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Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data

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Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data

Corinne L. Giacobbe*

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I. Introduction

A commercial defendant in a recent lawsuit had a policy of retaining all of its electronically stored data.¹ This policy caused the defendant to amass thousands of gigabytes of backup files spanning a period in excess of ten years.² During the course of litigation, the defendant learned that this electronic data was subject to discovery.³ Consequently, the court ordered the defendant to review the stored backup data and to produce all relevant information contained on those backup tapes.⁴ This extensive technical discovery required the defendant to hire special experts to aid in the production process.⁵ Ultimately, the defendant incurred costs in excess of three million dollars in order to comply with this single discovery request.⁶

1. See Geanne Rosenberg, *Electronic Discovery Proves Effective Legal Weapon*, J. REC., Apr. 27, 1997, available in 1997 WL 14390671 (providing summary of case to illustrate serious problems regarding electronically stored data discovery).

2. *Id.*
 3. *Id.*
 4. *Id.*
 5. *Id.*
 6. *Id.*

Electronic discovery has become a "mini-industry"⁷ in the legal field, with that aspect of the discovery process having a significant impact on the results of numerous cases.⁸ Electronically stored data has become a prime source of evidence in litigation because of the increasing use of computer technology.⁹ Recent industry surveys reveal that approximately thirty percent of all current discovery requests involve electronically stored data.¹⁰ Requests for electronically stored data undoubtedly will increase because experts estimate that today's computer users never actually print out in paper form almost one-third of all electronically stored data.¹¹ Discovery of electronically stored data is essential because litigants would not find much of this information through traditional paper discovery processes.¹² To the average person, discovery requests for electronically stored data might seem to involve only the simple and inexpensive task of inserting a disk into a hard drive and copying selected files. Yet a closer look at the matter reveals an extremely technical and exceedingly expensive process that creates many perplexing problems in the pretrial stages of litigation.

This Note explores the problems that the increase in electronic data discovery has created in litigation. Specifically, this Note focuses on the cost-allocation issues involved with the discovery of electronically stored data. Part II of this Note provides a background discussion of the technical, practical, and legal aspects of the issue.¹³ It discusses the factors that contribute to the excessive costs involved in the discovery of electronically stored data, it explores the inherent differences between traditional paper discovery and electronic data discovery, and it analyzes the Federal Rules of Civil Procedure

7. *Id.*

8. *See id.* (explaining effect of computer age on electronic data storage and electronic data discovery).

9. *See* Ron Chepesiuk, *Trial by E-Mail*, STUDENT LAW., Sept. 1998, at 31, 31-32 (considering impact of heightened use of computer technology on legal profession, specifically litigation-related matters).

10. *Id.* at 32.

11. *See* Monte E. Sokol & Philip P. Andriola, *Cyberspace Becomes Ground Zero in Discovery Process and at Trial*, N.Y. L.J., Dec. 1, 1997, at S5 (discussing various legal issues surrounding electronically stored data, such as privacy rights, discovery costs, and client counseling).

12. *See id.* (stating that 90% of all businesses with over 1000 employees rely on e-mail, but individuals never print 20 to 30% of electronically stored data); *see also* James J. Marcellino & Anthony A. Bongiorno, *E-Mail Is the Hottest Topic in Discovery Disputes: One Litigant Seeks Facts Buried in a Data Base; the Other Seeks to Avoid Burdens of Production*, NAT'L L.J., Nov. 3, 1997, at B10 (explaining that 20 to 30% of computerized information never reaches paper form (citing Paul Frisman, *E-Mail: Dial 'E' for Evidence*, N.J. L.J., Dec. 25, 1995, at 12)).

13. *See infra* Part II (providing background information regarding discovery of electronically stored data).

that apply to discovery of electronically stored data.¹⁴ Part III examines the likely sources of the problems surrounding the discovery of electronically stored data and contains detailed discussions and analyses of the cases in which courts have dealt with discovery requests for such data.¹⁵ Part IV gives three specific recommendations to remedy the problems surrounding the allocation of discovery costs of electronically stored data.¹⁶ In addition, Part IV explains the need for these changes and the specific manner in which they will solve the current problems.¹⁷ Finally, Part V summarizes the pertinent issues and recommendations and concludes that, regardless of the exact remedy chosen, the time has come to bring the judiciary and the Federal Rules of Civil Procedure into the computer age.¹⁸

II. Background

A. The Importance of Obtaining the Electronic Form of a Document

Experts estimate that computer users never convert up to thirty percent of all electronically stored documents into paper form.¹⁹ This fact is significant because litigants who fail to request electronic data will never find many files through traditional means of paper discovery. Additionally, the electronic version of a document may provide an individual with much more information than its paper counterpart.²⁰ For example, a paper printout of an electronic mail (e-mail) message simply contains the names of the sender and the receiver, the text of the message, and the date and the time that the sender sent the message.²¹ An electronic copy of the same e-mail message may reveal not only the above information, but also the date and the time that the recipient received the message, whether the recipient actually "opened" the message, and also to whom, if anyone, the recipient forwarded the mes-

14. See *infra* Parts II.A-D (providing background discussion of technical, practical, and legal aspects of discovery of electronically stored data).

15. See *infra* Part III (discussing and analyzing pertinent cases).

16. See *infra* Part IV (giving recommendations to solve problems surrounding allocation of discovery costs of electronically stored data).

17. See *infra* Part IV (discussing recommendations to solve electronic data discovery cost issues and explaining manner in which those recommendations will remedy current problems).

18. See *infra* Part V (providing summary and conclusion).

19. Sokol & Andriola, *supra* note 11.

20. See Karen L. Hagberg & A. Max Olson, *Shadow Data, E-Mail Play a Key Role in Discovery*, Trial, N.Y. L.J., June 16, 1997, at S3 (discussing differences between paper and electronic versions of documents); see also Charles A. Lovell & Roger W. Holmes, *The Dangers of E-Mail: The Need for Electronic Data Retention Policies*, R.I.B.J., Dec. 1995, at 7, 7 (explaining that computer printouts do not contain complete information that computer's memory stores).

21. See Hagberg & Olson, *supra* note 20 (describing specific content of paper copy of e-mail message and electronic copy of same message).

sage.²² In addition, computer experts often have the ability to determine the exact terminal within a network from which the sender sent the message.²³ Such information has proven critical in some cases.²⁴

Aside from e-mail, electronic versions of other types of documents also are important to litigants today.²⁵ For example, electronic data discovery has become a significant tool in contractual disputes because experts can restore previous versions of contracts from backup tapes.²⁶ These restored versions of contracts may reveal many important details about the parties' agreement, such as the intent of the parties.²⁷ Litigants might never find this type of important information through traditional paper discovery because it is unlikely that a party would print out and retain every preliminary draft of a document.²⁸ Therefore, it is often imperative that litigants obtain electronic versions of pertinent documents to ensure that they rely on the most accurate information concerning their cases. However, electronic data is considerably more expensive to produce than mere paper documents.²⁹ The sheer costliness

22. See *id.* (describing difference between paper copy and electronic copy of same e-mail message).

23. See Chepesiuk, *supra* note 9, at 31 (discussing recent case in which defendant prevailed through use of electronic version of e-mail message that computer experts were able to retrieve). In that case, the plaintiff claimed that the defendant corporation terminated her employment because she ended a romantic relationship with the corporate defendant's CEO. *Id.* The plaintiff presented a paper copy of an incriminating e-mail from the CEO indicating that he personally ordered her termination. *Id.* Yet computer experts were able to determine, through the electronic version of the same document, that the plaintiff had actually sent the message to herself using the defendant's computer password. *Id.* The defendant prevailed but only after expending a vast amount of money on electronic data discovery in order to find the proverbial "smoking gun." *Id.*; see Janet Novack, *control/alt/discover*, FORBES, Jan. 13, 1997, at 60, 60 (addressing same case facts).

24. See *supra* note 23 (discussing facts of case in which electronic version of document proved critical).

25. See Hagberg & Olson, *supra* note 20 (emphasizing value of electronic versions of documents); Lovell & Holmes, *supra* note 20, at 8 (discussing importance of retrieval of previously deleted documents).

26. See Hagberg & Olson, *supra* note 20 (mentioning importance of computer data as vast source of discovery for drafts of documents and other sensitive correspondence); Lovell & Holmes, *supra* note 20, at 8 (discussing case in which previously deleted draft of agreement revealed valuable information).

27. See Lovell & Holmes, *supra* note 20, at 8 (reporting case in which producing party retrieved 27 drafts of disputed agreement that provided insight into intent of parties).

28. See Lovell & Holmes, *supra* note 20, at 7 (discussing importance of discovery of electronic versions of documents as opposed to mere printouts); Sokol & Andriola, *supra* note 11 (stating that much electronically stored data is never reproduced in paper form).

29. See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120 (LMM) (AJP), 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995) (explaining that requesting party or court can require producing party to design computer programs to extract electronic data from its computer network or backup tapes).

surrounding the discovery of electronically stored data has caused many significant problems in litigation.³⁰

B. Factors Contributing to the Excessive Discovery Costs of Electronically Stored Data

At least three factors contribute to the excessive costs of discovery of electronically stored data. First, the discovery of electronic information is extremely costly because individuals and companies tend to retain greater quantities of electronically stored data than data stored in paper form.³¹ Specifically, unlike paper copies of documents that can fill numerous rooms and warehouses, electronically stored data takes up very little physical space.³² Because computer users can store enormous amounts of information in extremely small spaces, they tend to allow data to linger for longer in a company's network and on backup tapes than they would if they stored the data in paper form.³³ Even though many companies and individuals continue to store paper copies of various documents, it is important to recognize that even if a litigant properly makes the information available to the requesting party in paper form, an adversary still can demand the same information in a usable electronic format.³⁴ A requirement that the data be in electronic form also increases the cost of discovery because production often can entail creating complex computer programs to convert the electronic data from its current format to an electronic format that the requesting party can use.³⁵

30. See *infra* Part II.D (discussing problems that costliness of discovery of electronically stored data has caused for litigants).

31. See Hagberg & Olson, *supra* note 20 (explaining difficulties of purging electronic data and prevalence of backup copies of such data).

32. See *id.* (discussing importance of electronically stored information in litigation and problems surrounding such information); see also Rosenberg, *supra* note 1 (reporting that one 10-inch hard-drive can store more information than entire floor of building).

33. See Hagberg & Olson, *supra* note 20 (commenting that although many companies have document retention programs, few enforce them regarding their computer systems).

34. See *Anti-Monopoly*, 1995 WL 649934, at *1 (explaining that parties can discover data in computerized form, even if producing party already has produced paper copies of same information). In *Anti-Monopoly*, the plaintiff filed a motion to compel production of certain data processing files from the defendants. *Id.* The defendants objected, claiming that they had produced the data in paper format and should not have to produce the data in computer form. *Id.* The defendants argued that complying with the request for electronic data would entail recreating the information at substantial expense because the requested reports no longer existed in electronic format. *Id.* However, the court emphasized that the rule is clear that "production of information in 'hard copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form." *Id.* at *2.

35. See *id.* (explaining that court can require producing party to design computer program to extract electronic data from its computer network or backup tapes). For example, a producing party may possess electronic data stored in a format that the requesting party is unable to use.

Second, the discovery of electronically stored data is exceedingly expensive in part because many individuals and most companies use magnetic tapes to store backup versions of their computer networks.³⁶ These magnetic tapes can hold vast amounts of data;³⁷ for example, a single eight-millimeter backup tape can maintain the equivalent of 1500 boxes of paper.³⁸ Moreover, because many companies never reuse or destroy these backup tapes, the unlimited data retention makes the information indefinitely available for discovery.³⁹ Consequently, the amount of electronically stored data that is subject to discovery can be astronomical.⁴⁰ In most cases, litigants must hire special experts to

Often this occurs because one party utilizes an outdated computer system on which it is unable to work with the requested data in its current electronic format or because the producing party possesses the data on backup tapes from an obsolete computer system. In either case, the producing party would have to create a specialized computer program to convert the electronic data from its current format into a format with which the requesting party can work. However, such processes are often extremely costly. *Id.*

36. See Hagberg & Olson, *supra* note 20 (discussing differences between paper data storage and electronic data storage).

37. See *id.* (explaining differences between electronic version of document and mere paper version of document); see also Marcellino & Bongiorno, *supra* note 12 (discussing numerous factors contributing to excessive costs of discovery of electronically stored data).

38. See Marcellino & Bongiorno, *supra* note 12 (discussing companies' ability to retain vast amounts of data on computer backup tapes).

39. See *id.* (explaining tendency of e-mail to "proliferate" and difficulty of deleting it).

40. See *A Balancing Act: Determining the Proper Level of Electronic Data Preservation*, RECENT DEVS. (Electronic Evidence Discovery, Inc.), June 1998, at 1, 1-3 [hereinafter *A Balancing Act*] (discussing problems relating to preservation of electronic data); Lovell & Holmes, *supra* note 20, at 8 (considering data retention issues involving electronically stored data); Novack, *supra* note 23, at 60 (presenting legal issues surrounding retention of electronically stored data); Daryll R. Prescott et al., *Electronic Data Balancing Act: Preserve or Delete?*, NAT'L L.J., Aug. 17, 1998, at B7 (discussing litigation problems created by retention or lack thereof of electronically stored data).

Although most companies have data retention policies in effect regarding the retention of paper documents, many companies have overlooked the importance of retention policies regarding computer data. See Lovell & Holmes, *supra* note 20, at 8 (discussing positive aspects of instituting electronic data retention policies). Some companies that have instituted electronic data retention policies believe it is necessary to preserve everything and, thus, institute total preservation policies. See Prescott et al., *supra* (discussing various ramifications of maintaining total preservation electronic data retention policy). Although total preservation policies seem cautious, they are exceedingly costly and typically unnecessary. *Id.* On the other hand, some companies have instituted complex data preservation policies whereby they purge electronic data from their systems on a routine basis. See Lovell & Holmes, *supra* note 20, at 8 (discussing positive aspects of maintaining well planned rotational data retention policy). However, courts have severely punished defendants for the inadvertent destruction of electronically stored data that resulted from a company's regular data purging schedule. See Prescott et al., *supra* (discussing recent cases in which courts have imposed harsh sanctions for inadvertent destruction of evidence in accordance with standard data retention policy). These decisions send mixed signals to many companies and make it nearly impossible for them to determine the correct course to take regarding retention of electronically stored data. See *A Balancing Act*, *supra*, at

search through the enormous amount of data contained in their computer network and on backup tapes in order to separate the relevant and discoverable data from that which either is irrelevant or is protected from discovery.⁴¹ In addition, even though many computer systems and backup systems that companies utilized in the past have become obsolete, adversaries still can discover the data contained on disks and backup tapes from those obsolete systems.⁴² In these situations, litigants must hire computer experts to convert these functionally antiquated files into usable form in order to comply with the rules of discovery.⁴³ This too carries a hefty price.⁴⁴

A third factor contributing to the excessive costs of discovery of electronically stored data involves the manner in which files are deleted from a computer.⁴⁵ A great number of computer users are under the impression that once they delete a file, that file is gone forever;⁴⁶ however, this is usually not the case.⁴⁷ Deleting a file simply allows the computer to overwrite the file and to remove it from the directory.⁴⁸ Therefore, often unknown to the user, instead of being immediately overwritten and purged from the system, "deleted" files remain in the computer until the computer needs that space for new data.⁴⁹

1-3 (discussing recent case providing insight into determining correct amount of data retention). As a result, many companies simply "play it safe" and preserve everything. *Id.*

41. See Lawrence Aragon, *E-Mail Is Not Beyond the Law*, PC WK., Oct. 6, 1997, at 111, 112 (discussing various costs associated with searching company's backup tapes).

