Reducing Civil Litigation Costs by Promoting Technological Innovation: Adopting Standards of Reasonableness in E-Discovery

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Discovery costs have ballooned over the last decade, in large part because attorneys must review vast amounts of electronically stored information ("ESI") for relevancy and privilege and must collect all potentially relevant ESI on which to perform those reviews. Courts can reduce costs associated with reviewing ESI by finding that the use of recently developed search software can be "reasonable" under Federal Rule of Civil Procedure 26(g) and Federal Rule of Evidence 502. Courts also can ultimately reduce costs associated with collecting ESI by taking into account the reasonableness of parties' prelitigation document-management systems when determining whether to require production of inaccessible ESI at a responding party's expense. Historically, courts were more likely to require production of inaccessible documents when the responding party had assumed the risks of high production costs by storing its information in a particular manner. In recent years, courts have retreated from this approach; some courts rejected the assumption-of-risk doctrine in favor of considering the reasonableness of the responding party's document-management policies under the circumstances, while other courts explicitly refused to consider reasonableness. The latter approach has dominated in the courts since the FRCP were amended in 2006. This Note proposes that courts reinstate the reasonableness standard when deciding whether to grant motions to compel or to protect. By doing so, courts will incentivize the implementation of document-management systems that facilitate inexpensive discovery. This proposed approach will also stimulate technological innovation in the document-management software industry, which ultimately will lead to reduced discovery costs.

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INTRODUCTION

The relatively new phenomenon of clients retaining vast amounts of electronically stored information ("ESI") has led to an exponential increase in civil litigation discovery costs in the last decade. Costs have increased so rapidly that the legal community has joined in an effort to reduce costs for clients. Lawyers, judges, and academics attended the Sedona Conference in 2003 to discuss ESI discovery issues, and have now established a working group to "develop principles and best practice recommendations for electronic document retention and production in civil litigation."[1]

Despite the efforts in recent years to reduce the cost of discovery, eighty-five percent of attorneys believe that discovery is still too expensive, according to a recent study.[2] This Note discusses two main reasons why e-discovery is expensive—document review and collection—and urges courts to implement certain discovery rules in a way that will incentivize the utilization of technological advancements that could cut down on costs. In considering (1) whether document reviews for relevancy and privilege are adequate, or (2) whether to compel production of ESI that is extremely expensive and burdensome to collect, courts should consider

1. *Working Group Series*, SEDONA CONF., http://www.thesedonaconference.org/wgs (last visited Mar. 17, 2012).

2. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 4 (2008).

the technological capabilities of the parties and hold them to standards of reasonableness. Applying standards of reasonableness to both document review and prelitigation management of ESI ultimately will help to reduce e-discovery costs by stimulating innovation in the e-discovery and information-system-management software industries.

This Note is divided in two parts. Part I explains how courts can help litigants reduce discovery costs associated with *reviewing* ESI by finding that the use of certain new technologies to review ESI for relevance and privilege satisfies the reasonableness requirements of Federal Rule of Civil Procedure ("FRCP") 26(g) and Federal Rule of Evidence ("FRE") 502. Reviewing ESI is not the only source of high discovery costs, however. Before parties can review ESI for relevance and privilege, they must first collect the ESI on which to perform their reviews. Part II addresses the high discovery costs associated with *collecting* ESI and explains how poor prelitigation document management contributes to inflated collection costs. Part II.A surveys how courts historically have considered the nature of a party's document-management system when deciding whether to require production of documents at that party's expense. Part II.B explains how these historical notions of reasonableness changed leading up to the 2006 amendments to the FRCP: Courts became less likely to question a party's management of its ESI. Part II.C shows how Congress's 2006 enactment of FRCP 26(b)(2)(B), the so-called "two-tiered approach" or "balancing test," caused courts to ignore the unreasonableness of parties' document-management systems when deciding whether to compel production.

Next, Part II.D briefly discusses the common law doctrine of spoliation (the destruction of relevant evidence), which contains one of the only remaining legal standards of reasonableness in document management. Although some courts have performed a spoliation-like analysis when deciding whether to require production of inaccessible ESI, the enactment of FRCP 26(b)(2)(B) makes clear that spoliation is no longer the appropriate test when ESI is inaccessible; Congress has designed FRCP 26(b)(2)(B)'s two-tiered approach for that purpose. Thus, Part II.E proposes that courts, when performing the proper two-tiered approach under FRCP 26(b)(2)(B), as when performing a spoliation analysis, take into account the reasonableness of parties' document-management systems even though reasonableness is not explicitly mentioned in the rule or the Advisory Committee notes. This proposed approach is authorized by the current rules, will foster technological innovation in ESI management, and ultimately will decrease discovery costs associated with collection.

I. Reasonable Software Solutions for Document Review

E-discovery is costly largely because of the volume of ESI that attorneys must review and the time they spend reviewing the ESI for responsive and privileged documents.[3] Attorneys may face sanctions for failing to perform an adequate review before responding to a discovery request. Under FRCP 26(g), "[e]very disclosure . . . must be signed by at least one attorney of record . . . . [certifying] that to the best of the person's knowledge, information, and belief formed after a *reasonable inquiry* . . . [the disclosure] is complete and correct."[4] Improper certification may lead to sanctions.[5] Additionally, under FRE 502(b), a failure to take "*reasonable steps* to prevent disclosure" of privileged documents may result in a waiver of the attorney-client privilege or of work-product protection.[6] Thus, before producing ESI requested by an opposing counsel, an attorney must review all of the collected ESI for both relevancy and privilege,[7] and the review must be reasonable. The legal community's desire to reduce discovery costs through the endorsement of new e-discovery search software as an alternative to performing manual document review is evidenced by the recent enactment of FRE 502(b) and emerging case law.

Traditionally, in performing a review for the purposes of the discovery and privilege rules, firms have employed document-review teams consisting of attorneys who manually review all potentially relevant documents. As ESI has become more voluminous over the years, document-review teams have increased in size. Often more than ten attorneys bill one client for hundreds of hours spent rifling through millions of pages of documents. In such scenarios, the document-review-team approach can result in enormous costs to the client. Although assigning document-review teams to physically look through potential

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3. *See eDiscovery Solutions Group Announces Early Case Assessment (ECA) Tool*, eDiscovery Solutions Group (Sept. 29, 2010), http://www.ediscoverysolutionsgroup.com/PressReleases-092910.html ("[S]urveys by leading industry analysts indicate that 70% of the cost of eDiscovery is consumed in the document review process.").

4. Fed. R. Civ. P. 26(g)(1) (emphasis added).

5. *Id.*

6. Fed. R. Evid. 502(b) ("[A] disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error . . . ."). Before the enactment of FRE 502(b) on inadvertent disclosures, some courts would find that waiver had occurred even if the disclosure was inadvertent. *See, e.g.*, Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B., 148 F.R.D. 456, 457 (D.D.C. 1992).

7. *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 254, 262 (D. Md. 2008) (noting that "search terms . . . aimed at locating responsive ESI, rather than identifying privileged or work-product protected documents" would not qualify as a sufficient privilege review and, therefore, that the party must search for *both* responsiveness and privilege).

documents is considered a "reasonable inquiry," under the FRCP,[8] often it is no longer financially feasible for clients engaged in large-scale litigation.

Only in recent years has technology begun to adapt to help solve the document-review cost problem. Attorneys have begun making use of document-organization programs, such as Concordance, that allow them to perform complex keyword searches on collected ESI.[9] An attorney "imports e-documents and [the program] retains original source formatting, metadata, hyperlinks to native documents, and relationships between e-mail and attachments."[10] The entire collection is searchable for keywords decided upon by the parties, and as long as a party selects keywords reasonably designed to retrieve documents responsive to the discovery request, courts have considered this method of document review to be adequate.[11]

Recognizing that keyword searches on millions of pages of ESI is less than completely accurate but that parties cannot possibly perform manual reviews in cases involving voluminous ESI, Congress enacted FRE 502(b) in 2008 in part to treat inadvertent disclosures of privileged materials more leniently.[12] The rule provides that an inadvertent disclosure will not result in a waiver of privilege if the "holder of the privilege . . . took reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error" once it realized that it had disclosed privileged materials.[13] The Federal Rules of Evidence Advisory Committee explained that it drafted the new rule to respond "to the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive due to the concern that any disclosure (however innocent or minimal) will operate as a subject matter waiver of all protected communications or information," and noted that "[t]his concern is

8. *See, e.g.*, Kandel v. Brother Int'l Corp., 683 F. Supp. 2d 1076, 1085–86 (C.D. Cal. 2010) (finding that a party had taken reasonable steps to prevent disclosure of privileged documents by staffing and training a document-review team).

