CURBING ABUSIVE DISCOVERY BY INCLUDING CERTAIN E-DISCOVERY RELATED COSTS TO THE LIST OF TAXABLE COSTS IN 28 U.S.C. § 1920

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CONTENTS

[W]hen the costs of discovery and litigation are used to force settlement even absent fault or injury . . . the Court, by failing to adopt a reasonable interpretation to counter these excesses, risks compromising its own institutional responsibility to ensure a workable and just litigation system.[1]

I. INTRODUCTION

This article argues that discovery requests are susceptible to waste and abuse due to the moral hazard inherent to a producer pays system, and that one approach to solving these problems would be to include certain e-discovery related costs to the list of taxable costs contained in 28 U.S.C. § 1920. Adding e-discovery related costs (excluding attorney related fees) to the list of taxable cost in § 1920 would help to curb overbroad discovery request and act as a deterrent to discovery requests that are primarily calculated to drive up litigation expenses. By aligning transaction costs with the requesting party, the requesting party is more likely to make a request in which "the burden or expense of the proposed discovery outweighs its likely benefit."[2] This article discusses some of the issues involved in using a taxable cost approach, namely balancing the efficiencies and cost savings produced by aligning the costs of production with the requesting party against keeping courts accessible to indigent plaintiffs. This paper ends by proposing a model amendment that incorporates the Electronic Discovery Reference Model (EDRM) and discusses how such a rule might be applied in practice.

[1] Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1628-29 (2010) (JJ. Kenndey and Alito, dissenting).

[2] FED. R. CIV. P. 26(b)(2)(C)(iii) (2006).

II. CHALLENGES IN CURBING ABUSIVE DISCOVERY

The American civil discovery tradition is unique among the legal systems in the world. Unlike most countries, the producing party is responsible for the costs associated with responding to a requesting party's discovery request.[3] This system of requiring the responding party to pay for the costs of a request is popularly termed the producer pays rule[4] and is described as "letting discovery costs lie where they fall."[5]

The modern approach toward civil discovery, which combines broad and liberal with a producer pays rule, breaks down when parties are required to produce thousands or millions of documents. The costs associated with such requests impose significant financial burdens on the responding party. Under certain circumstances, parties have an incentive to use the costs associated with discovery as leverage in settlement negotiations. This runs contrary to the central purpose of discovery, which is: to provide the parties and court with enough information to decide the case on the merits of the parties' claims and defenses.[6] This incentive to abuse the discovery process can be described as an economic moral hazard.

Recent attempts to safeguard against overbroad and abusive discovery continue to be inadequate for two reasons. First, the American courts historically have had a strong presumption

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[3] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270-71 (1975); Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 473 (1994). The United States is unique in this respect in that most other countries allow the "successful litigant [to] collect his or her legal fees, or costs, from the loser." John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

[4] *Raging Debate: Who Should Pay for Digital Discovery?*, N.Y. L.J., Jan. 27, 2003 at T4 (discussing reformation of the producer pays rule).

[5] See, *e.g,. Discovery Of Electronic Evidence Under The Federal Rules*, CORPORATE COUNSEL LITIGATION NEWSLETTER (BOND, SCHOENECK & KING, PLLC) (June 2002), *available at* http://bsk.com/pdfinfomemos/06-2002%20im%20litigation.pdf.

[6] Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

against limiting the scope of discovery. Second, no reactive safeguards exist in the Federal Rules of Civil Procedure ("Rules"); the procedural safeguards that do exist in the Rules are all proactive measures that are difficult to practicably enforce.

A. Discovery Request Have the Potential to be Wasteful and Abusive

The modern civil discovery process is premised upon the idea that the merits (or lack thereof) of a case are best decided when both parties can provide the judge or jury with as much relevant information as possible.[7] Under the Rules, parties have an almost absolute right to any information regarding any claim or defense at issue, even when the information is controlled or possessed by the opposing party.[8]

The broad scope of discovery combined with a producer pays rule creates the possibility of a moral hazard.[9] The party who makes the decision of whether a request for production is worth the time and effort (the requestor) does not incur the transaction costs, while the party who does incur the transaction costs (the responding party) has no control over scope or nature of the request.[10]

Under the right circumstances, a requesting party has a rational incentive to request discovery, even if the request results in little probative value.[11] At a certain point, a rational

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[7] Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules,* 39 B.C. L. Rev. 691, 724 (1998).

[8] *Id.*

[9] Moral hazard is an economic principle. The term "describes behaviour when agents do not bear the full cost of their actions and are thus more likely to take such actions." Moral Hazard, OECD STATISTICS PORTAL, http://stats.oecd.org/glossary/detail.asp?ID=1689 (last visited Nov. 16, 2012).

[10] John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws,* 84 MINN. L. REV. 505, 543-49 (2000).

[11] Frank H. Easterbrook, *Discovery As Abuse,* 69 B.U. L. REV. 635, 636-38 (1989). The following hypothetical demonstrates why. Suppose that a plaintiff makes a discovery request that will increase her chances of prevailing in a lawsuit worth $100,000 from 60 percent to 65 percent. If the request costs the defendant $500 to produce and $500 for the plaintiff to review, this would be an efficient use of both parties' resources in resolving the matter because the information is valued at $5,000 and producing the information cost $500 and reviewing the production costs $500. However, if the request costs the defendant $40,000 to produce and $20,000 to review, then responding to the

responding party is better off settling a case even if the responding party is likely to win on the merits of the case, should the case go to trial. The effect that discovery costs have on settlement negotiations varies by case and is a function of the value of the case; the cost of discovery relative to the value of case; the cost of discovery relative to each party; and the value of discovery to each party.[12]

Parties can use asymmetric discovery burdens to their advantage during settlement negotiations[13] which subvert the entire purpose[14] of discovery, i.e. to provide enough accurate information so that the *merits* of the claims and defenses decide the outcome of the case. Instead, in cases where discovery costs are prohibitively high or asymmetrical, parties often settle cases based on the costs of litigation instead of the merits of the claims and defenses of the parties.[15]

This is true in cases involving the discovery of electronically stored information (e-discovery). Producing e-discovery is exceptionally expensive.[16] The costs associated with

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request is inefficient because the information is still valued at $5,000 and producing the information will cost $60,000.

[12] JAMES N. DERTOUZOS, NICHOLAS M. PACE & ROBERT H. ANDERSON, THE LEGAL AND ECONOMIC IMPLICATIONS OF ELECTRONIC DISCOVERY, RAND CORPORATION (2008).

[13] Beckerman, *supra* note 10, at 543.

[14] Subrin, *supra* note 7, 724 (1998).

[15] Ted Sichelman, *Why Barring Settlement Bars Legitimate Suits: A Reply to Rosenberg and Shavell*, 18 CORNELL J.L. & PUB. POL'Y 57, 58 (2008) ("Defendants often settle frivolous suits because litigation is not costless.").

[16] *See* Mia Mazza et. al., *In Pursuit of Fed. R. Civ. P. 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, 3-7 (2007); Vlad Vainberg, *When Should Discovery Come with A Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1530-32 (2010); Kenneth J. Withers, *The Real Cost of Virtual Discovery*, 7 FEDERAL DISCOVERY NEWS, Feb. 12, 2001, at 6, *available at* http://www.abajournal.com/files/report.pdf ("Although electronic discovery is becoming extraordinarily important in civil litigation, it is proving to be enormously expensive and burdensome. The vast majority (75 percent) of our respondents confirmed the fact that electronic discovery has resulted in a disproportionate increase in the expense of discovery and thus an increase in total litigation expense."); Jessica Lynn Repa, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 266 (2004) ("The Federal Rules govern electronic discovery in the same manner as traditional discovery of paper files.58 However, there are profound costs and burdens, as well as technological differences, associated with electronic discovery.").

identifying, preserving, collecting, processing, reviewing, analyzing, and producing a multimillion document discovery request can easily cost hundreds of thousands of dollars. Many factors contribute to the high costs of producing electronically stored information,[17] with scale and volume acting as the greatest cost drivers.[18]

In the largest cases, attorneys must review millions of documents for relevance and privilege. The cost associated with having an attorney read every single document in such cases is prohibitive.[19] Law firms and litigation support vendors scramble to find ways to reduce review costs through the use of technology.[20] Providing cost saving e-discovery services is big money. The e-discovery industry is maturing into a billion-dollar market.[21] This niche market composed of attorneys, litigation support specialists, information technology specialists, consultants, and contract attorneys has started to take away work traditionally handled by junior associates in large law firms.[22]

The problems associated with e-discovery are unlikely to go away in the near future. Digital technology continues to exponentially increase parties' capacity to store information. The

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[17] Robert E. Altman & Benjamin Lewis, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 572 (2009) ("Privilege review, in-house information technology ('IT') costs, format conversion, backup tape retrieval and restoration, expert assistance, printing costs, and actual production are all examples of costs associated with the production of ESI.").

