# Discoverability of Electronic Evidence

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## INTRODUCTION

Computers have revolutionized the way people live and do business.[1] In 2003, it was projected that 105 million e-mail users in the United States would be sending approximately 547.5 billion e-mail messages per year.[2] It is believed that at least 93 percent of information created today is first generated in digital format,[3] 70 percent of corporate records may be stored in electronic format,[4] and 30 percent of electronic information is never printed to paper.[5] As a result, discovery of documents and data stored on computer systems . . . has become an increasingly important part of the litigation process.[6]

In the past, it was assumed that when one deleted a file from a computer, it was removed completely.[7] It is now common knowledge that deleting a file from a computer does not render

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[1] Stephen J. Snyder & Abigail E. Crouse, *Applying Rule 1 in the Information Age*, 4 SEDONA CONF. J. 165, 167 (2003).

[2] THE SEDONA CONFERENCE, *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* 3-4 (March 2003), *at* http://www.thesedonaconference.org/publications_html [hereinafter THE SEDONA PRINCIPLES].

[3] THE SEDONA PRINCIPLES, *supra* note 2, at 4 (citing Kenneth J. Withers, *The Real Cost of Virtual Discovery*, FEDERAL DISCOVERY NEWS (Feb. 2001)).

[4] *Id.* (citing *Digital Data Changing Legal Landscape*, E-COMMERCE TIMES, May 16, 2000).

[5] *Id.* (citing Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Materials*, 64 SUM LAW & CONTEMP. PROBS. 253, 280-81 (2001)).

[6] Dale M. Cendali & Lydia R. Zaidman, *Electronic Discovery*, 610 P.L.I../PAT. 895, 901 (2000).

[7] Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?* 41 B.C. L. REV. 327, 336 (2000).

the file unrecoverable.[8] Deleting the body of a document will not delete the document itself; the document can potentially be retrieved until the computer needs the space that the particular document occupies, at which point the content of the document will be overwritten.[9] Most computer professionals suggest that in order to completely eliminate data, one should follow the practice of the United States Military and melt down the data-carrying media. [10]

This note will outline how the Federal Rules of Civil Procedure and recent court decisions have affected the discovery of deleted files. This note proposes that the Federal Rules should be amended to: 1) limit discovery to electronic information that is readily available to a computer user in the ordinary course of business, thereby making deleted and archival files undiscoverable except in extraordinary circumstances; 2) protect a company adhering to an established retention/destruction policy when it destroys files prior to litigation; and, 3) in the case of extraordinary circumstances, shift the costs of producing any material beyond those kept in the ordinary course of business to the requesting party, unless the requesting party can show that doing so would cause undue hardship.

## DISCOVERY SHOULD BE LIMITED TO ELECTRONIC FILES THAT ARE IN THE POSSESSION, CUSTODY, OR CONTROL OF THE USER

### *Relevant Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure embody notions of liberal discovery.[11] The rules relevant to discovery of electronic evidence are Rule 26 and Rule 34. Rule 26(b)(1) states that [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim

[8] John L. Carroll, *Discovery Disputes and Electronic Media*, SG045 ALI-ABA 421, 424 (2001).

[9] THE SEDONA PRINCIPLES, *supra* note 2, at 4.

[10] Steven C. Bennett & Thomas M. Niccum, *Two Views from the Data Mountain*, 36 CREIGHTON L. REV. 607, 615 (2003).

[11] *See generally* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978).

or defense of any party[,] including the existence of documents and other tangible things that are in the possession, custody, or control of the responding party.[12] Additionally, Rule 26 adds that for good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. [13] Implied in this rule is the notion that discovery should be focused upon the needs of the parties, and that if the parties do not agree, the judge should tailor discovery to those particular needs.[14] Rule 26 authorizes the court to limit discovery to claims and defenses asserted only in the pleadings.[15] Additionally, discovery should not be used by a party for the purpose of developing additional claims or defenses.[16]

Rule 26(b)(1) requires disclosure of the existence and location of evidence that may be relevant prior to receiving a discovery request.[17] It is possible that a court will find a violation of this disclosure obligation if a party does not provide this information at the outset.[18] Because this disclosure may be important to both offensive and defensive litigation strategies, failure to disclose may later preclude a party from using such information to support his or her claims or defenses.[19] Additionally, potential sanctions from failure to disclose have included: the awarding of damages, the allowance of an adverse inference or a rebuttable presumption, the exclusion of evidence, the striking of expert testimony, the dismissal of a suit, or the entry of a

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[12] FED. R. CIV. P. 26(b)(1).

[13] *Id.*

[14] Carroll, *supra* note 8, at 427.

[15] *Id.*

[16] *Id.*

[17] FED. R. CIV. P. 26(b)(1).

[18] Richard J. Corbett & Virginia R. Llewellyn, *The Next Discovery Frontier: Preparing for Backup Data Requests*, 21 No. 9 ACCA Docket 116, 120 (2003).