9. *Concordance*, ADVANTAGE COMPANIES, http://www.advantage-companies.com/litigation/concordance (last visited Mar. 17, 2012); *Concordance*, LEXISNEXIS, http://law.lexisnexis.com/concordance (last visited Mar. 17, 2012).

10. LEXISNEXIS, *supra* note 9.

11. "The use of key words has been endorsed as a search method for reducing the need for human review of large volumes of ESI. As noted in the case of *In re Seroquel Products Liability*, however, it must be 'a cooperative and informed process [which includes] sampling and other quality assurance techniques.'" Thomas Y. Allman, *Conducting E-Discovery After the Amendments: The Second Wave*, 10 SEDONA CONF. J. 215, 223 (2009) (citing *In re* Seroquel Prods. Liab. Litig., 244 F.R.D. 650, 662 (M.D. Fla. 2007)).

12. FED. R. EVID. 502 advisory committee's note (discussing the purposes of the new rule).

13. FED. R. EVID. 502(b).

especially troubling in cases involving electronic discovery."[14] Thus, courts and rulemakers have endorsed keyword searches of ESI as a reasonable method of document review.

Newer software programs go even further and do not require attorneys to formulate keyword searches at all. Instead, using intelligent search and document-analysis software like Equivio, a lead attorney on a case reviews a sample of documents and scores them for relevance and privilege.[15] The software uses the sample to create an algorithm, which it then uses to score all of the collected documents. The software feeds scored samples to the attorney and is self-correcting in that it revises the algorithm based on further feedback from the attorney. Such technology has not been in use long enough to give rise to much case law evaluating its reasonableness. However, at least one court has found that using software like Equivio constitutes taking "reasonable steps" for the purposes of avoiding waiver of privilege under FRE 502, which covers inadvertent disclosures.[16]

In *United States v. Sensient Colors, Inc.*, the plaintiff used Equivio to perform its privilege review.[17] After producing a total of 45,000 documents, the plaintiff realized that it had inadvertently disclosed 214 privileged documents.[18] A New Jersey district court commended the plaintiff's "effort to employ a sophisticated computer program to conduct its privilege review."[19] In holding that the plaintiff had not waived privilege under FRE 502 because it had taken reasonable steps to prevent disclosure, the court noted that the "[p]laintiff should not be unduly punished for occasional mistakes that occurred while it started to use new software to organize and sort its documents."[20] The court's willingness to find that the use of novel document-analysis software constituted taking "reasonable steps"[21] to prevent disclosure reflects an understanding that standards of reasonableness in the discovery rules should evolve as ESI search technology advances.[22]

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14. FED. R. EVID. 502 advisory committee's note ("[E]lectronic discovery may encompass 'millions of documents' and to insist upon 'record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation.'" (quoting Hopson v. Mayor of Balt., 232 F.R.D. 228, 244 (D. Md. 2005))).

15. *See Culling*, EQUIVIO, http://www.equivio.com/scenario.php?ID=2 (last visited Mar. 17, 2012).

16. United States v. Sensient Colors, Inc., No. 07-1275 (JHR/JS), 2009 WL 2905474, at *1, *4 (D.N.J. Sept. 9, 2009).

17. *Id.* at *1.

18. *Id.* at *1–2.

19. *Id.* at *4.

20. *Id.*

21. FED. R. EVID. 502.

22. As one district court noted in *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 244 (D. Md. 2005):

> The unavoidable truth is that it is no longer remarkable that electronic document discovery

Another kind of advanced case assessment software called FirstCull "automatically scans and assesses data (from hard drives, entire computers, servers, removable media, whole networks, etc.), and then generates a series of easy to read reports that categorically detail the key attributes about that information."[23] One e-discovery consultant group explained that FirstCull helps reduce the costs of document review because it "enables users to easily identify potential electronic evidence[,] . . . unpack any files . . . such [as] ZIP, CAB, RAR and TAR file types, [and] determine file sizes and generate a set of standard reports to calculate the magnitude and cost of . . . document review."[24] To support the exploration of new technological solutions by civil litigants and their e-discovery vendors, courts should monitor these potential new software solutions and assess whether they are reasonable methods of reviewing ESI for relevancy or privilege. For example, although the use of FirstCull might not alone be sufficient, using FirstCull in conjunction with other methods of document review might result in a finding of reasonableness. Parties can assist courts to understand new technology by presenting e-discovery expert witnesses to explain the reasonableness or unreasonableness of advanced ESI review software.[25]

Evolution of standards of reasonableness is also evidenced by the fact that parties now frequently agree to use new types of litigation software as a part of their proposed discovery plans and meet-and-confer reports under FRCP 26(f).[26] This practice demonstrates that litigants have a growing desire to reduce costs and that they consider the use of many technological and software solutions to be reasonable methods of reviewing documents for relevancy and privilege.

Case law, the enactment of FRE 502(b), and party stipulations to use of document-review software demonstrate that the standards of

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> may encompass hundreds of thousands, if not millions, of electronic records that are potentially discoverable under Rule 26(b)(1). In this environment, to insist in every case upon 'old world' record-by-record pre-production privilege review, on pain of subject matter waiver, would impose upon parties costs of production that bear no proportionality to what is at stake in the litigation . . . .

In fact, the Advisory Committee has specifically endorsed the use of "advanced analytical software applications and linguistic tools" for performing a privilege review in certain circumstances. *See* FED. R. EVID. 502(b) advisory committee's note.

23. *FirstCull*, XPRIORI, http://xpriori.com/content/firstcull/firstcull-overview (last visited Mar. 17, 2012).

24. EDISCOVERY SOLUTIONS GROUP, *supra* note 3.

25. *See* United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (requiring parties to submit expert testimony on the adequacy of one party's ESI searches to assist the court in ruling on a motion to compel production).

26. FRCP 26(f) requires the parties to meet and confer at an early stage in the litigation to prepare a discovery plan. In fact, some local rules state that the parties *must* be prepared to discuss the use of litigation support software at preliminary conferences. *See, e.g.*, NASSAU CNTY. COMMERCIAL DIV., GUIDELINES FOR DISCOVERY OF ELECTRONICALLY STORED INFORMATION 3–5 (2009).

reasonableness for document review, for both relevancy and privilege, have evolved[27] to encompass the use of cutting-edge technology as an alternative to employing large document-review teams. A flexible interpretation of the reasonableness requirements of FRCP 26(g) and FRE 502 is consistent with the legal community's desire to reduce discovery costs and increase efficiency. No matter how efficiently new technology allows attorneys to review documents for relevancy and privilege, however, it is often of little use unless the attorney first *collects* all of the potentially relevant ESI and loads it into a searchable system. The collection problem has led to an entirely new dimension of e-discovery-related costs.

II. Reasonableness in Document Management

Before a party can make use of advanced search and document-analysis software, it must first collect all of the potentially relevant ESI on which to perform its review. And before responding to another party's discovery request, an attorney has a duty to make a "reasonable inquiry" to assure that her response and accompanying production of documents is "complete and correct."[28] A reasonable inquiry encompasses not only a reasonable review of compiled ESI, as discussed in Part I, but also a reasonable search for *sources* of potentially relevant ESI.[29] For example, assume an attorney, representing a plaintiff in an employment discrimination matter, receives a request from the defendant for discovery of all communications between the plaintiff and her supervisor during a particular period of time. The attorney uses keywords to

27. *Cf.* Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B., 148 F.R.D. 456, 457 (D.D.C. 1992) (holding that the failure to locate and screen any privileged document from production to the opposing party results in a waiver of the attorney-client privilege, even if the disclosure was inadvertent), *superseded by* Fed. R. Evid. 502(b); Treppel v. Biovail Corp., 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (rejecting the plaintiff's demand that the defendants manually review the documents). The *Treppel* court also noted, 233 F.R.D. at 374, that:

> Even in a case involving exclusively hard copy documents, there is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files in order to comply with its discovery obligations. Rather, it must conduct a diligent search, which involves developing a reasonably comprehensive search strategy. Such a strategy might, for example, include [electronic searches].

