determined, in large part, by the amount of ESI created and maintained by the responding party and the effectiveness of the management system applied to the stored data. Organizations seeking to reduce the cost of e-discovery would be well-advised to define a legally defensible process to identify and preserve ESI subject to legal holds or regulatory requirements and delete all electronic data that need not be saved for any other legitimate purpose.

The United States Supreme Court has given its imprimatur to corporate document retention and destruction policies:

Document retention policies, which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business . . . . It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.<sup>191</sup>

The 2006 amendments to the Federal Rules provide a “safe harbor” protecting organizations from sanctions resulting from the destruction of ESI “lost as a result of the routine, good-faith operation of an electronic information system.”<sup>192</sup>

And yet, a 2009 survey found that 35% of responding organizations have no record retention schedules in place for electronic records of any kind.<sup>193</sup> Nearly half (47%) of the organizations have no formal email retention policy.<sup>194</sup> Nearly two-thirds (64%) have no formal procedures in place for the destruction of records.<sup>195</sup> Seventy-eight percent (78%) have no retention practices in place for emerging sources of ESI such as voicemail, instant messaging, blogs and web pages.<sup>196</sup> Not surprisingly, the following were among the survey findings:

- Most organizations are not prepared to meet many of their future compliance, legal and governance responsibilities because

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<sup>191</sup> Arthur Andersen, L.L.P. v. U.S., 544 U.S. 696, 704 (2005).

<sup>192</sup> FED. R. CIV. P. 37(e).

<sup>193</sup> Cohasset Associates & ARMA Int’l, *2009 Electronic Records Management Survey: Call for Sustainable Capabilities* at 23, available at <http://www.rimeducation.com/survey.php>.

<sup>194</sup> *Id.* at 26.

<sup>195</sup> *Id.* at 36.

<sup>196</sup> *Id.* at 27.

of deficiencies in the ways they retain and dispose of their electronically stored information and records.<sup>197</sup>

- A majority of organizations still do not have the capability or infrastructure in place to preserve their records for as long as they are needed and cannot ensure integrity and future accessibility to their electronic records.<sup>198</sup>

According to the IAALS, “[B]asic e-discovery preparation means that when the lawsuit is anticipated, (1) the litigant and its counsel should be able to identify and discuss the location and retrieval of all potentially relevant and ‘reasonably accessible’ ESI at the mandatory early meeting of the parties; and (2) all potentially relevant ESI can and will be preserved during the life of the lawsuit.”<sup>199</sup> Various surveys in 2007 found that from 65% to 94% of responding organizations were unprepared for e-discovery.<sup>200</sup> And, a 2009 survey by Kroll Ontrack found that fewer than half of the responding companies have policies in place to facilitate ESI discovery readiness.<sup>201</sup> While most of the companies have instituted some form of document retention policy, they have not adopted the policies, procedures, and tools needed to locate, preserve, and produce ESI for threatened or actual litigation. Over 40% of the respondents either do not have a mechanism in place to suspend their document retention policy in response to a litigation hold or did not know whether they had such a procedure in place.<sup>202</sup>

This is simply unacceptable in the face of the 2006 amendments. Now, more than three years later, creators of information continue to gripe about the burdens of ESI in litigation but have taken few steps to ameliorate the problems and prepare for the future.

According to a 2008 Gartner Group report, companies that had not implemented formal e-discovery processes spent nearly twice as much to gather and produce documents as those that have adopted formal procedures.<sup>203</sup> By the end of 2012, enterprises that fully document their search processes in e-discovery will save 25% on their collection processes.<sup>204</sup> Enterprises of all sizes, and those facing any number of legal

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<sup>197</sup> *Id.* at 10.

<sup>198</sup> *Id.*

<sup>199</sup> IAALS, *supra* note 60, at 16.

<sup>200</sup> *Id.* at 11.

<sup>201</sup> Kroll Ontrack, *Third Annual ESI Trends Report 3* (2009), available at [http://www.krollontrack.com/library/esitrends3\\_krollontrack2009.pdf](http://www.krollontrack.com/library/esitrends3_krollontrack2009.pdf).

<sup>202</sup> *Id.* at 8.

<sup>203</sup> Gartner Research, *The Costs and Risks of E-Discovery in Litigation 2* (Dec. 1, 2005).