42. See *id.* (listing different factors contributing to excessive costs of electronic data discovery).

43. See *id.* (discussing process of converting files from obsolete computer systems to current computer systems).

44. See *id.* (discussing expenses associated with restoring "ancient" data from backup systems).

45. See Hagberg & Olson, *supra* note 20 (considering numerous factors contributing to excessive costs of discovery of electronically stored data, including inadvertent data retention); Marcellino & Bongiorno, *supra* note 12 (same).

46. See Hagberg & Olson, *supra* note 20 (explaining that numerous factors contribute to excessive costs of electronically stored data discovery, including inadvertent data retention); Marcellino & Bongiorno, *supra* note 12 (discussing various factors contributing to excessive costs of discovery of electronically stored data); Rosenberg, *supra* note 1 (same).

47. See Rosenberg, *supra* note 1 (discussing preservation and retrieval of previously deleted documents). "The fact that 'deleted' documents are often preserved in computer hard drives and on back-up tapes came to public attention a decade ago during the Iran-Contra scandal." *Id.*; see Bruce Rubenstein, *Electronic Discovery Costs Are Leveraging Settlements*, CORP. LEGAL TIMES, Sept. 1997, at 26, 26 (describing Iran-Contra as step toward awareness of retrieval of previously deleted data).

48. See Marcellino & Bongiorno, *supra* note 12 (explaining process by which computers replace "deleted" data with new data).

49. See *id.* (discussing process through which computers overwrite previously deleted data with new data). Marcellino and Bongiorno emphasize that adversaries may discover the "deleted" data remaining in the computer. *Id.*

Litigants can hire computer experts to restore these previously "deleted" files even years after the supposed deletion of the files, but this procedure can be extremely costly.⁵⁰ In addition, even when new data overwrites these documents, electronic copies of the files often remain on the network backup tapes and thus are subject to discovery.⁵¹

C. Procedures Required in the Discovery of Electronically Stored Data

Although some companies specialize in discovery of electronically stored data, their services are extremely costly.⁵² For example, one company that specializes in this type of work explained that if a client must review data contained in twelve monthly backup tapes, it must consider electronic discovery costs that include both person hours and machine hours.⁵³ That company estimated that if a client seeks to restore e-mail messages contained in a year's worth of its monthly backup sessions, the retrieval costs include an estimated one hundred person hours to restore the monthly sessions to a computer drive and an additional estimated 250 person hours to redact the data to eliminate duplicate messages.⁵⁴ The costs of that project also include 250 person hours to convert the messages to text in order to facilitate a search and manipulation of the data.⁵⁵ Furthermore, it takes approximately sixty person hours to search and print the necessary data.⁵⁶ Experts estimate their fees at an average of \$150 per hour; thus, the total cost of the aforementioned electronic data discovery is nearly \$100,000.⁵⁷ More recently, however, commentators have reported numerous instances in which plaintiffs have presented defendants with electronic data discovery requests with which compliance would cost approximately a million dollars or more.⁵⁸ Moreover, as mentioned in the introduction,⁵⁹ in one extreme example, the plaintiff forced the defendant to

50. See Hagberg & Olson, *supra* note 20 (discussing retrieval of previously deleted files in discovery); Marcellino and Borngiorno, *supra* note 12 (same).

51. See Hagberg & Olson, *supra* note 20 (explaining prevalence of computer backup systems).

52. See Aragon, *supra* note 41, at 112 (discussing discovery costs and procedures specifically involving retrieval of e-mail).

53. See *id.* (outlining electronic discovery costs incurred to review e-mail messages contained in 12 monthly backup sessions).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See Chepesuk, *supra* note 9, at 33 (discussing exceeding costs of complying with electronic data discovery requests); Rubenstein, *supra* note 47, at 26 (discussing skyrocketing costs of litigation due to advent of electronic data storage).

59. See *supra* notes 1-6 and accompanying text (describing case in which defendant had to produce electronically stored data spanning period exceeding 10 years).

review and to produce electronically stored data contained on backup tapes spanning a period exceeding ten years.⁶⁰ Complying with this extensive discovery request cost the producing party several million dollars.⁶¹

D. Problems Created by the Discovery Rules

Although modern technology has led to many positive changes and has created numerous advantages in the litigation process, it also has created some negative side effects because of the vast increase in the use of electronically stored data in litigation.⁶² Many of these problems stem from the broad wording of the general rules applicable to electronic data discovery and from the way in which judges have applied these rules to electronic data discovery issues.⁶³ Thus, it is imperative to understand the procedural rules that currently provide the basis for determining which party bears the cost of producing electronic data for discovery.

1. Rule 34 of the Federal Rules of Civil Procedure

Rule 34 of the Federal Rules of Civil Procedure authorizes a party to request production of electronically stored data.⁶⁴ The rule states that "[a]ny party may serve on any other party a request . . . to produce . . . any designated documents (including writings, . . . and *other data compilations* from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form)."⁶⁵ The 1970 Advisory Committee Notes to the rule make clear that Rule 34 applies to electronic data compilations.⁶⁶ The Advisory Committee Notes emphasize that they intend the descriptive definition of the term "documents" within Rule 34 to adapt to changes in technology.⁶⁷ The Notes also explain that the burden of complying

60. See Hagberg & Olson, *supra* note 20 (mentioning exceedingly expensive discovery costs of retrieving and producing electronically stored data); Rosenberg, *supra* note 1 (highlighting case in which plaintiff forced defendant to review backup tapes covering over 10 years and to produce relevant data at cost of more than \$3 million).

61. See *supra* notes 1-6 and accompanying text (discussing example in which defendant incurred several million dollars in electronically stored data discovery costs).

62. See generally Hagberg & Olson, *supra* note 20 (discussing problems that use of electronically stored data in discovery can cause); Novack, *supra* note 23 (same); Rosenberg, *supra* note 1 (same); Sokol & Andriola, *supra* note 11 (same).

63. See *infra* Part II.D.1-2 (discussing current discovery rules and judiciary's application of those rules).

64. See FED. R. CIV. P. 34 (addressing production of documents for inspection and other purposes).

65. *Id.* (emphasis added).

66. See FED. R. CIV. P. 34 advisory committee's notes (1970 Amendment) (explaining that Rule 34 applies to discovery of electronic data compilations).

67. See *id.* (noting that definition of "documents" is meant "to accord with changing technology").

with a discovery request for electronically stored data rests on the producing party.⁶⁸ When confronted with cases involving the discovery costs of electronically stored data, courts typically have considered this provision to be the general rule regarding the allocation of those discovery costs.⁶⁹

Consequently, when applying Rule 34 in cases involving discovery of electronically stored data, the majority of courts have required that the producing party bear all the costs involved in complying with discovery requests for computer data.⁷⁰ Although this rule seems reasonable on the surface, it has led to numerous problems in the discovery process.⁷¹ The most frequent problem surrounding the general rule is that the sheer breadth of the rule has opened the door to a new means of abusing the discovery process.⁷² With increasing

68. See *id.* (explaining that respondent bears burden of production of electronically stored data, but courts can shift costs to discovering party under Rule 26(c)).

69. See *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (explaining that even in instances in which producing party must translate electronic data into form usable by requesting party, producing party should bear costs involved). In this case, the court explained that "[t]he normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent." *Id.* (quoting *Daewoo Elecs. Co. v. United States*, 650 F. Supp. 1003, 1006 (Ct. Int'l Trade 1986)); see *Sanders v. Levy*, 558 F.2d 636, 650 (2d Cir. 1977) (en banc) (discussing general rule applicable to discovery of electronically stored data), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In *Sanders*, the court explained that "the general rule [is]: 'The responding party who is required to prepare a printout or otherwise make the data reasonably usable for the discovering party must ordinarily bear the expense of doing this.'" *Id.* (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2218 (1970)).

70. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *1, *3 (requiring defendant to retrieve requested electronically stored data at cost estimated at \$50,000 to \$70,000); *Sanders*, 558 F.2d at 650 (discussing general rule applicable to discovery of electronically stored data); *Lovell & Holmes*, *supra* note 20, at 9 (mentioning tradition that parties are responsible for their own discovery costs). In *Sanders*, the court of appeals upheld the district court's denial of the defendant's Rule 26(c) motion to shift the burden of cost of obtaining electronically stored data to the plaintiff. *Sanders*, 558 F.2d at 650.

71. See Mark D. Robins, *Computers and the Discovery of Evidence – A New Dimension to Civil Procedure*, 17 J. MARSHALL J. COMPUTER & INFO. L. 411, 477 (1999) (stating that "the framework of Rule . . . 34 does not fit aptly to the discovery of computer-related evidence"); *Hagberg & Olson*, *supra* note 20 (mentioning problem involving plaintiffs using discovery rules to harass defendants); *Marcellino & Bongiorno*, *supra* note 12 (asserting potential for abuse of discovery rules involving electronically stored data requests); *Novack*, *supra* note 23, at 60 (discussing problems surrounding discovery of electronically stored data); *Rosenberg*, *supra* note 1 (pointing to use of electronically stored data discovery requests as negotiation tool).

72. See FED. R. CIV. P. 34 (governing production of documents for inspection by adversary); see also *Hagberg & Olson*, *supra* note 20 (mentioning problem involving plaintiffs using discovery rules to harass defendants); *Marcellino & Bongiorno*, *supra* note 12 (discussing potential for abuse of discovery rules involving electronically stored data requests); *Novack*, *supra* note 23, at 60 (focusing on problems surrounding discovery of electronically stored data); *Rosenberg*, *supra* note 1 (pointing out use of electronically stored data discovery requests as negotiation tool).

frequency, plaintiffs are using Rule 34 to force defendants into settlement.⁷³ Plaintiffs often present defendants with extremely broad discovery requests for electronically stored data – compliance with which would cost the defendants enormous amounts of money.⁷⁴ The prospect of fulfilling these expensive discovery requests forces many defendants to settle rather than incur such tremendous costs at a very early stage of the litigation process.⁷⁵

2. Rule 26(c) of the Federal Rules of Civil Procedure

To avoid harsh results under Rule 34, litigants may use Rule 26(c) to attempt to shift the cost of production to the requesting party.⁷⁶ Rule 26(c) provides that "the court . . . may make any order which justice requires to

73. See Aragon, *supra* note 41, at 111 (discussing instance in which defendant chose to settle rather than to incur enormous electronic data discovery costs); Hagberg & Olson, *supra* note 20 (discussing problem involving plaintiffs using discovery rules to harass defendants); Marcellino & Bongiorno, *supra* note 12 (discussing potential for abuse of discovery rules involving electronically stored data requests); Novack, *supra* note 23, at 60 (referring to use of cost of electronic data discovery to force settlement as "blackmail"); Rosenberg, *supra* note 1 (discussing use of electronically stored data discovery requests as negotiation tool). Aragon cites one instance in which a corporate defendant faced an electronic data discovery request that cost between \$500,000 and \$750,000. Aragon, *supra* note 41, at 111. The defendant was not as concerned with whether or not the requested backup tapes contained detrimental data as it was with the enormous burden of complying with such a discovery request. *Id.* Ultimately, "[t]he huge tab weighed on the company's decision to settle the case." *Id.*

74. See Chepesiuk, *supra* note 9, at 33 (discussing instances in which plaintiffs took advantage of breadth of discovery rules by requesting that defendants conduct extensive and extremely costly electronic data discovery); Hagberg & Olson, *supra* note 20 (mentioning recent case in which court ordered defendant to review and produce 10 years worth of backup tapes at cost of more than \$3 million); Novack, *supra* note 23, at 60 (discussing case in which court forced defendant to search 50,000 backup tapes, costing defendant more than \$1 million); Rosenberg, *supra* note 1 (giving example of instance in which plaintiff forced defendant to conduct extremely expensive electronic data discovery). See also FED. R. CIV. P. 34 (governing production of documents for inspection by adversary). This rule states that a party may request an adversary to produce *any designated documents*, and the producing party must present the requested documents in "reasonably usable form." *Id.* When interpreted broadly, Rule 34 allows parties to request large volumes of electronically stored data. As a result, the respondent must bear the costs of locating the requested data, possibly restoring much of the data, and translating the data into a form that the requesting party can use.

75. See *supra* note 73 and accompanying text (discussing plaintiffs' use of discovery rules as settlement tools and providing example of situation in which enormous electronic data discovery request forced defendant to settle lawsuit).

76. See FED. R. CIV. P. 26(c) (providing means by which producing party may obtain relief upon showing that discovery request creates undue burden or expense); see also FED. R. CIV. P. 34 advisory committee's notes (1970 Amendment) (explaining that although Rule 34 places burden of cost of complying with discovery request on respondent, courts have ample power under Rule 26(c) to protect respondent against undue burden or expense). The Advisory Committee Notes to Rule 34 further explain that courts have the discretion under Rule 26(c) to restrict discovery or to require that the discovering party pay the costs. *Id.*

protect a party . . . from . . . undue burden or expense.⁷⁷ The Advisory Committee interpreted Rule 26(c) as providing courts with ample discretion to protect a respondent against the undue burden or expense that might result from an overly broad discovery request.⁷⁸

Although Rule 26(c) seems to provide a solution to the problem of discovery abuse surrounding requests for electronically stored data, courts have been extremely hesitant to exercise the discretion that this burden-shifting rule affords them.⁷⁹ In the few cases that involve requests to shift the burden of cost to the requesting party, the courts have varied greatly in their reasoning, considering many different factors and emphasizing distinct considerations.⁸⁰ Thus, it is uncertain what conditions must be present in order for a court to find a discovery request for electronically stored data unduly burdensome or expensive.⁸¹

When presented with defendants' motions to shift the burden of discovery of electronically stored data, most courts simply have denied these motions, even when the costs involved have been exorbitant.⁸² In explaining their reasons for refusing to shift the burden of cost to the requesting party these

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

78. See FED. R. CIV. P. 34 advisory committee's notes (1970 Amendment) (explaining that Rule 26(c) gives courts ample power to protect respondents against undue burden or expense by restricting discovery or shifting burden of cost to requesting party).

79. See *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, MDL 997, 1995 WL 360526, at *3 (N.D. Ill. June 15, 1995) (refusing to shift burden of cost of discovery of electronically stored data to requesting party); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 462-64 (D. Utah 1985) (refusing to shift discovery costs of electronically stored data to requesting party).