28. Fed. R. Civ. P. 26(g)(1).

29. *See* Qualcomm Inc. v. Broadcom Corp., No. 05cv1958-B, 2010 WL 1336937, at *4–6 (S.D. Cal. 2010) (noting that in responding to a discovery request, an attorney should have searched travel records, certain of his client's employees' personal computers, and other sources for responsive documents, but holding that sanctions for failing to perform a "reasonable inquiry" under FRCP 26(g) were improper only because the attorney had been misled by his client into believing the documents did not exist); Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (noting that a party has a duty to preserve and collect documents from the "key players" in the litigation).

perform a reasonable search of her client's personal computer hard drive, work computer hard drive, and scanned hard copy files, and produces to the defendant the results of her search. The attorney fails, however, to search her client's cell phone SIM card and, as a result, the produced documents do not contain responsive text message communications. A court might find that even though the attorney performed a reasonable review of the documents she collected, she did not perform a "reasonable inquiry" into the sources of potentially relevant documents. The error in such a situation is a collection error rather than a review error, and the attorney might face sanctions for improper certification of the document production.

Costs of collecting potentially relevant ESI have ballooned as ESI has grown more voluminous, taken more forms, and become scattered through thousands of different sources. For example, potentially relevant ESI might be contained in Word documents, Excel spreadsheets, PDFs, TIFFs, emails, instant messages, voicemail WAV files, or in any number of other formats, and might be located on an employee's personal computer or PDA, a server, a backup tape, a database, or any number of other sources. The time and costs associated with locating and collecting all potentially relevant ESI can be staggering.

In looking for ways to reduce discovery-related costs, many courts and lawmakers have focused primarily on requiring cooperation between the parties during discovery.[30] The 2006 amendments to the FRCP codify this approach and mandate cooperation between the parties during the discovery planning process.[31] Although cooperation between parties during the discovery process eliminates some unnecessary costs, this solution reduces only those costs arising *after* the filing of litigation. Many ESI collection costs, however, arise from activities in which the parties are engaged *before* litigation. For example, courts have frequently emphasized that as soon as a party anticipates litigation, it must take steps to preserve all potentially relevant documents, even if the suit has yet to be filed.[32] Counsel must affirmatively monitor client compliance

30. *See In re* Seroquel Prods. Liab. Litig., No. 1769, 2007 WL 219989, at *5 (M.D. Fla. Jan. 26, 2007) (ordering the parties to confer with one another with respect to discovery issues before seeking judicial intervention); SEDONA CONFERENCE, THE SEDONA CONFERENCE COOPERATION PROCLAMATION (2008) ("The costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system.").

31. FED. R. CIV. P. 26(f) (requiring parties to "confer as soon as practicable" to discuss discovery-related issues, and making the parties responsible for "attempting in good faith to agree on the proposed discovery plan").

32. Rambus, Inc. v. Infineon Techs. AG, 222 F.R.D. 280 (E.D. Va. 2004) ("[E]ven valid purging programs must be put on hold so as to avoid the destruction of relevant materials when litigation is 'reasonably foreseeable.'"). The duty to preserve is not explicitly stated in the FRCP but is widely recognized.

with such "litigation holds" by identifying and performing an initial review of all sources of potentially relevant ESI.[33] Failure to comply with this "duty to preserve" might result in spoliation sanctions for both the client and its attorneys.[34] Thus, a party reasonably foreseeing litigation must institute a litigation hold and essentially perform an entire round of collection and review for relevance before even meeting and conferring with opposing counsel.[35] Cooperation during a FRCP 26(f) discovery-planning conference, which takes place shortly after a complaint is filed, does not help to reduce the enormous costs associated with complying with this duty to preserve.

As discussed in the Subparts that follow, civil litigants that store information in a format that makes the information extremely expensive or burdensome to produce may seek a court order allowing them to avoid producing that information. Poor management and organization of ESI, either before or after the party anticipates litigation, contributes significantly to growing costs of collection and has allowed parties that institute unreasonable document-management policies to avoid producing relevant documents. Despite the significant contribution of poorly organized ESI to civil litigation costs, very few courts or critics have addressed this problem in recent years.

A. Historical Notions of Reasonableness

The advent of ESI made it difficult for courts to apply the discovery rules under the FRCP, which originally were fashioned to deal exclusively with paper documents. As the Federal Rules of Civil Procedure Advisory Committee made clear in the 2006 amendment to the discovery rules, although "[ESI] may exist in dynamic databases and other forms far different from fixed expression on paper. . . . discovery of [ESI] stands on equal footing with discovery of paper documents."[36] Nevertheless, ESI is often much more difficult and costly to produce than paper documents. As the Court of International Trade pointed out in *Daewoo Electronics Co. v. United States* in 1986,

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33. Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

34. *See Rambus*, 222 F.R.D. at 288, 299 (finding that a failure to implement the duty to preserve, by failing to halt routine destruction of documents, constitutes spoliation and therefore may subject a party to sanctions); *Zubulake V*, 229 F.R.D. at 437 (explaining that trial court judges have the discretion to sanction a party for failing to comply with the duty to preserve during a litigation hold).

35. Case law has demonstrated that this is true. For example, Judge Scheindlin, in *Zubulake V*, emphasized that attorneys have a duty to affirmatively "monitor compliance [with a litigation hold] so that all sources of discoverable information are identified and searched." 229 F.R.D. at 432. To comply with this obligation, attorneys must communicate with the key players and familiarize themselves with the computer and backup systems. Thus, attorneys essentially have to perform an initial round of collection prior to meeting with opposing counsel.

36. Fed. R. Civ. P. 34(a) advisory committee's note (2006 amendment).

> It would be a dangerous development in the law if new techniques for easing the use of information become a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms. . . . It is also in consonance with Rule 34 of the Federal Rules of Civil Procedure, and the revision comments of the Advisory Committee which indicate that the rule is intended to keep pace with changing technology.[37]

When courts first began dealing with excessive costs related to the production of ESI more than a decade before the 2006 amendments to the discovery rules, they did take into account parties' prelitigation information-management systems. For example, in *In re Brand Name Prescription Drugs Antitrust Litigation*, a federal district court in Illinois wrestled with how to determine whether the costs of requiring production would be "undue" when a party refused to produce requested emails and alternatively suggested that the requesting party pay for the expense of production.[38] The court noted that on one hand, sticking the responding party with "the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request" would be unfair.[39] But on the other hand, a party choosing to store its documents electronically assumes an "ordinary and foreseeable risk" that it might be required to retrieve them.[40] The court gave more weight to the second consideration and granted the motion to compel production at the responding party's expense.[41]

In *Linnen v. A.H. Robins Co.*, a Massachusetts trial court similarly considered a party's document-management system when determining whether to require that party to engage in expensive ESI production.[42] The plaintiff moved to compel production of backup tapes containing email correspondence and the defendants opposed the motion, characterizing it as a "multi-million dollar fishing expedition."[43] The court granted the motion in part, requiring production of a sample of the tapes to analyze for responsiveness.[44] Significantly, the court noted that the high costs associated with producing backup tapes were

> one of the risks taken on by companies which have made the decision to avail themselves of the computer technology now available to the

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37. 10 Ct. Int'l Trade 754, 757 (1986) (citing the Advisory Committee notes to the 1970 amendments to the discovery rules, 48 F.R.D. 487, 527 (1970)).

38. Nos. 94 C 897, MDL 997, 1995 WL 360526, at *1–2 (N.D. Ill. June 15, 1995).

39. *Id.* at *2.

40. *Id.*

41. *Id.* at *3.

42. No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. Ct. June 16, 1999).

43. *Id.*

44. *Id.* at *13.

> business world. [And t]o permit a corporation . . . to reap the business benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results.[45]

Even prior to the advent of ESI, courts sometimes took into account the reasonableness of a party's prelitigation document-management system when determining whether to grant a protective order or a motion to compel. In *Kozlowski v. Sears, Roebuck & Co.*, the plaintiff sued a manufacturer of children's pajamas after his pajamas ignited, causing him to suffer severe burns.[46] During discovery, the plaintiff requested copies of all other complaints or communications of customers regarding the burning of children's nightwear.[47] The defendant's records, however, were organized by the claimants' names rather than by the product that was the subject of the complaints.[48] Producing the documents would have entailed searching through all claims in the Sears index, which the defendant complained was "the equivalent of an impossible task."[49] The Massachusetts federal district court denied the defendant's motion for a protective order, reasoning that "the costliness of the discovery procedure involved [was] entirely a product of the defendant's self-serving indexing scheme."[50] Significantly, the court noted that "[t]o allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules."[51]

These case studies illustrate that before the turn of the century, courts took into consideration the reasons for high costs of production in any particular case. If the party responding to the discovery request was at fault for, or had assumed the risk of, high collection and production costs, courts were less likely to grant a protective order or to shift costs to the requesting party.