[18] Thomas Y. Allman, *The Need for Federal Standards Regarding Electronic Discovery*, 68 DEF. COUNS. J. 206 (2001) ("the sheer volume of information available in the electronic context [makes e-discovery] materially different [from regular discovery]"); Robert Hardaway et. al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 546-52 (2011);

[19] Assuming that an attorney can read one document every thirty seconds (a generous assumption), reviewing a set of one million documents would take a little over 8,300 hours to complete. Billing at $40 per hour, the review alone of one million documents would cost over $300,000.

[20] Joe Palazzolo, *Why Hire a Lawyer? Computers Are Cheaper*, THE WALL STREET JOURNAL (June 18, 2012, 2:06 p.m. ET), *available at* http://online.wsj.com/article/SB10001424052702303379204577472633591769336.html;

[21] Debra Logan & John Bace, *Magic Quadrant for E-Discovery Software*, GARTNER, INC. (2011); *eDiscovery Market, 2011-2015*, THE RADICATI GROUP, INC. (2011).

[22] John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1.

amount of information that digital devices can store compared to a book or ledger is astounding.[23] A single laptop holds the equivalent of a warehouse full of printed documents. In larger cases, requests for production can involve the review of millions of documents.[24] E-discovery issues will continue to increase as the total volume of information in the world increases.[25] This inevitable[26] increase in discoverable material will continue to lead to higher litigation costs absent a comparable increase in search capability or decrease in collection costs.[27]

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[23] *See* Brian Vastag, Exabytes: *Documenting the 'digital age' and huge growth in computing capacity*, WASHINGTONPOST.COM (February 10, 2011, 11:17 PM), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021004916.html?sid=ST2011021100514; *Britons growing 'digitally obese'*, BBC NEWS (Thursday, 9 December, 2004, 09:51 GMT), *available at* http://news.bbc.co.uk/2/hi/technology/4079417.stm ("Gadget lovers are so hungry for digital data many are carrying the equivalent of 10 trucks full of paper in 'weight'"). To illustrate this, compare how many copies of Leo Tolstoy's War and Peace can fit onto an iPhone. On Project Gutenberg, War and Peace is available for download in a printable version coming in at 3.1 MB. With 1024 MB in one gigabyte, your standard iPhone 3GS with 4 gigabytes of storage has the ability to hold 1,300 copies of War and Peace. It is hard to image any one person carrying 1,300 copies of War and Peace around in their pocket, but that is approximately what millions of people do every day as they carry around smartphones in their pockets. Instead of War and Peace, people are carrying around emails, address books, phone records, text messages, music, GPS coordinates, and video recordings.

[24] *E.g.*, Lockheed Martin Idaho Technologies Co. v. Lockheed Martin Advanced Envtl. Sys., Inc., CV-98-316-E-BLW, 2006 WL 2095876 (D. Idaho July 27, 2006) ("the litigation database was necessary due to the extreme complexity of this case and the millions of documents that had to be organized"); United States v. Duke Energy Corp., CIV. 100CV01262, 2002 WL 31844699 (M.D.N.C. Dec. 18, 2002) ("During the course of discovery, Duke Energy has produced more than 2 million pages of documents, and the government has produced 2.6 million pages of documents. To complete its document production, Duke Energy organized approximately twenty lawyers and paralegals to search . . . . The government has 1100 federal employees who have spent in excess of 112,000 hours completing its document production.").

[25] By 2013 the amount of traffic flowing over the internet alone will reach 667 exabytes. *Data, data everywhere*, THE ECONOMIST (Feb 25th 2010) http://www.economist.com/node/15557443. To put this in perspective, one Exabyte is the printed collection of the Library of Congress is equal to about ten Terabytes. *Megabytes, Gigabytes, Terabytes - What Are They?*, WHAT'S A BYTE (last accessed Nov. 16, 2012), www.whatsabyte.com. One Exabyte is equal to 1,048,576 terabytes or about 100,000 Libraries of Congress. *Id.*

[26] Two laws of computer science predict that this exponential growth of information will steadily continue for many years to come. Moore's law, a common axiom in the computer hardware industry, states that the number of transistors that can be placed inexpensively on an integrated circuit doubles approximately every two years, meaning that computers double in speed every two years. Gordon E. Moore, *Cramming more components onto integrated circuits*, ELECTRONICS, April 19, 1965. Originally, Moore had predicted that a doubling every year; however, as time went on; the doubling effect was later pegged at every two years to more accurately reflect the actual rate of doubling. *Excerpts from A Conversation with Gordon Moore: Moore's Law*, INTEL.COM (2005), http://download.intel.com/museum/Moores_law/Video-transcripts/excepts_a_Conversation_with_gordon_Moore.pdf (last visited Nov. 20, 2011). Complimenting Moore's Law is a lesser known law of computer known as Kryder's Law. Chip Walter, *Kryder's Law*, SCIENTIFIC AMERICAN MAGAZINE, July 25, 2005, at 12. Kryder's Law states that magnetic disk real storage density doubles annually. *Id.* What Moore's Law is to speed, Kryder's Law is to storage. This combination of greater speed and greater storage

B. Policy Concerns: the American Rule and Taxable Costs

The inefficiencies caused by the moral hazards associated with a producer pays system combined with broad and liberal discovery have long been criticized by scholars, with many advocating that federal courts switch to a requestor pays system.[28] Despite the remedying effect a requestor pays system would have on wasteful and abusive discovery, a requestor pays system is unlikely to be adopted in the United States. This is due to the corollary role the producer pays rule plays to the American Rule. The American Rule states that each party is responsible for its own attorney's fees, and that courts should abstain from awarding attorney's fees to the prevailing party unless specifically authorized by statute. The American Rule rests on the assumption that indigent parties will be more willing to afford themselves the services of the courts knowing that they will not be responsible for the costs and fees incurred by the opposing party should the indigent party end up as the losing party in litigation.[29] The awarding of costs is separate from the awarding of attorney's fees, but the same policy concerns dealing with plaintiff's access to courts applies. Court may only award costs that are specifically authorized by statute.[30] Lawmakers are sensitive to these policy concerns, and, as a result, only a few categories of taxable costs exist.

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capacity leads to computing devices which are cheaper, smaller and more powerful which translate into a larger universe of discoverable material.

[27] E-discovery professionals typically attempt to lower review costs by increasing search capability through software or by decreasing collection costs through process controls and best practices which limit the initial pool of searchable documents.

[28] *See* Cooler and Rubinfeld, *The Economic Analysis of Legal Disputes and Their Resolution,* 27 J. ECON. LIT. 1067 (1989); John J. Donohue, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees,* LAW & CONTEMP. PROBS., Summer 1991; William M. Landes, *An Economic Analysis of the Courts,* 14 J. L. & ECON. 61 (1971).

[29] House v. Estate of Edmondson, 245 S.W.3d 372, 377 (Tenn. 2008).

[30] Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2001 (2012) (citations and quotations omitted) ("We have held that § 1920 defines the term 'costs' as used in Rule 54(d). In so doing, we rejected the view that "the discretion granted by Rule 54(d) is a separate source of power to tax as costs expenses not enumerated in § 1920.").