80. Compare *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120, 1995 WL 649934 (LMM) (AJP), at *3 (S.D.N.Y. Nov. 3, 1995) (referencing comparison of plaintiff's and defendant's need and cost in time and money as factors for court to consider in determining whether burden shifting is proper), with *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2 (adopting factors set forth in *Bills v. Kennecott Corp.*, but using different argument to make decision), and *Bills*, 108 F.R.D. at 463-64 (setting forth four factors for court to consider in deciding whether to shift burden of cost to requesting party).

81. See *Bills*, 108 F.R.D. at 462 (recognizing that courts lack sufficient guidance as to how to determine properly whether situation warrants burden shifting under Rule 26(c)). The court explained that "[the Advisory Committee] gives the [c]ourt no guidance as to how properly to determine whether the burden or expense is 'undue' where discovery of computer stored information is involved." *Id.*; see *Robins*, *supra* note 71, at 482 (explaining that "the discretionary exercise of a court's authority to allocate costs is inherently uncertain").

82. See, e.g., *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2 (refusing to shift cost of production to requesting party). In this case, the defendant faced discovery costs of approximately \$70,000 in order to comply with one request, yet the court refused to find such a request overly burdensome or expensive. *Id.* at *1. The court reasoned "that the mere fact that the production of computerized data will result in a substantial expense [to the respondent] is not a sufficient justification for imposing the costs of production on the requesting party." *Id.* at *2.

courts have failed to recognize the effects of modern technology on litigation.⁸³ Furthermore, in the few instances in which courts have recognized the inequity of placing the costly burdens on the producing party, the remedies that courts have prescribed have been inadequate and unreasonable.⁸⁴ In some situations, judges have tackled the cost issue simply by placing the burden of searching the producing party's computer networks and backup tapes upon the *requesting* party.⁸⁵ Commentators have criticized this practice because it requires a litigant to grant an adversary access to its network.⁸⁶ In fact, most litigants are vehemently against this invasive practice because "it's almost like giving someone the key to your house."⁸⁷ Others warn that although giving disks and backup tapes to the adverse party may avoid substantial costs, the producing party risks waiving its attorney-client privilege and disclosing proprietary information.⁸⁸ These "remedies" risk causing more harm than good for defendants – harm that defendants need not initially face.⁸⁹

III. Case Discussions and Analyses

As the previous discussion illustrates, it is clear that the current state of the discovery rules and the judiciary's application of those rules in the context of electronically stored data discovery have created many significant problems in litigation.⁹⁰ As one commentator explained, "Although the Rules provide tools to allocate such costs, the framework that the Rules provide for cost-

83. *See id.* (providing reasoning behind decision to deny respondent's request to shift burden of cost of discovery of electronically stored data to requesting party). In this case, the court explained that "[i]f a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." *Id.* (emphasis added). The court further stated that it found it unfair to force the plaintiffs to bear a burden caused by the defendant's choice of electronic storage. *Id.*

84. *See* Hagberg & Olson, *supra* note 20 (reporting practice of turning over computer disks and tapes to adversary in order to avoid substantial costs involved in searching such data); Rosenberg, *supra* note 1 (discussing alternative solutions that judges prescribe in order to deal with issues regarding cost of production of electronically stored data).

85. *See* Rosenberg, *supra* note 1 (explaining various ways in which courts have dealt with discovery cost-allocation issues).

86. *See* Hagberg & Olson, *supra* note 20 (considering problems surrounding alternatives to requiring respondents to bear substantial costs involved in producing electronically stored data); Rosenberg, *supra* note 1 (discussing alternative ways in which courts have addressed allocation of discovery costs of electronically stored data).

87. Rosenberg, *supra* note 1 (quoting practitioner).

88. *See* Hagberg & Olson, *supra* note 20 (criticizing practice of turning over computer disks and tapes to adversary in order to avoid substantial costs involved in searching such data).

89. *See id.* (explaining that alternative means of production can cause litigants unnecessary harm and present litigants with unnecessary risks).

90. *See supra* Part II.D (describing numerous problems that current discovery rules and judiciary's misapplication of those rules have created in dealing with discovery of electronically stored data).

allocation in conventional discovery does not precisely fit computer-related discovery, and the discretion that the Rules afford courts to adjust the allocation leaves much uncertainty⁹¹ These problems have had severe ramifications on litigants, both small and large. With the use of computer technology steadily increasing, it is important to understand exactly how the judiciary has dealt with the computer-related issues discussed above. The following subparts will discuss and analyze some of the case law in which courts have addressed the allocation of discovery costs of electronically stored data.⁹²

A. Cases in Which Courts Have Considered Burden Shifting Under Rule 26(c) of the Federal Rules of Civil Procedure

Although few opinions involve the issue of shifting the costs of discovery of electronically stored data, the opinions that are available provide some insight into the pertinent considerations. Some of these cases stand as examples of the problems that the judiciary's current application of the relevant rules of civil procedure create in the context of electronically stored data discovery.⁹³ These cases illustrate that the current rules and their advisory committee notes are insufficient because they provide the judiciary with little guidance on how to apply the rules properly in cases involving electronically stored data discovery.⁹⁴ The following cases demonstrate the most common manner in which the courts have dealt with motions to shift the burden of cost of electronically stored data under Rule 26(c) of the Federal Rules of Civil Procedure. These opinions also reveal much of the judiciary's lack of experience and expertise in dealing with discovery issues involving electronically stored data.⁹⁵

1. Bills v. Kennecott Corp.

In 1985, the United States District Court for the District of Utah decided *Bills v. Kennecott Corp.*,⁹⁶ a well-known case in which a court considered a motion by the producing party to shift the cost of production of electronically

91. Robins, *supra* note 71, at 473.

92. See *infra* Part III.A (considering cases in which courts have considered burden shifting under Rule 26(c)); *infra* Part III.B (analyzing cases that involve shifting burden of discovery costs in order to pinpoint source of problems); *infra* Part III.C (examining decisions in which courts have prescribed alternative means of production or have refused to compel respondents to bear costs of discovery).

93. See *infra* notes 96-274 and accompanying text (discussing typical cases in which courts have tackled electronic data discovery cost-allocation issues).

94. See *infra* notes 96-274 and accompanying text (analyzing and critiquing cases in which courts have dealt with electronic data discovery cost-allocation issues).

95. See *infra* notes 96-274 and accompanying text (discussing major cases in which courts have addressed issue of electronic data discovery).

96. 108 F.R.D. 459 (D. Utah 1985).

stored data to the requesting party.⁹⁷ *Bills* involved an age discrimination suit that a group of former employees brought against the defendant corporation.⁹⁸ During the course of discovery, the plaintiffs requested production of documents that contained detailed information regarding a number of employees at Kennecott's Utah operations.⁹⁹ The defendant offered to comply with the discovery request by providing the plaintiffs with either a computer tape or a printout of the requested data, but it refused to do so at its own expense.¹⁰⁰ The plaintiffs would not pay the costs associated with production of the requested data absent a court order to do so.¹⁰¹ Ultimately, the defendant produced the requested data, but it also filed a motion asking the court to exercise its discretion under Rule 26(c) by issuing an order requiring the plaintiffs to pay the \$5,411.25 incurred in complying with the discovery request.¹⁰²

The main issue in *Bills* was whether the discovery request in question was so unduly burdensome or expensive that it warranted shifting the burden of cost to the requesting party under Rule 26(c) of the Federal Rules of Civil

97. See *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 464 (D. Utah 1985) (concluding that court should not shift cost of production of electronically stored data to plaintiffs). In *Bills*, the underlying dispute involved a wrongful termination action that a group of former employees brought against the defendant corporation. *Id.* at 460. The discovery request at issue sought the production of documents containing detailed information regarding numerous employees at Kennecott's Utah operations. *Id.* This discovery request cost the defendant \$5,411.25. *Id.* In considering the defendant's motion for an order requiring the plaintiffs to bear the costs of discovery, the court contemplated whether it was appropriate under the circumstances to exercise its discretion under Rule 26(c) of the Federal Rules of Civil Procedure and to shift the burden of cost to the plaintiffs in order to protect the defendant from undue expense. *Id.* at 461-64. At the heart of the court's analysis was the determination of what constitutes an undue expense in the context of computer stored data for the purposes of Rule 26(c) burden shifting. *Id.* at 462-64. The court decided that it should balance the expense and burden to the responding party against the relative expense and burden to the requesting party in addition to determining whether such burden was excessive. *Id.* at 463. The court relied on four factors in deciding to deny the defendant's request to shift the burden of cost to the plaintiffs in this case. *Id.* at 464. First, the court looked at the amount of money involved and determined that such sum was neither excessive nor inordinate. *Id.* Second, the court weighed the relative expense and burden of obtaining the requested data between the plaintiff and defendant and determined that both the burden and expense would be greater to the plaintiffs in this case than to the defendant. *Id.* Third, the court took into account the financial position of the plaintiffs and determined that the amount of money required to comply with the discovery request in question would be a substantial burden to the plaintiffs. *Id.* Finally, the court considered whether the responding party would benefit at all by producing the data in question; it determined that the defendant would benefit to some degree by producing the data requested. *Id.* Thus, the court refused to shift the burden of cost of production to the plaintiffs. *Id.*

98. *Id.* at 460.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

Procedure.¹⁰³ In considering the issue, the *Bills* court recognized the important impact that computers have had on litigation in general and on discovery in particular.¹⁰⁴ It also addressed the significant cost-allocation differences inherent in discovery of electronically stored data versus discovery of paper documents.¹⁰⁵ The court explained that because of these differences, parties presented with requests to produce electronically stored data must shoulder the burden of showing undue expense before courts will shift the costs to the requesting party.¹⁰⁶

In determining exactly what constitutes an undue expense, the court emphasized that although the Advisory Committee Notes to the Federal Rules of Civil Procedure address the issue of burden shifting based on undue burden or expense, the committee failed to give courts guidance on how to determine properly whether a burden or expense is undue in the context of electronically stored data.¹⁰⁷ Before setting forth the factors it considered in its ultimate decision, the court explained that it was not attempting to set forth an "iron-clad formula"¹⁰⁸ for determining the definition and the scope of "undue" under the applicable federal rules.¹⁰⁹ Rather, the court explained that the judiciary should resolve these questions on a case-by-case basis.¹¹⁰ However, the court noted that certain propositions, such as the general rule that the producing party pays, should apply in nearly all cases.¹¹¹ The court ultimately established a number of factors that it found persuasive in determining whether the discovery request in question placed an undue burden or expense on the defendant such that it warranted shifting the costs of discovery to the requesting party.¹¹²

The court explained that it is proper to balance the expense and burden on the responding party against the relative expense and burden on the re-

103. *Id.*

104. *Id.* at 461-66. The court noted that "[c]omputers have become so commonplace that most court battles now involve discovery of some type of computer-stored information." *Id.* at 462.

105. *Id.* The court explained that "[a]lthough parties in the past have been able sometimes to shift the majority of the costs of document production to the requesting party merely by making records available for inspection, that cost-shifting tactic is less available . . . when the information is stored in computers." *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 463.

109. *Id.* The court explained that in its opinion, "[s]uch a formula would be judicially imprudent and wholly impractical in view of the diverse nature of the claims, discovery requests and parties before the [c]ourts in a variety of cases and situations." *Id.*

110. *Id.*

111. *Id.* at 464-65.

112. *Id.*

questing party in addition to determining whether the burden is excessive.¹¹³ The *Bills* court concluded that the relative expense and burden in producing the requested data would be significantly greater to the plaintiff than to the defendant.¹¹⁴ Next, the court looked at the amount of money involved and determined that \$5,411.25 was neither excessive nor inordinate.¹¹⁵ In addition, the court asserted that the expense would be a substantial burden to the plaintiffs.¹¹⁶ Finally, the court found it significant that the defendant would benefit to some degree from producing the requested data.¹¹⁷ After setting forth the aforementioned factors and conducting its analysis, the court refused to shift the burden of cost to the requesting party.¹¹⁸ Consequently, the court denied the defendant's motion.¹¹⁹ In sum, *Bills* provides an example of the typical manner in which courts handle requests to shift the burden of discovery costs of electronically stored data.

2. *In re Brand Name Prescription Drugs Antitrust Litigation*

Ten years after *Bills*, the United States District Court for the Northern District of Illinois decided *In re Brand Name Prescription Drugs Antitrust Litigation*,¹²⁰ the most well-known recent case involving the allocation of the discovery costs of electronically stored data.¹²¹ This case stands as an impor-

113. *Id.* at 463.

114. *Id.* at 464.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. Nos. 94 C 897, MDL 997, 1995 WL 360526, at *1 (N.D. Ill. June 15, 1995).

121. See *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *3 (N.D. Ill. June 15, 1995) (requiring defendant to produce computer-stored data at own expense). In *In re Brand Name Prescription Drugs*, the court considered whether a discovery request for the defendant's e-mail was untimely, overly-broad, or overly-burdensome on the defendant, such that it warranted denial of the request, or alternatively, shifting the burden of cost to the requesting party. *Id.* at *1. The plaintiffs requested production of the defendant's e-mail, a request that would cost between \$50,000 and \$70,000. *Id.* The defendant claimed that the court should require the plaintiffs to bear the costs of retrieving the e-mail because the Manual for Complex Litigation implies that reimbursement is proper in such circumstances. *Id.* The court recognized that the manual did lend some support to the defendant's argument, yet after examining relevant case law, it refused to shift the burden of cost to the plaintiffs. *Id.* at *2. The court reasoned that "the mere fact that the production of computerized data will result in a substantial expense is not a sufficient justification for imposing the costs of production on the requesting party." *Id.* The court considered a number of factors in making its determination and concluded that "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." *Id.* Although the court acknowledged that \$70,000 in discovery costs is expensive, it failed to find

tant example of the significant impact that *Bills* has had on the judiciary's consideration of electronic data discovery issues. In addition, it illustrates the common problems that the lack of technical knowledge of much of the judiciary creates in the complicated realm of electronic data discovery allocation.

In *In re Brand Name Prescription Drugs*, the class plaintiffs filed a motion to compel the defendant, CIBA-Geigy Corporation, to produce electronically stored e-mail messages in response to a prior discovery request.¹²² The defendant agreed that the plaintiffs could discover the requested e-mail,¹²³ yet refused to produce the requested data.¹²⁴ The defendant explained its refusal by claiming that the plaintiffs' request was "untimely, overly-broad, and overly-burdensome."¹²⁵ The defendant argued that the plaintiffs waived their right to seek the e-mail because they failed to pursue diligently their original request.¹²⁶

In considering the defendant's claims, the court first rejected the argument that the plaintiffs waived their right to discovery of the requested e-mail.¹²⁷ Second, the court examined the defendant's argument that the court should shift the costs for retrieving the e-mail to the class plaintiffs.¹²⁸ The defendant supported its argument by estimating that it had at least thirty million pages of e-mail stored on backup tapes.¹²⁹ The defendant contended that it would cost approximately fifty to seventy thousand dollars to search the e-mail data in order to retrieve the appropriate information for discovery.¹³⁰

those costs unduly burdensome or excessive. *Id.* The court further stated that placing the burden on the defendant was reasonable because the expense of the discovery procedures involved was a direct result of the defendant's record-keeping system over which the plaintiffs had no control. *Id.* The court went even further by referring to the defendant's electronic storage method as a *choice*. *Id.* The court did require the plaintiffs to narrow their request in an effort to contain costs, but it refused to require the plaintiffs to assume the costs associated with complying with the discovery request in question. *Id.* at *3.