B. Changing Notions of Reasonableness Leading to the 2006 Amendments to the Federal Discovery Rules

A general principle stated by the Sedona Conference is that "[a]n organization should have reasonable policies and procedures for managing its information and records."[52] Yet in practice this principle has

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45. *Id.* at *6 (citing *In re* Brand Name Prescription Drugs Antitrust Litig., 1995 WL 360526).
46. 73 F.R.D. 73, 74 (D. Mass. 1976).
47. *Id.*
48. *Id.* at 75–76.
49. *Id.* at 76.
50. *Id.* at 77.
51. *Id.* at 76.
52. Sedona Conference, The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age, at iv, 11–12 (2d ed. 2007) (stating that

not often been tested because the Sedona Conference and the legal community instead have emphasized the importance of maintaining business autonomy with respect to document management[53] and accordingly have not considered the reasonableness of the document-management system as a factor when deciding whether to order expensive ESI production. For example, two influential decisions in the Southern District of New York[54] departed from the historical notions of reasonableness in document management described previously.[55] In 2002, that court declined to find that a party storing ESI in an inaccessible format had assumed the risk of high production costs.[56] In the following year, the court explicitly refused to consider the reasonableness of prelitigation document management when deciding whether to require production of inaccessible ESI.[57] These seminal cases influenced the 2006 amendments to the FRCP's discovery rules[58] and contributed to the elimination of the reasonableness consideration in determining whether to require production of inaccessible information.

Shortly before the 2006 amendments, Judge Scheindlin of the Southern District of New York, in *Zubulake v. USB Warburg LLC* ("*Zubulake I*"), set out the basic rule for when a court should consider granting a protective order for ESI or shifting the costs of production to the requesting party.[59] The *Zubulake I* test formed the basis for the 2006 amendments.[60] Before setting out the test, however, Judge Scheindlin first looked to an eight-factor test the same court had designed the previous year in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[61] which also was fashioned to assist courts in determining when to shift discovery costs.[62]

The *Rowe* court disavowed the approaches taken in *In re Brand Name Prescription Drugs* and *Daewoo*, where the courts found that the

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"identifying and managing information and records should be a business priority" and emphasizing the importance of devoting financial and human resources to records-management programs).

53. *Id.* at 14 ("Information and records management requires practical, flexible and scalable solutions that address the differences in an organization's business needs . . . .").

54. Zubulake v. USB Warburg LLC (*Zubulake I*), 217 F.R.D. 309 (S.D.N.Y. 2003); Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421 (S.D.N.Y. 2002).

55. *See supra* Part II.A.

56. *Rowe*, 205 F.R.D. at 429–32.

57. *Zubulake I*, 217 F.R.D. at 321–22.

58. Benjamin D. Silbert, Note, *The 2006 Amendments to the Rules of Civil Procedure: Accessible and Inaccessible Electronic Information Storage Devices, Why Parties Should Store Electronic Information in Accessible Formats*, 13 RICH. J.L. & TECH. 14, ¶ 34 (2007), http://jolt.richmond.edu/v13i3/article14.pdf.

59. 217 F.R.D. 309.

60. Silbert, *supra* note 58, ¶ 34 ("With [*Zubulake I*] as a backdrop, . . . the Judicial Conference of the United States set about to rework the Rules to accommodate electronically stored discoverable information.").

61. 205 F.R.D. at 429.

62. *Zubulake I*, 217 F.R.D. at 316.

responding parties had assumed the risk of producing ESI at high costs.[63] Instead, the *Rowe* court reasoned that ESI differed from paper records in that the "underlying assumption [for paper records] is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention."[64] For ESI, however, the cost of storage is so minimal that a party may choose to retain it "not because it is expected to be used, but because there is no compelling reason to discard it."[65] Therefore, the *Rowe* court refused to presume that a party storing information electronically had assumed the risk of having to produce it at high costs.[66] Yet even though the *Rowe* court rejected the flat assumption-of-risk approach, it did encourage courts to consider "the purposes for which the responding party maintains the requested data" as part of its eight-factor cost-shifting test.[67] If the responding party retained the documents in an inaccessible format only (a) because it had simply neglected to delete it or (b) for emergency retrieval, this factor should weigh against requiring that party to produce the ESI at its own expense and in favor of cost shifting.[68] The court reasoned that a party should be required to produce the documents only if it also expected to have to retrieve those documents as part of its normal business activities.[69] Thus, although the *Rowe* court considered the assumption-of-risk approach to be extreme and unreasonable, it still found that prelitigation document management would be relevant to determining whether to require production or cost shifting.[70] If the purpose for which the responding party retained the ESI indicated that retrieval was expected or foreseeable, then a court should more strongly consider requiring the responding party to produce the documents at its own expense.

In *Zubulake I*, however, Judge Scheindlin went even further than the *Rowe* court and explicitly rejected consideration of the reasonableness factor entirely.[71] Judge Scheindlin was more concerned with whether the responding party could demonstrate that the ESI was inaccessible than with why it was inaccessible: "Whether the data is kept for a business purpose or for disaster recovery does not affect its *accessibility*, which is the practical basis for calculating the cost of production."[72] According to

63. *Rowe*, 205 F.R.D. at 429.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 431.
69. *Id.*
70. *Id.* at 429–31.
71. 217 F.R.D. 309, 321–22 (S.D.N.Y. 2003).
72. *Id.* at 321–22.

Zubulake I, if a party can demonstrate that ESI is inaccessible, it does not matter why it was inaccessible; a court should simply weigh the costs of production against its likely benefits by considering other relevant cost-shifting factors.[73] Therefore, *Zubulake I*'s seven-factor cost-shifting test contains no mention of the reasonableness or purpose of the responding party's document-management system.[74] This decision had a strong influence on the 2006 amendments and Advisory Committee notes, and led to the elimination of standards of reasonableness in the storing of ESI.[75]

C. The 2006 Amendments and the Two-Tiered Approach to E-Discovery

To protect civil litigants against disproportionate discovery costs, when Congress amended the FRCP in 2006, it designed a balancing test to help courts determine whether to compel, protect against, or shift the costs of production (FRCP 26(b)(2)'s "two-tiered approach").[76] FRCP 26(b)(2) and its corresponding Advisory Committee notes—like *Zubulake I*, from which they stem—contain no mention of prelitigation document management. As a result, after the 2006 amendments to the discovery rules, few courts have considered a party's unreasonable prelitigation document management when deciding whether to grant motions to compel or to protect inaccessible ESI.[77]

Since 2006, under the newly amended FRCP 34(b), a party may elect to produce ESI to opposing counsel in the form in which it retains the ESI in its ordinary course of business.[78] This reflects the Advisory

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73. *Id.*

74. The seven *Zubulake I* factors, 217 F.R.D. at 322, include:

> (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 costs to the parties of obtaining the information.

75. *Cf.* Quinby v. WestLB AG (*Quinby II*), No. 04 Civ. 7406 (WHP) (HBP), 2006 U.S. Dist. LEXIS 64531, at *101–02 (S.D.N.Y. Sept. 5, 2006). The court in *Quinby II* applied the seven-factor *Zubulake I* test for cost-shifting, but also looked at the reasonableness of the inaccessibility of the ESI. *Id.* at *105. Because the responding party had failed to institute a litigation hold or to preserve ESI that was previously active but now inaccessible, the court required that party to produce the documents at its own expense. *Id.* However, the Advisory Committee did not take this case into consideration when it drafted the 2006 amendments. Silbert, *supra* note 58, ¶ 34.

76. *See* Fed. R. Civ. P. 26(b)(2)(B)–(C) (setting forth the two-tiered approach).

77. W.E. Aubuchon Co. v. Benefirst, LLC, 245 F.R.D. 38, 43–45 (D. Mass. 2007) (emphasizing the unreasonable nature of a party's prelitigation document management, but not officially considering it when deciding whether to compel production).

