ELECTRONIC DISCOVERY: TO WHAT EXTENT DO THE 2006 AMENDMENTS SATISFY THEIR PURPOSES?

by
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In the year and a half since the 2006 amendments to the Federal Rules of Civil Procedure took effect, general counsel across the nation have invested considerable time investigating whether their clients have adequately prepared to deal with electronic discovery issues. A more global question, however, is whether the 2006 amendments adequately prepare courts and practitioners to handle electronic discovery. After years of discussions, workgroups, and drafting, the Committee emerged with amendments addressing four major goals: reducing the burdens and expense of e-discovery, creating rules with the flexibility to withstand future technological advances, designing uniform rules, and providing appropriate guidance. This Comment evaluates the practical success of the amendments in achieving these goals. Beginning with the historical shift that gave rise to the amendments, the Comment then describes the goals of the amendments, then discusses the manner in which the Committee pursued its goals and, looking at the rules in practice, the success of the amendments in achieving those goals.

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I. INTRODUCTION

Harrowing tales of multi-million dollar sanctions and botched preservation and production schemes made electronic discovery a hot legal topic. As "e-discovery" began to ignite, the December 2006 amendments to the Federal Rules of Civil Procedure, Rules 16(b)(5), 26(b)(2), 26(f), and 37(f) [now 37(e)], took effect.[1] The amendments envisaged four major goals: 1) addressing the burdens and expense of e-discovery, 2) creating rules with the flexibility to withstand future technological advances, 3) designing uniform rules, and 4) providing appropriate guidance.[2]

This Comment looks to the cases of the last year and a half to evaluate the practical success of the amendments in achieving these goals. Understanding the strengths and weaknesses of the current e-discovery rules will help litigants and judges in federal court understand how the rules have been operating. Moreover, it may help guide state judiciaries—which manage much more litigation than the federal judiciary—as they develop their e-discovery rules. Part II of this Comment addresses the historical shift that gave rise to the amendments; Part III describes the goals of the amendments. Part IV discusses the manner in which the Committee pursued its goals and, looking at the rules in practice, the success of the amendments in achieving those goals.

II. HISTORICAL SHIFT

In the late 1990s, discussion of electronic discovery rule reform began to percolate, and by 2000, the Advisory Committee was meeting in an organized fashion with "diverse segments of the bar, technologists, and judges."[3] At that time, "there was some recognition among practitioners, judges, and legal scholars that 'digital is different,' but little agreement as to what exactly the differences were between the discovery of conventional paper-based records and correspondence and discovery of the new digitally created, managed, and stored information."[4] While electronic technology and particularly electronic communication were not mainstream in the early nineties, by the time of the 2004 Conference,

[1] In 2007, former Rule 37(f) became 37(e) when the rules were amended as part of the general restyling of the Civil Rules.

[2] See *infra* Part IV.

[3] In 2000, the Committee held two mini-conferences; while no official record exists of the conferences, the Committee's Special Reporter, Prof. Richard L. Marcus prepared summaries. Kenneth J. Withers, *Two Tiers and a Safe Harbor: Rederal Rulemakers Grapple with E-Discovery*, FEDERAL LAWYER, Sept. 2004, at 29 [hereinafter Withers, *Two Tiers*].

[4] Kenneth J. Withers, *Electronically Store Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171, 172 (2006) [hereinafter Withers, *E.S.I.*].

e-discovery litigants produced and maintained about 90% of their information electronically.[5]

As courts issued landmark opinions like *Zubulake v. UBS Warburg LLC*,[6] litigants began to push for reform.[7] The vice president and general counsel of Intel Corporation testified that "those who say that there is no problem and that we don't need new rules to address electronic discovery . . . don't litigate in today's real world. . . . [D]iscovery and other defense costs often exceed actual liability costs."[8] In 2004, academics, judges, and practitioners, perceiving real differences between electronic and traditional discovery, assembled to discuss reform.[9]

While forty years ago brilliant scholars would emerge from behind closed doors with a final draft of the new rules—accepted virtually without debate—the process has since grown politicized.[10] The Committee described its process: "It is deliberately transparent, it is deliberately slow, it deliberately goes through a lot of layers after opportunity for comment from a lot of sources, before it can go before the Supreme Court, and then Congress, where [the Committee] hope[s] they do nothing."[11] Of course, before the amendments go to the Supreme Court, the Committee must find consensus to shelter a proposed rule or rule change from a lethal firestorm of controversy.[12] This open process of writing and adopting amendments, of compromise and deliberation, explains why the amendments present only modest reform.

Views on the degree of reform required ranged from soup to nuts. Complete transcripts from the Conference's eight panel discussions[13]

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[5] Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 10 (2004).

[6] This case, the fifth in a series of six opinions on a discovery dispute, drew gasps because of the severe sanctions imposed, including an adverse inference and more than $20 million in punitive damages, bringing total damages to $29 million. Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) [hereinafter *Zubulake V*]; Eduardo Porter, *UBS Ordered to Pay $29 Million in Sex Bias Lawsuit*, N.Y. TIMES, Apr. 7, 2005, at C4 (reporting the total damages awarded).

[7] Withers, *E.S.I.*, *supra* note 4, at 192.

[8] Public Hearing On Proposed Amendments To The Federal Rules Of Civil Procedure 14 (January 12, 2005), *available at* http://www.uscourts.gov/rules/e-discovery/0112frcp.pdf. Sewell, chief counsel at Intel, testified that plaintiffs use electronic discovery to force a case into early settlement.

[9] Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure Conference on Electronic Discovery, 73 FORDHAM L. REV. 23 (2004) [hereinafter Conference].

[10] Lee. H. Rosenthal et al., *Conference: Panel Eight: Civil Rules Advisory Committee Alumni Panel: The Process of Amending the Civil Rules*, 73 FORDHAM L. REV. 135, 137 (2004) [hereinafter *Panel Eight*] (explaining that the Class Action Rule emerged from the closed-door process).