The history of awarding costs shows different issues have driven the allowance of certain taxable costs. Common law courts started awarding costs in the thirteenth century.[31] Early American courts and legislatures broke away from the common law tradition and sought to protect against unjustly enriching prevailing parties at the expense of the losing party, especially in regard to attorney's fees.[32] Towards the end of the nineteenth century, Congress aimed to standardize taxable attorney's fees and costs across the different district courts in order to create a more uniform litigation experience for parties across federal courts.[33] Most recently, § 1920 was updated in 2008 to include the costs of electronically recorded transcripts and non-paper

[31] The practice of awarding attorney's fees and costs in common law courts originated during the late 1200's and was based entirely on statute. 6 Edw. I, c. 1 (1278); Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929). Originally, costs were not allowed by the common law. Day v. Woodworth, 54 U.S. 363, 372 (1851). The first award of costs by courts was to reimburse the crown for court expenses and was unavailable to parties. Common law courts adopted the practice of indemnifying prevailing plaintiffs of counsel fees and other related expenses from the civil law and from admiralty courts. *Id.* Prevailing plaintiffs were first allowed costs starting in 1278 and later successful defendants were allowed costs in 1532. 6 Edw. I, c. 1 (1278); 23 Henry VIII, c. 15, § 1 (1531–1532). Under the statute of Gloucester (1275), every court of common law had an established system of costs; however, these taxable costs were set far below the actual incurred expenses. *Woodworth*, 54 U.S. at 372. While it is unclear whether the power to tax costs in chancery courts derived from statute or were simply an inherent power, chancery courts had been awarding costs at least as far back as 1200's. Goodhart, *supra* note 31, at 852; 17 Rich. II, c. 6; Corporation of Burford v. Lenthall, 2 Atk. 551.

[32] In America, the early states adopted the English practice of the losing party reimbursing the prevailing party. 10 FED. PRAC. & PROC. CIV. § 2665 (3d ed.). This practice of reimbursement included attorney fees. *Id.* Over time, however, states began to drift away from the English Rule of totally reimbursing the prevailing party. *Id.*.

[33] In the nation's beginning years, legislation required federal courts to follow fee and cost statutes of the states in which the federal court was located. Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat 429; Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-49 (1975). *Id.* at 251. In 1796, the Supreme Court created a default presumption against the awarding of attorney's fees. Arcambel v. Wiseman, 3 U.S. 306 (1796). Congress attempted to standardize the awarding of costs among the various federal courts in 1842 first by giving the Supreme Court the authority to prescribe the items and amounts of costs which could be taxed in federal courts. *Alyeska* 421 U.S. at 250. When the Supreme Court failed to set fee schedules, Congress took the initiative and in 1853 passed legislation which "specif[ied] in detail the nature and amount of the taxable items of cost in the federal courts." *Id.* at 252. The impetus behind the 1853 Fee Act was twofold: to standardize practice across courts and to protect losing litigants from the practice of being unfairly saddled with exorbitant fees for the prevailing party's attorney. Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2001 (2012). Under the 1853 Act, attorney's fees were allowed but limited in amount. *Id.* The basic substance of the 1853 Act was imported into the Revised Statutes of 1874, the Judicial Code of 1911 and the Revised Code of 1948 as 28 U.S.C. §§ 1920 and 1923(a). *Id.* Courts are limited by federal statute as to what costs they may award. *Taniguchi*, 132 S. Ct. 1997; W. Virginia Univ. Hospitals, Inc. v. Casey, 499 U.S. 83, 86 (1991).

copies of materials.[34] In its current form, Section 1920 provides for six different categories of costs.[35] Section 1920(4) allows for "Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case." Most recently, § 1920 was amended in 2008 to make electronically produced information taxable.[36]

C. Why Current Rules Sometimes Fail to Curb Wasteful or Abusive Discovery

The Rules encourage a proactive approach to combat abusive discovery as opposed to a reactive approach. As a standalone policy, a proactive approach could be effective in discouraging abusive discovery. However, strong normative values originating from the early twentieth century encourage an antiquated approach to modern discovery that has weakened the effectiveness of a proactive approach.

Courts regard the responder pays tradition as sacrosanct[37] and are hesitant to limit discovery requests due to strong tradition of broad and liberal discovery afforded by American courts.[38] The tradition of broad and liberal discovery originated with the adoption of the Rules in 1938 as reaction against the strict code pleading requirements that dominated civil procedure during the nineteenth century.[39] The drafters of the original Rules were most concerned with

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[34] Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat 4291.

[35] 28 U.S.C. § 1920 (2006).

[36] 154 CONG. REC. H10270-01, 2008 WL 4373185 ("Other updates include making electronically produced information coverable in court costs").

[37] *See* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011) ("Indeed, what is most surprising about the twenty-year debate over rising discovery costs and abuse is the collective failure on the part of most scholars and judges to question the theoretical foundations of our current model of discovery cost allocation.").

[38] *Id.*

[39] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 556-57 (2010). Code pleading discouraged legal conclusions and encourage facts at the pre-trail stage in an attempting to reduce the amount of necessary documentation. Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 856-57 (2012) ("Instead of focusing on the conceptual niceties of legal pigeonholing that had characterized common law pleading, the codes

designing a system that cured the litigant-barring effects seen in code pleading systems. While the scope of discovery was a heavily debated topic that was given much thought by the drafters, the issue of who should pay for discovery received little deliberation and was added as an afterthought.[40]

This strong tradition originating in the early 1900's led to the present situation where courts and legislatures are hesitant to adapt or make changes despite the many changes[41] that have occurred in law and society since the Rules were first adopted almost seventy-five years ago. The world of 1938 was a one of bound ledger books, card catalogues, local businesses, and twice a day postal delivery. Today's world consists of cloud storage, computerized searches, mega-corporations, and email. Likewise, legal theories have evolved over the same period of time. Product liability and privacy torts were still in their intellectual infancies in 1938. Law and economics as a discipline had not yet emerged. Indeed, it would be nine more years before Judge Learned Hand would introduce his famous formula in *United States v. Carroll Towing Co.*[42]

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shunned the pleading of legal conclusions in favor of an intensive emphasis on the need for detailed facts."); Robert Hardaway et. al., *E-Discovery's Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 543 (2011) ("The Field Code attempted to reduce the amount of documentation prevalent in the equity courts and in the early common law discovery mechanisms modeled after those courts."). The pleading stage played an important role under code pleading because plaintiffs were required to gather detailed facts to support their allegations. Redish, *supra* note 39, at 857. Plaintiffs were disadvantaged when necessary information was not readily available to the plaintiff or when the defendant controlled critical information; such situations often led to the dismissal of an otherwise meritorious complaint. *Id.* Code pleading continued as the prevailing system until the adoption of the Federal Rules of Civil Procedure in 1938. *Id.* In reaction to the burdens imposed on plaintiffs under code pleading, the Rules provide for broad and liberal discovery by require pleadings to include "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8 (1938)

[40] Redish & McNamara, *supra* note 37, at 774 ("At the time of the Federal Rules' adoption in 1938, however, apparently no attention, at any level of the process, was devoted to the question of to which party, in the first instance, the cost of discovery should be attributed. It appears that it was widely--if only implicitly--assumed that discovery costs were to remain where they fell: a party required to produce discovery requested by another party was--and to this day continues to be-- assumed to bear whatever costs it incurred in the course of that production.").

[41] Gordon W. Netzorg & Tobin D. Kern, *Proportional Discovery: Making It the Norm, Rather Than the Exception*, 87 DENV. U. L. REV. 513, 515 (2010) ("Forty years later, much has changed. With the emergence of the information society, sentiments among the bench and bar towards discovery have shifted dramatically. Judges and litigants now routinely describe modern discovery as a 'morass,' 'nightmare,' 'quagmire,' 'monstrosity,' and 'fiasco.'").

[42] United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

Antiquated traditions have influenced Rule drafters to the extent that many of the proactive safeguards contained in the rules have been rendered ineffective.[43] In theory the Rules provide protection against excessive and abusive discovery.[44] However, these rules in practice can be hard to enforce[45] and are approached with a predisposition toward allowing discovery requests.

Seeking protection under the Rules can be problematic.[46] A producing party is entitled to protection from excessive or abusive discovery under Rule 26(b)(2).[47] A court must limit the frequency or extent of discovery if the burden or expense of the proposed discovery outweighs its likely benefit.[48] In conducting this cost-benefit analysis, the court may consider 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.[49] However, all these factors are considered against the backdrop of a strong tradition of broad and liberal discovery.[50] Proportionality requirements are ineffective when the value of the proposed discovery request

[43] INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., 21ST CENTURY CIVIL JUSTICE SYSTEM: A ROADMAP FOR REFORM: PILOT PROJECT RULES 2 (2009) ("The Fed. R. Civ. P. and many state rules already contain factors that—where applied—address proportionality in discovery. However, these factors are rarely if ever applied because of the longstanding notion that parties are entitled to discover all facts, without limit, unless and until a court says otherwise.").

[44] FED. R, CIV. P. 26(b)(2), (c) (2006).