122. *Id.* at *1.

123. *Id.* The court explained that "Rules 26(b) and 34 of the Federal Rules of Civil Procedure instruct that computer-stored information is discoverable under the same rules that pertain to tangible, written materials." *Id.*

124. *Id.*

125. *Id.*

126. *Id.* The defendant claimed that the plaintiffs had been dilatory in pursuing their e-mail request and, thus, it denied the defendant discovery of the e-mail. *Id.*

127. *Id.* The court agreed that the plaintiffs' efforts in pursuing the e-mail issue were less than exemplary, but it ultimately concluded that such conduct was not egregious and did not constitute an abuse of the discovery process. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* The defendant explained that complying with the discovery request in question would entail searching the e-mail data contained on the backup tapes, eliminating duplicate messages, compiling, formatting, and retrieving the appropriate data requested. *Id.*

In addition, the defendant argued that the Manual for Complex Litigation proposes that reimbursement is proper in similar situations.¹³¹

In addressing the defendant's argument regarding the Manual for Complex Litigation,¹³² the court reviewed the pertinent sections of the manual; it acknowledged that the manual did shed some light on the situation and did lend some support to the defendant's theory that the plaintiffs should bear the cost of discovery of the requested e-mail.¹³³ However, the court explained that certain case law, specifically *Bills v. Kennecott Corp.*,¹³⁴ was more persuasive than the Manual for Complex Litigation.¹³⁵ This case law, the court stated, provided insight into the determination of whether a discovery request is unduly burdensome or excessive to the point of warranting a shift in the burden of production to the requesting party.¹³⁶

The court relied on cases which establish that the simple fact that production of electronically stored data will result in a substantial expense does not justify imposing the costs of production on the requesting party.¹³⁷ The court reasoned that sheer costliness was not enough to render a request for electronically stored data unduly burdensome or excessive.¹³⁸ Instead, the court suggested that it was necessary to consider at least four factors: (1) whether the amount of money in question was excessive and inordinate; (2) whether the relative expense and burden in obtaining the data would be greater to the requesting party than to the responding party; (3) whether the amount of money in question would be a substantial burden to the requesting party; and (4) whether the responding party would incur some benefit by producing the data in question.¹³⁹ However, the court recognized that determinations in the

131. *Id.*

132. *Id.* at *2.

133. *Id.* The MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.446 (1993) provides that:

Parties sometimes request production in a form that can be created only at substantial expense for additional programming; if so, payment of such costs by the requesting party should be made a condition to production. Indeed, parties obtaining information from another's computerized data typically are required to bear any special expense incident to this form of production.

Id. at *2 n.1 (quoting MANUAL FOR COMPLEX LITIGATION, (SECOND) § 21.446 (1993)).

134. *See supra* Part III.A.1 (discussing *Bills v. Kennecott Corp.*).

135. *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2.

136. *Id.* The court relied on the factors that the Central Division of the District of Utah considered in *Bills v. Kennecott Corp.* in determining whether the cost of complying with the discovery request at issue was unduly burdensome or expensive. *Id.*; *see infra* text accompanying note 139 (setting out *Bills* factors).

137. *Id.*

138. *Id.*

139. *Id.* (citing *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 464 (D. Utah 1985)). However, it is important to note that the court in *Bills* explicitly stated that in setting forth factors in that

context of retrieval and production of electronically stored data are exceedingly complicated.¹⁴⁰

In weighing the foregoing factors, the court looked at the situation from the perspectives of both parties.¹⁴¹ Ultimately, the court determined that the defendants, because they *chose* an electronic storage method, should bear the costs necessary to retrieve and produce the requested information.¹⁴² The costs, according to the court, were a product of the defendant's record-keeping scheme and were a foreseeable risk of maintaining such a storage method.¹⁴³ In the court's opinion, forcing the plaintiffs to bear costs that are a product of a storage method over which they have no control would be unfair.¹⁴⁴

The court ultimately denied the defendant's request to shift the burden of cost of retrieving the electronically stored data to the plaintiffs, but the court did provide the defendant with some relief.¹⁴⁵ The court required the plaintiffs to bear any costs associated with printing the selected e-mail files that the defendant produced.¹⁴⁶ Furthermore, the court required the plaintiffs to narrow their discovery request in an effort to contain the costs that the defendant incurred.¹⁴⁷ In the end, however, the court granted the plaintiff's motion to compel the defendant to produce the requested computer stored data at its own expense.¹⁴⁸

3. Sanders v. Levy

Over twenty years ago, the United States Court of Appeals for the Second Circuit decided *Sanders v. Levy*,¹⁴⁹ an important case that, although ultimately

case it did not mean for other courts to use those factors as an "ironclad formula" for conducting burden-shifting analyses. *See Bills*, 108 F.R.D. at 463.

140. *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2.

141. *Id.* The court first reasoned that "[o]n the one hand, it seems unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request." *Id.* The court also reasoned that "[o]n the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at *3.

146. *Id.* The court required the plaintiffs to pay the defendant 21¢ per page for copies of documents selected from the defendant's productions. *Id.*

147. *Id.* The court explained that the defendant claimed that much of the expense associated with retrieving and producing the requested e-mail was due to the size of the data set that the plaintiffs requested. *Id.*

148. *Id.*

149. 558 F.2d 636 (2d Cir. 1977), *rev'd sub nom.* *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

reversed by the United States Supreme Court, continues to shed some light on the judiciary's disparate treatment of allocation of electronic data discovery costs.¹⁵⁰ *Sanders* was a class action suit in which the plaintiffs requested that the defendants produce a list of names and addresses of the class members from its electronically stored records; they needed the information to properly notify the class members in accordance with the rules governing class actions.¹⁵¹ The district court determined that the rules of discovery, rather than the class action rules, governed the issue at hand.¹⁵² Thus, it required the *defendants* to shoulder the costs of retrieving and producing the requested class member information at a cost of approximately sixteen thousand dollars in 1976 dollars.¹⁵³

150. See *Sanders v. Levy*, 558 F.2d 636, 646 (2d Cir. 1977) (en banc) (holding that district court did not abuse its discretion by requiring defendant to bear costs of production of lists that plaintiffs needed in order to provide individualized notice to class plaintiff members), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In *Sanders*, the district court required the defendant, Oppenheimer Fund, Inc. (the fund), to produce the names and addresses of the class plaintiffs so that the plaintiffs could properly notify the members of the class. *Id.* at 647. The fund expended \$16,000 in extracting the lists of the names and addresses of the class members from its computerized records. *Id.* The defendants appealed the order of the district court requiring them to bear the burden of costs of retrieving and producing the class lists; they claimed that such costs were the responsibility of the plaintiffs as part of the notice requirements under Rule 23 of the Federal Rules of Civil Procedure. *Id.* at 647-48. On rehearing en banc, the United States Court of Appeals for the Second Circuit upheld the district court's order requiring the defendants to cull the names and addresses of the class members from its computer system. *Id.* at 646. The court explained that the district court acted within its discretion by requiring that production of the lists be at the defendant's expense. *Id.* The court reasoned that Rule 34 of the Federal Rules of Civil Procedure provided the basis for requiring the defendants to bear the expense of producing the information contained in their computer records. *Id.* at 648. It rejected the defendants' argument that Rule 23 should govern the request for the class list because it is in essence part of the costs involved in notifying the class. *Id.* Rather, the court found that the information that the plaintiffs sought regarding the names and addresses of the class members was within the broad scope of discovery allowed under Rule 34. *Id.* Furthermore, the court found that the district court did not err in failing to exercise its discretion under Rule 26(c) and shifting the burden of cost to the requesting party. *Id.* The court reasoned that the burden that the defendants faced was not unreasonable, excessive, or unjust. *Id.* In arriving at its conclusion, the court emphasized that it was not unreasonable or unjust to require a party whose business is vast and complex to bear such a burden. *Id.* Thus, the Court of Appeals for the Second Circuit, sitting en banc, found that the district court did not err in requiring the defendants to bear the burden of cost required to produce the class lists. *Id.* at 651. However, the United States Supreme Court reversed the appellate court's decision, holding that Rule 23 governed the situation at hand, not the rules of discovery. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 342, 350 (1978). The Supreme Court concluded that the lower court erred by applying the discovery rules to a situation in which Rule 23 was clearly the appropriate source of authority. *Id.* at 350.

151. *Sanders*, 558 F.2d at 647.

152. *Id.*

153. *Id.*

On appeal, the United States Court of Appeals for the Second Circuit, sitting en banc, addressed the issue of whether the district court acted within its discretion in ordering the defendants to bear the costs of producing the names and addresses of the class members.¹⁵⁴ The defendants claimed that precedent dictated that the class plaintiffs should be responsible for bearing the costs of giving notice to the class because notice is an incidental part of class certification.¹⁵⁵ Nonetheless, the court disagreed with the defendant.¹⁵⁶ It found that Rule 34 of the Federal Rules of Civil Procedure, rather than the class action rules, governed the decision to require the defendant to bear the expense of producing the class list that the plaintiffs requested.¹⁵⁷ Furthermore, the Court of Appeals determined that the burden imposed upon the defendant was not unreasonable because of the nature of the information requested and the extent and character of the defendant's business.¹⁵⁸ The court explained that it found nothing unfair or unjust in requiring large business enterprises to go to great lengths in order to meet the legitimate requirements of the law.¹⁵⁹ Thus, the Court of Appeals for the Second Circuit affirmed the district court's order by finding that the trial judge did not abuse his discretion in declining to shift the burden of cost to the plaintiffs under Rule 26(c) of the Federal Rules of Civil Procedure.¹⁶⁰

On further appeal, the United States Supreme Court held that the rules governing class actions, not the rules of discovery, provided the appropriate

154. *Id.* at 648.

155. *Id.* The defendants claimed that *Eisen v. Carlisle & Jacquelin* held that "[t]he usual rule is that a plaintiff must initially bear the cost of notice to the class. . . . [T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178-79 (1974)). The defendants argued that "since it is prerequisite to sending the notice mandated by [*Eisen*] that plaintiffs obtain the names and addresses of those to whom the notice will be sent, *Eisen* should govern the allocation of the cost of providing the information." *Sanders*, 558 F.2d at 647. The court, however, disagreed. *Id.*

156. *Id.*

157. *Id.* The court explained that, in its opinion, the lists that the plaintiffs sought were merely discoverable, electronically stored information. *Id.* The court further explained that the information fell "within the broad scope of permissible discovery" set out in the Federal Rules because it was relevant to the subject matter of the pending action. *Id.*

158. *Id.* at 650. The court acknowledged that the total expense of \$16,000 was rather large, but it reasoned that identifying each individual shareholder only cost the defendants 13¢. *Id.*

159. *Id.* The court further indicated that it would not expect or require small or simple businesses to go to the same lengths as large corporations in the same situation. *Id.* The court attempted to analogize this disparity to the requirements of the Internal Revenue Service. *Id.* The court explained that "[g]reat corporations . . . must expend millions to provide to the government information necessary to comply with internal revenue laws; an individual taxpayer may provide the required information at a cost to himself of a mere few dollars." *Id.*

160. *Id.* at 649-50. The appellate court determined that shifting the burden of cost of production due to the sheer time and expense involved would be the equivalent of applying an inflexible rule that the discovering party bear the expense. *Id.* at 649.

sources of authority in the case.¹⁶¹ The Court explained that Rule 23 generally requires a class plaintiff to bear the costs associated with notification of the class members, but a court has the power to shift these costs to the defendant in situations in which the defendant is able to perform the tasks involved in notifying the class more easily than the plaintiff.¹⁶² The Supreme Court also concluded that the present situation did not warrant shifting the burden of cost to the defendant.¹⁶³ Thus, the Supreme Court reversed the decision on the grounds that the district court and the court of appeals applied the wrong rules to the case and that it was an abuse of discretion not to require the plaintiffs to bear the cost of discovery.¹⁶⁴

B. Pinpointing the Source of the Problem: Analysis of Cases That Involve a Shift in the Burden of Discovery Costs

Unsatisfactory outcomes regarding electronically stored data are partly the result of the judiciary's lack of the necessary familiarity with and knowledge of current computer technology, which are needed to achieve just and equitable ends.¹⁶⁵ The reasoning that the courts provide in many of the cases

161. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 342, 350 (1978). Justice Powell, writing for the majority, stated: "[W]e hold that Rule 23(d), not the discovery rules, is the appropriate source of authority for such an order." *Id.* at 350.

162. *Id.* at 349-50, 356. The Court explained that "[t]he general rule must be that the representative plaintiff should perform the tasks, for it is he who seeks to maintain the suit as a class action and to represent other members of his class." *Id.* at 356. However, the Court also explained that "where a defendant can perform one of the tasks necessary to send notice . . . more efficiently than the representative plaintiff, the district court has discretion to order him to perform the task under Rule 23(d)." *Id.* at 350.

163. *Id.* at 350, 362-63.

164. *Id.* at 350, 364. The Supreme Court explained that "[i]n short, we do not think that the discovery rules are the right tool for this job." *Id.* at 354.

165. See *Sanders v. Levy*, 558 F.2d 636, 649 (2d Cir. 1977) (en banc) (discussing problems stemming from courts' lack of knowledge and experience with computer technology), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). In *Sanders*, the court admitted that "computer technology presents discovery problems with which the courts have developed relatively little familiarity." *Id.*; see also Chepesiuk, *supra* note 9, at 36 (explaining that problems regarding decisions involving discovery of electronically stored data stem from fact that most judges have little experience with today's computer technology). Chepesiuk illustrates this point by noting "that when the Supreme Court handed down its decision on the Communications Decency Act in 1997, not one of the justices had ever been on the Internet." *Id.*; see *Electronic vs. Paper: Determining the Proper Format for Production: A Source of Uncertainty in Litigation*, RECENT DEVS. (Electronic Evidence Discovery, Inc.), Aug. 1998, at 1, 5 [hereinafter *Electronic vs. Paper*] (discussing problems surrounding mix of legal and complex technological questions involved in electronic data discovery disputes that stem from judges' lack of technical knowledge); Robins, *supra* note 71, at 510 (explaining that "[u]ntil litigators and judges gain greater familiarity with these issues, disputes over computer-related discovery are likely to yield more fact-specific discretionary rulings that offer minimal guidance to the bar").

involving discovery of electronically stored data evidences a lack of knowledge regarding current computer technology.¹⁶⁶ It is becoming increasingly obvious that a significant part of the judiciary does not realize the extent to which individuals and businesses are using computers.¹⁶⁷ A second reason for the inequitable decisions regarding the allocation of discovery costs of electronically stored data is the insufficiency of the Federal Rules of Civil Procedure in addressing the issue.¹⁶⁸ Critics maintain that the rules are too broad and require substantial amendment to address more directly the changes in technology and their impact on litigation.¹⁶⁹ Regardless of the exact sources of the problem, it is evident that something must be done to remedy the situation because the courts seem to be unable to provide sound solutions under the present rules.¹⁷⁰

In order to remedy the current situation, one must thoroughly analyze the foregoing decisions to identify their flaws and weaknesses. In looking at these cases, one must examine the various factors that the courts considered and the manner in which the courts applied those factors when presented with motions to shift the burden of cost of discovery of electronically stored data under

166. See *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *2-*3 (N.D. Ill. June 15, 1995) (providing reasoning behind decision to deny request to shift burden of cost of discovery of electronically stored data to requesting party). The court unreasonably referred to electronic storage of data as a *choice*. *Id.* Thus, it failed to recognize the extent to which such practices have become commonplace in today's business world. *But see* *Bills v. Kennecott Corp.*, 108 F.D.R. 459, 462 (D. Utah 1985) (recognizing fact that computers have become commonplace in every aspect of society today). The court in *Bills* acknowledged that "[f]rom the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development." *Id.*

167. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2-*3 (referring to electronic storage of data as choice). By referring to the use of electronic data storage as a choice, the court failed to acknowledge the fact that most businesses and individuals today utilize some method of computer storage. Thus, the court failed to take into consideration the state of today's technology.