[11] *Panel Eight*, *supra* note 10, at 136.

[12] Marcus, *supra* note 5, at 9–10. *Panel Eight*, *supra* note 10, at 137–38.

[13] Conference, *supra* note 9, at 23.

reveal the different perspectives and "anecdata"[14] that went into formulating the rules.[15] The Committee solicited other viewpoints through open letters and hearings during the comment period.[16] Some Committee members saw no need to amend the rules, believing the old system could accommodate new e-discovery issues.[17] The voice for radical change came from corporate America, a group which pushed the Committee to provide more predictability.[18] While neither group carried the day, both shaped the amendments. The modest changes to the Rules reflect the influence of the Committee's conservative voices. The innovative safe harbor provision, a source of tremendous controversy, provided more certainty for corporations and other large producers of information.[19]

With such a variety of views, even small changes like the addition of "electronically stored information" generated controversy. Some members believed "documents" covered electronic information; others believed electronic information was unique.[20] In opposition to a new term, one member cited an unpublished opinion which held "computerized data is discoverable if relevant."[21] In support of the new term, another member reminded the Committee that some states only apply "document" requests to paper.[22] Additionally, the new language might draw attention to the changed landscape.[23] Ultimately, the Committee decided to incorporate the term "electronically stored information" (E.S.I.) into the rules.[24]

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[14] Who could resist this turn of phrase, which emphasizes the great reliance the Committee placed on anecdotal evidence as though it were empirical? *Panel Eight*, *supra* note 10, at 136, 143.

[15] *Panel Eight*, *supra* note 10, at 135–36.

[16] Withers, *E.S.I.*, *supra* note 4, at 192–93. *See also* 2004 Civil Rules Comments Chart, Including Requests To Testify, http://www.uscourts.gov/rules/e-discovery.html (listing hundreds of the individuals that testified during the comment period).

[17] *Panel Eight*, *supra* note 10, at 150.

[18] *See e.g.* Public Hearing, *supra* note 8 (illustrating the sort of proposals representatives of Intel, Microsoft, and counsel for pharmaceutical companies presented).

[19] See *id.* at 9–13.

[20] Shira Ann Scheindlin et al., *Conference, Panel Two: Rules 33 and 34: Defining E-Documents and the Form of Production*, 73 FORDHAM L. REV. 33, 39 (2004) [hereinafter *Panel Two*].

[21] *Id.* at 39 (citing Anti-Monopoly, Inc. v. Hasbro, Inc., No. CIV.A.94-2120, 1995 WL 649934, at 2 (S.D.N.Y. 1995)).

[22] *Id.* at 37 (pointing out that Mississippi and Texas laws presume that "documents" covers only paper, and that a requesting party must make a specific request for electronic information).

[23] In 2004, 65% of businesses surveyed failed to request electronic information; the Committee hoped the amendments would bring the number down to two or three percent. *Id.* at 39.

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

A. Characteristics of E.S.I.

A basic understanding of E.S.I.'s characteristics helps explain the goals of the amendments and should also inform parties' decisions as they approach the new rules. Compared to paper, electronic media differs fundamentally; experts have discussed the character of E.S.I. as uniquely voluminous, complex, fragile, persistent, and dependent.[25]

No characteristic has borne more on the Committee's decision to give E.S.I. different treatment than volume. Large corporations and government agencies, for example, measure their server space in terabytes, each of which "represents the equivalent of 500 billion typewritten pages of plain text."[26] The volume problem results primarily from the growing dependence on electronic technology. Corporations like Microsoft reportedly receive three to four hundred million internal and external e-mails a month.[27] Moreover, once created, E.S.I. grows more voluminous with little effort on the part of the user.[28] For example, an e-mail sent on January 1 will produce an estimated twenty-seven or twenty-eight thousand copies by December 31—most often located in various places.[29]

Second, electronic information has greater complexity. Unlike paper, where what you see is what you get, E.S.I. includes metadata and embedded data which do not typically appear on the computer screen. When reviewed, the metadata can reveal changes made to a document, the time they were made, and their author. Metadata generally changes on its own, but users can design and manipulate it, too.[30]

Third, E.S.I. has inherently fragile and dynamic features. Even booting a computer changes the metadata.[31] Furthermore, E.S.I. in dynamic databases "do[es] not correspond readily to hard-copy documents traditionally subject to discovery . . . . [C]omputer systems often automatically discard or overwrite data as a part of their routine operation."[32] By contrast, paper documents do not change automatically or without a person's awareness.

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[25] Marcus, *supra* note 5, at 12–14 (discussing the volume and dynamism of E.S.I.); Withers, *E.S.I.*, *supra* note 4, at 173–91. Without inflicting too much jargon on the reader, Withers also discusses these characteristics as they relate to accessibility, cost paradigm shift, privilege screening, and choice in the form of production.

[26] Marcus, *supra* note 5, at 12 n.51.

[27] Public Hearing, *supra* note 8. McCurdy from Microsoft testified that the volume of emails surged over five years; employees in two groups kept seven times as many emails in 2003 as they had in 1998. *Id.* at 6.

[28] Lee H. Rosenthal, James C. Francis IV & Daniel J. Capra, *Managing Electronic Discovery: Views From the Judges*, 76 FORDHAM L. REV. 1, 2 (2007).

[29] *Id.*

[30] Joan E. Feldman, George J. Socha, Jr. & Kenneth J. Withers, *Conference, Panel One: Technical Aspects of Document Production and E-Discovery*, 73 FORDHAM L. REV. 23, 24 (2004) [hereinafter *Panel One*].

[31] Marcus, *supra* note 5, at 13.