[45] EMERY G. LEE III & THOMAS E. WILLGING, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, FEDERAL JUDICIAL CENTER (2010) ("The statement, 'Judges do not enforce Rule 26(b)(2)(C) to limit discovery,' elicited more agreement than disagreement in each of the surveys and among every group, although ABA Section plaintiff attorneys were almost evenly divided.").

[46] Easterbrook, *supra* note 11, at 635.

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

[48] *Id.*

[49] *Id.*

[50] Netzorg & Kern, *supra* note 41, 517 ("In practice, however, those protections lie dormant, or are made subservient, to the default rule in favor of virtually unlimited discovery.").

cannot be determined until the request has been produced and costs have already been incurred. Likewise, it is difficult for a court to know the importance of an issue when discovery is being used to find the details of the case. Even in retrospect, it may be hard to define abusive discovery. Moreover, some of the protective rules contain considerable loopholes. For example, Rule 26(b)(2)(B) contains a giant loophole which allows the court to order discovery if the requesting party shows good cause, even when the electronically stored information is not reasonably accessible because of undue burden or cost.

III. INCENTIVIZING MORE EFFICIENT DISCOVERY BY AWARDING E-DISCOVERY COSTS TO THE PREVAILING PARTY

Adding e-discovery costs to the list of taxable costs in § 1920 would act as a reactive safeguard against discovery abuse and is a low hanging fruit as far as reform efforts go. Including non-attorney, e-discovery related costs as taxable costs under 28 U.S.C. § 1920 would incentivize the requesting party, knowing that there exists a chance that the production costs could be taxed against them, to better optimize the costs of a production request.[51] Amending § 1920 to include non-attorney, e-discovery related costs would discourage wasteful and abusive discovery while also standardizing the awarding of discovery costs across districts. Courts are already adept at awarding costs and are familiar with resolving sticky issues such as determining who the prevailing party in a case is and whether a particular item was necessarily obtained for use in a case.

The core driver behind wasteful and abusive discovery in requests for production is the moral hazard that exists in a producer pays system. One way to solve a moral hazard dilemma is to align transaction costs with the risk taker. Under the present system, the requesting party's

[51] *See infra* notes 54-59 and accompanying text.

primary consideration when making a discovery request is the probable value of the requested discovery in strengthening the party's claims or defenses. Under a cost awarding paradigm, the requesting party would weigh the following factors: (1) the relative strength of the party's case, (2) the probable value of the requested discovery in strengthening the party's claims or defenses, (3) the costs of producing the discovery request, and (4) the amount in controversy.[52] Aligning a portion of the risk to the requesting party essentially forces the requesting party to go through a Rule 26(b)(2)(C)(iii) analysis before making a discovery request. Parties are less likely to engage in costly fishing expeditions knowing that they could end up paying for them. Similarly, if a party knows ii may be on the hook for production costs, a requesting party would think twice before it made a request designed to drive up litigation costs, such as when a plaintiff with a weak claim uses the threat of a costly discovery request to force a settlement.

One particular concern with awarding non-attorney, e-discovery related costs is to what extent such an amendment would deter indigent plaintiffs from filing suits for fear of being held liable for discovery costs should they end up the losing party. As a general principle, American courts cherish the "egalitarian concept of providing relatively easy access to the courts to all citizens and reducing the threat of liability for litigation expenses as an obstacle."[53] This concern is properly mitigated when one understands that the practice of awarding costs already provides several safeguards against such effects.

First, judges may exercise discretion and take into account the losing party's ability to pay when awarding costs. While it is true that Rule 54(d) states "costs—other than attorney's fees—should be allowed to the prevailing party,"[54] both the decision to award costs and the

[52] If these factors sound familiar, that is because they overlap with several factors continued in Rule 26(b)(2)(C)(iii).

[53] 10 FED. PRAC. & PROC. CIV. § 2665 (3d ed.).

[54] FED. R. CIV. P. 26 (2006).

amount of any award is subject to the judge's discretion.[55] Courts have denied the awarding of costs or reduced the award amounts for the following reasons: the limited financial resources of the losing party,[56] misconduct by the prevailing party,[57] the existence of close and difficult legal issues presented,[58] and any substantial benefit conferred to the public.[59]

Second, non-attorney e-discovery related costs represent a small percentage of the overall costs of production. In discovery request involving electronically stored information, attorney's fees related to identifying responsive documents and privilege reviews take up the greatest portion of the overall costs.[60]

Third, the responding party has several economic incentives to keep production costs low. The responding party is not guaranteed an awarded costs. Costs may be denied to a party

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[55] FED. PROC., L. ED. § 50:1218 ("A court may reduce a cost award for a variety of reasons, including factors used in exercising its discretion as to whether costs should be awarded.")

[56] Ellis v. Grant Thornton LLP, 434 F. App'x 232, 235 (4th Cir. 2011) ("Among the factors that justify denying an award of costs are . . . the unsuccessful party's inability to pay the costs . . . ."); Rivera v. City of Chicago, 469 F.3d 631, 635 (7th Cir. 2006) (citations omitted) ("Furthermore, seven other circuits permit district courts to consider the losing party's indigence when determining whether to award costs. Because the acceptance of the indigence exception is well established, we decline to abandon it."); Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001) ("There is also widespread agreement among the courts of appeals that indigency per se does not preclude an award of costs against an unsuccessful litigant"); *In re* Paoli R.R. Yard PCB Litig., 221 F.3d 449, 462 (3d Cir. 2000) ("Moreover, in fulfilling its responsibility to insure that a costs award is not "inequitable,", the district court not only can, but should, consider evidence that completes the factual record or sheds light on the equities in a given case."); Chapman v. AI Transp., 229 F.3d 1012, 1039 (11th Cir. 2000) ("We hold that a non-prevailing party's financial status is a factor that a district court may, but need not, consider in its award of costs pursuant to Rule 54(d)"); Nat'l Org. for Women v. Bank of California, Nat. Ass'n, 680 F.2d 1291, 1292 (9th Cir. 1982). *Contra* White & White, Inc. v. Am. Hosp. Supply Corp., 786 F.2d 728, 730 (6th Cir. 1986) ("This court has also identified factors that a district court should ignore when determining whether to exercise its discretion and deny costs. Examples of inappropriate factors include the size of a successful litigant's recovery, and the ability of the prevailing party to pay his or her costs.").

[57] Weeks v. Samsung Heavy Indus. Co., Ltd., 126 F.3d 926, 945 (7th Cir. 1997) ("Generally, only misconduct by the prevailing party worthy of a penalty or the losing party's inability to pay will suffice to justify denying costs.");

[58] Cherry v. Champion Int'l Corp., 186 F.3d 442, 446 (4th Cir. 1999) ("We have recognized additional factors to justify denying an award of costs, such as their excessiveness in a particular case, the limited value of the prevailing party's victory, or the closeness and difficulty of the issues decided.").

[59] Suffolk County v. Sec'y of Interior, 76 F.R.D. 469, 473 (E.D.N.Y. 1977).

[60] NICHOLAS M. PACE & LAURA ZAKARAS, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, at 41-43 (2012), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf;

because the producing party is not judged to be the prevailing party in the case or because the judge exercises their judicial discretion in awarding costs. Also, the responding party must immediately incur the costs of production, but costs are only awarded once a final judgment has been entered. Should the opposing party decide to appeal, it can motion for a stay of order pending appeal, further lengthening the time before an award of costs in realized. Moreover, an award of costs is simply a piece of paper with an order on it; actually collecting an award of costs involves its own challenges. An award of costs is of little value if the losing party has no assets in which to pay for the award or if the judgment forces the losing party into bankruptcy.

A taxable costs approach is superior to a strict requestor pays rule because the taxable costs approach is flexible in protecting against the adverse effects that shifting discovery costs could have on indigent parties. A taxable cost approach includes structural safeguards (the judge's discretion in awarding costs) and incentives (the producing party's uncertainty in recovering costs due to either losing the case, the judge's discretion in awarding costs, or the party being judgment proof) that would continue to encourage indigent plaintiffs to file cases without the fear of being bankrupted by an award of costs should they come out the losing party.