168. See Rosenberg, *supra* note 1 (discussing view of one judge in favor of revising Federal Rules of Civil Procedure in order to thwart such broad discovery). Rosenberg quoted Judge Paul Niemeyer of the United States Court of Appeals for the Fourth Circuit: "I sense that discovery is being used as a tool of oppression, rather than as a tool of fairness." *Id.* Rosenberg explained that Judge Niemeyer is "engaged in a national effort to re-examine the Federal rules that allow such broad discovery." *Id.*; see Robins, *supra* note 71, at 473 (stating that "[i]n the area of cost-allocation, however, the guidance provided by the Rules is far less certain"). Robins is also of the opinion that "the framework of [the] Rules . . . does not fit aptly to the discovery of computer-related evidence." *Id.* at 477.

169. See Rosenberg, *supra* note 1 (explaining that Judge Niemeyer assists in national movement to re-examine federal discovery rules).

170. See Robins, *supra* note 71, at 483 (explaining that unless things change, "courts will probably continue to balance . . . factors . . . in an *ad hoc* fashion, while avoiding the question of whether a fundamental recalibration is needed").

Rules 34 and 26(c) of the Federal Rules of Civil Procedure. Furthermore, it is important to explore the reasoning that the courts have set forth in reaching their conclusions as well as the attitudes that the courts have presented in the foregoing opinions.

The first case that the previous subpart discussed, *Bills v. Kennecott Corp.*,¹⁷¹ is significant not because of the amount of money involved in producing the requested computer data,¹⁷² but rather because of the factors that the court set forth in its burden-shifting determination.¹⁷³ When examining the factors that the court considered in *Bills*, it is important first to note that the court in *In re Brand Name Prescription Drugs* adopted and relied upon the factors that the district court promulgated in *Bills*.¹⁷⁴ Although it is not unusual for one court to follow the opinion or analysis set forth in a decision of one of its fellow courts, in this instance it is significant because the district court in *Bills* specifically stated that in providing certain factors to consider in determining a definition of "undue" under Rules 34 and 26(c), it was not attempting to promulgate "an ironclad formula"¹⁷⁵ for courts to use in other cases.¹⁷⁶ The *Bills* court further opined that such a formula would be "judicially imprudent"¹⁷⁷ and entirely impractical because of the diverse nature of the various cases and situations that confront the judiciary.¹⁷⁸ However, by applying identical factors in an entirely different case involving unique parties, claims, and discovery requests, the court in *In re Brand Name Prescription Drugs* virtually turned the *Bills* factors into an established formula for making burden-shifting determinations under Rules 34 and 26(c) of the Federal Rules of Civil Procedure. Furthermore, the court's action is significant because much of the legal community currently considers *In re Brand Name Prescription Drugs* to

171. See *supra* Part III.A.1 and accompanying text (providing detailed discussion and analysis of *Bills v. Kennecott Corp.*).

172. See *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 460 (D. Utah 1985) (involving discovery request for electronically stored data that cost defendant \$5,411.25).

173. See *id.* at 464 (outlining factors court considered in determining whether discovery request at issue amounted to undue burden or expense under Rule 26(c) of Federal Rules of Civil Procedure); see also *supra* note 97 (providing detailed summary of *Bills*).

174. Compare *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (listing factors for court to consider in burden shifting decision) with *Bills*, 108 F.R.D. at 464 (outlining factors court considered in determining whether to shift burden of cost of electronically stored data to requesting party).

175. *Bills*, 108 F.R.D. at 463.

176. See *id.* ("This Court does not attempt to set forth an ironclad formula into which the facts of this or another case can be placed for determination of what 'undue' means under Rule 34.").

177. *Id.*

178. See *id.* ("Such a formula would be judicially imprudent and wholly impractical in view of the diverse nature of the claims, discovery requests and parties before the Courts in a variety of cases and situations.").

be the "golden rule" regarding how courts should evaluate Rule 26(c) motions to shift the burden of cost of electronically stored data discovery.¹⁷⁹ Thus, in *In re Brand Name Prescription Drugs*, the District Court for the Northern District of Illinois did exactly what the court in *Bills* was trying to prevent – it inadvertently created an "ironclad formula" for these determinations.¹⁸⁰

The *Bills* opinion is also significant because the court articulated many important concerns regarding the allocation of electronically stored data discovery costs.¹⁸¹ First, the court recognized that the ever-changing computer age makes certain cost-shifting tactics less available to litigants than in the past.¹⁸² Specifically, the court explained that in the past, litigants were able to shift the burden of cost to the requesting party simply by making their paper records available for inspection.¹⁸³ However, that choice is not available to parties when electronically stored data is involved because it is usually far too dangerous for a party to make its computer system available to an adversary.¹⁸⁴ Thus, in the computer age, Rule 26(c) is a litigant's only source of relief from an unduly burdensome or expensive discovery request.¹⁸⁵ Although its observations are accurate, the court's ultimate decision seems to disregard these observations by refusing to shift the burden of cost to the requesting party.¹⁸⁶

One can rationalize the conclusion in *Bills* by conceding that a cost of approximately five thousand dollars¹⁸⁷ was not so expensive as to warrant shifting the burden of cost to the requesting party. However, the amount in controversy in *In re Brand Name Prescription Drugs* was far greater than five thousand dollars,¹⁸⁸ yet the court in that case also failed to shift the burden to

179. See Hagberg & Olson, *supra* note 20 (explaining that *In re Brand Name Prescription Drugs* presents generally accepted method of dealing with burden-shifting determinations); Lovell & Holmes, *supra* note 20, at 9 (same).

180. See *supra* notes 176-78 and accompanying text (discussing concerns of *Bills* court in setting forth factors to consider in burden-shifting case).

181. See *Bills v. Kennecott, Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985) (articulating concerns regarding problems involved in allocating discovery costs of electronically stored data).

182. See *id.* (explaining that when information is stored in computers, it is less possible and less necessary to make requesting party search records).

183. *Id.*

184. *Id.* Making a company's computer system available to an adversary runs the risk of having the adverse party discover privileged information. *Id.* The court also explained that opening up one's computer system to an adversary is impractical because of the various types of computers in existence and the differences in experience and knowledge of many parties. *Id.*

185. *Id.*

186. *Id.* at 464.

187. See *id.* (stating that printout cost \$5,411.25).

188. See *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *1 (N.D. Ill. June 15, 1995) (explaining that cost of retrieving requested e-mail would be approximately \$50,000 to \$70,000).

the requesting party.¹⁸⁹ The court in *In re Brand Name Prescription Drugs* articulated the factors set forth in *Bills* and claimed to apply these factors in making its final determination, but a closer look at the opinion reveals that certain outdated principles seem to have been the determinative forces behind the court's conclusion.¹⁹⁰

First, in *In re Brand Name Prescription Drugs*, the defendant relied upon the Manual for Complex Litigation to support its argument that the court should shift the burden of cost of discovery of the electronically stored data to the requesting party.¹⁹¹ The relevant portion of the manual provides that if the discovery request requires substantially expensive additional programming for adequate compliance, the requesting party should bear the costs.¹⁹² The manual even suggests that the parties make cost shifting a condition to production.¹⁹³ The manual provides guidance, and the situation before the court clearly fit within the scenario illustrated in the manual in that it required additional programming at substantial expense.¹⁹⁴ However, the court found it more appropriate to look to non-precedential case law as a basis for its decision, although it did not provide a reason for this choice.¹⁹⁵ Instead, as previously discussed, the court adopted the factors set forth in *Bills* as the basis for its determination.¹⁹⁶ After articulating these factors, the court seemingly failed to apply them to the case at hand.¹⁹⁷ Instead, it simply concluded that even though the discovery procedures at issue were expensive and the discovery involved creating special computer programs for extracting the requested data,

189. See *id.* (concluding that current situation did not warrant shifting burden of cost of discovery of electronically stored data to plaintiffs).

190. See *infra* notes 191-203 and accompanying text (discussing basis for court's decision in *In re Brand Name Prescription Drugs*).

191. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2 (explaining that defendant's position was based on argument that Manual for Complex Litigation contemplated reimbursement in circumstances such as those in present case). Although the Manual for Complex Litigation is not binding upon the courts, it stands as a well-respected source of guidance in the legal community.

192. See *id.* at *2 n.1 (quoting MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.446 (1993)).

193. *Id.*

194. *Id.*

195. *Id.* at *2. The court relied on case law that provided that "the mere fact that the production of computerized data will result in a substantial expense is not a sufficient justification for imposing the costs of production on the requesting party." *Id.* However, the court failed to provide a reason as to why it chose not to give the Manual for Complex Litigation any weight in the current case and instead to rely on case law from a district court in Utah.

196. See *id.*; see also *supra* Part III.A.1 (summarizing and analyzing *Bills v. Kennecott Corp.*).

197. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at * 2 (articulating court's reasoning for refusing to shift burden of cost to plaintiff).

the requesting party should not bear these costs when the burden is a direct result of the defendant's *chosen* record-keeping scheme.¹⁹⁸

In referring to the use of computer systems to store records as a choice, the court demonstrated its lack of a true understanding of today's technological world.¹⁹⁹ In order to keep up with competitors and to maintain a successful enterprise in the computer age, one has virtually *no choice* but to utilize computers in business operations. Moreover, it is likely that even in 1995, most individuals utilized computers in every facet of their lives, including their personal lives.²⁰⁰ This proposition is hardly new or unique.²⁰¹ Thus, the *In re Brand Name Prescription Drugs* court was effectively punishing the defendants simply for using technology consistent with normal practices of the time.²⁰² Although the court conceded that issues of "undue burden" are complicated within the context of the retrieval and production of electronically stored data, the fact that these determinations are difficult does not excuse the unreasonableness displayed in the court's opinion.²⁰³ The court's reasoning simply illustrates the lack of familiarity and knowledge that much of the judiciary has regarding computer related issues.

Finally, although the Supreme Court reversed *Sanders v. Levy* because of the court of appeals's reliance on the wrong rules in the case,²⁰⁴ the appel-

198. *Id.*

199. *Id.* The court conceded that "[i]n the context of the retrieval and production of computer-stored information issues of 'undue burden' become complicated." *Id.*

200. See *Bills v. Kennecott, Corp.*, 108 F.R.D. 459, 462 (D. Utah 1985) ("From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development.").

201. See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94CIV.2120 (LLM) (AJP), 1995 WL 649934, at *2 (S.D.N.Y. Nov. 3, 1995) (quoting *National Union Elec. Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1257, 1262-63 (E.D. Pa. 1980)); *supra* note 200 (quoting *Bills* court's acknowledgment of impact that computers have on today's society). In 1980, the *Matsushita* court predicted that by the year 2000 individuals and businesses would store virtually all data electronically. *Id.* Thus, nearly 20 years ago, the judiciary was aware of the impending growth in the use of computers in every facet of life. Yet, the court in *In re Brand Name Prescription Drugs* failed to recognize the advent of the computer age and referred to the defendant's use of an electronic storage method as a *choice*. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at * 2.

202. See *Robins*, *supra* note 71, at 483 (explaining that in order to make equitable cost-allocation determinations, "courts must balance the need to preserve inexpensive access to relevant information that has traditionally been available at little expense in conventional discovery with the need to *avoid penalizing the use of new technologies with whose evolution the Rules have not kept pace*" (emphasis added)).

203. See *In re Brand Name Prescription Drugs*, 1995 WL 360526, at *2 (illustrating court's lack of knowledge of technological issues by referring to defendant's use of computer storage as choice).

204. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 364 (1978) (reversing

late court decision is still significant to this discussion because it illustrates one court's misapplication of the discovery rules in the context of a burden-shifting determination regarding electronically stored data. In reversing the court of appeals's decision, the Supreme Court did not address the merits of the lower court's application and analysis of the discovery rules; rather, the Court simply determined that those rules were inappropriate in that case.²⁰⁵ Therefore, the lower court's application of, interpretation of, and ultimate conclusion under the discovery rules are useful in that they provide another poignant example of the judiciary's disparate treatment of requests to shift the burden of discovery of electronically stored data. Furthermore, the opinion illustrates the problems that the lack of specificity and guidance in the present rules create in the complicated realm of computer-related discovery.

The *Sanders* opinion is illustrative of the reasoning and analysis of many courts when dealing with these issues. The court's focus was misguided because it relied almost solely on the impressive status and financial position of the defendant to justify keeping the burden of cost on that party.²⁰⁶ This type of analysis is far from sound because it only takes into consideration the status and relative financial positions of the parties in determining proper allocation of discovery costs, rather than considering other more neutral and objective factors.²⁰⁷ It is hardly fair or equitable for courts to make burden-shifting decisions based solely on the status and financial positions of the parties because such purely subjective considerations will proliferate inconsistencies among various court decisions. Thus, *Sanders* stands as a distressing example of how easily the judiciary can abuse the sheer breadth of and lack of guidance of the current discovery rules.

appellate court's decision that placed burden of culling names and addresses of class members from electronic database on defendant rather than on plaintiff). The Supreme Court determined that the district court erred by applying the rules of discovery, rather than the rules governing class actions, in that case. *Id.* at 342. In addition, the Supreme Court determined that it was an abuse of discretion not to require plaintiffs to bear the cost of discovery in this case. *Id.*

205. *Id.* at 350.

206. See *Sanders v. Levy*, 558 F.2d 636, 650 (2d Cir. 1977) (en banc) (reasoning that "[t]here is no injustice in requiring one whose business is vast and complex to go to proportionately greater lengths to meet the law's legitimate requirements for disclosure of business-related information than might be expected of one whose business is small and simple"), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 342 (1978).

207. See *id.* (finding insufficient justification for refusing to shift burden of cost to requesting party). Although it is not wholly improper for a court to consider the parties' relative financial positions as one factor in its burden-shifting determination, it is insufficient for a court to make such a factor its sole consideration. In this case, the court seemed to use the general rule that the producing party pays as a crutch upon which to rest its inequitable reasoning. The court seemed to use the general default rule in an attempt to justify its purely financial and status-based reasoning.