[32] Lee H. Rosenthal, Report of the Civil Rules Advisory Committee, 25

Similarly, documents linger without or despite the direction of the user; a "deleted" document still exists on the hard drive.[33] Committee members frequently talked about this characteristic in terms of persistence. To effectively delete a document, an individual would have to take a hammer to hard drive.[34]

Finally, accessing E.S.I. requires particular systems and software. Due to this dependence, "much of the electronically stored information that may be subject to discovery is not easily rendered intelligible with the computers, operating systems, and application software available in everyday business and personal environments."[35]

B. Pre-Amendment Concerns

Among the challenges e-discovery presented, those concerns the Committee addressed included: the parties' legitimate worries about sanctions, production costs, and the burdens and expenses of privilege review.

The frequency and severity of sanctions grabbed the Committee's attention. As the Committee talked seriously about amendments, courts were granting sanctions in about sixty-five percent of the cases in which the requesting party filed a motion.[36] Defendants suffered sanctions four times as often as plaintiffs and shouldered the burdens and costs of privilege review.[37] In terms of severity, litigants risked multi-million dollar penalties, costly compliance orders, and default judgments.[38] Judge Lee H. Rosenthal noted that a motion for sanctions frequently resulted from three situations. First, the failure of a producing party to engage in "early and detailed management" of E.S.I.—such as proper preservation and pre-trial conferencing with the requesting party—could lead to disputes over information that it arguably should have preserved. Second, when a party with few producing obligations faced a major data producer it could leverage its position by making aggressive discovery requests without worrying that the other party would reciprocate. Third, "judges seeking effective control over electronic discovery may impose unrealistically stringent demands on litigants and lawyers"; considering the voluminous and fragile nature of E.S.I., a party could easily run afoul

(May 17, 2004), *available at* http://www.kenwithers.com/rulemaking/civilrules/report051704.pdf [hereinafter May 17 Report].

[33] *Panel One*, *supra* note 30, at 24–25.

[34] Rosenthal et al., *supra* note 28, at 21.

[35] Withers, *E.S.I.*, *supra* note 4, at 176.

[36] Shira A. Scheindlin & Kanchana Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 MICH. TELECOMM. TECH. L. REV. 71, 75 (2004), *available at* http://www.mttlr.org/voleleven/scheindlin.pdf.

[37] Withers, *E.S.I.*, *supra* note 4, at 176.

[38] Eduardo Porter, *UBS Ordered to Pay $29 Million in Sex Bias Lawsuit*, N.Y. TIMES, Apr. 7, 2005, at C4 (reporting the total damages awarded); *see also*, *Zubulake V*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004).

of its preservation duties, exposing it to sanctions.[39] To reduce the risk of sanctions, the Committee attempted to provide producing parties more certainty in Rule 37 by signaling to litigants and judges what constituted proper preservation.

Second, the Committee addressed concerns about aggressive production requests. Like preservation, culling information for production required significant resources. Some corporations minimized long-term costs in this area by hiring vendors and purchasing sophisticated search software, but others could not afford the initial investment.[40] During the comment period, general counsel for Microsoft testified that the search technology that it would procure from vendors to reduce the number of dollars and billable hours spent on things like compiling and reviewing documents still comes with a sizable price tag—a half-million dollars, for example, would not be unusual.[41] While this price tag does not completely hamstring a resource-rich corporation like Microsoft, it would prohibit smaller corporations, subject to the same discovery requirements.

The Committee acknowledged that production expenses drove even the wealthiest litigants out of the courthouse.[42] Incensed that requesting parties had a "sense of entitlement to every document," Judge Higginbotham reminded the Committee:

> I see cases where they are pleading for DNA in capital cases, and we are scratching our heads about whether we are going to give it to them, and that may be outcome determinative. And I hear civil lawyers here making serious arguments that they are entitled to look at back up tapes that cost millions of dollars on the possibility that they might get a document that might be relevant in a civil case. There is something wrong with this picture.[43]

Conscious of the power a requesting party wielded, courts developed law to help create a fairer result where prior amendments had failed to offer guidance.[44] Running contrary to the traditional discovery principle

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[39] Lee H. Rosenthal, *A Few Thoughts on Electronic Discovery After December 1, 2006*, 116 YALE L.J. POCKET PART 167, 167 (2006), http://thepocketpart.org/2006/11/30/rosenthal.html.

[40] *See* Public Hearing, *supra* note 8, at 9, 17 (Microsoft counsel warns the expense of software and services to manage and search E.S.I. can reach hundreds of thousands or even a million dollars).

[41] Public Hearing, *supra* note 8, at 9, 17.

[42] Judge Higginbotham provided figures that suggested district courts try about one-third the number of cases they tried just three decades ago He recalls trying between forty and forty-five trials per year when he served in the district court from 1975 to the early eighties; by contrast, in 2002, Higginbotham said—due primarily to cost driving litigants out of the courthouse—the average district court tried just over thirteen cases. Panel Eight, *supra* note 10, at 143.

[43] *Id.* at 144.

[44] In 1999, the Judicial Conference voted to adopt amendments "to narrow the scope of discovery . . . and to impose judicial oversight on the discovery process. . . . [T]he amendments reminded judges that all discovery requests are subject to

that requires each litigant to pay his own production costs, courts allowed requesting parties to share more of the production burden. In addition to codifying cost-shifting, the Committee developed a larger two-tiered discovery system to dissuade requests for hard-to access information.

Finally, the Committee considered the expenses and burdens of privilege review. They recognized that combing through the voluminous E.S.I. requires tremendous time and money, even for litigants with the tools to find privileged information.[45] In addition to the first layer of information, parties must review embedded data and metadata unless they agree to produce information in a .tiff or .pdf format. Experts expressed concern that this area would grow more costly as the volume of information requiring review swells.[46]

C. Pre-Amendment Case Law

This common law remains significant for two reasons. First, the amendments largely codify the principles articulated in landmark cases. Second, the common law has had an enduring influence in post-amendment cases as a result. While the major cases often addressed the same few issues, judges rarely applied the same law, or the same law in the same fashion.[47] Even those who engaged in creating some of the most influential precedent in e-discovery law lamented that "these opinions provide a less-than-crystalline legal framework regarding the issues presented by electronic discovery."[48]

As pre-amendment cases were decided, creative figures like Judge Francis, the author of *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[49] and Judge Scheindlin, the author of *Zubulake*,[50] offered preliminary solutions that would help resolve questions of how to approach requests

limitations that balance the likely benefits and burdens. The one proposed amendment that the Judicial Conference did not approve was an explicit reference to 'cost bearing' as a mechanism for balancing those benefits and burdens." Withers, *Two Tiers*, *supra* note 3, at 29.