IV. How Courts Currently Approach the Taxation of E-Discovery Related Costs Under 28 U.S.C. § 1920

District courts have shown a willingness to award a portion of e-discovery costs to prevailing parties under § 1920(4) in order to promote justice and judicial efficiency, but circuit courts have been weary of upholding broad awards of e-discovery costs because the narrow language used in § 1920(4).[61] District courts have encouraged computerized review (the imaging,

[61] *In re* Online DVD Rental Antitrust Litig., C 09-2163 PJH, 2012 WL 1414111 (N.D. Cal. Apr. 20, 2012); *In re* Aspartame Antitrust Litig., 817 F. Supp. 2d 608 (E.D. Pa. 2011); *In re* Scientific-Atlanta, Inc. Sec. Litig., 1:01-CV-1950-RWS, 2011 WL 2671296 (N.D. Ga. July 6, 2011); Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 2:07-CV-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011) aff'd in part, vacated in part, remanded, 674 F.3d 158 (3d Cir.

scanning, and indexing of documents into a computer searchable database) to address concerns involving fairness to the responding party and judicial efficiency.[62] Scanning and indexing documents often times cost less than making paper copies of those same documents.[63] Imaging and indexing documents for computerized review can decrease review time, thus helping to move the case along and resolve the dispute more quickly.[64] Also, research has found computerized review to be more accurate than traditional paper review, thus leading to more accurate work product.[65]

Despite the benefits of computerized review, circuit courts have shown a tendency to reign in the award of e-discovery related costs; not because circuit courts are unsympathetic to the benefits that awarding e-discovery related costs has on fairness and efficiency, but because

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2012); Mann v. Heckler & Koch Def., Inc., 1:08CV611 JCC, 2011 WL 1599580 (E.D. Va. Apr. 28, 2011); CBT Flint Partners, LLC v. Return Path, Inc., 676 F. Supp. 2d 1376 (N.D. Ga. 2009) vacated, 654 F.3d 1353 (Fed. Cir. 2011); Fast Memory Erase, LLC v. Spansion, Inc., 3-10-CV-0481-M-BD, 2010 WL 5093945 (N.D. Tex. Nov. 10, 2010) *report and recommendation adopted*, 3-10-CV-0481-M-BD, 2010 WL 5093944 (N.D. Tex. Dec. 13, 2010) *aff'd sub nom.* Fast Memory Erase, LLC v. Intel Corp., 423 F. App'x 991 (Fed. Cir. 2011).

[62] Jardin v. DATAllegro, Inc., 08-CV-1462-IEG WVG, 2011 WL 4835742 (S.D. Cal. Oct. 12, 2011) ("Because e-data may be created and stored in many different formats—often incompatible with one another or requiring individual licenses to access data—converting data into a format that all parties can utilize not only allows for more efficient and less expensive discovery, but is often necessary for any meaningful discovery at all."); Parrish v. Manatt, Phelps & Phillips, LLP, C 10-03200 WHA, 2011 WL 1362112 (N.D. Cal. Apr. 11, 2011) ("Relatedly, the fact that defendants had not yet produced all the client documents they had begun to collect and review does not show that those client documents were reproduced only for attorney convenience. On the contrary, it suggests that defendants were warming up their electronic discovery engine so that timely document productions could be made.").

[63] Chenault v. Dorel Indus., Inc., A-08-CA-354-SS, 2010 WL 3064007 (W.D. Tex. Aug. 2, 2010) ("Plaintiffs do no dispute that by producing the 800,000 pages of emails electronically, Defendants saved the costs of printing and copying some 800,000 pages of email. This was a reasonable calculation, as it would have cost—at a price of $0.15 per page—approximately $120,000 to print the emails in response to Plaintiffs' discovery request. . . . Therefore, the Court finds the expense falls within the category of costs recoverable for "fees and disbursements for printing" under § 1920(3).")

[64] *Parrish*, 2011 WL 1362112 (N.D. Cal. Apr. 11, 2011) ("[T]he fact that defendants had not yet produced all the client documents they had begun to collect and review does not show that those client documents were reproduced only for attorney convenience. On the contrary, it suggests that defendants were warming up their electronic discovery engine so that timely document productions could be made.").

[65] Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11 (2011); Bruce Hedin, et al., *Overview of the TREC 2009 Legal Track, available at* http://trec.nist.gov/pubs/trec18/papers/LEGAL09.OVERVIEW.pdf.

the plain language of § 1920(4) is not broad enough[66] to include many e-discovery related costs.[67] The 2008 amendments provide the strongest historical evidence favoring the awarding of e-discovery related costs.[68] However, the purpose of the 2008 amendments was not to add additional categories, only to expand categories of costs which already existed.[69]

A. Race Tires Am., Inc. v. Hoosier Racing Tire Corp

Race Tires Am., Inc. v. Hoosier Racing Tire Corp demonstrates the tension that exists between the black letter law of § 1920(4) and district courts' sympathies regarding the practical realities of parties needing to use e-discovery services in order to respond to discovery requests. At issue was to what extent can e-discovery costs be taxed against the losing party under 28 U.S.C. § 1920. *Race Tires* involved antitrust litigation between several high-end, racecar tire manufacturers.[70] The plaintiffs in the case consisted of several entities collectively referred to as "RTA" (Race Tires America).[71] RTA sued Hoosier Racing Tire Corp., a competitor, and a Dirt

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[66] The Supreme Court has consistently interpreted cost awarding statues narrowly. Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987) (holding that a prevailing party's recovery of expert witness fees could not exceed statutory limit of $30 per day); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (holding that courts cannot authorize an exception to the 'American Rule' and that only Congress can authorize such exceptions).

[67] Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 171 (3d Cir. 2012) cert. denied, 11-1520, 2012 WL 2340866 (U.S. Oct. 1, 2012) ("Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute.").

[68] 154 CONG. REC. H10270-01, 2008 WL 4373185 ("Other updates include making electronically produced information coverable in court costs").

[69] Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110–406, 122 Stat 4291 ("Section 1920 of title 28, United States Code, is amended . . . in paragraph (2), by striking 'of the court reporter for all or any part of the stenographic transcript' and inserting 'for printed or electronically recorded transcripts'; and . . . in paragraph (4), by striking 'copies of papers' and inserting 'the costs of making copies of any materials where the copies are.'").

[70] Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 2:07-CV-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011) aff'd in part, vacated in part, remanded, 674 F.3d 158 (3d Cir. 2012).

[71] The four Plaintiff companies were: (1) Race Tires America, Inc., a Division of Specialty Tires of America Inc.; (2) Specialty Tires of America, Inc.; (3) Specialty Tires of America (Pennsylvania), Inc.; and (4) Specialty Tires of America (Tennessee), LLC. Plaintiffs were referred to the courts by numerous names, including STA, Race Tires, and RTA.

Motor Sports, Inc., a motorsports sanctioning body.[72] RTA asserted that the "single tire rule" imposed by the Dirt Motor Sport violated sections 1 and 2 of the Sherman Antitrust Act.[73] In total, Hoosier Racing Tire produced 430,733 pages of ESI, and Dirt Motor Sports produced 178,413 documents in electronic format.[74] The district court granted summary judgment in favor of Hoosier Racing Tire and Dirt Motor Sport, finding that RTA had failed to prove any antitrust injury.[75] On appeal the Third Circuit Court of Appeals affirmed the district court's summary judgment ruling in July 2010.[76]

The defendants, the prevailing parties, each filed a Bill of Costs with the court.[77] Hoosier Racing Tire claimed more than $125,000 in e-discovery vendor costs while Dirt Motor Sports claimed more than $240,000.[78] The Clerk of the District Court concluded that electronic discovery costs would be considered taxable.[79] RTA requested that the district court appoint a special master to address the reasonableness and necessity of the e-discovery related fees claimed as costs by both defendants.[80]

B. The District Court's Ruling Allowing Full E-Discovery Costs

[72] Dirt Motor Sports, Inc. was added as an additional defendant in an amended complaint. *Id.*

[73] *Id.*

[74] Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012) at 162.

[75] *Race Tires*, 2011 WL 1748620.

[76] *Id.*

[77] *Id.*

[78] *Race Tires*, 674 F.3d 158.

[79] *Id.*

[80] *Race Tires*, 2011 WL 1748620.