C. Cases in Which Courts Have Prescribed Alternative Means of Production or Have Refused to Compel Respondents to Bear the Costs of Discovery

As noted above, very few reported opinions consider the proper allocation of the costs of discovery of electronically stored data.²⁰⁸ The preceding cases illustrate instances in which the courts have considered and ultimately have refused to shift the burden of cost to the requesting party by exercising their discretion under Rule 26(c) of the Federal Rules of Civil Procedure.²⁰⁹ The following cases illustrate situations in which courts have suggested alternative means of production in lieu of forcing the responding parties to bear the costs of producing the requested electronically stored data.²¹⁰ In addition, some of these cases illustrate instances in which courts have denied requesting parties discovery of certain electronically stored data.²¹¹ In looking at these cases, it is important to observe the unusual circumstances under which the courts either have prescribed alternative means of production or have denied production of certain electronically stored data.²¹² These opinions represent the exception rather than the rule in cases involving discovery of electronically stored data.²¹³

1. Cases in Which Courts Have Dealt with Alternative Means of Production

a. Sattar v. Motorola, Inc.

In 1998, the United States Court of Appeals for the Seventh Circuit decided *Sattar v. Motorola, Inc.*,²¹⁴ an employment discrimination action that involved alleged religious discrimination by the plaintiff's supervisors.²¹⁵ The

208. See *supra* Part III.A (explaining lack of vast amounts of case law pertaining to allocation of discovery costs of electronically stored data).

209. See *supra* Part III.A-B (discussing and analyzing cases in which courts refused to shift burden of cost to requesting party).

210. See *infra* Part III.C.1 (setting out cases in which courts have suggested alternative means of production).

211. See *infra* Part III.C.2 (explaining cases in which courts have denied discovery of certain electronically stored data).

212. See *infra* Part III.C (discussing and analyzing cases in which courts have prescribed alternative means of production or have denied discovery of electronically stored data).

213. Compare *supra* Part III.A-B (critiquing cases in which courts have refused to shift burden of cost of electronically stored data to requesting party) with *infra* Part III.C.1-2 (considering cases in which courts either have prescribed alternative means of production or have denied requests for electronically stored data due to extreme circumstances).

214. 138 F.3d 1164 (7th Cir. 1998).

215. See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1170-72 (7th Cir. 1998) (concluding that former employee failed adequately to link discharge and religious harassment and that district

plaintiff appealed the district court's ruling denying his discovery request for hard copies of certain e-mail messages.²¹⁶ In that action, Sattar requested approximately 210,000 pages of e-mail in hard copy format, even though the defendant had produced the data in the form of four-inch tapes.²¹⁷ The plaintiff requested the paper versions of the e-mail messages because he lacked the equipment and software needed to read the tapes.²¹⁸

Instead of requiring the defendant to incur the substantial cost of printing the already produced data in paper format, the district court prescribed alternative accommodations.²¹⁹ The court ordered the defendant either to download the data from the tapes onto diskettes or a computer hard drive that the plaintiff could use, to loan the plaintiff a copy of the software needed to read

court did not abuse its discretion in requiring defendant either to download electronic data to disk or to loan plaintiff hard drive rather than requiring defendant to produce, at its own expense, requested data). In *Sattar*, the plaintiff filed a religious discrimination suit against the corporation for which he worked and his two supervisors, both in their corporate and individual capacities. *Id.* at 1168. The district court granted summary judgment for the defendant and Sattar appealed. *Id.* at 1166. First, the appellate court found that the district court was correct in dismissing Sattar's claims against his supervisors because supervisors do not, in their individual capacities, fall within the statutory definition of employer. *Id.* at 1168. Second, the appellate court affirmed the district court's grant of summary judgment for the defendant because Sattar failed adequately to link his discharge to his supervisor's religious harassment. *Id.* at 1170.

Sattar also appealed the district court ruling that denied his motion to compel the defendant to produce data in hard copy format. *Id.* at 1171. The defendant previously had produced the data in electronic format on four-inch tapes; however, the plaintiff claimed the data was inaccessible to him in this format because he did not have the necessary software to read the tapes. *Id.* The district court determined that it was appropriate to require the defendant to either download the data onto standard computer disks or onto a computer hard drive, to loan the plaintiff the necessary software with which to read the tapes, or to offer the plaintiff access to its own computer system. *Id.* Should all of the recommended alternative means of production fail, the court ordered the parties to split the costs of copying the data. *Id.* The defendant ultimately complied with the district court's order by providing the plaintiff with a hard drive that contained the requested electronic data. *Id.* However, the plaintiff claimed that the defendant had altered or modified the data contained on the hard drive. *Id.* He then asked the court to compel discovery in hard copy format and to hold the defendant in contempt. *Id.* The district court inferred that the plaintiff was using this claim in an attempt to broaden the scope of his discovery of electronically stored data. *Id.* at 1172. Accordingly, the district court rejected Sattar's claim that the defendant altered the data, and the appellate court affirmed the lower court's order. *Id.* at 1171-72.

216. *Id.* at 1171. The plaintiff also appealed the district court's grant of summary judgment to the defendant on the Title VII claim. *Id.* at 1166.

217. *Id.* at 1171.

218. *Id.* It is important to note that the four-inch tapes that the defendant produced were a commonly used form of backup tape. See *Electronic vs. Paper*, *supra* note 165, at 1 (discussing and analyzing *Sattar*).

219. *Sattar*, 138 F.3d at 1171.

the tapes, or to provide the plaintiff in-house access to its own computer system.²²⁰ Furthermore, the district court determined that if the parties found the previous options to be unsatisfactory then it would simply require each party to bear half the costs of printing the requested data.²²¹ In reviewing this ruling, the United States Court of Appeals for the Seventh Circuit determined that the lower court did not abuse its discretion by prescribing alternative means of production.²²²

Sattar provides an example of the typical alternative means of production that courts offer parties in cases involving disputes over discovery of electronically stored data.²²³ Although the *Sattar* court's recommendations seem sound and reasonable, some of these alternatives are extremely risky for the producing parties. For example, the court proposed that the defendant provide the plaintiff with access to its computer system.²²⁴ Such access is extremely risky for the defendant because the plaintiff would then have "free reign" over the defendant's files.²²⁵ This poses the risk that the plaintiff will gain access to sensitive or privileged data.²²⁶ Thus, most defendants are not willing to undertake such severe potential risks.²²⁷

Furthermore, although the court's decision provides the parties with alternative methods of production from which to choose freely, the decision implies that the defendant failed to satisfy the discovery request by producing the data on a commonly used type of backup tape.²²⁸ One commentator warned that this type of decision could lead to needless increases in discovery costs.²²⁹ Thus, *Sattar* is yet another example of some of the many problems that the lack of clear standards or guidelines within the Federal Rules of Civil Procedure

220. *Id.*

221. *Id.*

222. *Id.*

223. *See supra* notes 84-89 and accompanying text (discussing alternative means of production in lieu of requiring producing party to bear electronic data discovery costs).

224. *Sattar*, 138 F.3d at 1171.

225. *See supra* notes 84-89 and accompanying text (addressing risks inherent in turning over computer system to adversary in litigation).

226. *See supra* note 88 and accompanying text (mentioning risk of waiving attorney-client privilege by providing adversary with access to their computer system).

227. *See supra* note 87 and accompanying text (asserting fact that most litigants are vehemently against allowing adversary to have access to their computer network).

228. *See Electronic vs. Paper, supra* note 165, at 1 (summarizing *Sattar* decision, in which court proscribed alternative methods of production in lieu of requiring defendant to produce printouts at own expense).

229. *See id.* (explaining that "[t]he decision that defendant had not satisfied its discovery obligations by producing data on a type of backup tape commonly used by businesses is troublesome because it is not clearly explained and if misinterpreted it could lead to unwarranted increases in costs of discovery").

creates, as well as an example of the judiciary's lack of experience with and technical understanding of computer-related issues in litigation.²³⁰

b. Fennell v. First Step Designs, Ltd.

Although most courts are unaware of the potential problems that providing for alternative means of discovery of electronically stored data can create, some courts have acknowledged these potential problems; as a result, those courts have refused to prescribe or to condone alternatives.²³¹ For example, in *Fennell v. First Step Designs, Ltd.*,²³² the United States Court of Appeals for the First Circuit affirmed a district court's ruling that denied the plaintiff access to the defendant's hard drive.²³³ In reaching this conclusion, the Court of Appeals for the First Circuit explained that the discovery would involve substantial risks and costs and could permanently affect the defendant's computer network.²³⁴ The court balanced the risks, burdens, and delays involved in providing the plaintiff with access to the defendant's hard drive against the importance of the evidence sought and the likelihood of finding the evidence.²³⁵ Ultimately, both the district and appellate courts concluded that such an alternative was neither sound nor efficient in that case.²³⁶

It is important to note that the facts in *Fennell* are quite unusual because the defendant already had produced the requested data on computer disks and the plaintiff merely was seeking discovery of the defendant's hard drive in an

230. *See id.* at 2 (explaining that "[t]he courts are naturally reluctant to go beyond general decisions until greater judicial experience and understanding has been accumulated. In the meanwhile, these issues are going to continue to be a source of uncertainty in litigation.").

231. *See infra* notes 232-49 (discussing and analyzing cases in which courts have refused to prescribe alternative means of discovery because of potential problems involved).

232. 83 F.3d 526 (1st Cir. 1996).

233. *See Fennell v. First Step Designs, Ltd.*, 83 F.3d 526, 533 (1st Cir. 1996) (concluding that district court did not abuse its discretion in refusing to grant plaintiff access to defendant's hard drive). In *Fennell*, the plaintiff sued the defendant, her former employer, claiming that the defendant discharged her because she reported a sexual harassment complaint. *Id.* at 526. During the course of litigation, the plaintiff requested further discovery of the defendant's hard drive to determine whether the defendant fabricated the data in question. *Id.* at 531-32. The district court denied the plaintiff further discovery because the risks and costs to the defendant would be substantial and because the plaintiff could not substantiate her claim that a computer expert could discover evidence of fabrication. *Id.* at 532-33. First, the appellate court found that the district court did not abuse its discretion in denying the plaintiff further discovery. *Id.* at 533-34. Second, the appellate court determined that the plaintiff failed to present a genuine issue of material fact regarding whether her former employer's proffered reason for her discharge was actually a pretext for retaliation. *Id.* at 537. Accordingly, the appellate court affirmed the district court's judgment. *Id.*

234. *Id.* at 533 n.8.

235. *Id.* at 532.

236. *Id.* at 533.

attempt to prove that the defendant had fabricated certain data.²³⁷ Thus, it is unclear whether the court would have denied the request for discovery of the defendant's hard drive if the defendant had not already produced the requested data in a reasonably usable electronic form. It seems likely that the court would not have denied the plaintiff's request absent such unusual circumstances.

c. *Playboy Enterprises, Inc. v. Welles*

In *Playboy Enterprises, Inc. v. Welles*,²³⁸ the plaintiff requested access to the defendant's personal computer hard drive in order to attempt to recover deleted files, to review certain e-mail messages, and to produce relevant documents.²³⁹ The plaintiff explained that it needed access to the defendant's hard drive because the defendant's practice of deleting e-mail messages made it impossible to produce the information in paper form.²⁴⁰ In addressing the plaintiff's request, the court determined that it was likely that the defendant's hard drive contained the relevant information.²⁴¹ However, the court explained

237. *Id.*

238. 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

239. *See Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054 (S.D. Cal. 1999) (allowing plaintiff to create mirror image of defendant's hard drive in order to review and produce relevant documents). In *Playboy*, the plaintiff sought access to the defendant's hard drive in order to recover electronic versions of e-mail messages that the defendant previously had deleted and that were no longer available in paper form. *Id.* at 1051. The court allowed the plaintiff to discover the requested information, but it sought to protect the defendant against undue burden and expense and against an invasion of privileged information. *Id.* at 1053. Thus, the court ordered that the parties follow a specific protocol with respect to the discovery of the defendant's hard drive. *Id.* at 1054-55. The court-ordered protocol required the plaintiff to submit statements from computer experts regarding the ability to recover the deleted e-mail messages, the likelihood of recovering some of those messages, and the amount of damage, if any, that would result to the defendant's computer from this recovery process. *Id.* at 1054-55. The protocol required the court to appoint a computer expert to create a "mirror image" of the defendant's hard drive and to serve as an officer of the court. *Id.* at 1055. The parties had to agree on a date and time to access the defendant's computer, and the defendant and her attorney could be present during the recovery of the defendant's hard drive. *Id.* Once the computer expert created the mirror image of the defendant's hard drive, that mirror image would be given to the defendant's attorney, who would "print and review any recovered documents and produce to Plaintiff those communications that are responsive to any earlier request for documents and relevant to the subject matter of this litigation." *Id.* Finally, the court ordered that any documents that the defendant's attorney found to be privileged would be recorded in a privilege log. *Id.* In addition to the discovery of the defendant's hard drive, the plaintiff sought discovery of the defendant's federal and state income tax returns. *Id.* The appellate court ordered the defendant to produce her 1997 corporate tax return and to submit her tax returns for three other years to the court for an in camera review. *Id.* at 1056.

240. *Id.* at 1053.

241. *Id.*

that in cases involving the discovery of electronically stored data, the producing party must be "protected against undue burden and expense and/or invasion of privileged matter."²⁴² The court allowed the plaintiff to gain access to the defendant's hard drive, but it outlined specific protocol with regard to the discovery of the defendant's hard drive in order to ensure protection against an invasion of privileged matter.²⁴³

The court in *Playboy* recognized the risks inherent in allowing an adversary to gain access to one's hard drive.²⁴⁴ However, instead of merely voicing its concern for the defendant's protection against undue burden, expense, and invasion of privileged matter, the court took action to protect the defendant against these risks by creating a detailed protocol for the parties to follow.²⁴⁵ Specifically, the court appointed a neutral computer expert to create a "mirror image" of the defendant's hard drive.²⁴⁶ The court went even further by requiring that computer expert to serve as an officer of the court.²⁴⁷ In addition, the court allowed the defendant's counsel to review the recovered documents and to produce only those documents that were responsive and relevant, and it allowed the defendant's attorney to be the sole custodian of the mirror image of the defendant's hard drive.²⁴⁸ Through these procedures, the court ensured the protection of the defendant's privacy and privilege interests while still allowing the plaintiff to discover the information sought.²⁴⁹ Thus, *Playboy* is significant because it represents a step in the right direction on the part of the judiciary.

2. Cases in Which Courts Have Refused to Place the Burden of Cost on the Producing Parties

In some instances, courts have denied requests for electronically stored data after finding that those requests were unduly burdensome or expensive.²⁵⁰ These decisions represent a step in the right direction on the part of the judi-

242. *Id.*

243. *Id.* at 1054-55. The court stated that "the [d]efendant's privacy and attorney-client privilege will be protected pursuant to the protocol outlined below, and [d]efendant's counsel will have an opportunity to control and review all of the recovered e-mails, and produce to [p]laintiff only those documents that are relevant, responsive, and non-privileged." *Id.* at 1054.