[45] Edward H. Cooper et al., *Conference, Panel Six: Rules 26 and/or 34: Protection Against Inadvertent Privilege Waiver*, 73 FORDHAM L. REV. 101, 103 (2004) [hereinafter *Panel Six*].

[46] *Id.* at 104–05. Public Hearing, *supra* note 8, at 100.

[47] In a 2000 article, Judge Scheindlin explained the reason that e-discovery common law lacked coherency. "First, district court opinions resolving discovery disputes are interlocutory in nature and thus not subject to immediate appeal"; consequently, a party cannot challenge a discovery order until the judge renders a decision on the case. Second, courts have "drawn on established discovery principles to resolve the disputes arising from electronic discovery, with varying degrees of clarity, consistency and persuasiveness" because they do not have a guidance in the rules. Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up To the Task?*, 41 B.C. L. REV. 327, 351 (2000).

[48] *Id.*

[49] 205 F.R.D. 421 (S.D.N.Y. 2002).

[50] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) [hereinafter *Zubulake*].

for E.S.I. that the producing party had established were not reasonably accessible. By shifting costs, the judges created a measure that limited the costs a producing party would have to expend to produce, at best, marginally relevant E.S.I. Although the rules did not expressly address "cost shifting," courts borrowed this principle from the Texas rules[51] and the proportionality principle of Rule 26(c) "to protect respondent against undue burden or expense, either by restricting discovery or requiring that the discovering party pay costs."[52]

The following chart compares the factors that the courts in these seminal cases took into account. As discussed below, the priority of these factors is important in *Zubulake*, not *Rowe*.

Priority	Rowe *test*[53]	Zubulake *test*[54]
1	specificity of the discovery requests	extent to which the request is specifically tailored to discover relevant information
2	availability of such information from other sources	availability of such information from other sources
3	total cost associated with production	total cost of production, compared to the amount in controversy;
4	resources available to each party	total cost of production, compared to the resources available to each party
5	relative ability of each party to control costs and its incentive to do so	relative ability of each party to control costs and its incentive to do so
6	likelihood of discovering critical information	importance of the issues at stake in the litigation
7	relative benefit to the parties of obtaining the information	relative benefit to the parties of obtaining the information
8	purposes for which the responding party maintains the requested data	

Figure A. A side-by-side Comparison of Rowe *and* Zubulake *factors.*

While the factors the two judges evaluated closely resemble each other,[55] the *Zubulake* and *Rowe* tests are different. Under the *Zubulake*

[51] TEX. R. CIV. P. 196.4.

[52] Laura E. Ellsworth & Robert Pass, *Cost Shifting in Electronic Discovery*, 5 SEDONA CONF. J. 125, 125 (2004).

[53] *Rowe*, 205 F.R.D. at 429.

[54] *Zubulake*, 217 F.R.D at 322.

[55] *See* fig.A.

factors, the court applies the factors in a weighted, hierarchical fashion. By contrast, in *Rowe*, the court considers the factors as a sort of checklist.[56]

As courts moved from the "halcyon days of purely paper discovery"[57] to the era of e-discovery, judges employed this cost-shifting power—once largely ignored—with increasing frequency. Courts most frequently cited the *Zubulake* test (although they may have applied the test in a more checklist fashion à la *Rowe*). Assuming courts understand the distinction between the Zubulake and Rowe tests, some courts may have chosen to apply Rowe because it militates toward cost shifting.[58] In spite of the increased application of cost-shifting methods, courts have offered little guidance as to when cost-shifting analysis is appropriate, or when the judge should simply deny the discovery request.[59]

III. GOALS OF THE AMENDMENTS

Organized around the amendments' goals, this section will cover the courts' responses to the challenges presented and the development of the e-discovery amendments. Despite differing viewpoints expressed by Committee members, at the end of the day, four goals emerged: 1) to create more uniformity in e-discovery, 2) to withstand advances in technology, 3) to ease the expense and burdens of e-discovery on the producing party, and 4) to offer guidance to judges.[60] While the first three of these goals manifest themselves clearly in the amendments, the Committee's struggle as to how to achieve the fourth goal resulted in broad guidance and lots of room for judicial discretion. Each goal will receive more detailed attention in the next Part, which discusses the manner in which these goals shaped the rules and the extent to which the rules have met their aims.

The uniformity problem only became clear years after the Committee started to consider e-discovery issues. In 2000, still hesitant to amend the Rules, the Committee held off on amendments to allow courts time to develop common law. Four years later, however, non-uniformity became an apparent concern as local districts and states began adopting rules; the Committee worried that if it waited too long to act, the federal courts would be guided by a patchwork of rules.[61] In addition, courts had not developed a consistent approach to e-discovery issues because they rarely gained the consideration of appellate courts.

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[56] *See Zubulake*, 217 F.R.D. at 322 (explaining why the Zubulake factors should not receive equal weight).

[57] Ellsworth & Pass, *supra* note 52, at 125.

[58] *See* Ronald J. Hedges, *Discovery of Digital Information*, *in* LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 58–70 (2006) (pointing out that most courts who have applied Rowe have engaged in cost-shifting).

[59] Because these issues so rarely rise to the appellate level, judicial guidance has been stunted. Ellsworth & Pass, *supra* note 52, at 141.

[60] See *infra* Part IV.

[61] Withers, *E.S.I.*, *supra* note 4, at 196.

Consequently, the Committee gathered at the 2004 Conference to create a uniform set of rules.