78. Fed. R. Civ. P. 34(b).

Committee's assumption that ESI produced in the ordinary course of business already exists in a reasonably usable format.[79] Nevertheless, the Committee recognized that:

> Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. . . . The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).[80]

FRCP 26(b)(2)(B) relates to ESI that is "inaccessible," meaning ESI that is extremely burdensome and costly to produce.[81] Courts apply this rule when a party moves either for an order compelling the production of ESI or for an order protecting ESI against production.[82] Once the party responding to a document request has made a showing that the ESI is inaccessible, the court performs a balancing test to determine whether to compel or to protect against production.[83] Under the balancing test, a court determines whether the benefits of production would outweigh the costs, and the requesting party is invited to show "good cause" for requiring production.[84] The factors that courts take into consideration for the "good cause" analysis appear in FRCP 26(b)(2)(C), and include whether

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.[85]

The balancing of (1) the burdens and costs of producing inaccessible ESI against (2) the reasons to require production has often been referred to as the two-tiered approach for ESI discovery.[86] Like the seven-factor

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79. FED. R. CIV. P. 34(b) advisory committee's note (2006 amendment).

80. *Id.*

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

82. *Id.* Courts also have applied FRCP 26(b)(2) in situations where a party is under a duty to preserve and moves for a protective order that would allow it to continue destroying certain documents that are overly costly and burdensome to preserve. *See, e.g.*, Pippins v. KPMG LLP, No. 11 Civ. 0377 (CM) (JLC), 2011 WL 4701849, at *2–3 (S.D.N.Y. Oct. 7, 2011).

83. FED. R. CIV. P. 26(b)(2)(B)–(C).

84. *Id.*

85. FED. R. CIV. P. 26(b)(2)(C).

86. *See, e.g.*, Thomas Y. Allman, *The "Two-Tiered" Approach to E-Discovery: Has Rule 26(b)(2)(B) Fulfilled Its Promise?*, 14 RICH. J.L. & TECH. 7, ¶ 7 (2008), http://jolt.richmond.edu/v14i3/article7.pdf; Douglas L. Rogers, *A Search for Balance in the Discovery of ESI Since December 1, 2006*, 14 RICH. J.L. & TECH. 8, ¶ 112 (2008), http://jolt.richmond.edu/v14i3/article8.pdf ("The ESI Rules create a two-tier system

Zubulake I test, the rules establishing the two-tiered approach do not instruct courts to consider *why* the ESI would be costly and burdensome to produce.

Courts and commentators disagree about whether *during a litigation hold* a party's unreasonable ESI management, which results in relevant documents becoming inaccessible, should influence a court's decision about whether to require production.[87] This debate, however, has not yet extended to whether unreasonable *prelitigation* document management should be a factor. Unreasonable document management, both during and prior to litigation, often is inherently relevant to whether the responding party should be required to produce inaccessible documents, and courts should take it into consideration when performing a good cause analysis under FRCP 26(b)(2)(C).[88]

In *Zubulake v. UBS Warburg LLC* ("*Zubulake IV*"), Judge Scheindlin, considering the reasonableness of document management during a litigation hold, noted that parties may choose any number of ways of organizing their documents, "[i]n recognition of the fact that there are many ways to manage electronic data."[89] Although this is inevitably true given the enormous variety of document-management software and technology, this hands-off approach, where courts do not even inquire into the reason for high production costs, has led to results that are inconsistent with historical notions of reasonableness in document management.

For example, in *Major Tours, Inc. v. Colorel*, the defendant failed to institute a litigation hold for approximately three-and-a-half years after litigation was foreseeable.[90] As a result of the defendant's unreasonable document management, by the time the parties became engaged in discovery, many previously "active" documents were available only on backup tapes and thus inaccessible for purposes of FRCP 26(b)(2)(B).[91] The defendant requested a protective order for the inaccessible documents.[92] Because it had failed to comply with its duty to preserve relevant documents, the defendant was entirely at fault for causing the requested ESI to become costly and burdensome to produce.[93]

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of discovery.").

87. *Compare* Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 617–18 (D.N.J. 2010) (granting a protective order for documents rendered inaccessible during a litigation hold), *with* Rogers, *supra* note 86, ¶ 135 (arguing that good cause "clearly arises" if a party allows ESI to become inaccessible during a litigation hold).

88. *See infra* Part II.E.

89. 220 F.R.D. 212, 218 (S.D.N.Y. 2003).

90. 720 F. Supp. 2d 587.

91. *Id.*

92. *Id.* at 617.

93. *See id.* at 618.

Nevertheless, the documents in question would have cost $1.5 million to restore, and therefore a magistrate judge in the District of New Jersey found that they were "inaccessible" under FRCP 26(b)(2)(B).[94] Without seriously considering the fact that the defendant's failure to properly manage its system had resulted in the inaccessibility of the documents, the judge applied the two-tiered test and concluded that the cost of production outweighed the possibility that the materials would be relevant.[95] The judge therefore granted the defendant's motion for a protective order.[96]

The district court found that the magistrate judge had not misapplied the two-tiered test.[97] Significantly, the court held that there is no "bright line rule" as to whether "a protective order under FRCP 26(b)(2)(B) can ever be granted to a party when the evidence is inaccessible because of that party's failure to institute a litigation hold."[98] Important to the court's holding was the fact that "[n]othing in the plain language of FRCP 26(b)(2)(B) requires such a threshold determination of who is at fault for the data having become inaccessible."[99] However, although the court did not find that the magistrate judge had abused his discretion, it made an interesting observation with respect to how a responding party's culpability could factor into the two-tiered test.[100] It noted that when performing the "good cause" analysis, a court might take into consideration the fault of the defendant in causing the data to become inaccessible,[101] even though it is not a factor listed in FRCP 26(b)(2)(C) or the Advisory Committee notes.

A number of courts and commentators have suggested that poor information management of the responding party during a litigation hold is relevant and that courts should factor it into the good cause analysis under FRCP 26(b)(2)(C).[102] The duty to preserve potentially relevant

94. *Id.*
95. *Id.* at 618–19.
96. *Id.* at 618.
97. *Id.* at 621.
98. *Id.* at 619.
99. *Id.*
100. *Id.*
101. *Id.* at 621.
102. Advante Int'l Corp. v. Mintel Learning Tech., No. C. 05-01022 JW (RS), 2006 WL 3371576, at *1 (N.D. Cal. Nov. 21, 2006); Rogers, *supra* note 86, ¶ 135 ("[G]ood cause to order the search of inaccessible ESI clearly arises when the requesting party shows that the producing party allowed the destruction of ESI in accessible format when it had an obligation to preserve documents." (citing Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth., 242 F.R.D. 139, 147–48 (D.D.C. 2007))); *see Disability Rights Council*, 242 F.R.D. at 148 (considering a party's failure to institute a litigation hold as part of the good cause analysis). In *Disability Rights Council of Greater Washington v. Washington Metro Transit Authority*, the court stated, "[T]here is absolutely no other source from which electronically stored information can be secured, thanks to WMATA's failure to impose a litigation hold." 242 F.R.D. at 148.

information after anticipating litigation is one of the only standards[103] the law imposes on civil litigants with respect to document management.[104] To allow active documents that are potentially relevant to impending litigation to become inaccessible and then seek to avoid production reflects at least negligent conduct, and certainly should influence a court's decision about whether to compel production. When documents are rendered inaccessible due to unreasonable document management *before* litigation is anticipated, the responsible party might not be as culpable as those that allow documents to become inaccessible during a litigation hold. But courts should still take it into consideration, along with the totality of the circumstances, when performing a good cause analysis.[105] Since the 2006 amendments to the discovery rules, however, courts have not applied any standards on parties relating to *prelitigation* document management.

For example, in *W.E. Aubuchon Co. v. Benefirst, LLC*, the plaintiffs sued the defendant in the District of Massachusetts for failing to properly administer an ERISA plan and requested copies of all medical claim files associated with that plan.[106] The defendant, prior to the filing of litigation, had indexed scanned copies of all of its claim forms by processing date and the name of the claims examiner.[107] The image files contained no searchable information about the particular ERISA plan or group to which the claims related.[108] At first, the court granted the plaintiff's motion to compel production of the forms.[109] However, the defendants asked the court to reconsider its order to compel, arguing that the forms requested were inaccessible and that it would be unduly burdensome and costly to produce them given that they were not searchable by group.[110] The court found that retrieval would indeed be burdensome and costly under FRCP 26(b)(2)(B), but noted:

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103. The other standard of reasonableness in document management applied by some federal courts appears in a spoliation analysis, which often intersects with the duty to preserve. *See infra* Part II.D.