<sup>204</sup> Press Release, Gartner Research, Gartner Says Enterprises That Fully Document Their Search Processes in E-Discovery by 2012 Will Save 25 Percent on Their Collection Processes (Sept. 17, 2009), available at <http://www.gartner.com/it/page.jsp?id=1180688>.

actions annually, should have a simple set of practices to follow anytime they need to embark on an e-discovery process.

According to Magistrate Judge Andrew Peck, “[m]any large companies are implementing email archiving and indexing systems, and ESI retention practices, as a general matter, separate and apart from any specific litigation. That preparation should bring down the cost of discovery of ESI when litigation arises.”<sup>205</sup> The IAALS warns that “[t]he reactive approach toward e-discovery causes inefficiencies at both the front-end search and retrieval stage and the back-end attorney review stage. Both stages are responsible for high e-discovery costs.”<sup>206</sup>

The courts are gradually coming to demand evidence of defensible records management systems when parties are accused of failing to produce relevant ESI in litigation. In *Phillip M. Adams & Associates, L.L.C. v. Dell, Inc.*, the court found the plaintiff guilty of spoliation due to its:

[Q]uestionable information management practices. A court—and more importantly, a litigant—is not required to simply accept whatever information management practices a party may have. A practice may be unreasonable, given responsibilities to third parties. While a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties.<sup>207</sup>

Citing *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, the court wrote: “An organization should have reasonable policies and procedures for managing its information and records.’ ‘The absence of a coherent document retention policy’ is a pertinent factor to consider when evaluating sanctions. Information management policies are not a dark or novel art.”<sup>208</sup>

Clearly, lack of management controls over rapidly increasing amounts of electronically stored information—in some institutions exceeding exabytes (1 billion gigabytes) of content—multiplies the costs of e-discovery. Most companies maintain stores of outdated ESI including e-mail collections, data from legacy systems, and obsolete disaster recovery

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<sup>205</sup> Andrew J. Peck, *The Federal Rules Governing Electronic Discovery* 2 n.2 (June 4, 2009), available at <http://www.abanet.org/labor/lel-annualcle/09/materials/data/papers/138.pdf>.

<sup>206</sup> IAALS, *supra* note 60, at 19.

<sup>207</sup> 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

<sup>208</sup> *Id.* at 1193-94; *see also* *Maggette v. BL Dev. Corp.*, Nos. 07-181, 182, 2009 WL 4346062, at \*1 (N.D. Miss. Nov. 24, 2009) (court expresses doubt that “corporations as large and sophisticated as the defendants . . . do not have either paper files, electronic files or information or—even in light of Hurricane Katrina—backup measures and files for at least *some* of the information requested by plaintiffs.”); *Meeks v. Parsons*, No. 03-6700, 2009 WL 3003718, at \*6 (E.D. Cal. Sept. 18, 2009) (“A recipient that is a large or complex organization or that has received a lengthy or complex document request should be able to demonstrate a procedure for systematic compliance with the document request.”).

tapes. Even companies with document destruction policies in place often fail to comply with those policies.

As Magistrate Judge John Facciola observed:

Electronic data is difficult to destroy and storage capacity is increasing exponentially, leading to an unfortunate tendency to keep electronically stored information even when any need for it has long since disappeared. This phenomenon—the antithesis of a sound records management policy—leads to ever increasing expenses in finding the data and reviewing it for relevance or privilege.<sup>209</sup>

The situation was perhaps best summed up by the court in *Starbucks Corp. v. ADT Security Services, Inc.*: “The fact that a company as sophisticated as [defendant] chooses to continue to utilize [an obsolete data system] instead of migrating its data to its now-functional archival system should not work to plaintiff’s disadvantage.”<sup>210</sup> “[T]he Court cannot relieve Defendant of its duty to produce those documents merely because Defendant has chosen a means to preserve the evidence which makes ultimate production of relevant documents expensive.”<sup>211</sup>

#### *F. Improved Attorney Education Will Mitigate E-Discovery Problems Going Forward*

Too many attorneys who seek revisions to the Rules do not have a sufficient understanding of ESI or the 2006 amendments. Rather than revise the Rules, attorneys need to learn more about both the technical aspects of ESI and how the current Federal Rules can be used to make electronic discovery effective and efficient. “Each attorney is a perpetual student who must strive to keep abreast of the rapid inventions and progress of the unstoppable tidal wave of technological evolution.”<sup>212</sup>