As a second goal, the Committee tasked itself to create rules that are "form-, media-, and technology-neutral."[62] The Committee did not anticipate that the amendments would endure like stone tablets handed down from on high; it did, however, make a conscious effort to create amendments that would not soon be outdated. Conscious of mistakes made in the seventies when the Rules Committee specifically addressed "phono records," a technology outmoded long before it was erased from the rules in December 1, 2006, the Committee wrote the Rules to accommodate future advances, at the same time imminent and unpredictable.

Third, the expenses and burdens of e-discovery concerned Committee members because "unrestricted and undefined preservation obligations can function as a really excessive force that has the potential to drive litigation purely based on cost issues, as opposed to the merits of the litigation."[63] While the expense of litigation has long diminished the number of cases that go to trial, e-discovery has had a disproportionate impact on defendants because, in our system of law, it is the producing party, usually the defendant, who bears the costs of the production and the risk of sanctions.[64] As a result of these perceived pre-amendment inequities, the Committee attempted to even the playing field by providing some guidance and expectations for producing parties. Specifically, the Committee: 1) created a two-tiered system of discovery,[65] 2) established a safe harbor provision,[66] and 3) encouraged parties to enter into "clawback"[67] agreements to preserve privilege in the face of inadvertent disclosure.[68]

Fourth, the rules had to provide guidance to judges. In terms of judicial guidance, Committee members clashed over the appropriate level of specificity. Because the desire to create enduring amendments favored more abstract guidance, this goal received the least attention by

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[62] Withers, *Two Tiers*, *supra* note 3, at 5.

[63] Andrew M. Scherffius et al., *Conference on Electronic Discovery, Panel Four: Rules 37 and/or a New Rules 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 FORDHAM L. REV. 71, 77 (2004) [hereinafter *Panel Four*]. Public Hearing, *supra* note 8, at 32. Sewell, chief counsel at Intel testified that plaintiffs use electronic discovery to force a case into early settlement.

[64] *See* Scheindlin & Wangkeo, *supra* note 36, at 80.

[65] FED. R.CIV. P. 26(B)(2) Advisory Committee Notes (2006 Amendment).

[66] FED. R. CIV. P. 37(f); FED. R.CIV. P. 37(f) Advisory Committee Notes (2006 Amendment).

[67] "Claw-back" agreements (also called "quick peek" agreements) are created by the parties to reduce pre-production privilege review costs. The requesting party agrees that if the producing party hands over information for the requesting party to review, the producing party has not waived its privilege to protect the information from production.

[68] FED. R.CIV. P. 26(f) Advisory Committee Notes (2006 Amendment).

the Committee. Early discussion of the amendments reflects conflicting views on the role the amendments should play. Some advocated for clear guidance in the rules to offer practitioners the predictability they sought. Others thought of the amendments as "very, very broad-based tools to allow judges to exercise their discretion on a case-by-case basis."[69] Because these members believe the amendments should not "define or codify how that ought to happen," they aimed to keep changes as minimal as possible.[70]

IV. ACHIEVING THE GOALS

Looking at recent cases and the observations of experts in the field, this final Part will address the manner in which goals influenced the amendments and will review the success of the amendments in achieving those goals.

A. Burdens and Expenses

As noted above, prior to the passage of the rules, judges granted sanctions in about 65% of the cases in which a party moved for sanctions.[71] Since the amendments took effect, it appears that figure has dropped to about 50%.[72]

Based on his observations, Thomas Y. Allman, a member of the Sedona Conference Steering Committee,[73] credited the early improvement to parties successfully engaging in pre-trial conferences.[74] His view aligns with those of several influential Committee members, who believed added emphasis on pretrial conferences would solve the bulk of e-discovery problems.[75] Because the parties know more than judges about the expenses and obstacles to production and the importance of the information, the members reasoned, they should work together to set forth a reasonable discovery plan.[76] This theme, "lawyers must cooperate," carries throughout the rules.[77] In the context of privilege, for example, parties have the opportunity, and are often encouraged, to

[69] *Panel Eight*, *supra* note 10, at 138.

[70] *Id.*

[71] Scheindlin & Wangkeo, *supra* note 36, at 75.

[72] I arrived at this figure by first searching Westlaw for e-discovery cases in which the court considered sanctions; thirty-seven cases met this criteria. I then tallied the number of cases in which the court granted a motion for sanctions in full or in part; in eighteen (48.6%) of the thirty-seven cases, the judge levied sanctions.

[73] 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, 1 biographical n., http://law.richmond.edu/jolt/v14i3/article7.pdf.

[74] *Id.* at ¶¶ 67–68.

[75] *Panel Eight*, *supra* note 10, at 138; see also FED. R. CIV. P. 16, 26.

[76] *Panel Eight*, *supra* note 10, at 138.

[77] *Id.*

address non-waiver agreements or "claw-back agreements" in their pre-trial conference.

Second, the Committee took care to balance the interest in protecting producing parties from unnecessarily aggressive discovery requests against the interest in providing the requesting party with proper tools to gain important evidence. To accommodate both interests, the Committee made proportionality standards central to the two-tiered system of discovery, and provided a safe harbor that still permitted judicial discretion. In brief, the two-tiered system places all "reasonably available" E.S.I. in a top tier.[78] A court would presume all relevant information in this category to be discoverable. The second tier includes information that is not reasonably accessible and, therefore, presumed undiscoverable. To obtain E.S.I. from this second tier, the court will require the requesting party to rebut the presumption by showing "good cause." The safe harbor helps protect producing parties from sanctions when they lose E.S.I. as part of a regular information system before their litigation hold responsibilities arise. To ensure the safe harbor would not provide overbroad protections, the Committee laced the provision with language that permits considerable judicial discretion under "exceptional circumstances."[79]

1. Privilege

While expensive in the world of paper discovery, preproduction review quickly grew unaffordable in the context of e-discovery due to the enormous volume of E.S.I., including embedded data and metadata. The volume not only affected the cost, but also increased the risk of mistakenly producing privileged material.[80] To keep the costs of discovery down, parties sometimes enter into agreements that will allow the requesting party to review documents while preserving the right of the producing party to assert privilege. This agreement, also known as a "claw-back" or "quick peek" agreement, may minimize the need for pre-production privilege review by allowing the producing party to disclose E.S.I. prior to or without a review for privilege, confidentiality, or privacy.[81] "[I]f the requesting party finds a document that appears to be privileged, the producing party can 'claw back' the [information] without having waived any privilege."[82] The Sedona Conference has endorsed claw-back agreements.[83]

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[78] Myles V. Lynk et al., *Conference: Panel Seven: Rulemaking and E-Discovery: Is There a Need to Amend the Civil Rules?*, 73 FORDHAM L. REV. 119, 127 (2004) [hereinafter *Panel Seven*].