[19] Corbett & Llewellyn, *supra* note 18, at 120.

default judgment.[20] The advent of electronic data has increased the chances a company has of violating its disclosure obligation.

Rule 26(b)(2) outlines limitations to the rule of discovery, and states that the court may limit discovery if the costs of discovery are greater than the benefit upon consideration of the requirements of the case, the amount of the claim, resources, the particular issues, and the necessity of discovery.[21] Therefore, a court must carefully apply the limitations in an evenhanded manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent. [22]

Rule 34 further elaborates upon the scope of discovery.[23] A party can request an opposing party to produce specific documents, which can include data compilations from which information can be obtained [or] translated. [24] Rule 34 requires that such information be in the possession, custody, or control of the party upon whom the request is served.[25] Under Rule 34, the term documents has been interpreted to apply to electronic data compilations from which information can be obtained only with the use of detection devices. [26]

_Types of electronic evidence_

Electronic evidence has been defined as any electronically-stored information subject to

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[20] Cendali & Zaidman, *supra* note 6, at 925.

[21] FED. R. CIV. P. 26(b)(2)(iii).

[22] Carroll, *supra* note 8, at 429.

[23] Scheindlin & Rabkin, *supra* note 7, at 344.

[24] *Id.*

[25] *Id.*

[26] *Id.*

pretrial discovery. [27] One commentator has divided electronic evidence into four categories: active, replicant, archival, and residual data.[28] Additionally, there is a fifth category of electronic data called metadata. [29] Active data is accessible to the computer user, and is located on the users hard drive and/or network server.[30] Replicant data are cloned files, such as data that can be retrieved through the undo and redo buttons; retrieval of such data may be costly.[31] Archival data is saved on backup tapes in a non-user friendly format.[32] [B]ackup tapes collect information indiscriminately, regardless of topic. [33] Retrieving archival data is very expensive because it typically requires a technician to write a program to collect the data.[34] Residual data consist of deleted files and e-mails, which are the most expensive to retrieve.[35] Residual data can be retrieved until the medium on which [it] reside[s] has been completely overwritten by the system with another file. [36] Metadata is electronically stored data that relates to a document and may consist of the authors name; creation and edit dates; and, revision history.[37]

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[27] Scheindlin & Rabkin, *supra* note 7, at 332-33.

[28] Barbara A. Caulfield & Zuzana Svihra, *Electronic Discovery Issues for 2002: Requiring the losing Party to Pay for the Costs of Digital Discovery*, 2 SEDONA CONF. J. 181, 182 (2001).

[29] THE SEDONA PRINCIPLES, *supra* note 2, at 5 n.9.

[30] Jonathan M. Redgrave & Erica J. Bachman, *Ripples on the Shores of Zubulake: Practice Considerations from Recent Electronic Discovery Decisions*, 50 FED. LAWYER 31, 32 (2003).

[31] Caulfield & Svihra, *supra* note 28, at 182.

[32] *Id.*

[33] McPeek v. Ashcroft, 212 F.R.D. 33, 34 (D.D.C. 2003).

[34] Caulfield & Svihra, *supra* note 28, at 182.

[35] *Id.*

[36] *Id.*

[37] THE SEDONA PRINCIPLES, *supra* note 2, at 5 n.9.

*The effects of electronic discovery requests*

Discovery of electronic data often involves substantial work and costs for both parties.[38] Industry surveys estimate that approximately [30] percent of all current discovery requests involve electronically stored data. [39] Experts in electronic discovery estimate a computer analyst would require 100 hours to restore a month s worth of email.[40] In one case, a defendant spent over $3 million responding to a discovery request, and in another situation, a defendant incurred costs greater than $1 million in response to a discovery order to search 50,000 backup tapes.[41]

Electronic discovery commands the responding and requesting parties time, energy, and money. When a responding party fails to produce electronic records after disclosure is requested, the requesting party must follow up to determine what information exists and what searches were utilized.[42] If the requesting party is still prevented from receiving certain information, it will need to get a court order to compel production or to compel access to electronic records so that an expert, if necessary, may try to reconstruct and retrieve the necessary information.[43] Once the documents are received, the requesting party must review and analyze them.[44] At each step, expenses are incurred and one must decide at what point the effort and cost involved is greater than the information obtained.[45]

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[38] Bennett & Niccum, *supra* note 10, at 617.

[39] Snyder & Crouse, *supra* note 1, at 168.

[40] *Id.*

[41] *Id.*

[42] Bennett & Niccum, *supra* note 10, at 617.

[43] *Id.*

[44] *Id*. at 617-18.

[45] *Id.* at 617

Electronic discovery can give the requesting party power to impose disproportionate burdens on an opposing party. The expense of complying with discovery requests may force a responding party to settle a suit, even one with dubious merit. [46] As a result, courts have been forced to determine whether the needs of each party merits the expense of production on a case-by-case basis.[47]

The resolution of the issue, what is and is not discoverable, has far reaching consequences.[48] First, residual or deleted data could be a valuable source of information.[49] For example, by viewing the edits and prior drafts of a document, a party could show the intent of the parties.[50] Second, there is an enormous amount of residual data available. Third, a litigant may fail to look for residual data because he or she is unaware of its existence when responding to Rule 26 or Rule 34 requests.[51] Fourth, requiring a respondent to search for deleted files could impose a significant cost on the responding party.[52] And fifth, by allowing discovery of residual data, including third party discovery, it essentially prevents deletion of any thought created and stored via an electronic medium.[53]

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[46] *Id.* at 618.