When the parties in *Covad Communications* complained to a magistrate judge that the producing party had produced image files when the requesting party wanted native files (but had not specified that request to the producing party), Judge Facciola reprimanded the parties for failing to understand the ramifications of production in different formats, adding “the courts have reached the limits of their patience with having to resolve electronic discovery controversies that are expensive, time consuming and so easily avoided by the lawyers’ conferring with each other on such a

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<sup>209</sup> *Covad*, *supra* note 123, at 16.

<sup>210</sup> No. 08-900, 2009 WL 4730798, at \*6 (W.D. Wash. Apr. 30, 2009).

<sup>211</sup> *Id.* (emphasis added; citation omitted).

<sup>212</sup> Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in E-Discovery*, 60 MERCER L. REV. 983, 1004 (2009).

fundamental question as the format of their productions of electronically stored information.”<sup>213</sup>

Rather than learn the hard way, as some attorneys regrettably do, attorneys should take the time to educate themselves on ESI. Lawyers are accustomed to learning about new fields and expanding their expertise. As Megan Jones wrote in the *National Law Journal* last December:

*If your case were about e-discovery, you would learn it. A good antitrust lawyer with a case about polyester learns the economics of the textile industry, perhaps even hiring an industry expert. The same should be so for electronic discovery. Not every attorney on a case team needs to be conversant, but at least one does. And that attorney alone should, despite rank or prestige, be the advocate that speaks on behalf of the client on these matters. Only an attorney who understands what preserving “all metadata” means should be in the position to agree to it on behalf of a client. Only an attorney who knows what the current state of ESI common law decisions is should decide which motions should be filed (not every fight should be fought).*<sup>214</sup>

The 2006 amendments to the Federal Rules will not reach their full utility if attorneys do not make any effort to utilize them properly and if courts do not require parties to do so.

#### V. MORE TIME IS NEEDED

Despite the clamor from segments of the bar that the 2006 amendments to the Federal Rules need to be immediately revised, a more rational and reasoned approach would allow the latest set of revisions to get their walking legs. The 2006 amendments have been in effect for less than four years. Most lawyers do not yet understand the full implications of the revised Rules, and the number of complex litigation cases in which they have been able to play out from start to finish is miniscule.

At this time, we have little reason to believe that the Rules are not or will not be effective in promoting the fair administration of justice in an efficient and effective manner. Indeed, when one compares the FJC Survey taken in 1997 (before the advent of e-discovery) with the responses to the 2009 survey conducted by the FJC, a similar percentage of respondents said that the amount of discovery is right, the cost of discovery is reasonable,

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<sup>213</sup> *Covad Commc'ns Co. v. Revonet, Inc.*, 254 F.R.D. 147, 151 (D.D.C. 2008).

<sup>214</sup> Megan Jones, *Giving Electronic Discovery a Chance to Grow Up*, NAT'L L. J., Dec. 14, 2009, at 19 (emphasis added).

and the discovery process is fair.<sup>215</sup> The 2009 FJC Survey did not produce a consensus that the Rules need to be revised to *limit* electronic discovery;<sup>216</sup> instead, the majority of respondents supported revising the Rules to *enforce* discovery obligations more effectively.<sup>217</sup> More than two-thirds of survey respondents agreed that “the procedures employed in the federal courts are generally fair.”<sup>218</sup>

Furthermore, as even Judge Lee Rosenthal has recognized, the 2006 amendments were never meant to solve all the issues raised by the increasing volumes of ESI and the evolving process of electronic discovery.<sup>219</sup> Litigators and judges alike need to confront the realities of a changing litigation environment head-on—for instance, by taking active steps to manage their data and engaging in increased cooperation in the discovery process. We are just beginning to obtain the kind of empirical data we need to understand the adequacy of the Rules, and perhaps more importantly, what changes to discovery outside of the Rules may be necessary to ensure that discovery in the digital age can succeed without unreasonable expense.