The district court denied RTA's motion to appoint a special master and affirmed the award of costs issued by the Clerk of Court.[81] In its analysis, the district court focused on whether the scope of § 1920(4)–the exemplification and copying of materials–included e-discovery related costs. The court recited the different approaches other courts have taken in interpreting the scope of § 1920, reporting that: (1) some courts have defined the terms narrowly, focusing solely on physical preparation and duplication of documents, not the intellectual effort involved in their production;[82] (2) other courts have taken a broader view to include changes in technology;[83] (3) the United States Court of Appeals for the Sixth Circuit has held that electronic scanning and imaging could be interpreted as exemplification and copies of papers;[84] (4) several courts have found the cost of scanning documents for use in electronic format is for the convenience of counsel and not "necessary" for use in the case;[85] (5) one court refused to extend the terms "exemplification" and "copying" to cover tasks such as processing records, extracting data, and converting files because these tasks served to create searchable documents, rather than

[81] *Id.*

[82] Romero v. City of Pomona, 883 F.2d 1418, 1428 (9th Cir.1989) ("Section 1920(4) speaks narrowly of [f]ees for exemplification and copies' "), overruled in part on other grounds by Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1141 (9th Cir.1990).

[83] Hecker v. Deere & Company, 556 F.3d 575 (7th Cir.2009) (finding no abuse of discretion in district court awarding costs to defendant in the amount of $164,814.43 for converting computer data into readable format in response to plaintiffs' discovery requests); Cefalu v. VIllage of Elk Grove, 211 F.3d 416, 428 (7th Cir.2000) (finding "no limits inherent in the term exemplification' that would ... preclude [a court] from compensating a party for ... computer-based, multimedia displays."); Parrish v. Mannatt, Phelps, & Phillips, LLP, Civil Action No. C 10–03200, 2011 WL 1362112 (N.D.Cal. Apr.11, 2011) (finding that invoices from electronic discovery vendors were properly taxable).

[84] BDT Products, Inc. v. Lexmark International, Inc., 405 F.3d 415, 420 (6th Cir.2005) (finding no abuse of discretion in the district court's taxing of copying costs based on electronic scanning and imaging); Brown v. McGraw–Hill Cos., Inc., 526 F.Supp.2d 950 (N.D.Iowa 2007) (holding that "electronic scanning of documents is the modern-day equivalent of exemplification and copies of paper,' and therefore, can be taxed pursuant to § 1920(4)").

[85] Roehrs v. Conesys, Inc., 2008 WL 755187, at *3 (N.D.Tex. Mar.21, 2008) (rejecting argument that scanned digital versions of paper documents were "merely only more convenient for counsel to search and examine").

merely reproduce paper documents in electronic form;[86] (6) many courts have taxed costs because the court found that the steps the third-party vendor performed appeared to be the electronic equivalents of exemplification and copying; [87] and (7), various courts have allowed a prevailing party to recover the costs of converting paper documents into electronic files where the parties agreed that responsive documents would be produced in an electronic format.[88]

The district court then pointed out several important facts specific to the case at hand. First, defendants produced a massive quantity of electronically stored information in response to written discovery requests. Second, the parties had previously agreed that document production would be made in electronic format.[89] Third, Race Tires America aggressively pursued e-discovery under the Case Management Plan filed with the court.[90] Fourth, neither Dirt Motor

[86] Fells v. Virginia Dept. of Transp., 605 F.Supp.2d 740, 743 (E.D.Va.2009) (rejecting defendant's request contrasting the scanning of documents in a case like BDT Products to convert "a paper document into an electronic document," from the techniques defendant used to "create electronically searchable documents"); Klayman v. Freedom's Watch, Inc., 2008 WL 5111293 (S.D.Fla. Dec. 4.2008) (holding that experts hired at a huge hourly cost to search for and retrieve discoverable electronic documents which, in a non-electronic document case, would be performed by paralegals and associate attorneys and would not be compensable as costs under 28 U.S.C. § 1920).

[87] CBT Flint Partners, LLC v. Return Path, Inc., 676 F.Supp.2d 1376, 1380–81 (N.D.Ga.2009) (denying plaintiff's objection to the taxation of costs in fees that defendant incurred for its e-discovery vendor when the defendant had retained a computer consultant to collect, search, identify, and help produce electronic documents from defendant's network files and hard drives in response to plaintiff's discovery requests); Cargill Inc. v. Progressive Dairy Solutions, Inc., No. CV–F–07–0349, 2008 WL 5135826 at *6 (E.D.Cal. Dec.8, 2008) (holding that invoice—case management done electronically was recoverable because of the volume of documents and scanning of documents was necessary to provide an adequate defense to the several motions and trial presentation); Neutrino Dev. Corp. v. Sonosite, Inc., 2007 WL 998636 (S.D.Tex. Mar. 30, 2007) (holding that the electronic production in response to Plaintiff's discovery request falls within costs recoverable for fees and disbursements for printing); Lockheed Martin Idaho Technologies Co. v. Lockheed Martin Advanced Environmental Systems, Inc., 2006 WL 2095876 (D. Idaho July 27, 2006) (allowing for the taxation of costs incurred for "the creation of a litigation database).

[88] Fast Memory Erase, LLC v. Spansion, Inc., No. 3–10–CV–0481, 2010 WL 5093945 (N.D.Tex. Nov. 10, 2010); Rundus v. City of Dallas, 2009 WL 3614519 (N.D.Tex. Nov.2, 2009), aff'd, 634 F.3d 309 (5th Cir.2011); *See also Neutrino*, 2007 WL 998636 at *4 (where electronic data was produced by agreement, in lieu of paper copies, the cost of production was recoverable under § 1920).

[89] Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 2:07-CV-1294, 2011 WL 1748620 (W.D. Pa. May 6, 2011).

[90] Race Tires America directed 273 discovery requests to Dirt Motor Sports, including 119 separate requests for documents and ESI. Capitol City, the vendor for Dirt Motor Sports, copied 490 gigabytes of electronic data and over 270,000 files from Dirt Motor Sports' servers. During the collection process, Race Tires America imposed—over Dirt Motor Sports' objections—over 442 search terms. *Id.* During an initial search by Capitol City of Dirt Motor

Sports nor Hoosier Racing Tires sought reimbursement for any legal fees charged by the attorneys or paralegals who reviewed documents to determine responsiveness, privilege, or confidentiality.[91] Finding that no court had categorically excluded e-discovery costs from allowable costs and given the facts of the case, the district court denied RTA's motion to appoint a special master and affirmed the taxation of costs entered by the Clerk of Court.[92]

C. The Circuit Court's Ruling Limiting the Award to Copying Costs

On appeal, the circuit court vacated the district court's award of costs and remanded to the district court to re-tax costs in accordance with its opinion.[93] Only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved copying; therefore, only those activities were recoverable under § 1920(4).[94]

The circuit court started its analysis by reviewing the history of the taxation of costs. It first laid the foundation by citing the American Rule and emphasized the rule's importance in American jurisprudence.[95] The Third Circuit emphasized that § 1920 defines the full extent of a federal court's power to shift litigation costs absent from other express statutory authority.[96] The circuit court acknowledged other circuit's narrow[97] and broad[98] interpretation of the word

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Sports' computers in May 2008, 274 keyword searches resulted in over seven million hits on possibly relevant and responsive ESI files. *Id.*

[91] *Id.*

[92] *Id.*

[93] Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158 (3d Cir. 2012).

[94] *Id.* at 171.

[95] *Id.* at 164 (quotations omitted) ("the American rule against shifting the expense of litigation to the losing party is founded on the egalitarian concept of providing relatively easy access to the courts to all citizens and reducing the threat of liability for litigation expenses as an obstacle to the commencement of a lawsuit or the assertion of a defense that might have some merit.").

[96] *Id.*

[97] *Id.* at 166.

"exemplification" and found that the e-discovery vendor's work did not qualify as an exemplification under either construction of the term.[99]

Next, the circuit court considered whether the e-discovery vendor's work would qualify as a cost of making copies of any materials under § 1920(4). The court acknowledged that this task was made more difficult due to the general descriptions and technical jargon contained in the vendor's invoice. Accordingly, the circuit court relied on RTA's brief in explaining and breaking down the invoice and the technical jargon. The court engaged in statutory interpretation and looked toward the common meaning of the word "copy" and used the dictionary definition: "an imitation, transcript, or reproduction of an original work."[100] The court also referred to its common meaning of "'photocopies' or 'xerox copies'— reproductions of documents made using 'copy' machines."[101] The circuit court then acknowledged that the 2008 amendment to the statute permits an award to the prevailing party of the cost of making copies of "materials," plainly signifying that § 1920(4)'s allowance for copying costs is not limited to paper copies.[102] The circuit court was not persuaded by the argument that because the e-discovery services are highly technical and beyond the expertise of the prevailing party's own attorneys, the fees that are incurred in retaining experts to perform the services are unavoidable.[103] While it conceded that the processing of electronically stored information was essential to make the production intelligible and comprehensive, it differentiated between the processes leading up copying and

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[98] *Id.*

[99] *Id.* at 165-66.