[47] *Id.* at 620.

[48] Scheindlin & Rabkin, *supra* note 7, at 381.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Courts have been inconsistent in determining a party s obligation with respect to the discovery of residual and archival data due to the fact-specific analyses courts have used.[54] Without any standards, a party is left to guess as to what obligations he or she has, and faces the threat of a discovery violation if he or she guesses incorrectly.[55]

*Discovery should be limited to non-deleted files that are in the possession, custody, or control of the user and kept in the ordinary course of business*

Rule 34 can be read to require respondents to produce responsive, discoverable documents in the manner in which they are kept in the ordinary course of business.[56] Because residual data is information that was discarded by the user, the user could not produce the data in the form as it was kept in the ordinary course of business.[57] For example, if the data was in paper form and shredded or discarded, the responding party would not have to produce the requested documents.[58] However, great weight of authority has found that shredded and deleted files are discoverable under Rule 34.[59] For example, in *State v. Townsend*, the court stated that technically, e-mail messages are permanently recorded, because copies of all messages sent, received, and deleted, are retrievable using software and, therefore, a deleted file is not truly a

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[54] *Id.* at 361.

[55] THE SEDONA PRINCIPLES, *supra* note 2, at 7.

[56] Scheindlin & Rabkin, *supra* note 7, at 381.

[57] FED. R. CIV. P. 34.

[58] Scheindlin & Rabkin, *supra* note 7, at 365.

[59] *See generally*, McPeek v. Ashcroft, 202 F.R.D. 31 (D.D.C. 2001); Simon Property Group v. mySimon, Inc., 194 F.R.D. 639 (S.D. Ind. 2000); Playboy Enters., Inc. v. Welles, 60 F. Supp. 2d 1050 (S.D. Cal. 1999).

deleted file, it is simply organized differently.[60] Similarly, in *Simon Property Group v. mySimon, Inc.*, the court held that deleted documents were discoverable under Rule 34.[61]

Judge Shira Scheindlin, a leading authority on electronic discovery, suggests one solution that Rule 34(a)(1) should require a responding party to produce any form of electronic evidence, so long as it is in the possession, custody, or control of the responding party.[62] Judge Scheindlin would permit the production of embedded, history, cloned, temporary, and backup data, and any data created by employee monitoring software, so long as it was in the possession, custody, or control of the responding party.[63] In *Zubulake*, Scheindlin held that once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents. [64] However, as a general rule, this holding does not apply to backup tapes saved for disaster recovery purposes, which may be recycled according to a company s retention policy.[65] If the backup tapes are used for information retrieval, then those tapes should be held on to for potential discovery.[66]

Another possible solution is to amend the Federal Rules to follow Texas Rule of Civil Procedure 196.4, which states that a responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in the

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[60] State v. Townsend, 57 P.3d 255, 264 (Wash. 2002) (Bridge, J. concurring).

[61] *mySimon, Inc.*, 194 F.R.D. at 640 (S.D. Ind.).

[62] Scheindlin & Rabkin, *supra* note 7, at 372.

[63] *Id*.

[64] Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

[65] *Id.*

[66] *Id.*

ordinary course of business. [67] However, if through reasonable efforts the responding party is unable to retrieve or produce the requested information, the respondent must state his or her objection in compliance with the rules.[68]

At the Sedona Conference regarding electronic discovery, it was suggested that requiring litigants to immediately canvass all potential outlets of data in responding to preservation obligations and discovery requests is unreasonable.[69] It was urged that forensic data should not be required unless extraordinary circumstances warrant the cost and burden.[70] In a report from the Conference, attorneys submitted the best approach to determine what is discoverable would be to use information [that] is readily available to the computer user in the ordinary course of business. [71] Additionally, metadata created by the computer system would not be discoverable.[72]

Another alternative is to incorporate a rule pertaining specifically to discovery of electronic data and to proscribe that attorneys should determine what type of information management system is being used and what files should be preserved in a Rule 26(f) conference.[73]

Even though courts have allowed the discovery of deleted and backup files, it would be appropriate to implement a rule stating that only in extraordinary circumstances will deleted,

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[67] Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery,* 68 DEF. COUNS. J. 206, 209 (2001).

[68] *Id.*

[69] THE SEDONA PRINCIPLES, *supra* note 2, at 29.

[70] *Id.*

[71] *Id.* at 30.