#### A. *The Costs of E-Discovery Do Not Justify Reactionary Rule Changes*

Those seeking to amend the Federal Rules often cite the cost of e-discovery as a principal justification for immediate change.<sup>220</sup> This is not the first time that premature rule changes have been called for in response to technological changes. Throughout the twentieth century, lawyers and judges expressed surprise every time discovery volume increased, never recognizing that the Rules, litigation strategy, and most importantly, technology, have always adapted, finding ways to make the new larger volume manageable. When volume has increased, technology has caught up; in 2001, processing, searching, and exporting one gigabyte of data cost around \$2,000, now it costs about \$400.<sup>221</sup> Backup tapes, which were almost always deemed inaccessible as recent as two years ago, are now routinely indexed and archived in a way that make them readily

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<sup>215</sup> FJC Survey, *supra* note 50; Hon. Lee H. Rosenthal, Keynote Address at the Georgetown University Law Center Advanced E-Discovery Institute: Is the E-Discovery Process Broken, And, If So, Can It Be Fixed? (Nov. 12, 2009) (recording available at the Continuing Legal Education Department of Georgetown University Law Center).

<sup>216</sup> FJC Survey, *supra* note 50, at 61.

<sup>217</sup> *Id.* at 63-64.

<sup>218</sup> *Id.* at 68-69.

<sup>219</sup> Rosenthal, *supra* note 215.

<sup>220</sup> See, e.g., ALFRED W. CORTESE, JR., SKYROCKETING ELECTRONIC DISCOVERY COSTS REQUIRE NEW RULES, ALEC Policy Forum, at 9-12 (Mar. 2009), available at <http://www.alec.org/am/pdf/apf/electronicdiscovery.pdf>.

<sup>221</sup> Jones, *supra* note 214.

accessible.<sup>222</sup> Modern e-discovery tools have dramatically increased the rate of document review from approximately 25 documents per hour to nearly 200 documents per hour.<sup>223</sup> And, as discussed in Part IV.D above, new e-discovery tools are in constant development. Calls to amend the Federal Rules based on the current costs or burdens of e-discovery will be rendered obsolete by advancing technology before such amendments even take effect.<sup>224</sup> It would be foolhardy to base decisions about the Federal Rules on what is considered appropriate volume or usable technology in today's world.

Moreover, while the costs of e-discovery may be increasing due to the volume of information being created and retained, litigation of e-discovery issues has declined significantly since 2006. In a recent survey, 67% of responding companies reported *zero* instances of e-discovery issues becoming the subject of a motion, hearing, or ruling from a court in 2008, in contrast to 44% in 2007.<sup>225</sup> According to the survey findings, "this most likely reflects the efforts of the judiciary to update and clarify rules concerning e-discovery, as well as the desire by many litigants to resolve e-discovery issues through the 'meet and confer' process rather than in the courtroom."<sup>226</sup>

#### B. *The Threat of Sanctions Does Not Justify Reactionary Rule Changes*

Much has been made of the rising number of reported cases dealing with e-discovery sanctions and the burden that the resulting fear of sanctions places on corporations with large repositories of electronic data.<sup>227</sup> A review of the "evidence," however, reveals that the imposition of

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<sup>222</sup> Craig Ball, *The Lowdown on Backups*, LAW TECH. NEWS, Mar. 2010 at 30 ("[W]e may have reached the point where backups are not that much harder or costlier to deal with than dispersed active data, and they're occasionally the smarter first resort in e-discovery.").

<sup>223</sup> Montgomery N. Kosma & Paul H. McVoy, *Document Review with Attenex Patterns E-Discovery Platform*, 22 LEGAL TECH NEWSLETTER (Law Journal Newsletters, Philadelphia, PA), July 2004, at 1.

<sup>224</sup> See Comments of Hon. Lee H. Rosenthal in *Managing Electronic Discovery: Views From The Judges*, *supra* note 180, at 5 ("It takes about three years for a rule amendment to become effective through the Rules Enabling Act process.").

<sup>225</sup> Fulbright & Jaworski L.L.P., *Fifth Annual Litigation Trends Survey Findings*, <http://www.fulbright.com/mediaroom/files/2008/Fulbright-FifthLitTrends.pdf>.