[100] *Id.* at 166 (quoting Webster's Third New International Dictionary 504 (3rd ed. 1993)).

[101] *Id.* at 166.

[102] *Id.*

[103] *Id.* at 168-69.

the actual copying process.[104] The circuit court noted the similarities between pre-digital and post-digital document production in complex litigation, emphasizing that pre-digital discovery obligations (locating paper documents in file cabinets, transporting them into a dusty warehouse and reviewing them for relevancy or screening them for privileged or otherwise protected material) were not taxable.[105] The Sixth Circuit concluded that fees are only permitted for the physical preparation and duplication of documents, not the "intellectual effort" involved in their production.[106] "Neither the language of § 1920(4), nor its history, suggests that Congress intended to shift all the expenses of a particular form of discovery—production of ESI—to the losing party."[107] The circuit court held that only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved copying, and that the costs attributable to only those activities are recoverable under § 1920(4).[108] The circuit court vacated the district court's award of costs and remanded to the district court to re-tax costs.

D. Resolving the Two Decisions

The district and circuit courts' discussions in Race Tires provide a good case study in awarding e-discovery costs under § 1920. Even though digital documents and paper documents have similar properties, they are not fungible. This leads to some cognitive dissonance in the way certain rulings play out in practice. For example, in many jurisdictions, courts will allow the printing costs associated with printing digital documents, but not allow for the preprocessing and

[104] *Id.* at 169.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 171.

[108] *Id.*

formatting work which is a necessary precondition to printing out the documents. As a matter of policy, it seems odd that a party who decides to respond by printing out a request for production (which is harder for both sides to review and analyze, thus making the litigation process longer and often leading to less accurate results and analysis) can be awarded the full printing costs associated with production request. Contrast this with a party who decides to create a searchable database of paper and digital documents (which is easier for both sides to review and analyze, thus making the litigation process shorter and often leading to more accurate results and analysis) can only be awarded the costs for scanning the documents.

Litigants want to be able to collect the costs associated with e-discovery, and lower courts have shown a willingness to award those costs.[109] Because § 1920 fails to address the realities of modern discovery practices,[110] courts are attempting to cram e-discovery costs into § 1920(4).[111] Trying to fit e-discovery costs into provisions that were not drafted to address the modern discovery process has resulted in bizarre outcomes and has led to an inconsistent treatment of e-discovery costs across districts.[112] A well-crafted amendment to § 1920 designed to deal with e-discovery costs would help to standardize the award of e-discovery related costs across districts.

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[109] *See supra* Part IV.

[110] Lockheed Martin Idaho Technologies Co. v. Lockheed Martin Advanced Envtl. Sys., Inc., CV-98-316-E-BLW, 2006 WL 2095876 (D. Idaho July 27, 2006) ("[T]he litigation database was necessary due to the extreme complexity of this case and the millions of documents that had to be organized. While the creation of the database is expensive, it is not unreasonably so, and it saved immense time for counsel who otherwise would have to sift through the documents by hand.").

[111] *See supra* Part IV.B.

[112] *Compare* Fells v. Virginia Dept. of Transp., 605 F. Supp. 2d 740, 743 (E.D. Va. 2009) ("Regardless of whether scanning documents should be viewed as copying materials, the court does not find that this category of taxable costs includes defendant's techniques of processing records, extracting data, and converting files, which served to create searchable documents, rather than merely reproduce paper documents in electronic form.") *with Lockheed*, 2006 WL 2095876 ("While the creation of the database is expensive, it is not unreasonably so, and it saved immense time for counsel who otherwise would have to sift through the documents by hand.").

V. USING THE ELECTRONIC DISCOVERY REFERENCE MODE AS A BASE FOR AN AMENDMENT TO 28 U.S.C. § 1920

E-discovery industry best practices have broken down e-discovery into well-defined sub processes that would provide a solid base in crafting a model amendment to § 1920. The Electronic Discovery Reference Model ("EDRM") was created by e-discovery experts and consultants in May 2005 to address the lack of standards and guidelines in the e-discovery industry.[113] The EDRM employs several terms of art in defining the different stages of e-discovery: information management,[114] identification,[115] preservation,[116] collection,[117] processing,[118] review,[119] analysis,[120] production,[121] and presentation.[122] The rules of statutory interpretation allow technical terms and terms of art to keep their technical meaning in a state, especially when the legislative intent supports this interpretation.[123] Previous attempts to categorize e-discovery costs have looked to who does the work. The proposed amendment

[113] EDRM Stages « The Electronic Discovery Reference Model, EDRM, http://www.edrm.net/resources/edrm-stages-explained (last visited Nov. 16, 2012)

[114] *Id.* ("Getting your electronic house in order to mitigate risk & expenses should e-discovery become an issue, from initial creation of electronically stored information through its final disposition").

[115] *Id.* ("Locating potential sources of ESI & determining its scope, breadth & depth.").

[116] *Id.* ("Ensuring that ESI is protected against inappropriate alteration or destruction.").

[117] *Id.* ("Gathering ESI for further use in the e-discovery process (processing, review, etc.").

[118] *Id.* ("Reducing the volume of ESI and converting it, if necessary, to forms more suitable for review & analysis.").

[119] *Id.* ("Evaluating ESI for relevance & privilege.").

[120] *Id.* ("Evaluating ESI for content & context, including key patterns, topics, people & discussion.").

[121] EDRM, *supra* note 113 ("Delivering ESI to others in appropriate forms & using appropriate delivery mechanisms.").

[122] *Id.* ("Displaying ESI before audiences (at depositions, hearings, trials, etc.), especially in native & near-native forms, to elicit further information, validate existing facts or positions, or persuade an audience." *Id.*

[123] 2A SUTHERLAND STATUTORY CONSTRUCTION § 47:29 (7th ed.) ("In the absence of legislative intent to the contrary, or other overriding evidence of a different meaning, technical terms or terms of art used in a statute are presumed to have their technical meaning.").

instead seeks to differentiate costs based on the nature of the work performed and not on who performs the work.

A. Proposed Amendment

The following is a proposed amendment to 28 U.S.C. § 1920 which uses the EDRM model:

> (7) Costs, other than attorney's fees, for the identification, preservation, collection, processing or production of documents or electronically stored information that occur outside of the ordinary course of business as part of a request for production.

The amendment can be conceptually separated into three distinct concepts: (1) the exclusion of attorney-related fees, (2) using EDRM stages as a limit as to which costs are taxable, and (3) an ordinary course of business exception.

B. Concept One: The Exclusion of Attorney Fees

The American Rule and Rule 54(d) discourage the awarding of attorney's fees unless specifically authorized by statute. In keeping with the strong policy arguments ensconced by these rules, the model amendment explicitly excludes the awarding of attorney's fees. In determining what qualifies as attorney's fees, especially in environments where attorneys and technologists work closely together on matters, an unauthorized practice of law test could be used to differentiate between attorney and non-attorney activities. A task would be considered taxable if a non-attorney, without the supervision of a licensed attorney, could perform the task without violating an unauthorized practice of law statute.

Issues may arise in cases where an attorney who possesses both legal and technical knowledge and skills provides both legal and technical services. For example, if an attorney forensically images a hard drive and also participates in a privilege review process, the reasonable costs associated with imaging the hard drive should be taxable because a

unsupervised, non-attorney could image a hard drive without violating an unauthorized practice of law statute. The work done on the privilege review would not be taxable because an unsupervised, non-attorney would be violating an unauthorized practice of law statute by engaging in a privilege review of documents. In keeping with the tradition and policy considerations of the American Rule, courts should ere on the side of disallowing such costs, where the "taint" of legal related tasks would disqualify the entire process. Such an approach should incentivize law firms and e-discovery vendors to provide detailed invoices under threat of having the judge disallow the entire bill because the attorney and non-attorney services were combined into a single invoice line item.

The exclusion of attorney costs can be seen as a bug or a feature depending on the importance one places on efficient discovery or the American rule. Attorney review costs compose the largest proportion of costs associated with e-discovery and comprise around three quarters of total e-discovery costs.[124] By excluding attorney costs (the largest portion of the production costs) a moral hazard continues to exist. Completely eliminating the moral hazard by burdening the requestor with total costs of production would most likely run afoul the American Rule. This would be especially true in instances where the plaintiff is indigent, the plaintiff's claim was uncertain but probable, e-discovery is necessary to resolving the claim, and e-discovery costs are high. The proposed rule attempts to split the difference by excluding attorney fees. A compromise is reached where the threat of moral hazard is only partially diminished.