[72] *Id.*

[73] Merrick T. Rossein, *Employment Discrimination Law and Litigation*, EMP. DISC. L. & LITIG. § 14:29:10 (2005).

archival, and metadata be discoverable. This rule requires the data to be in the possession, custody, or control of the user, which deleted, archival, and metadata are not. Analogous to throwing away a paper document, edits to an electronic document should not be discoverable. Additionally, initial discovery should not require a party to search deleted and backup tapes for fear of forfeiting his or her right to use them later on if they are required to be discovered. A rule 26(f) conference should require both parties to discuss issues involving electronic data, which will allow a party to know of the opposing party s retention policy. This will permit both parties the opportunity to reach an agreeable solution, or allow one party to request a court order. Rule 34 should be amended to include a definition of what type of electronic data is discoverable so that a party is on notice as to his or her duties with regard to the preservation of electronic data when he or she is aware that litigation is possible.

These amendments and limitations will give a party a better understanding of what data he or she must preserve.

## SPOLIATION

*Spoliation is a potential issue in the realm of electronic discovery*

In a survey of litigators, 50 percent considered unfair and inadequate disclosure of material information prior to trial to be a regular problem.[74] Because electronic records are easy to manipulate and discard, the issue of spoliation arises in the electronic discovery context. Spoliation is the act of destroying or otherwise suppressing evidence in litigation. [75] Interviews

[74] Charles R. Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 793 (1991).

[75] *Id.*

and surveys have suggested that spoliation is a prevalent practice.[76] Generally, a party is obligated to retain evidence that he or she knows or reasonably should know may be relevant to pending or future litigation.[77] Failure to comply can create sanctions for that party including discovery sanctions, a spoliation inference, obstruction of justice, referral to bar associations, or a tort claim of spoliation.[78] Additionally, spoliation has the potential to threaten the integrity of the discovery process.[79]

The duty to preserve arises upon service of a discovery demand, service of a complaint, or anticipation of litigation.[80] In *Lombardo v. Broadway Stores, Inc.,* the court upheld sanctions where the defendant destroyed computerized payroll data that was subject to the plaintiff s discovery request.[81] In *Telecom International America, Ltd. v. AT & T Corporation*, the court, using its inherent power to supervise the discovery process, ordered spoliation sanctions despite no specific discovery order for certain records.[82] One court has sanctioned a party, in the absence of an allegation of willful destruction, such as routine recycling of backup tapes or in the case of ordinary negligence.[83] Yet another court has imposed sanctions despite the

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[76] *Id.*

[77] Carroll, *supra* note 8, at 432.

[78] Nesson, *supra* note 74, at 806.

[79] *Id.* at 805.

[80] Carroll, *supra* note 8, at 432.

[81] Lombardo v. Broadway Stores, Inc., 2002 WL 86810 (Cal. Ct. App. Jan. 22, 2002).

[82] Telecom Int l Am., Ltd. v. AT & T Corp., 189 F.R.D. 76, 81 (S.D.N.Y. 1999).

[83] Corbett & Llewellyn, *supra* note 18, at 122.

requesting party s failure to request the backup tapes and awareness of the company s procedure regarding recycling of the tapes.[84]

In *Trigon Insurance Co. v. United States*, the court found that the defendant willfully and intentionally destroyed documents that should have been produced during discovery, and issued adverse inferences and reimbursement of attorneys fees as damages.[85] In *Long Island Diagnostics Imaging v. Stony Brook Diagnostic Associations*, the court dismissed the party s counterclaims and third party complaint because of spoliation, and the defendant purged his computer database against a court order.[86]

A New York court granted judgment against a defendant because of its wholesale failure to establish a coherent and effective system to faithfully and effectively respond to discovery requests. [87] The court noted that counsel should advise his client of his duty to implement a retention policy of both paper and electronic documents.[88]

In *United States v. Phillip Morris*, the court precluded all potential witnesses who failed to adhere to both a court ordered preservation order and their company s own document retention program from testifying at trial.[89] The court further ordered a monetary penalty of $2,995,000 as punishment for Phillip Morris egregious violation of the court order.[90] The court reasoned that

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[84] *Id.*

[85] Trigon Ins. Co. v. United States, 204 F.R.D. 277, 289-91 (E.D. Va. 2002).

[86] Long Island Diagnostic Imaging v. Stony Brook Diagnostic Assocs., 728 N.Y.S.2d 781, 782 (N.Y. App. Div. 2001).

[87] Corbett & Llewellyn, *supra* note 18, at 124. *See* Metro Opera Ass n v. Local 100, Hotel Employees & Rest. Employees Int l Union, 2003 U.S. Dist. LEXIS 1077, at *5-6 (S.D.N.Y., Jan. 28, 2003).

[88] Corbett & Llewellyn, *supra* note 18, at 124.

[89] United States v. Philip Morris, 327 F. Supp. 2d 21, 25 (D.D.C. 2004).