<sup>226</sup> *Id.*

<sup>227</sup> See, e.g., *Managing e-Discovery and Avoiding Sanctions Under the FRCP Amendments*, The Metro. Corp. Counsel, at 1 (Jan. 2008), available at <http://www.metrocorpcounsel.com/pdf/2008/January/15.pdf> ("Since the amendments to the Federal Rules of Civil Procedure (FRCP) went into effect in December 2006 (and even before), the number one change we have seen is the an increased level of uncertainty and the fear of what might happen if changes are not made to how companies respond to e-discovery. At best, companies can continue to satisfactorily respond to discovery, but with higher costs and unpredictable outcomes. . . . At worst, the company subjects itself to undue leverage and sanctions because it didn't do the right thing and can't defend its practices.").

sanctions is an exceedingly rare event and that serious sanctions are a realistic threat only to litigants engaging in the most extreme discovery misconduct.

“When It Comes to E-Discovery Sanctions, Be Afraid. Be Very, Very Afraid,” trumpets one recent Internet headline.<sup>228</sup> Another article warns: “Today, corporations are facing an increased risk of sanctions if they do not have a consistent, auditable legal hold process.”<sup>229</sup> A third recent web posting says: “Given the current economic condition, corporate clients are being forced to cut back legal and IT budgets, while the threat of sanctions due to improper ESI handling continues to rise.”<sup>230</sup> What all of these websites have in common—aside from a gift for hyperbole—is that they belong to e-discovery vendors with services and products to sell to corporations and law firms who become very, very afraid of discovery sanctions.

Legal commentators have also weighed in about the “skyrocketing” number of discovery sanctions cases. An article by Dan H. Willoughby and Rose Hunter Jones, posted on the Duke Conference website, informs us: “There were more e-discovery sanctions cases and more sanctions awards in 2009 than in all years prior to 2005 combined.”<sup>231</sup> “[S]anction awards for e-discovery violations have been trending ever-upward for the last ten years and are at historic highs.”<sup>232</sup> According to a mid-year 2009 survey by law firm Gibson Dunn, the first half of that year saw “a dramatic increase in the frequency with which courts consider and apply sanctions.”<sup>233</sup>

But how frequently are sanctions imposed in e-discovery cases? What are the real numbers? According to Willoughby and Jones, sanctions were awarded in forty-six cases in all of 2009.<sup>234</sup> Gibson Dunn reported sanctions were applied in twenty-two cases during the first five months of 2009.<sup>235</sup>

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<sup>228</sup> Legaltechtoday.com, *When It Comes to E-Discovery Sanctions, Be Afraid. Be Very, Very Afraid*, <http://legaltechtoday.globaledd.com/2010/01/19/when-it-comes-to-e-discovery-sanctions-be-afraid-be-very-very-afraid>.

<sup>229</sup> Press Release, Bridgeway, *Bridgeway Puts In-House Corporate and Government Legal Departments in Control of Legal Hold Obligations* (Jan. 27, 2010) *available at* <http://www.bridgeway.com/news-events/press-releases/Bridgeway-Puts-In-House-Corporate-and-Government-Legal-Departments-In-Control-of-Legal-Hold-Obligations.cfm>.

<sup>230</sup> *Case Law Update & E-Discovery News*, 9 KROLL ONTRACK NEWSLETTER 9, Sept. 2009, at 1, *available at* [http://www.krollontrack.com/newsletters/clu\\_0909.html](http://www.krollontrack.com/newsletters/clu_0909.html).

<sup>231</sup> Willoughby & Jones, *supra* note 101, at 4.

<sup>232</sup> *Id.* at 26.

<sup>233</sup> Gibson Dunn, *supra* note 95.

<sup>234</sup> Willoughby & Jones, *supra* note 101, at 4.

<sup>235</sup> Gibson Dunn, *supra* note 95.