104. Unlike the *Major Tours* court, other courts have reviewed a failure to properly institute a litigation hold under the common law rules regarding spoliation rather than under the FRCP 26 two-tiered test. *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 106 (2d Cir. 2002) (describing the lower court's application of a spoliation analysis to address one party's failure to produce requested documents); Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360 (N.D. Ga. 2008); Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 375–76 (D. Conn. 2007). Determining whether to require production of inaccessible documents through application of a spoliation analysis is improper, however, especially after the 2006 amendments to FRCP 26(b)(2)(B)–(C). *See infra* Part II.D.

105. *See infra* Part II.E.

106. 245 F.R.D. 38, 40 (D. Mass. 2007).

107. *Id.* at 41.

108. *Id.*

109. *Id.* at 40.

110. *Id.* at 42.

> I am hard pressed to understand the rationale behind having a system that is only searchable by year of processing, then claims examiner, then the month of processing, and finally the claims date. None of these search criteria reflect the name of the individual claimant, the date that the claimant received the medical service, who the provider was, or even the company that employed the benefit holder. It would seem that such a system would only serve to discourage audits and the type of inquiries that have led to the instant litigation.[111]

Nevertheless, given that unreasonable organization of ESI is not a factor listed in the two-tiered balancing test, the court did not actually take it into account when performing its FRCP 26(b)(2)(C) good cause analysis.[112] The fact that the court mentioned it at all, however, demonstrates that reasonableness of prelitigation document management is inherently relevant to the question of whether the responding party should be required to produce inaccessible ESI at its own expense.

D. Reasonableness in Spoliation Law

Even after Congress's 2006 enactment of FRCP 26(b)(2)(B), a rule specifically designed to help courts determine whether to compel production of inaccessible documents, some courts performing that very inquiry have improperly applied a common law spoliation analysis instead.[113] The common law doctrine of spoliation generally arises when (1) a party was under a duty to preserve the information at issue, (2) that party acted with culpability in failing to preserve that information or in actively destroying it, and (3) the other party suffered prejudice as a result of not having access to relevant information.[114] Given the difficulty of demonstrating the relevance of documents that have disappeared, most courts will presume relevance and prejudice under the third prong where the responding party acted with a high level of culpability in destroying or failing to preserve the information.[115] Thus, the culpability

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111. *Id.* at 43.

112. *Id.* at 43–45. However, considering the factors listed in FRCP 26(b)(2)(C) alone, the court did find that the plaintiffs had demonstrated good cause for production, and denied the defendant's motion for reconsideration. *Id.* at 44–45.

113. *See, e.g.*, Connor v. Sun Trust Bank, 546 F. Supp. 2d 1360, 1375 (N.D. Ga. 2008); Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 375–76 (D. Conn. 2007).

114. *See* Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Telecomm. & Tech. L. Rev. 71, 80 (2004) ("[A] typical sanctioned party is a defendant that destroys electronic information in violation of a court order, in a manner that is willful or in bad faith, or causes prejudice to the opposing party.").

115. *See, e.g.*, *Zubulake IV*, 220 F.R.D. 212, 220 (S.D.N.Y. 2003) ("When evidence is destroyed in bad faith (*i.e.*, intentionally or willfully), that fact alone is sufficient to demonstrate relevance."); *see also* Scheindlin & Wangkeo, *supra* note 114, at 84. ("[C]ourts have been less concerned with proof of prejudice when faced with willful or bad faith conduct."). There seems to be a "sliding scale" with respect to whether sanctions are premised on culpability or prejudice; based on a case study, Shira Scheindlin and Kanchana Wangkeo conclude that "the more prejudice there is, the less willfulness

of the responding party in losing or destroying documents often becomes crucial to the spoliation analysis.

Some courts have performed a spoliation analysis when determining whether to require production of information rendered inaccessible during a litigation hold,[116] further demonstrating that courts consider the culpability of the responding party in failing to institute a reasonable document-management system to be intrinsically relevant to whether that party should bear the expense of producing inaccessible documents. The law must draw a distinction, however, between spoliated evidence and inaccessible ESI. The major difference is that with spoliation, the information is irretrievable, whereas with inaccessible information, a court may decide to require retrieval under certain circumstances. The spoliation analysis is thus more appropriate where ESI has been lost or destroyed than where ESI is inaccessible.[117] Courts must now, therefore, apply FRCP 26(b)(2)(B) when considering whether to require production of inaccessible ESI. Yet taking a brief look at how courts have applied standards of reasonableness in document management under a spoliation analysis helps demonstrate (1) that unreasonable management of an information system is often intrinsically related to whether a party should be required to produce inaccessible documents and (2) the need for uniform, clear standards of culpability and reasonableness in document management.

The culpability factor under the spoliation test, which, depending on the jurisdiction, instructs courts to consider whether the party acted intentionally, in bad faith, or unreasonably in destroying relevant information, is one of the only standards of reasonableness with respect to document management actually articulated in the discovery rules applied by federal courts.[118] Spoliation is not mentioned at all in the FRCP and is analyzed inconsistently across jurisdictions. The doctrine of spoliation was developed under state law, and states have adopted different definitions of and rules relating to spoliation. California, for

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courts require before sanctioning a party for e-discovery violations, and vice versa." Scheindlin & Wangkeo, *supra* note 114, at 89.

116. *See* Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (applying a spoliation analysis where the documents were neither lost nor destroyed but simply not produced in time for trial and existed on relatively inaccessible backup tapes).

117. *Id.* at 106 (noting that because the responding party had simply failed to produce requested documents rather than destroying them, this was "not a typical spoliation case" but was "more akin to [cases] in which a party breaches a discovery obligation or fails to comply with a court order"). The confusion over what type of authority the court has to impose sanctions and which rules apply highlights the lack of clarity in the discovery rules.

118. The other standard of reasonableness in document management is the duty to collect and preserve potentially relevant documents after anticipating litigation. *See supra* Part II.C. These two standards often overlap because a failure to comply with the duty to preserve often results in a motion for sanctions for spoliation.

example, prescribes both civil and criminal penalties for spoliation of documents: "Every person who, knowing that any [document or other evidence] is about to be produced in evidence upon any trial, inquiry, or investigation whatever, authorized by law, *willfully* destroys or conceals the same, with intent thereby to prevent it from being produced, is guilty of a misdemeanor."[119] And at trial, the court may provide an adverse-inference instruction to the jury if it determines that a party *willfully* failed to produce documents.[120] California courts have great discretion to provide adverse-inference instructions and are "free to adapt [instructions] to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation."[121] In New York, by contrast, "[s]poliation sanctions are appropriate where a litigant, intentionally *or negligently*, disposes of crucial items of evidence."[122] And if litigation is foreseeable, the failure to preserve relevant documents may also justify the imposition of spoliation sanctions.[123]

The Eighth Circuit case of *Stevenson v. Union Pacific Railroad Co.* serves as an example of how the reasonableness of a document-management system plays into a spoliation analysis.[124] In that case, the plaintiff sued the defendant railroad company after he was seriously injured and his wife was killed during a collision with a train.[125] He moved for sanctions on the ground that the railroad company destroyed a "tape of conversations between the train crew and dispatch at the time of the accident."[126] The defendant argued that it should not be subject to sanctions because it had destroyed the tapes in accordance with its document-retention policy of re-recording over the tapes after ninety days.[127] Nevertheless, the district court found that the defendant had destroyed the tapes in bad faith and was subject to sanctions for spoliation.[128]

In making its determination, the court considered "(1) whether the record retention policy is *reasonable* considering the facts and

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119. CAL. PENAL CODE § 135 (2011) (emphasis added).

120. "If you find that a party willfully [suppressed] [,] [altered] [,] [damaged] [,] [concealed] [, or] [destroyed] evidence in order to prevent its being used in this trial, you may consider that fact in determining what inferences to draw from the evidence." WEST'S COMM. ON CAL. CIVIL JURY INSTRUCTIONS, CALIFORNIA CIVIL JURY INSTRUCTIONS (BAJI) § 2.03 (2012) (brackets in original).

121. Cedars-Sinai Med. Ctr. v. Superior Court, 954 P.2d 511, 517 (Cal. 1998).

122. Abar v. Freightliner Corp., 617 N.Y.S.2d 209, 212 (App. Div. 1994) (emphasis added).

123. Enstrom v. Garden Place Hotel, 811 N.Y.S.2d 263, 264 (App. Div. 2006).

124. *See* 354 F.3d 739 (8th Cir. 2004).