[90] *Id.* at 26.

it would be impossible to determine the value of the documents that were lost, and that these sanctions were guided by the concept of proportionality between offense and sanction.[91]

Based on previous court decisions, there is a duty to preserve not only active data but also archival, backup, and residual data.[92] However, with the vast amount of electronic data potentially available, a party cannot reasonably take every step to preserve the relevant data.[93] It would seem appropriate that if overwriting is incidental to the operation of the [computer] systems, it should be permitted to continue after the commencement of litigation.[94]

The requirement to preserve evidence must be balanced against a party s right to continue the management of its business in its own best interests, even if such management would entail overwriting documents.[95]

*Rule 34 should be amended to protect parties that adhere to a document retention/destruction policy*

Some commentators have suggested that the compact size and relative ease of retaining electronic records provides a persuasive argument for requiring producing parties to retain material for perpetuity.[96] Alternatively, it has been argued that indefinite retention is totally inconsistent with implementation of retention policies, and [] has had a paralyzing effect on development of those polices.[97]

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[91] *Id.* at 25.

[92] Carroll, *supra* note 8, at 431.

[93] THE SEDONA PRINCIPLES, *supra* note 2, at 18.

[94] *Id*.

[95] *Id.*

[96] Allman, *supra* note 67, at 209.

[97] *Id.*

It has been proposed that Rule 34 should be amended so that a party is not required to suspend the normal operation of reasonable document destruction without [a] prior court order. [98] The amendment should also be drafted so that it limits spoliation sanctions to willful violations of such orders. [99] The amendment could be written as follows:

> No sanctions or other relief predicated upon a failure to maintain or preserve documents or data, including electronically stored information, shall be entered in the absence of a discovery request that describes with particularity the specific documents or data requested and evidence that (1) the documents or data requested were relevant to the claim or defense of a party and (2) the party upon whom the request was served willfully failed to preserve such documents or data. Evidence that reasonable steps were undertaken to notify relevant custodians of preservation obligations shall be prima facie evidence of compliance. Nothing in these rules shall require the responding party to suspend or alter the operation in good faith of disaster recovery or other electronic or computer systems absent court order issued upon good cause shown.[100]

In addition to amending Rule 34, Rule 26(a) could be extended to include document retention policies as a specific item of disclosure, and it could be further mandated that such preservation be included in the Rule 26(f) conference.[101] This would force the issue to be a topic of discussion early on in the discovery process.[102]

In a recent article, Thomas Allman pointed out that parties often request preservation orders ex parte, which does not provide an opposing party with an adequate opportunity to respond to the order or defend its internal preservation policies. [103] A preservation order is the

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[98] *Id*.

[99] *Id*.

[100] *Id*.

[101] Carroll, *supra* note 8, at 432.

[102] *Id*.

[103] Thomas Y. Allman, *The Case for a Preservation Safe Harbor in Requests for E-Discovery*, 70 DEF. COUNS. J. 417, 421 (2003).

equivalent of injunctive relief, which typically is issued in a hearing upon an adequate showing that equitable relief is warranted.[104] A party will sometimes seek a preservation order for the sole reason of having a ground upon which they may later seek sanctions, regardless of the utility of the documents that are the subject of the order.[105] Allman argues that necessity should be required for a requesting party to obtain a preservation order.[106] Allman further argues that by giving the responding party an opportunity to explain [to the court] that inaccessible material cannot or should not be . . .preserved, it allows a record to be created that could be used in the future to debunk the chance of sanctions being imposed where the preservation of information was reasonable, but not perfect.[107]

Moreover, a potential litigant may help avoid spoliation inferences by creating a document retention/destruction policy.[108] A retention/destruction policy can be an invaluable part of an organization s argument against spoliation charges.[109] First, adherence to a document retention policy helps ensure that the organization will not retain outdated or irrelevant documents. [110] Second, during a discovery dispute, if the responding party is able to provide evidence of a pre-existing document retention policy, it will be able to objectively and credibly

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[104]*Id*. at 421-22.

[105]*Id*. at 421.

[106] *Id.*

[107] *Id.* at 421-22.

[108] THE SEDONA PRINCIPLES, *supra* note 2, at 19.

[109] *Id*.

[110] *Id*.

account for any documents that were destroyed prior to the commencement of litigation in accordance with the policy.[111]

Allman advocates an amendment to Rule 37 that would provide a safe harbor for businesses that follow a retention/destruction program.[112] The proposed amendment would state that where information was not readily accessible at the outset of litigation, there would be no requirement to alter the treatment of that data, if the retention/destruction program was operated in good faith.[113] Furthermore, Allman would add that if a company maintained a rational and reasonable retention plan, it would be prima facie evidence that no spoliation was intended.[114]

Alternatively, it has been argued that no change will remedy the current problem of spoliation.[115] Discovery sanctions, including a spoliation inference, obstruction of justice statutes, referral to bar associations, and the independent tort of spoliation give judges an adequate array of options of punishment to impose.[116] However, because of judicial indifference, the court has been reluctant to use these sanctions to deter spoliation.[117] It has been urged that a change in judicial attitude is needed toward the subject so judges will punish those in violation.[118] Currently, the risk of suffering a severe sanction is low because trial judges are reluctant to explore discovery violations which do not blatantly prejudice a party; and, additionally, the use of a criminal standard of proof makes it difficult to be charged with

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[111] *Id.*

[112] Allman, *supra* note 103, at 422.