[79] *See* FED. R. CIV. P. 37(f), Advisory Committee Notes (2006 Amendment).

[80] Rosenthal et al., *supra* note 28, at 7.

[81] THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 41 (2005), *available at* http://www.sedonaconference.org/content/miscFiles/7_05TSP.pdf.

[82] *Id.* at 41.

[83] THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS

Many courts have also supported "claw-back" agreements. In the second *Zubulake* case, for example, Judge Scheindlin encouraged the parties to enter into such a privilege agreement.[84] Prior to *Zubulake II*, at least six courts honored privilege agreements in the context of general discovery;[85] however, not all courts would respect privilege agreements. In *Koch Materials Co. v. Shore Slurry Seal Inc.*, the court rejected the privilege agreement for fear that claw-back agreements "could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases."[86] Similarly, in *In re Columbia/HCA Healthcare Corp.*,[87] the court took a hard line against privilege agreements, "rejecting the doctrine of 'selective waiver.'"[88]

Some jurisdictions, by contrast, will not honor a claw-back agreement. Under the "'death penalty rule' . . . any kind of disclosure of privileged information results in a waiver . . . . Some courts have even said that it is a subject matter waiver."[89] That means that some courts will allow only the specific information to come in (simple waiver), and others will consider the party has waived its privilege to *all* information on that subject (subject matter waiver). Since they might fail "to insulate the parties from waiver," entering into a claw-back agreement presented grave risks.[90] According to one court, "even if they are enforceable as between the parties that enter into them, it is questionable whether they [would be] effective against third-parties."[91] Such Draconian rules led parties away from claw-back agreements and toward the costly alternative of preproduction privilege review.

The 2006 amendments[92] "encourage the party receiving the electronic discovery to agree not to assert waiver of privilege/work

& PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 51 (2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSC_PRINCP_2nd_ed_607.pdf.

[84] Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) [hereinafter *Zubulake II*].

[85] Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 234–35 (D. Md. 2005). In this pre-amendment opinion, Judge Grimm included a lengthy discussion of privilege agreements citing seven opinions in which courts upheld privilege agreements. VLT Corp. v. Unitrode Corp., 194 F.R.D. 8 (D. Mass. 2000); Ames v. Black Entm't Television, No. 98CIV0226, 1998 WL 812051, at *1 (S.D.N.Y. Nov.18, 1998); Dowd v. Calabrese, 101 F.R.D. 427, 439 (D.D.C. 1984); W. Fuels Ass'n, Inc. v. Burlington N. R.R. Co., 102 F.R.D. 201, 204 (D. Wyo. 1984); Eutectic Corp. v. Metco, Inc., 61 F.R.D. 35, 42 (E.D.N.Y. 1973); United States v. United Shoe Mach. Corp. 89 F. Supp. 357, 359 (D. Mass. 1950).

[86] 208 F.R.D. 109, 118 (D.N.J. 2002).

[87] 192 F.R.D. 575 (M.D. Tenn. 2000).

[88] Hopson, 232 F.R.D. at 235 n.10 (quoting Columbia/HCA Healthcare Corp., 192 F.R.D. at 577–78).

[89] Rosenthal et al., *supra* note 28, at 25.

[90] Hopson, 232 F.R.D. at 235.

[91] *Id* .

[92] FED. R. CIV. P. 16, 26.

product protection against an opposing party that agrees to provide expedited production of electronically stored information without first doing a full-fledged privilege review."[93] Under the amendments, if parties agree to preproduction review, the judge is encouraged to "include their agreement in the case-management order," although the rules do not require it.[94] But agreements are not always upheld by the court, and the protections between parties are limited as to the parties; they do not extend to third parties.[95] Some courts have already shown an unwillingness to enforce claw-back agreements.[96]

Although the rules suggest claw-back agreements to parties, they cannot "limit the consequences of inadvertent disclosure"[97] because privilege—a substantive, evidentiary issue—lies beyond the reach of the Federal Rules of Civil Procedure.[98] Currently, Congress is considering an amendment to Federal Rules of Evidence (FRE) 502 "to ensure that parties will take advantage of [claw-back agreement] protections,"[99] by reducing "the need for exhaustive, costly, and time-consuming preproduction review" and extending waiver protections to third parties in subsequent cases or proceedings.[100] The Senate has already approved the bill to amend FRE 502 and has referred it to the House Judiciary Committee where it awaits review.[101]

2. Proportionality Principles

E-discovery uses proportionality principles to help limit expenses and burdens while allowing for the production of valuable information. Although the 2006 amendments incorporate broad proportionality principles like "good cause," courts have not figured out how to give the new standard meaning apart from the old 26(b)(2)(C) standard.

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[93] Hopson, 232 F.R.D. at 234.

[94] BARBARA J. ROTHSTEIN, RONALD J. HEDGES & ELIZABETH C. WIGGINS, MANAGING DISCOVERY OR ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 15 (2007), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/eldscpkt.pdf/$file/eldscpkt.pdf.

[95] *Id.*

[96] *Id.* at 15 n.20 (citing Manual for Complex litigation § 11.431; Maldonado v. New Jersey; and The Sedona Principles, Comment 10.d).