125. *Id.* at 742.

126. *Id.* at 743.

127. *Id.* at 747.

128. *Id*. at 746.

circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (3) whether the document retention policy was instituted in bad faith."[129] The district court found that the defendant "had been involved in many grade crossing collisions and knew that the taped conversations would be relevant in any potential litigation regarding an accident that resulted in death and serious injury."[130] Additionally, in past cases, the defendant "had preserved such tapes . . . where it was helpful to [its] position."[131] On appeal, the Eighth Circuit found that the district court had not abused its discretion because all of these circumstances "create[d] a sufficiently strong inference of an intent to destroy [the voice tape] for the purpose of suppressing [relevant] evidence."[132]

Stevenson illustrates how a court performs a reasonableness analysis under the doctrine of spoliation: by considering whether a party's failure to manage its information in a way designed to preserve relevant information was reasonable under the totality of circumstances. Because the defendant had selectively preserved some such tapes in the past and knew that the tapes would be relevant to litigation, the court found that its failure to preserve the tapes was so unreasonable as to indicate bad faith management of its information system. Just as unreasonable document management is inherently relevant to whether a party has acted culpably in destroying relevant evidence, it is also inherently relevant to whether the party should be required to produce ESI which that party has rendered inaccessible but has not actually destroyed. And as explained in the next Subpart,[133] courts should perform a reasonableness inquiry (similar to the reasonableness inquiry performed by the court in *Stevenson*) when deciding whether to require production of inaccessible ESI, and should consider reasonableness as a factor when performing the balancing test under FRCP 26(b)(2)(B).

Federal courts do not clearly or uniformly apply spoliation law and its standards of reasonableness in document management. The circuit courts are split over the level of culpability required under the second prong, ranging from a mere negligence standard in the Second Circuit[134] to an intentional destruction standard in the Eighth Circuit.[135] The

129. *Id.* (emphasis added).

130. *Id.* at 747.

131. *Id.*

132. *Id*. at 748.

133. *See infra* Part II.E.

134. Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 108 (2d Cir. 2002) (holding that the lower court had erred in finding that there must be gross negligence or bad faith to satisfy the "culpable state of mind" requirement).

135. Greyhound Lines, Inc. v. Wade, 485 F.3d 1032, 1035 (8th Cir. 2007) (requiring "a finding of intentional destruction indicating a desire to suppress the truth" before allowing the imposition of

circuits that require bad faith or intentional destruction set an extremely high bar for demonstrating that sanctions are appropriate, and it is often unclear whether a failure to institute a litigation hold would meet the requisite level of culpability.

For example, the Fifth Circuit requires a showing of bad faith. In *Escobar v. City of Houston*, a police department became subject to a litigation hold sixty days after a particular incident occurred.[136] However, it failed to halt its routine destruction of electronic communications over ninety days old and, as a result, communications relating to the incident in question were permanently deleted approximately one month after the trigger date.[137] The Fifth Circuit held that the department's failure to comply with its duty to preserve did not by itself rise to the level of bad faith without further evidence of culpability.[138] In contrast, a Connecticut district court, in *Doe v. Norwalk Community College*, held that a failure to institute any sort of litigation hold after anticipating litigation automatically amounts to gross negligence or recklessness and satisfies both the second and third prongs of the spoliation analysis with respect to culpability and prejudice.[139] As *Doe*, *Escobar*, *Stevenson*, and the California and New York approaches demonstrate, the standards of reasonableness for spoliation and the treatment of a failure to preserve documents during a litigation hold vary greatly between courts. Given the lack of uniformity, it becomes difficult for litigants to understand their document-management obligations and to predict at what point a failure to comply with those obligations would give rise to sanctions.

Courts often fail to differentiate between what constitutes spoliation and when sanctions would be warranted, which contributes to a lack of clarity in spoliation law. Whether spoliation has occurred and whether the responsible party is be subject to sanctions should be two entirely separate inquiries, much like the difference between determining whether a lower court has committed an error and whether that error was harmful and warrants reversal. Therefore, in articulating spoliation standards, Congress and the courts might establish a lower, reasonable person standard for determining whether spoliation has occurred, and then establish a gradient for what types of sanctions are warranted based on minimum levels of culpability. For example, the culpability required for imposing a light monetary sanction might be negligence, whereas the culpability required for imposing an adverse-inference instruction or dismissing a claim entirely might be bad faith or intentional destruction.

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sanctions for spoliation).

136. No. 04-1945, 2007 WL 2900581, at *17 (S.D. Tex. Sept. 29, 2007).

137. *Id.*

138. *Id.* at *18.

139. 248 F.R.D. 372, 379–81 (D. Conn. 2007).

The establishment of clear standards would help to eliminate confusion in the courts and among litigants about standards for document management during litigation holds.

After the 2006 amendments, FRCP 26(b)(2)(B) and (C) apply specifically to inaccessible ESI.[140] As a result, if a failure to institute a litigation hold leads to active ESI becoming inaccessible rather than to destruction of the ESI, courts should perform the two-tiered FRCP 26(b)(2) test rather than a spoliation analysis. Unfortunately, the plain language of FRCP 26(b)'s two-tiered test makes no mention of the reasonableness of the responding party's document-management system or the culpability of the responding party. Furthermore, no consensus exists as to whether unreasonable information management is relevant to the determination of whether a party should be required to produce inaccessible ESI. Yet if a party has unreasonably rendered potentially relevant ESI inaccessible, that fact is inherently relevant to whether the court should compel production, just as a party's unreasonable loss or destruction of relevant evidence is inherently relevant to whether spoliation sanctions are warranted. The following Subpart proposes why and how courts should take reasonableness in document management into account when performing FRCP 26(b)(2)(B)'s balancing test.

E. Proposed Standards of Reasonableness in Document Management

Neither FRCP 26(b)(2)(B) and (C), which establish the two-tiered approach, nor the accompanying Advisory Committee notes, explicitly discuss the reasonableness of storing ESI in an inaccessible format. The language of the rule and the Advisory Committee notes suggest, however, that Congress intended for courts to consider factors beyond those listed in subsection (C) when performing the good cause analysis.[141] Subsection (C)(iii) explains that, in determining whether good cause exists for requiring production, a court should consider whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the *needs of the case*."[142] The Advisory Committee elaborates that the good cause prong under FRCP 26(b)(2)(C) allows courts to consider "whether [the] burdens and costs can be justified in the

140. Fed. R. Civ. P. 26(b)(2)(B)–(C).

141. At least one court agrees that the factors listed in the rule and Advisory Committee notes are nonexhaustive. *See* Major Tours, Inc. v. Colorel, 720 F. Supp. 2d 587, 619 (D.N.J. 2010) (suggesting that the culpability of a party responding to a discovery request in allowing active documents to become inaccessible during a litigation hold would be a factor contributing to a finding of good cause for production under FRCP 26(b)(2)(C)).

142. Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphasis added).

circumstances of the case."[143] The Committee then goes on to list factors, more specific than those listed in FRCP 26(b)(2)(C), that courts "may" take into consideration:

> Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[144]

The language, particularly the insertion of the word "may," suggests that the Committee did not intend for this list to be exhaustive and that it contemplated that other factors might also be relevant to the good cause analysis. If the responding party's document-management system unreasonably causes ESI to become inaccessible, this should constitute one of the "needs" or "circumstances" of the case that might justify the "burdens and costs" of requiring production.[145] Thus, if a court determines that the party responding to a discovery request caused the requested ESI to become inaccessible or that it unreasonably stored the ESI in an inaccessible format, the court may and should consider that fact when determining whether the requesting party has demonstrated good cause for production.

The Advisory Committee might have shied away from explicitly mentioning the reasonableness of document-management systems, despite its inherent relevance, because consideration of this factor likely would increase the costs of e-discovery, at least initially. One of the main purposes of the 2006 amendments, after all, was to introduce an element of proportionality in the two-tiered approach in an effort to reduce costs.[146] Unfortunately, under the current cost-benefit analysis paradigm, instituting a new, discovery-friendly document-management system likely would increase costs without much accompanying benefit; if a party maintains its old system it can simply claim that the ESI is inaccessible and likely avoid producing it. In other words, the current system disincentivizes technological advancement in information management. Courts should alter this cost-benefit analysis and incentivize the adoption of discovery-friendly document-management systems.

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143. FED. R. CIV. P. 26(b)(2) advisory committee's note (2006 amendment) (emphasis added).