[113] *Id.*

[114] *Id.*

[115] Nesson, *supra* note 74, at 806.

[116] *Id.*

[117] *Id.*

[118] *Id.* at 807.

spoliation.[119] Therefore, it has been recommended that judges take a more active role in policing potential spoliators.[120]

Rule 34 should be amended to state that destruction of documents pursuant to a valid document retention/destruction policy will not be punishable until a party in a Rule 26 conference requests that a responding party halt their destruction policy for cause. If that cannot be agreed to, the requesting party should obtain a court order compelling preservation of all documents. In order to acquire a preservation order, the requesting party should be required to show necessity. The Rule 26 conference will help reduce intentional spoliation. Additionally, by making electronic discovery a subject of the conference, appropriate action by either party can be taken at the beginning of litigation to help remedy instances of unintentional spoliation and prevent claims based on unintentional spoliation.

## COST SHIFTING OF DISCOVERY EXPENSES

*The use of electronic discovery has forced the courts to entertain cost shifting arguments*

Allowing discovery of residual and archival data has necessitated courts to entertain cost shifting arguments by responding parties. In *Sanders v. Levy*, the court recognized that Rule 26(c), combined with Rule 34, allowed the court to shift the expense of discovery to the requesting party if a demand posed an undue burden or expense to the responding party.[121] Courts have used Rule 26(b) to develop various cost shifting formulas. The ease and minimal storage costs associated with the retention of electronic documents have led companies to retain

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[119] *Id.* at 806.

[120] *Id.* at 807.

[121] Sanders v. Levy, 558 F.2d 636, 650 (2d Cir. 1976).

documents not only for retrieval purposes, but for a lack of a reason to destroy them.[122] Additionally, many companies only retain information on backup tapes, which are typically reserved for emergency data recovery purposes, and are not particularly amenable to discovery.[123]

The need for cost shifting has been brought to the forefront in light of the expenses responding parties have incurred in complying with electronic discovery requests. While there is no specific cost-shifting provision in the Federal Rules of Civil Procedure, courts have recognized that the proportionality requirement in Rule 26(b)(2)(iii) provides authority to shift discovery costs to the requesting party.[124] Whether or not the cost of document production should be shifted is determined by whether the cost is undue.[125] Rule 26(b)(2) grants discretion to a court to guide discovery, while Rule 26(c)(2) empowers a court to limit the extent of discovery, sua sponte or on motion by a party.[126] However, courts have been inconsistent in their analyses of determining who should pay the expenses of electronic discovery. Normally, a court should consider cost shifting only when electronic data is inaccessible to a user, such as instances involving the use of backup tapes.[127] In determining whether the restoration of residual data is necessary, it is often sensible to retrieve a small sample to determine the chance of finding relevant information.[128]

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[122] Rowe Entm t, Inc. v. The William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

[123] *Id.*

[124] Carroll, *supra* note 8, at 438-39.

[125] *In re* Brand Name Prescription Drugs Antitrust Litig., No. 94 C 897, 1995 WL 360526, at *2 (N.D. Ill. June 15, 1995).

[126] Redgrave & Bachman, *supra* note 30, at 31.

[127] Rossein, *supra* note 73, at § 14:29.10.

[128] *Id.*

One argument against cost shifting contemplates that such a shift would discourage poor litigants from bringing valid claims, and could deter a party from defending itself against non-meritorious lawsuits.[129] Alternatively, the exponential increase in discovery costs could potentially be used as a negotiating tool to blackmail corporate defendants, and force them to settle claims rather than foot the cost of responding to discovery requests.[130] Courts have taken several approaches to determining whether costs should be shifted to the requesting party.

*Previous court decisions regarding cost shifting request*

The traditional discovery rule is that each side bears the burden of complying with discovery requests.[131] However, in the electronic evidence context, courts have been willing to entertain cost shifting arguments to protect parties from undue burden or expense. [132] Courts that have refused to shift costs have relied on the axiom that the party responding is usually in the best and most economical position to call up its own computer stored data. [133]

In *In re Brand Name Prescription Drugs Antitrust Litigation*, the court refused to shift costs where the cost of the discovery procedure resulted from the type of recordkeeping scheme the responding party had implemented.[134] The court focused on the responding party s decision to store the data electronically.[135] The responding party maintained at least thirty million pages of e-mail data on backup tapes, and claimed that it would cost between $50,000 and $70,000 to

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[129] Caulfield & Svihra, *supra* note 28, at 181.

[130] *Id*.

[131] *Oppenheimer Fund, Inc*., 437 U.S. at 356.

[132] *In re* Brand Name Prescription Drugs Antitrust Litig., 1995 WL 360526, at *2.

[133] Bills v. Kennecott Corp., 108 F.R.D. 459, 463-64 (D.Utah 1985).

[134] *In re* Brand Name Prescription Drugs Antitrust Litig., 1995 WL 360526, at *2.