[97] Proposed Amendment to F.R.E. 502. S. Rep. 110-264, 3, *available at* http://www.uscourts.gov/rules/S_Rep_110-264.pdf.

[98] SHIRA A. SCHEINDLIN, MOORE'S FEDERAL PRACTICE: E-DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 20 (2006).

[99] Proposed Amendment to F.R.E. 502. S. Rep. 110-264, *available at* http://www.uscourts.gov/rules/S_Rep_110-264.pdf.

[100] *Need for Change Balanced by Deliberate Pace: An Interview with Judge Lee H. Rosenthal*, NEWSLETTER OF THE FEDERAL COURTS, March 2008, *available at* http://www.uscourts.gov/ttb/2008-03/article01.cfm.

[101] ABAnet.org, *Rule 502 Passes Senate; Awaiting Vote in House*, http://www.abanet.org/litigation/committees/trialevidence/news.html.

Two-tiered discovery[102] allows courts to limit discovery when the burdens and expenses of production would outweigh the value of the E.S.I. sought. Under the two-tiered system of discovery, the rules emphasize a proportionality standard in determining when a party should produce E.S.I.[103] The court lumps reasonably accessible E.S.I. into a first tier, treating it as presumably discoverable because producing tier one E.S.I. should not require too much expense or effort. If a producing party shows information is not reasonably accessible, it gets funneled into a second tier of presumably *non*-discoverable information. Because of the duplicative nature of E.S.I., most courts presume that accessible E.S.I. will generally provide a requesting party all of the evidence it needs to make its case. The requesting party would have to rebut the presumption of non-discoverability by showing "good cause." The Committee adopted a "reasonably available" standard to shift more of the production burden onto the plaintiff.[104]

Likewise, in the cost-shifting scheme, judges use a proportionality test to determine who should bear the cost of presumably non-discoverable information. Cost-shifting allows judges to make "more nuanced" decisions in the face of uncertainty in determining whether information is discoverable.[105] The requesting party can rebut this presumption by showing "good cause."

Since the amendments do not define good cause, leaving tremendous discretion to judges, litigants do not have a clear concept of what they must demonstrate (or rebut) to establish (or rebut) good cause.[106] Instead, the amendments point them back to the old proportionality standard of Rule 26(b)(2)(C).[107] According to this standard, a court must limit discovery if:

> (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

[102] Under "two-tiered" discovery, reasonably accessible information comprises the first tier, and relatively inaccessible information makes up the second tier. Since electronic information is so manifold, the rules urge judges to require more cause to compel a party to produce information from the second tier.

[103] Allman, *supra* note 73, at ¶ 14.

[104] *Panel Seven*, *supra* note 78, at 127.

[105] FED. R. CIV. P. 26(c)(2); Rosenthal et al., *supra* note 28, at 26.

[106] Henry S. Noyes, *Good Cause is Bad Medicine of the New E-Discovery Rules*, 21 HARV. J.L. & TECH. 49, 89–90 (2007).

[107] *Id.* at 90.

> stake in the action, and the importance of the discovery in resolving the issues.[108]

Because the Rules reference the old proportionality provision without providing much other guidance to courts grappling with the new standard, many courts have given it no effect.[109] During the comment period, the Committee received numerous complaints that the good cause standard did not provide sufficient guidance.[110] One scholar surmises the Committee maintained a vague standard to encourage judicial discretion.[111]

A uniform interpretation of good cause will not likely develop without further guidance from the Committee. First, the notes, while purporting to supply good cause, only supply factors to consider in cost-shifting analysis.[112] This may actually confuse courts, struggling to determine when to apply cost-shifting analysis and when to deny a discovery request. Finally, district courts primarily decide e-discovery issues. District court decisions "provide little or no guidance to future litigants because they turn on case-specific considerations, rarely result in published opinions, and are virtually immune from review on appeal."[113]

3. Safe Harbor

Because the safe harbor was also intended to level the playing field between the producing and requesting parties, the Committee members focused on the tension between the traditional function of discovery, the production of relevant evidence, and the difficult feat of preserving all relevant information given the voluminous and fragile nature of E.S.I. In the drafting stages, the safe harbor proposal generated far more controversy than any other amendment. Those in opposition to a safe harbor worried it would have the effect of "stonewalling" individual litigants,[114] and that it pulled the focus on "expediency, corporate costs, [and] the needs of the company" while ignoring the "fundamental purpose of litigation"—to find truth. [115] Committee members that supported a safe harbor provision argued that it would allow parties to focus their efforts on the substance of the case, not the process of

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

[109] Noyes, *supra* note 106, at 52, 85 (observing courts have given the good cause standard no effect).

[110] *Id.* at 89–90.

[111] *Id.* at 90 (noting that judges, who favor judicial discretion, play a major role on the Committee).

[112] "[W]e end up with a good cause standard that is no longer used to determine whether information is discoverable or even whether it must be produced; it merely is used to determine whether the producing party must bear the costs of production." *Id.* at 73.

[113] *Id.* at 78–79.

[114] *Panel Four*, *supra* note 63, at 81 (remarks of Anthony Tarricone, a partner at Sarrouf, Tarricone & Fleming).

[115] *Id.* at 81.

discovery.[116] Another Committee member, taking a forward-looking approach, argued that a safe harbor rule would be desirable because as volume continues to increase, the requesting party will wield a bigger and bigger hammer.[117]

In pre-amendment cases, parties lacked sufficient guidance to formulate a proper litigation hold.[118] One Committee member, a former judge who subsequently returned to practice, asserted that companies operate on a set of assumptions that may lose validity three years down the road when they finally get to trial.[119] Therefore, a policy that once supported an appropriate litigation hold could have, consequently, resulted in sanctions down the road.