144. *Id.* (emphasis added).

145. *Id.*

146. *See* Rachel Hytken, Note, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 885 (2008).

Courts could alter the cost-benefit analysis and incentivize technological advancement by refusing to grant protective orders or to shift costs where the inaccessibility of ESI is unreasonable[147] under the circumstances of the case. Courts should consider the nature of the parties involved in the case and hold large companies that are frequently involved in litigation accountable when they organize their records in a manner that unreasonably obstructs discovery. This is not to say that large companies should be obligated to preserve all ESI eternally.[148] To the contrary, companies may continue to institute and comply with document-retention policies and permanently delete information not relevant to any reasonably foreseeable litigation. Instead, courts should encourage large companies to reduce their own future discovery costs by keeping those documents that they choose to retain in an accessible, discovery-friendly format. If a party fails to exercise reasonableness in its document management, then it should be more likely to suffer the consequences of having to produce the documents at its own expense. For companies that expect to be involved in litigation at some point, this accountability would incentivize the adoption of document-management systems that facilitate efficient collection of potentially relevant documents.

Such an approach also would create a monetary incentive for companies to dispose of ESI that they no longer have any reason to store, and thereby reduce the enormous volume of ESI to be collected and searched. As the *Rowe* court indicated, part of the reason that ESI collection costs are so high is that people now store enormous amounts of information that they never would have retained if it existed on paper.[149] Providing a "compelling reason to discard"[150] ESI that is irrelevant to any business purpose would help put ESI back on a level playing field with paper documents, as the Advisory Committee desired.

Yet deciding to take the reasonableness of a party's document management into account does not end the inquiry. Courts also must consider what standards of reasonableness apply under the circumstances. This Note does not suggest that companies should be required to organize ESI in one particular manner. Such an approach would be inconsistent

147. This approach is in line with the Sedona Conference best practice guidelines. *See* SEDONA CONFERENCE, *supra* note 52, at 12 ("The hallmark of an organization's information and records management policies should be reasonableness.").

148. *See* Concord Boat Corp. v. Brunswick Corp., No. LR-C-95-781, 1997 WL 33352759, at *4 (E.D. Ark. Aug. 29, 1997) (noting that a large company routinely involved in various lawsuits did not have an ongoing duty to preserve virtually all inaccessible ESI, even though the company was almost constantly subject to litigation holds); SEDONA CONFERENCE, *supra* note 52, at 13 ("Defensible policies need not mandate the retention of all information and documents.").

149. Rowe Entm't, Inc. v. William Morris Agency, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

150. *Id.*

with the fact that rapidly changing technology means that more efficient management systems frequently become available. Moreover, business autonomy is an extremely important consideration; businesses must have the flexibility to organize their records in a way that makes business sense. Many companies, particularly large ones, already factor litigation expenses into their business models and expect that they will, at some point, become engaged in litigation. For such companies, it makes business sense to organize records in a manner that would facilitate, or at least not unreasonably hinder, inexpensive discovery.

To properly determine the reasonableness of a party's document-management system, a court must fully understand the technological and financial capabilities of the parties.[151] For example, a small, family-owned business that never anticipated being involved in litigation should be held to a different standard of reasonableness than is a large company that frequently becomes entangled in lawsuits.[152] Additionally, both parties may help a court to analyze the circumstances of any given case by making use of expert witnesses.[153] Courts should encourage responding parties to explain the reasons for and relative costs of managing records in other, more accessible formats, and should consider whether the organization of the responding party's system was reasonable based on all of the circumstances.

To avoid case-by-case, highly discretionary analyses of their document-management systems, large companies also should consider joining with others in their respective industries to draft industry-specific guidelines for ESI management. Industry guidelines have assisted with other litigation-related corporate management issues. For example, the Kings County Medical Society and Kings County Bar Association formed a committee of attorneys and physicians to draft guidelines for attorneys and physicians.[154] The guidelines covered the handling of medical records and reports; communications with and depositions of treating physicians; how to obtain expert medical opinions; calling

151. *See* SEDONA CONFERENCE, *supra* note 52, at 12 ("Judging reasonableness includes considering the substantial efforts required to understand new technologies and to adopt policies governing the management of electronic information and records.").

152. A court should consider the fact that a small, privately owned business might find it much more financially burdensome to adopt an expensive, discovery-friendly management system than would a larger, more profitable business. Therefore, a court should be less likely to find the small business's failure to adopt such a system unreasonable, having considered all of those circumstances. In practice, however, the distinction between small and large businesses is unlikely to raise much of a problem because small businesses often do not generate enough ESI to cause e-discovery cost problems.

153. At least one court actually required that the parties meet the standards of FRE 702 (governing expert testimony) while hashing out a motion to compel that related to the sufficiency of certain search terms. United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008).

154. KING CNTY. MEDICAL SOCIETY & KING CNTY. BAR ASS'N, INTERPROFESSIONAL HANDBOOK: GUIDELINES FOR PHYSICIANS AND ATTORNEYS (2004).

physicians as witnesses; and appropriate medical expert fees, such as for the handling of medical records and reports, among other medical malpractice litigation matters.[155] Industry guidelines for document management similarly would be useful for facilitating inexpensive discovery and efficient resolution of discovery disputes. The existence of industry-specific guidelines would allow responding parties to emphasize their compliance with industry standards in defending the reasonableness of their document-management systems in court. Finally, if a court determines that a responding party's document-management system is unreasonably inaccessible under all of the circumstances, it may consider that as one factor contributing to a finding of good cause for production under FRCP 26(b)(2)(C).

Such an approach to resolving e-discovery disputes ultimately will decrease litigation costs because it creates an incentive for large businesses to more efficiently manage their ESI even *prior* to the institution of a litigation hold. If it becomes clear to large companies that courts will refuse to grant protective orders where storing ESI in an inaccessible format is unreasonable, companies that expect to be involved in litigation will be more likely to take it upon themselves to adopt more reasonable document-management systems to reduce their own future discovery costs.

Some might object that factoring in the reasonableness of the document-management system will increase the costs of e-discovery because it will impose on companies the cost of adopting new methods of document management, and might result in requiring certain parties to produce documents despite the high cost of doing so. Although this is true in the short-term, such an objection is shortsighted. Providing incentives for companies to adopt more efficient document-management systems will cause them to search for the cheapest, most efficient way to organize their documents with an eye toward decreased costs of collection during discovery. This, in turn, will increase demand in the marketplace for discovery-friendly technology and software. Given the rate at which technology is already adapting to help companies reduce litigation costs, we can expect that increased demand will only foster further adaptation and innovation.[156]

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155. *See id.* at 1–3.

156. See CLAYTON M. CHRISTENSEN ET AL., THE INNOVATOR'S PRESCRIPTION: A DISRUPTIVE SOLUTION FOR HEALTH CARE (2009) for an interesting theory on how to develop efficient, inexpensive solutions in industries where the costs of products or services are too high. According to Christensen, "sustaining innovations" differ from "disruptive innovations." Unlike sustaining innovations, the purpose of which is to "maintain the existing trajectory of performance improvement in the established market," disruptive innovations actually "transform an industry" by making the products or services "affordable and accessible." *Id.* at 2, 4–5. In many cases, existing industry leaders fail to foster disruptive innovation not because "they lack . . . money or technological expertise," but because they "lack the motivation to focus

CONCLUSION

Changing technology has led to more efficient communications and better-organized business records. However, it has also had the unjust side effect of inflating the costs of civil litigation discovery to the point that parties often settle cases rather than foot the bill for manually combing through millions of documents.[157] According to a 2009 Federal Judiciary Survey, problems arose in twenty-five percent of cases involving e-discovery.[158] Significantly, "[t]he most common problem [in those cases] was a dispute that could not be resolved without court action over the burden of production of ESI."[159] To address this serious problem, courts must make every attempt to understand the technologies available to the parties and to apply standards of reasonableness in a changing technological environment. Imposing standards of reasonableness with respect to document review and management ultimately will foster innovation, reduce costs, and allow for the more efficient administration of justice.

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sufficient resources on the disruption." *Id.* at 7. The industry providing technological tools for e-discovery is in desperate need of a disruptive innovation. Providing a motivation for such innovation could alter the marketplace in a way that fosters the development of cheap, efficient technologies that ultimately will reduce the cost of e-discovery dramatically.

157. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 73 (2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf.

158. *Id.* at 1.

159. *Id.*

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