[135] *Id.*

compile, format, search, and retrieve the e-mail.[136] The court stated that in addition to considering the cost of production, it would consider whether the relative expense and burden in obtaining the data would be greater to the requesting party as compared to the responding party, and whether the responding party [would] benefit to some degree in producing the data in question. [137] The court reasoned that the responding party should have anticipated the risk of having to create an expensive retrieval system for the type of electronic storage system they chose to utilize, and should accordingly bear the costs of producing the data.[138] However, the court limited discovery to a meaningful search of the respondent s e-mail.[139]

In *Anti-Monopoly, Inc., v. Hasbro, Inc*., the court ordered the requesting party to pay costs for the data that could be extracted only by special programming, that had to be newly written and implemented to satisfy the request.[140]

However, in *McPeek v. Ashcroft*, the court used a marginal utility test to determine whether the discovery of backup tapes was appropriate.[141]

> The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense.[142]

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[136] *Id.* at *1.

[137] *Id.* at *2.

[138] *Id.*

[139] *Id.* at *3.

[140] Anti-Monopoly, Inc. v. Hasbro, Inc. 1996 U.S. Dist. LEXIS 563, at*5 (S.D.N.Y. Jan. 23, 1996).

[141] *McPeek*, 202 F.R.D. at 34.

[142] *Id.*

Based on the uncertainty of this test, the court held that the defendant should take a sampling approach.[143] The court had the defendant restore and produce e-mails from one person s computer over a one-year period.[144] After the sample data was produced and accessed, the court would determine if a broader recovery was warranted given the burden and expense.[145] However, the court held that the mere possibility that data may exist does not alone justify forcing the responding party to search backup tapes irrespective of the cost. Rather, the less likely it is that the backup tapes contain relevant data, the more unjust it would be to force the responding party to search the tapes. [146]

In two recent decisions, the cost shifting analyses were based upon the concept of Rule 26 proportionality.[147] In *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, the court adopted a balancing test to determine whether the requesting party had to pay the cost of producing e-mail from backup tapes and hard drives.[148] The court considered eight factors, including:

> 1) the specificity of the discovery requests; 2) the likelihood of discovering critical information; 3) the availability of such information from other sources; 4) the purposes for which the responding party maintains the requested data; 5) the relative benefit to the parties of obtaining the information; 6) the total cost associated with production; 7) the relative ability of each party to control costs and its incentive to do so; and 8) the resources available to each party.[149]

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143 *Id.*

144 *Id.*

145 *Id.*

146 *McPeek*, 212 F.R.D. at 35.

147 Redgrave & Bachman, *supra* note 30, at 31.

148 *Rowe Entm t, Inc.*, 205 F.R.D. at 429.

149 *Id.*

The court concluded that the requesting party would have to bear the burden of producing the e-mails because the first, second, fourth, fifth, sixth, and seventh factors favored cost shifting, while the eighth factor was neutral, and the third factor cuts against cost shifting.[150] However, the court added that if the total discovery cost was unsubstantial, there would be no cause to deviate from the presumption that the responding party would bear the cost.[151]

In *Zubulake v. UBS Warburg LLC*, the court modified the eight-factor balancing test from *Rowe Entertainment*, and weighed seven factors to determine whether costs should be shifted.[152] The court ultimately required the shifting of one quarter of the estimated $166,000 cost of restoring and searching seventy-seven backup tapes.[153] The court stated that cost shifting is appropriate only when *inaccessible* data is sought. [154] The *Zubulake* court weighed seven factors in the following order:

> 1) the extent to which the request is specifically tailored to discover relevant information; 2) the availability of such information from other sources; 3) the total cost of production, compared to the amount in controversy; 4) the total cost of production, compared to the resources available to each party; 5) the relative ability of each party to control costs and its incentive to do so; 6) the importance of the issues at stake in the litigation; and 7) the relative benefits to the parties of obtaining the information.[155]

The first two factors are to be weighted the most heavily.[156] The court stated that these factors comprised the *McPeek* marginal utility test, in which the high probability of a backup

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[150] *Id.* at 429-32.

[151] *Id.* at 431.

[152] Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 294 (S.D.N.Y. 2003).

[153] *Id.* at 283-91.

[154] *Id.* at 284.

[155] *Id.*

[156] *Id.*

tape containing relevant information implied fairness in requiring a responding party to search at its own expense.[157] The less likely [the chance that a backup tape contain relevant information] is, the more unjust it would be to make the [responding party] search at its own expense. [158] The modification of the *Rowe Entertainment* standard was based in part on commentators fears that that the *Rowe* factors tended to favor the responding party, and frequently resulted in cost shifting.[159] In *Zubulake,* the court found that the first four factors weighed against cost shifting, the fifth and sixth were neutral, and the seventh favored cost shifting.[160] However, it found that because of the speculative nature of finding anything on the e-mails, shifting some of the cost was appropriate.[161] The court also held that as a general rule only restoration and searching costs should be shifted.[162] The responding party should always bear the cost of reviewing and producing the data, once converted into an accessible form.[163]

In *Rowe Entertainment*, the Southern District of New York held that if data was retained for emergency recovery only, then it was not considered to be kept for a business purpose, and weighed in favor of shifting costs to the requesting party.[164] In *Zubulake*, the purpose for the retention of data was not considered to be important.[165] In this case, however, the Southern

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[157] *Id.*

[158] *Id.* (alteration in original).