244. *See id.* (addressing risk that requesting party might gain access to privileged matter on defendant's hard drive).

245. *Id.*; *supra* note 239 (describing in detail court-ordered discovery protocol).

246. *Id.* at 1055.

247. *Id.*

248. *Id.*

249. *Id.* at 1054-55.

250. *See infra* Part III.C.2-3 (discussing and analyzing cases in which courts have denied requests for electronically stored data due to undue burden or expense).

ciary because they provide defendants with some protection against abusive discovery requests. However, as the following cases illustrate, the circumstances under which courts make these decisions are unusual and extreme.²⁵¹ It is evident that courts are still quite hesitant to shift the burden of cost from the producing party or to deny discovery of the requested materials altogether.

a. *Anti-Monopoly, Inc. v. Hasbro, Inc.*

In *Anti-Monopoly, Inc. v. Hasbro, Inc.*,²⁵² the plaintiff presented the District Court for the Southern District of New York with a request for discovery of certain electronically stored data.²⁵³ Specifically, the defendants already had produced the requested data in printout form, and the plaintiff requested the same data in electronic form as well.²⁵⁴ Although case law permits the discovery of data in computerized form even when the respondent already has produced that data in hard copy format,²⁵⁵ the district court determined that the case required further negotiation between the parties.²⁵⁶ The defendants

251. See *infra* Part III.C.2-3 (considering cases involving extreme circumstances under which courts have denied discovery of electronically stored data).

252. 94CIV.2120 (LLM) (AJP), 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995).

253. See *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 94CIV.2120 (LLM) (AJP), 1995 WL 649934, at *1 (S.D.N.Y. Nov. 3, 1995). In *Anti-Monopoly*, the plaintiff presented the court with a discovery request for specific electronically stored data. *Id.* The defendants objected to the request because they claimed that they already had produced the requested data in paper form. *Id.* at *2. The court rejected this objection by relying on the rule that production of information in "hard copy" form does not preclude a party from requesting and receiving that data in electronic format. *Id.* The defendants next argued that complying with the discovery request at issue would be unduly burdensome and expensive because the defendants would have to create new documents because the information no longer existed in electronic format. *Id.* at *2-*3. The court observed that if the requested data actually did not exist in electronic form, then the issue would be moot. *Id.* at *3. The court determined that the defendants would have to prove both that the data was no longer available electronically and that it was impossible to *recreate* electronically the data by using specially tailored computer programs over existing electronic data. *Id.* at *3 n.1. Furthermore, the court determined that it did not possess adequate information regarding the plaintiff's need for the electronic versions of the data or the true costs that the defendants faced in creating a special program to rewrite or to "retrieve" the data. *Id.* at *3. Ultimately, the court ordered the parties to attempt to resolve the issue on their own. *Id.* The court further stated that if the parties were unable to come to an agreement, they were to submit appropriate affidavits from computer experts to the court so that it could make a proper decision. *Id.*

254. *Id.* at *1.

255. See *id.* at *2 ("[T]he rule is clear: production of information in 'hard copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form."); see also *supra* note 34 and accompanying text (explaining that parties can discover data in computerized form, even if producing party already has produced paper versions of same data).

256. *Anti-Monopoly, Inc.*, 1995 WL 649934, at *1.

argued that the situation was unique because the requested computer data no longer existed in electronic format.²⁵⁷ Thus, the defendants would have to recreate the data in electronic format and incur substantial expense and delay in the process.²⁵⁸ The court declared that it would need additional information in order to rule on the issue, but it stated that if the reports actually no longer existed in electronic format, the issue would be moot.²⁵⁹ However, the court explained that in order to prove the issue moot, the defendants would have to show that it was impossible to recreate electronically the requested data through the use of special computer programs.²⁶⁰ In discussing the additional information needed, the court stated that it would take into account factors such as the plaintiff's actual need for the electronic versions of the documents and the "real costs"²⁶¹ to the defendants in both time and money.²⁶² Furthermore, the court explained that its ruling might depend on the plaintiff's willingness to bear the costs of creating the program needed to "recreate" the data.²⁶³ Ultimately, the court required the parties to submit affidavits from computer experts regarding the plaintiff's need for electronic versions of the invoices and the defendants' ability to recreate or restore the no longer existing electronic versions of the invoices.²⁶⁴

b. Torrington Co. v. United States

In *Torrington Co. v. United States*,²⁶⁵ the Court of International Trade considered a plaintiff's request for production of certain computer tapes containing the defendant's computer programming code and other data.²⁶⁶ As in

257. *Id.* at *2.

258. *Id.* at *3. The defendant claimed that "[t]he burden to Hasbro of collecting all of these electronic [documents] is substantial and certain: weeks of programming and computer time to collect the [documents] followed by substantial attorney review time to ensure that they are responsive. It would be impossible to complete production by the [c]ourt's . . . deadline." *Id.*

259. *Id.*

260. *Id.* at *3 n.1.

261. *Id.*

262. *Id.* at *3.

263. *Id.*

264. *Id.*

265. 786 F. Supp. 1027 (Ct. Int'l Trade 1992).

266. See *Torrington Co. v. United States*, 786 F. Supp. 1027, 1028 (Ct. Int'l Trade 1992) (discussing plaintiff's request for production of computer tape containing defendant's computer programming instructions and other data). In *Torrington*, the plaintiff requested production of certain data contained on computer tapes. *Id.* at 1028. The United States Court of International Trade first found that although the plaintiff claimed entitlement to the information as part of the administrative record of the case, the information actually was not in the administrative record. *Id.* Moreover, the court determined that the plaintiff failed to articulate adequately the need for the requested computer tapes. *Id.* at 1029. In addition, the court indicated that the defendant

Anti-Monopoly, the defendant already had produced the documents in hard copy format, but the plaintiff requested the electronic versions of the documents as well.²⁶⁷ The requested computer data no longer existed in electronic format, and either the plaintiff or the defendant would have had to recreate the data at a great burden and expense.²⁶⁸ After balancing the need of the plaintiff against the hardship to the defendant, the court denied the plaintiff's motion to compel production of the requested electronic data.²⁶⁹

3. Discussion and Analysis of the Preceding Cases

The two decisions discussed above demonstrate that the courts are beginning to acknowledge the differences inherent in discovery requests for electronically stored data as opposed to those for mere paper documents.²⁷⁰ In those cases, the courts implied that they would grant the electronic data discovery request at issue *only* if the requesting parties were willing to bear the costs associated with producing that electronic data.²⁷¹ However, those decisions are unique because of the unusual circumstances surrounding the opinions.²⁷²

For example, in both cases above, because the requested data ceased to exist in electronic format, the courts seemed willing to relieve the defendants of the burden of recreating the data under those circumstances.²⁷³ It is un-

sufficiently demonstrated that complying with the discovery request in question would result in extreme hardship. *Id.* The court explained that in the present case, the data requested did not exist in electronic format. *Id.* at 1030. Thus, the defendant "would be required to create the computer tapes at great burden and expense." *Id.* The court explained that access to the computer tapes was not essential because the plaintiff would receive microfilmed computer printouts of the information. *Id.* at 1029. Furthermore, the burden, cost, and time to recreate the tapes would be equal for both parties. *Id.* at 1030. The court reasoned that the burden of production should fall on the requesting party because to place such burden on the defendant would be wholly unfair. *Id.* Accordingly, the court denied the plaintiff's discovery request. *Id.* at 1031.

267. *Id.* at 1029.

268. *Id.* at 1030.

269. *Id.* at 1030-31. The court determined that in the present action, recreating the requested computer data would take the defendant substantial time and would cost the defendant an enormous amount of money. *Id.* at 1030. The court reasoned that because the burden would be equal on both parties, that is, it would cost the same and take the same amount of time for the plaintiff to recreate the data as the defendant, the requesting party should bear the burden of producing the information. *Id.*

270. *See supra* Part III.C.2 (discussing situations in which courts have acknowledged differences inherent in paper documents versus electronic documents and therefore have denied discovery requests).

271. *See supra* Part III.C.2 (discussing *Anti-Monopoly, Inc.* and *Torrington Co.* decisions).

272. *See supra* Part III.C.2 (involving situations in which requested data no longer existed in electronic format).

273. *See supra* Part III.C.2 (discussing cases in which requested data no longer existed in electronic format).

likely that the courts would have shifted the burden of cost to the plaintiffs if the data were still electronically available, even if the production entailed designing special computer programs to extract the requested files.²⁷⁴ The courts seem reluctant to prescribe this sort of remedy absent extremely unusual circumstances. Thus, in most instances, it is arguable that courts will remain unwilling to shift the burden of retrieving electronically stored data to the requesting party, even if the discovery entails extensive technical work and involves exorbitant expenses on the producing party's part. This realization demonstrates that the problems surrounding the allocation of discovery costs of electronically stored data will continue until something is done to remedy these inequities.

IV. Recommendations

Currently, conflicting schools of thought exist regarding the allocation of the costs of discovery of electronically stored data. One scholar and one judge have opined that the discovery rules should remain as they are and that courts should continue to construe them as broadly as possible.²⁷⁵ In addition to favoring a broad construction, they support the strict application of the general rule that the burden of discovery costs of electronically stored data falls upon the producing party.²⁷⁶ However, the preceding discussions show that such a strict approach has created serious problems in litigation and has opened the door to new means of discovery abuse by litigants.²⁷⁷ Furthermore, it is evident that the judiciary lacks sufficient technical knowledge and a true understanding of the complex issues involved in electronic data discovery with which to make fair and equitable determinations under the currently broad discovery rules.²⁷⁸

Other scholars and judges have opined that the current discovery rules need to be reshaped in order to address more adequately the technical com-

274. Cf. *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *1, *3 (N.D. Ill. June 15, 1995) (denying request to shift burden of discovery that cost \$50,000 to \$70,000); *Bills v. Kennecott Corp.*, 108 F.R.D. 459, 460, 464 (D. Utah 1985) (refusing to shift \$5411.25 burden of discovery to requesting party); *supra* Part III.A-B (discussing cases in which courts refused to shift discovery costs).

275. See Rosenberg, *supra* note 1 (explaining that some judges are in favor of extremely broad interpretations of discovery rules). Rosenberg quoted Judge Jack B. Weinstein: "I'm in favor of full revelation . . . I'm in favor of the Brandeis doctrine -- let the sun shine in." *Id.*

276. See *id.* (mentioning view of some members of legal community that judiciary should construe discovery rules broadly to allow for extensive discovery, regardless of costs that producing parties incur).

277. See *supra* notes 71-75 and accompanying text (discussing ways in which plaintiffs use electronic data discovery requests to force defendants into settlement).

278. See *supra* notes 83, 165-67, 199-203 and accompanying text (decrying judiciary's level of ignorance of computer-related issues).

plexities of our society.²⁷⁹ They believe that the lack of guidance contained in the current discovery rules has contributed to the inequities present in many of the decisions regarding discovery of electronically stored data.²⁸⁰ These views seem to represent the best way in which to cure the defects inherent in the current rules of civil procedure.

*A. Provide Courts with Specific Guidelines to
Consider by Amending the Advisory Committee Notes to the
Federal Rules of Civil Procedure*

The best way to remedy the current problems concerning allocating the discovery costs of electronically stored data involves providing courts with specific guidelines to consider when presented with electronic data cost-allocation decisions. These guidelines would address the issues and risks inherent in the nature of electronic data discovery.²⁸¹ As discussed above, the court in *Bills v. Kennecott* considered four factors in its burden-shifting decision.²⁸² Although it is improper for courts to rely solely on those factors in making similar decisions,²⁸³ it is not improper in some cases for courts to consider those factors in conjunction with other important factors. Therefore, the proposed guidelines should incorporate the *Bills* factors along with other pertinent factors.²⁸⁴ In order to keep the discovery costs proportionate to the

279. See Rosenberg, *supra* note 1 (explaining that some judges and practitioners believe that discovery rules should be amended to better address volume of electronic data in litigation). Rosenberg quoted Judge Paul Neimeyer of the United States Court of Appeals for the Fourth Circuit: "I sense that discovery is being used as a tool of oppression, rather than as a tool of fairness. I think we should be asking whether this is the way Solomon would have done it, given this complex society." *Id.* Rosenberg also quoted Jim Archibald, division director of the American Bar Association's litigation section: "Maybe this vast technology will be the catalyst to reshape the rules of discovery, which have been so broad up until this point. People have been claiming this discovery process has been getting out of hand." *Id.*

280. See *id.* (quoting judge and commentator who support notion that lack of guidance in discovery rules contributes to problems surrounding allocation of electronic data discovery costs); Robins, *supra* note 71, at 473 (stating that guidance discovery rules provide with regard to cost-allocation issues is uncertain).

281. See Robins, *supra* note 71, at 483 (suggesting that "courts must balance the need to preserve inexpensive access to relevant information that has traditionally been available at little expense in conventional discovery with the need to avoid penalizing the use of new technologies with whose evolution the Rules have not kept pace").

282. See *supra* Part III.A.1 (discussing *Bills v. Kennecott Corp.*).

283. See Robins, *supra* note 71, at 483 (hypothesizing that "courts will probably continue to balance the factors . . . in an *ad hoc* fashion, while avoiding the question of whether a fundamental recalibration is needed"); *infra* note 290 (explaining that reliance on formulaic factors creates problems in electronic data discovery cases).

284. See *Bills v. Kennecott, Corp.*, 108 F.R.D. 459, 464 (D. Utah 1985) (setting forth four factors that court considered in making burden shifting determination). The court in *Bills*

size and scope of the lawsuit, other factors should include, but are by no means limited to, a consideration of the amount of data requested and the related costs of retrieval of that data in relation to the magnitude of the lawsuit.²⁸⁵ In addition, the guidelines should include a consideration of the actual relevancy of the requested electronic data, in order for the court to determine whether the request is valid or merely oppressive or abusive. The guidelines should contain a consideration of the requesting party's actual need for the electronic versions of the requested data in order to determine whether it is possible for that party to achieve its objectives by using the less-expensive paper versions of the documents. The guidelines also should suggest that courts consider the possible benefits of the data to both parties and the ease or difficulty in actually producing the data in order to determine whether the situation warrants a "King Solomon"²⁸⁶ type of cost-allocation scheme. These proposed guidelines will provide greater balance in the electronic data discovery decisions because they aim at shifting the courts' focus from the individual status and financial positions of the parties to more objective and case-neutral considerations. However, the suggested guidelines do not represent an exhaustive list of factors for the courts to consider. Rather, the guidelines should continue to grow and change as technology does. Furthermore, the judiciary should not hesitate to utilize these guidelines because the current problems will only continue to worsen absent expedient changes.