C. Concept Two: Using EDRM Stages to Limit Costs

The proposed amendment includes the following EDRM stages: identification, preservation, collection, processing, analysis and production. Each stage is defined in ERDM

[124] *See* PACE & ANDERSON, *supra* note 12, at 41 (2008).

documentation.[125] Even though the language specifically provides for "[f]ees, other than attorney's fees," stages that involve work or expertise traditionally associated with attorneys (the review stage and the analysis stage) are excluded, even though non-attorneys may make contributions in these stages.

The impetus behind the proposed model rule relies on which EDRM category an activity falls under as opposed to the role of the human being who oversees the activity.[126] This is an important reversal. The intuitive principle courts have used in determining whether specific discovery activities are taxable. Courts have relied on the "tradition test" which compares whether the disputed activity was traditionally done by attorneys or legal assistants to determine whether an activity should be taxable under § 1920(4).[127] The "tradition test" compares what attorneys and paralegals used to perform (locate, retrieve, and store paper documents) with activities that information technology specialists currently perform (forensically imaging hard drives, restoring backups and other archival sets of data, de-duplication hashing, full text indexing, and creating searchable databases which hold various file formats). Such a broad comparison (as some courts have made[128]) is similar to concluding that driving to the grocery

[125] EDRM, *supra* note 113.

[126] Jardin v. DATAllegro, Inc., 08-CV-1462-IEG WVG, 2011 WL 4835742 (S.D. Cal. Oct. 12, 2011) (quotations omitted) ("The thrust of the debate is whether courts should view the conversion as something akin to the 21st Century equivalent of making copies or something more like assembling records for production);

[127] Rawal v. United Air Lines, Inc., 07 C 5561, 2012 WL 581146 (N.D. Ill. Feb. 22, 2012) ("Those tasks go far beyond the mere reproduction or exemplification of documents; instead, they comprise the kind of work conventionally performed by attorneys and paralegals, the costs of which are not recoverable under § 1920(4)."); Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co. W.L.L., CIV.A. H-07-2684, 2009 WL 1457632 (S.D. Tex. May 26, 2009) ("Rather, these steps appear to be the processing of tapes to locate, retrieve, and store information that might be responsive to a production request. The steps of extracting data from an electronic medium and storing that data for possible use in discovery is more like the work of an attorney or legal assistant in locating and segregating documents that may be responsive to discovery than it is like copying those documents for use in a case.").

[128] Comrie v. IPSCO Inc., 08 CV 3060, 2010 WL 5014380 (N.D. Ill. Dec. 1, 2010) ("These costs are equivalent to having an attorney or paralegal read through the documents, at an hourly rate, to determine whether documents are responsive."); Klayman v. Freedom's Watch, Inc., 07-22433-CIV, 2008 WL 5111293 (S.D. Fla. Dec. 4, 2008) ("In a

store and flying from San Francisco to New York are inherently the same activity; in each activity you are using a vehicle to travel from one destination to another. The characterization is truthful; however, it fails to take into account the differences in time and costs, and the difference of magnitude in each situation.

The proposed amendment instead looks to whether the activity adds value by preparing the information to be analyzed or whether the activity adds value by principally aiding in legal analysis. For example, the installation and programming of predictive coding software is a role traditionally carried out by a technologist.[129] If costs were determined along attorney/non-attorney roles, the software would be taxable because programming is a role traditionally carried out by a technologist. But predictive coding adds value by analyzing the content of documents like an attorney reviewer would, and the spirit and tradition of the American Rule would discourage the award of these fees. Under the proposed model amendment, the expenses incurred in installing and configuring predictive coding software would not be taxable because predictive coding is best categorized under the review and analysis stages.[130] Relatedly, if a law firm housed an e-discovery practice and provided database hosting and digital forensics services, these law firm's services should be taxable under the statute because database hosting and digital forensics services are best categorized under the identification, preservation, or collection stages. Under

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non-electronic document case this work would be performed by paralegals and associate attorneys and would not be compensable as costs under 28 U.S.C. § 1920.").

[129] Tibble v. Edison Int'l, CV 07-5359 SVW AGRX, 2011 WL 3759927 (C.D. Cal. Aug. 22, 2011) ("although costs associated with the function of attorneys are part of fees, costs associated with the technical expertise required to unearth electronically stored information are not.").

[130] *In re* Aspartame Antitrust Litig., 817 F. Supp. 2d 608, 616 (E.D. Pa. 2011) ("We draw the line, however, at the sophisticated e-discovery program Attenex Document Mapper. The Ajinomoto defendants describe Document Mapper as 'a document review tool with visual clustering of a document collection based on concepts extracted from those documents.' This service, while undoubtedly helpful, exceeds necessary keyword search and filtering functions. Rather, it is advanced technology that falls squarely within the realm of costs that are not necessary for litigation but rather are acquired for the convenience of counsel.").

the proposed amendment, the fact that these services are provided by a law firm has no bearing on whether costs should be awarded. Finally, the plain language in the first concept of the statute requires that any costs incurred in a taxable stage by an attorney should not be taxable. For example, the fees generated by an attorney who plays a part in the preservation stage by writing a litigation hold memo should not be taxable under the model amendment.

D. Concept Three: Ordinary Course of Business Exception

The model amendment includes an "ordinary course of business" exception. This exception is designed to keep producing parties from recovering costs that they would otherwise normally incur if the litigation had never occurred. The ordinary business requirement seeks to keep prevailing parties from being unduly enriched. Only costs actually incurred should be awarded. For example, a request for the production of emails may require a business to store emails that would otherwise be routinely deleted or to copy and store certain employees' email accounts. If a business already has extra storage capacity in place on an email or other server, then, as a prevailing party, it should not be awarded the costs for storing the extra emails even though cost associated with the extra storage cost is possible to separate and calculate. However, if a prevailing party outsources its email infrastructure to a company like Google or Microsoft and responding to the request will require the business to purchase additional monthly storage capacity, these costs should be counted as taxable and be awarded.

VI. CONCLUSION

This paper has argued that the discovery process has the potential to be abused due to the interplay of three principles: (1) broad and liberal discovery, (2) the producer pays rule, and (3) the American Rule. First, broad and liberal discovery provides the requestor with an almost unlimited universe in which to request information. Second, the producer pays rule decouples the

costs associated with production from the requestor, thus creating a moral hazard. Finally, the strong policy concerns ensconced in the American Rule creates an environment where courts are hesitant to shift costs even when doing so would produce a more equitable adjudication.

Rule makers have relied on constructing proactive safeguards to combat against abusive and wasteful discovery. Unfortunately, strong normative values surrounding the producer pays rule and the American Rule create an environment where abusive discovery can slip through the proactive procedural safeguards. No real reactive safeguard exists to cure abusive discovery after it has already happened.

Courts and litigants are aware of this situation and have attempted to fill the reactive hole by taxing certain e-discovery related costs under 28 U.S.C. § 1920(4). This solution is suboptimal for several reasons. First, courts are treating the taxation of e-discovery costs in an inconsistent manner, and the history surrounding taxable costs indicates a desire by the Congress for the taxable costs to be uniform across districts. Second, the most recent amendments to § 1920 were not written before e-discovery came into its own. Courts are attempting to cram e-discovery processes into provision never designed to handle e-discovery. This is leading to absurd outcomes[131] in some cases.

Because no reactive safeguard against abusive and wasteful discovery currently exists in the rules, and since courts are attempting to fill this hole by awarding e-discovery costs under § 1920 (which is only suboptimally addressing the problem), why not amend § 1920 to include e-discovery costs? The model amendment in Section V.A provides an example of an amendment that satisfactorily balances the different prevailing policy issues associated with extending

[131] For example, the multi-million dollar costs of photocopying one million documents would be allowed. Conversely, the thousands of dollar costs associated with creating a litigation database of those same records would not be allowed.

taxable costs, most notably concerns dealing with indigent plaintiff's access to courts. A model amendment similar to the one in Section V.A would do much to prevent abusive and wasteful discovery while at the same time establishing a uniform approach to awarding e-discovery costs across federal courts.