[159] *Id.*

[160] *Id.* at 289.

[161] *Id.* at 284.

[162] *Id.* at 290.

[163] *Id.*

[164] *Rowe Entm t, Inc.,* 205 F.R.D. at 429-431.

[165] Redgrave & Bachman, *supra* note 30, at 33.

District of New York excluded the cost of reviewing the information for privilege from the cost shifting analysis, even though it could cost a considerable amount of money.[166] Yet, it has been argued that Rule 26 does not require such a narrow interpretation, and the inclusion or exclusion of such costs could shift the outcome of the balancing test.[167] As these cases indicate, courts have approached cost shifting requests in different manners.

*Cost of production of residual and archival material should be shifted to the requesting party absent a showing of undue hardship*

The spirit of the [discovery] rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by the overuse of discovery or unnecessary use of defensive weapons or evasive responses. [168] The resulting costs and time consuming activities may be disproportionate to the nature of the case, the amount involved or the issues or values at stake. [169] Therefore, three potential solutions have been suggested to accommodate the increasing expense of electronic discovery.[170]

One solution is to incorporate a provision into the federal rules similar to Texas Rule of Civil Procedure 196.4.[171] The rule states that

> [t]o obtain discovery of electronic data . . . the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot through reasonable efforts retrieve the data or

[166] *Id.*

[167] *Id.*

[168] Carroll, *supra* note 8, at 428 (citing FED. R. CIV. PRO. 26 advisory committee s note).

[169] *Id.* at 429.

[170] *Id.* at 436-38.

[171] Caulfield & Svihra, *supra* note 28, at 189.

> information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.[172]

One benefit of this rule is that if a discovery request cannot be acquired through reasonable efforts, the cost of production could fall on the requesting party through a court order.[173] This would effectively deter a requesting party from making fishing expeditions during discovery.[174]

A second solution would entail the mandatory shifting of costs at judgment. Under this solution, the losing party would be required to reimburse the other side for all or part of discovery costs.[175] The court would also have discretion to shift all or part of the cost based on the economic resources of the party, the expense incurred, and the degree to which the requests were frivolous or irrelevant.[176] Under this approach, the proportionality test in Rule 26 would still be applied during discovery.[177]

This approach has many benefits, such as the prevention of abusive or overbroad requests.[178] Parties would become more efficient in requesting documents, necessitating less frequent court intervention.[179] Additionally, this model provides incentives for weaker sides to

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[172] TEX. R. CIV. P. § 196.4.

[173] Caulfield & Svihra, *supra* note 28, at 185.

[174] *Id.* at 183.

[175] *Id.* at 193.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

settle, and would not preclude less financially-able litigants from requesting discovery.[180] However, this approach may increase transactional costs because corporate litigants may be more willing to go to trial in hopes of recouping some of their expenses, and trial costs would extinguish any savings from discovery expenses.[181]

A third solution would be to maintain the status quo, and allow case law interpretation to develop.[182] This approach would require a court to find a degree of balance between allowing pretrial discovery that enables a plaintiff to satisfy his or her pleading burden, and protecting a defendant from expensive and time consuming discovery that is nothing more than an unfounded fishing expedition. [183]

In order to cut down on discovery costs, it would seem appropriate that whenever a party requests electronic discovery of deleted or archival data that a sampling be taken to determine the appropriateness of ordering more expansive and costly discovery. Additionally, it would be appropriate to give the court discretion to shift a portion of discovery costs based on the resources, expenses, and the frivolousness of the requests. However, cost shifting should be limited to the cost of residual and archival data not used in the ordinary course of business, and the expense of producing should be the only cost factored in. This would force parties to determine whether discovery is truly needed and relevant, and would potentially cut down on the cost of the discovery process.

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[180] *Id.*

[181] *Id.*

[182] Carroll, *supra* note 8, at 438.

[183] Adams v. Target, No. IP00-1159-C-T/G, 2001 WL 987853, at *2 (S.D. Ind. July 30, 2001).

## CONCLUSION

By requiring a party to discuss electronic discovery issues at a 26(f) conference, and by not permitting discovery of residual and archival data, a party will understand its discovery obligations, and as a result, spoliation will occur less frequently. Furthermore, Rule 26 should be amended so that a party is only required to produce data that is within its possession and control. A party should not be required to produce residual or archival data except in extraordinary circumstances. Cost shifting should only be considered when a party requests residual or archival data. Prior to ordering discovery of residual or archival data, a court should conduct a sampling of that data to determine if the information obtained will likely lead to useful information.

These changes will give a party notice of what types of electronic data are discoverable, and better facilitate the proper handling of such data.