The most effective way in which to implement these guidelines would be to incorporate them into the current Federal Rules of Civil Procedure. Although it may not be necessary to rewrite the current rules, it would be extremely helpful for the Advisory Committee to amend its notes to include these guidelines, which specifically address the issues surrounding discovery of electronically stored data.²⁸⁷ In recommending that the Advisory Committee incorporate these guidelines into its notes to the current Federal Rules of Civil Procedure, it is important to recognize that the guidelines would serve merely as structural "guideposts"; they would not attempt to promulgate a formulaic burden-shifting rule. Instead, these guidelines would provide judges with a better understanding of the issues involved and the concerns and risks

considered: (1) the expense and burden to the responding party as compared to the relative expense and burden on the requesting party, (2) whether the amount of money involved was excessive or inordinate, (3) whether the amount of money in question would be a substantial burden to the requesting party, and (4) whether the responding party would benefit to some degree from producing the data. *Id.*

285. See Rosenberg, *supra* note 1 (reporting judge's suggestion that costs of litigation be appropriate to size of case).

286. See *supra* note 279 (quoting Judge Paul Niemeyer of United States Court of Appeals for Fourth Circuit).

287. See *supra* note 81 and accompanying text (recognizing that Federal Rules of Civil Procedure fail to give courts sufficient guidance as to how to determine properly whether situations warrant burden shifting).

of the litigants. Furthermore, the guidelines would give judges an overview of the technical aspects of electronically stored data discovery – knowledge that many judges currently lack.²⁸⁸ These proposed guidelines would serve as helpful factors for courts to examine when determining whether a request for electronically stored data is legitimate and warrants the producing party's bearing the burden of cost or whether the request is merely abusive, oppressive, or excessive, such that it warrants shifting the burden of cost to the requesting party or prescribing alternative cost-allocation measures.

In suggesting that the Advisory Committee implement electronically stored data guidelines into its notes to the discovery rules, it is important to address the concerns that the court in *Bills v. Kennecott* voiced.²⁸⁹ That court recognized the risks posed by implementing a formula by which courts are to consider allocating the costs of discovery of electronically stored data.²⁹⁰ An established formula would thwart the purpose of amendment because it would merely codify what the courts have been doing wrong in these situations. Rather, it is more appropriate for the Advisory Committee to set forth the aforementioned guidelines in its notes for courts to take into consideration when faced with motions to shift the burden of cost to the requesting party under Rule 26(c) of the Federal Rules of Civil Procedure. Again, these guidelines would not be strictly binding; instead, they merely would stand as helpful "guideposts" aimed at keeping the courts in line with one another and on the path toward just and equitable decision-making. In addition, the guidelines would be flexible enough to withstand the constant changes in technology.

The courts have admitted openly that they lack the sufficient guidance and understanding of the issues surrounding the allocation of discovery costs of electronically stored data with which to make sound decisions.²⁹¹ For example, the cases previously discussed illustrate that courts often focus only on the status and relative financial positions of the parties rather than on factors that are more objective and case-neutral.²⁹² These decisions are often unjust or inequitable, and they usually fail to provide a sound basis for consistency in the

288. See Robins, *supra* note 71, at 510 ("Until . . . judges gain greater familiarity with these issues, disputes over computer-related discovery are likely to yield more fact-specific discretionary rulings that offer minimal guidance to the bar.")

289. See *Bills*, 108 F.R.D. at 463 (warning that in setting forth factors to consider in case at hand, court was not attempting to set forth "an ironclad formula" for determining whether discovery request for electronically stored data was undue burden upon responding party).

290. See *id.* (explaining that "[s]uch a formula would be judicially imprudent and wholly impractical in view of the diverse nature of the claims, discovery requests and parties before the [c]ourts in a variety of cases and situations").

291. See *id.* at 462 ("The Advisory Committee statement, however, gives the [c]ourt no guidance as to how properly to determine whether the burden or expense is 'undue' where discovery of computer stored information is involved.")

292. See *supra* Part III.A-B (discussing and analyzing pertinent opinions in which courts considered shifting burden of cost of discovery of electronically stored data to requesting party).

future. The suggested guidelines would help solve these problems by providing the judiciary with sufficient direction while still allowing for case-by-case decision-making. In addition, they would militate against courts relying on irrelevant or inconsequential factors in the decision-making process. Furthermore, if judges are better educated regarding the technological issues involved in electronic data discovery, they will be more able to decide the appropriate guidelines to weigh in each unique case. Ideally, the courts only will consider those factors that are of consequence to the case before them, rather than relying on factors that may not be of importance under that particular set of circumstances. Most importantly, these guidelines would prevent courts from relying upon the "general rule" simply because they lack the guidance or the knowledge with which to prescribe an alternative cost-allocation scheme.

Finally, although it is clear that including guidelines within the Advisory Committee Notes of the relevant discovery rules will create greater equity and consistency among the various court rulings without destroying the judicial discretion inherent in the current rules, courts should not wait until the ultimate amendment in order to acknowledge these guidelines. Rather, courts should begin to implement and to utilize the aforementioned guidelines as soon as possible so that the current inequities surrounding the allocation of discovery costs of electronically stored data will cease. The best way for the legal community to ensure that courts properly implement the suggested guidelines is to encourage the judiciary to become better educated regarding the technical issues surrounding electronic data discovery.

B. Educate the Judiciary on the Technological Issues Affecting the Litigation Process

Some members of the judiciary have recognized their lack of adequate technical knowledge and understanding of the issues surrounding cost-allocation of electronic data discovery needed to make just and equitable decisions.²⁹³ The questionable reasoning that the courts set forth in their opinions and the inconsistencies that exist from court to court evidence this lack of knowledge.²⁹⁴ Therefore, another step toward improving the current application of the Federal Rules of Civil Procedure in electronic data discovery cases

293. See *Sanders v. Levy*, 558 F. Supp. 636, 649 (2d Cir. 1977) (en banc) (discussing problems that stem from courts' lack of knowledge and experience with computer technology), *rev'd on other grounds sub nom. Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). The court admitted that "computer technology presents discovery problems with which the courts have developed relatively little familiarity." *Id.*

294. See *In re Brand Name Prescription Drugs Antitrust Litig.*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995) (referring to defendant's computer storage method as choice). In this case, the court penalized the defendant for choosing such a method, thereby illustrating the court's lack of technical knowledge concerning computer-related issues. *Id.*

involves thoroughly educating the members of the judiciary regarding the issues inherent in these cases.²⁹⁵ Increasing the technical knowledge of the judges would provide them with a greater understanding of the aggregate issues, and it would enable judges to make better decisions regarding the allocation of electronic data discovery costs. The legal community could accomplish these goals by establishing a system through which judges receive information regarding new developments in computer technology and their impact upon electronic data discovery. There are several companies that specialize in dealing with these issues.²⁹⁶ These "expert" companies could work in conjunction with members of the legal community to provide something as simple as periodic seminars or a newsletter service to the judges. Such a service undoubtedly would increase the quality and consistency of the opinions concerning electronic data discovery.

Finally, judges more readily should consult computer experts when specific, technical electronically stored data issues arise.²⁹⁷ Utilizing experts will lead to better decision-making and also will ensure that the judges rely on the most accurate and current information regarding computer-related discovery. Furthermore, implementation of these suggestions certainly will curtail the problems currently occurring because the better informed and educated the judges are, the harder it will be for litigants to succeed in using the discovery rules as tools of oppression against their adversaries. Recently, at least one court employed the services of a computer expert when confronted with a complicated electronic data discovery issue.²⁹⁸ That court utilized the computer expert's services in conjunction with a detailed discovery protocol in order to protect the defendant in that case against undue expense and burden and, more importantly, against an invasion of its privileged information.²⁹⁹ Such practices are a step in the right direction on the part of the judiciary.

295. See Robins, *supra* note 71, at 510 (opining that until "judges gain greater familiarity" with electronic data discovery issues, disputes regarding those issues are "likely to yield more fact-specific discretionary rulings that offer minimal guidance to the bar").

296. Electronic Evidence Discovery, Inc. and Computer Forensics, Inc. are two of the country's leading companies that specialize in the discovery of electronically stored data. Firms such as these could work in conjunction with members of the bar and members of the judiciary to create a program designed to bring the legal community up to speed with current computer technology and its impact on litigation.

297. See MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.446, at 60 n.78 (1985) (supplement to CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE (1964-1994)) (suggesting that if "the judge is not sufficiently familiar with the technology, the matter may be referred to a special master or to a court-appointed expert").

298. See *supra* Part III.C.1.c (discussing facts of *Playboy* case).

299. See *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1054-55 (S.D. Cal. 1999) (stating that "[d]efendant's privacy and attorney-client privilege will be protected pursuant to the protocol outlined below" that included appointment of computer expert to serve as officer of court throughout discovery process).

C. *Encourage Litigants to Address Electronic Data Discovery Issues Early in Litigation*

Another way in which to remedy the current problems regarding allocating costs of electronically stored data is to encourage litigants to address these issues at the earliest stages of litigation.³⁰⁰ All too often, litigants are unaware of the scope of discoverability of electronically stored data.³⁰¹ Many parties are unaware of specifically how much electronic data they have stored and exactly what those files or backup tapes include.³⁰² If the judiciary and the legal community encourage parties to address the electronic data discovery issues early on, those litigants will be better prepared for any electronic data discovery requests. Litigants then will have an opportunity to get their files in order, to discern what procedures they may need to comply with potential requests for electronically stored data, and to estimate the likely costs of producing the requested computer data.

In addition to making parties better informed and better prepared, encouraging parties to address electronic data discovery issues early in the process of litigation will give those parties the opportunity to negotiate possible discovery agreements. For example, if the parties to a suit are made aware of the possible requests for electronically stored data, each party can obtain an estimate of the costs, in both time and money, of complying with such requests. In some cases in which parties have done this, they have agreed to split the discovery costs of electronically stored data if the information sought would benefit both parties.³⁰³ In other cases, the parties have each agreed to be responsible for their own electronic data discovery costs when the discovery requests have been substantially similar in size and expense.³⁰⁴ Yet in other cases, the parties have agreed to set the boundaries of electronic data discovery by narrowing requests for this type of data in an effort to minimize costs.³⁰⁵

300. See Susan J. Silvernail, *Electronic Evidence: Discovery in the Computer Age*, ALA. LAW., May 1997, at 177 (1997) (supporting litigants making inquiries into existence of computerized data and processes for its retrieval at outset of litigation).

301. See Marcellino & Bongiorno, *supra* note 12 (discussing litigation hazards related to common user misperceptions).

302. See Rosenberg, *supra* note 1 (explaining problem that most parties retain vast amounts of data on hard drives and backup tapes).

303. See Hagberg & Olson, *supra* note 20 (discussing pending cases in which parties have worked together to come to agreements regarding discovery of electronically stored data).

304. See *id.* ("In a number of pending cases where substantial amounts of electronic data are being sought, each side has chosen to incur the expense of retaining experts who specialize in document retrieval.")

305. See *id.* (discussing situations in which litigants agree to limit scope of electronically stored data discovery).

For example, in one recent case, the court ordered the parties to an electronic data discovery dispute to follow the terms of a cost-allocation agreement between the parties of a related case.³⁰⁶ The related cost-allocation agreement required the defendant, at its own cost, to restore a sampling of the requesting backup tapes from each category of tapes that was identified as possibly containing relevant data.³⁰⁷ The defendant, however, had the right to seek reimbursement from the plaintiffs up to twenty-five thousand dollars.³⁰⁸ Furthermore, the parties in the related case had agreed that "any further production of electronic mail back-up tapes [would] be allowed only upon 'good cause shown by the [plaintiff.]'"³⁰⁹ As this example illustrates, if parties are able to arrive at agreements regarding the allocation of discovery costs of electronically stored data on their own, they may be able to draft agreements that are much more creative and appropriate to their individual needs in the particular case than if they relied on a court to make such a determination. Regardless of what the parties actually agree upon, if the judiciary and the legal community encourage litigants to address electronic data discovery issues as early as possible, they thereby will promote more equitable allocations of electronic data discovery costs and will decrease the number of discovery battles that litigants wage before the courts.

V. Conclusion

It is evident that numerous problems exist involving the allocation of electronic data discovery costs. These problems stem primarily from the sheer breadth of the rules and lack of guidance that the current rules of discovery provide.³¹⁰ In addition, the apparent lack of technical knowledge and practical understanding of computer related issues among much of the judiciary further

306. See *Linnen v. A.H. Robins Co., Inc.*, No. 97-2307, 1999 WL 462015, at *6-*7 (Mass. Super. June 16, 1999) (requiring plaintiff to adhere to discovery agreement in related case and deciding to await outcome of that discovery process before addressing requests for further information). In *Linnen*, the plaintiff sought discovery of e-mail messages stored on the defendant's backup tapes. *Id.* at *1. The defendant estimated the cost to restore the data contained on the backup tapes at between \$1,150,000 and \$1,750,000. *Id.* at *4. The court found that the current action raised issues that a related action in which the defendant was also a party had raised. *Id.* In that related action, the parties came to an agreement regarding the discovery of the electronically stored data sought. *Id.* at *5. Therefore, the court required the parties in the present action to abide by the terms of the agreement reached in the related action. *Id.* at *6-*7. Furthermore, the court decided to await the outcome of the discovery process under way in the related action before addressing the discovery of additional information. *Id.* at *6.

307. *Id.* at *5.

308. *Id.*

309. *Id.*

310. See *supra* Part II.D (discussing current discovery rules and problems surrounding those rules).

compounds the problems.³¹¹ The relevant decisions in which courts have considered the proper allocation of the costs of electronic data discovery evidence these problems.³¹²

In order to remedy these costly problems, judges should utilize specific guidelines when making electronic data discovery allocation decisions. The Advisory Committee to the Federal Rules of Civil Procedure should incorporate the aforementioned guidelines into its notes to the current discovery rules in order to better address the unique issues surrounding the allocation of electronically stored data discovery costs.³¹³ Furthermore, the legal community should encourage the judiciary to become better educated and more informed regarding technical issues involved in electronic data discovery decisions.³¹⁴ This increased knowledge will enable the judiciary to make more just and equitable decisions regarding electronic data discovery requests. Finally, the legal community and the judiciary should encourage litigants to address these costly issues at the onset of the litigation process so that they will be better prepared and better informed regarding the potential electronically stored data discovery issues involved in their suits.³¹⁵ Such preparedness will facilitate agreements between parties concerning the allocation of electronically stored data discovery costs. Regardless of exactly what is done to remedy these problems, it is evident that absent significant changes, the problems will only worsen with time. Thus, it is all too clear that the time has come to bring the judiciary and the Federal Rules of Civil Procedure into the computer age.

311. *See supra* Part II.D (discussing problems surrounding current discovery rules and judiciary's lack of technical knowledge in applying those rules in situations involving electronic data discovery).

312. *See supra* Part III (discussing and analyzing relevant case decisions).

313. *See supra* Part IV.A (suggesting that Advisory Committee incorporate specific guidelines regarding electronic data discovery issues into Rules of Civil Procedure).

314. *See supra* Part IV.B (discussing need for judges to become more informed regarding electronic data discovery issues).

315. *See supra* Part IV.C (suggesting that litigants address electronic data discovery issues early-on in litigation).

TRIBUTE



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