Approximately 250,000 civil cases are filed each year in federal courts.<sup>236</sup> The 2009 Federal Judicial Center survey reported that production of ESI was requested in 36% of recently closed federal court cases, or approximately 90,000 cases per year.<sup>237</sup> According to these statistics, e-discovery-related sanctions are imposed in approximately one out of every 2,000 cases in which e-discovery is requested and one out of 5,435 cases overall. Willoughby and Jones report that there have been 231 reported e-discovery cases in which sanctions were awarded—ever.<sup>238</sup>

The sanction of dismissal or default judgment has been imposed in a total of thirty-six reported e-discovery cases in history.<sup>239</sup> In sixteen of the cases, the court reported that misrepresentations had been made to the court by the client, counsel, or both.<sup>240</sup> In nineteen of the cases, “the court emphasized a pattern of misconduct.”<sup>241</sup> The number of dismissals has decreased recently, from seven in 2006 to five in 2009. Willoughby and Jones summarize: “In these terminated cases, the misconduct typically occurs after repeated warnings and after repeated willful failures that irreparably compromise the court’s ability to adjudicate on the merits, leaving no alternative but dismissal.”<sup>242</sup>

Adverse jury instructions have been granted in fifty-two e-discovery cases.<sup>243</sup> Thirty-four of these cases involved “intentional conduct and/or bad faith.”<sup>244</sup> Since 2006, adverse jury instruction cases have reached a historic high—ten per year. Monetary sanctions exceeding \$100,000 have been awarded in a total of twenty-eight reported cases in history.<sup>245</sup>

These numbers simply do not represent a threat to corporate America and certainly do not provide a rationale, as some would claim, to amend the Federal Rules. As the statistics clearly demonstrate, and recent cases confirm,<sup>246</sup> sanctions represent a significant threat only to those who fail to

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<sup>236</sup> U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2008 and 2009 (Table C), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C00Mar09.pdf>.

<sup>237</sup> FJC Survey, *supra* note 50, at 26.

<sup>238</sup> Willoughby & Jones, *supra* note 108, at 9.

<sup>239</sup> *Id.* at 11.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 12.

<sup>242</sup> *Id.* at 14-15.

<sup>243</sup> *Id.* at 15.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* at 17.

<sup>246</sup> Dispositive sanctions and adverse inferences are generally reserved for those whose spoliation was either knowing and willful or in bad faith. *See, e.g.*, Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 658 F. Supp. 2d 456 (S.D.N.Y. 2010) (plaintiffs who, *inter alia*, failed to institute timely litigation holds, failed to preserve ESI when required, failed to request documents from “key players,” and submitted misleading or inaccurate declarations to the court were found to have been grossly negligent and were subjected to monetary sanctions and an adverse inference instruction); Kvitka v. Puffin Co., No. 06-858, 2009 WL 385582, at \*6 (M.D.

make reasonable and good faith efforts to comply with the Federal Rules and existing case law.

## VI. SUMMARY

The drafters of the 2006 Federal Rules amendments recognized that electronic discovery was here to stay, and must be addressed in the Rules. While our present system of discovery may not be perfect, the answer does not lie in limiting litigants' access to the facts or to the courthouse. The Federal Rules were first adopted in 1938 to ensure that trials would be about the merits of a case rather than the gamesmanship that is a product of asymmetrical knowledge. More cooperation, more early planning and case management, and more knowledge of ESI, metadata, and the like, are necessary to truly understand whether the 2006 amendments have been—or have the ability to be—effective. Less discovery is not the answer.

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Pa. Feb. 13, 2009) (case dismissed where plaintiff intentionally discarded laptop containing critical evidence despite instruction from lawyer to maintain the laptop and despite plaintiff's admission that she knew e-mails should have been preserved); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494 (D. Md. 2009) (responding party was found to have acted willfully when it intentionally destroyed the computer of a relevant employee); *Keithley v. Home Store.com Inc.*, No. 03-4447, 2008 WL 3833384, at \*16 (N.D. Cal. Aug. 12, 2008) (imposing monetary sanctions of over \$600,000 for defendants' spoliation and delayed production of documents where the court found defendants had engaged in a "pattern of deceptive conduct and malfeasance in connection with discovery and production of documents . . . and reckless and frivolous misrepresentations to the Court"). Even significant misconduct often results in the mildest of sanctions. *See, e.g.*, *S.E. Mech. Servs., Inc. v. Brody*, No. 08-1151, 2009 WL 2242395 (M.D. Fla. Jul. 24, 2009) (motions for preclusion of evidence or adverse inferences denied despite plaintiffs' failure to institute litigation hold to prevent destruction of e-mails of "key player"); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424, 2009 WL 982460, at \*7 (S.D. Fla. Apr. 9, 2009) (court declines to impose severe sanctions despite finding defendant's discovery conduct "clearly egregious").