Rule 37 expressly provides protections and implicitly provides a basis for sanctions by defining both the inside and the outside of the safe harbor.[120] Because of the volume of E.S.I. on systems, big producers of information constantly manage and dispose of information to free up server space. Consequently, the Committee has decided to permit some loss of E.S.I. without threat of sanctions. The safe harbor discourages a judge from levying sanctions against a party who disposes of E.S.I. as part of their regular information management system in good faith and before their litigation hold responsibilities arise. A producing party benefits from Rule 37 when 1) acting in "good faith", 2) it implements a litigation hold, and 3) the loss of E.S.I. resulted from "the routine operation of the an electronic information system."[121]

The "good faith" standard was designed to be an intermediate standard between negligence and intentional malfeasance.[122] An early version of Rule 37 would have protected a party unless it "violated an order in the action requiring it to preserve electronically stored information,"[123] providing far more protection than the current Rule. Although public comment primarily pushed the Committee to provide

[116] *Id.* at 74.

[117] *Id.* at 72.

[118] "[T]he threat that implementing even a legitimate policy could subject a company to sanctions, has delayed or even scuttled the implementation of corporate electronic data retention policies." Thomas Y. Allman, *Defining Culpability: The Search for a Limited Safe Harbor*, FED. CTS. L. REV., Sept. 2006, at 1, 7 n.39, http://www.fclr.org/docs/2006fedctslrev7.pdf (testimony of Textron counsel).

[119] *Panel Seven*, *supra* note 78, at 129.

[120] *Panel Eight*, *supra* note 10, at 145.

[121] "The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery . . . . Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information." FED. R. CIV. P. 37(f) Advisory Committee Notes (2006 Amendment).

[122] Allman, *supra* note 118, at 10–11. "Parties are increasingly tempering their demands and reaching practical and effective accommodations under circumstances which did not exist before." Allman, supra note 74, at ¶ 67.

[123] Allman, *supra* note 118, at 9.

protections for all but those who transgressed a "higher standard of culpability or fault, such as recklessness or gross negligence,"[124] the Committee chose a lesser standard of fault—good faith.[125] The good faith standard drew less opposition from those on the Committee who opposed a generous safe harbor while signaling to courts and litigants that parties "lack[ed] [an] obligation to retain information indefinitely."[126]

The second requirement of the safe harbor, implementing a proper litigation hold, has great importance because a court may presume when a party has taken proper steps to put a litigation hold in place that it has acted in good faith.[127] This presumption of good faith essentially collapses the two prongs into one.

The third prong of Rule 37 protects a party from sanctions if it loses information from "the routine operation of an electronic information system," reducing the cost of preservation. In other words, to receive the benefits of a safe harbor, a party must have a functioning and enforced records management system. "Organizations without [a] state-of-the art [sic] electronic information management program in place, which classify information and routinely cull outdated or duplicative data, face enormous (often self-inflicted) costs and burdens."[128] They may find themselves forced into settlement by parties merely threatening electronic discovery.[129]

When a party disposes of information pursuant to prongs one and two of Rule 37, it still often has remnants of the information in a relatively inaccessible format. Prior to Rule 37, corporations spent thousands to preserve back-up tapes that captured information lost in the course of regular information management. The expense of preservation often overwhelmed parties, leading them to settle.[130] One Committee member illustrated the variety of cost-benefit analysis a corporation might face, citing a case in which the costs for back-up alone exceeded $3 million.[131] This prong of Rule 37 signals to parties that they need not keep every back-up tape at whatever expense. Unless the party suspects the E.S.I. might meet the "good cause" provision under Rule 26(b)(2)(B), it does not need to spend money to preserve it.

A court may impose a Rule 37 sanction on a party if it fails to implement a proper litigation hold,[132] or if the party does not adequately

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[124] *Id.* at 10.

[125] May 17 Report, *supra* note 32, at 82.

[126] Allman, *supra* note 118, at 10.

[127] *Id.* at 11–12.

[128] Withers, *E.S.I.*, *supra* note 4, at 182.

[129] *Id.*

[130] *Panel Four*, *supra* note 63, at 79.

[131] *Id.*

[132] *See* Peskoff v. Faber, 244 F.R.D. 54, 60 (D.D.C. 2007); *see also* Doe v. Norwalk Cmty. Coll., 248 F.R.D. 372, 377–78 (D. Conn. 2007).

preserve reasonably accessible E.S.I. under Rule 26(b)(2). Early critics of Rule 37 argued that it failed to provide "bright lines upon which a producing party can rely in planning its preservation compliance policies."[133] What triggers a preservation hold is one of the most vexing questions producing parties face. Large corporate players urged the Committee to define the trigger point to remove the guess work from the equation.[134] While the Committee agreed that "litigants are entitled to some predictability,"[135] the amendments do not squarely address the question because they cannot; such an event often arises before a party files a claim, and a duty under the Rules can only attach once a claim is filed. Furthermore, the Committee believed that the "specific steps to be taken would vary widely depending on the nature of the party's electronic information system and the nature of the litigation."[136]

Litigants should also remember that the Rules do not operate in a vacuum; a preservation duty created by statute or regulation may play into the sanction analysis. A court may consider, for example, the Auditor's Mandated Retention of Records or that the Securities and Exchange Commission and various state accountancy laws have record retention rules when determining whether the party has properly implemented a litigation hold.[137]

How can a party ensure that its litigation hold policy meets the minimum requirements under Rule 37? In short, the party must look outside the rules to other practitioner guides and local jurisdictions. Noting that the Rules have declined to offer specific guidance in this area, the Sedona Conference, a preeminent e-discovery think tank, offered guidance in 2007 to organizations to help them wade through this fact-intensive determination. Sedona recommends that the duty to preserve information arises "when an organization is on notice of a credible threat it will become involved in litigation or anticipates taking action to initiate litigation."[138] The Conference reminds litigants that jurisdictional requirements for preservation vary widely. In the famous *Zubulake* line of cases, for example, anticipation of litigation arose five months before the claim was filed, according to Judge Scheindlin.

On one hand, Rule 37 "evidences the widespread recognition that [E.S.I.] is not infrequently lost or destroyed,"[139] and it provides some security to parties who may inadvertently lose relevant information. On

[133] Allman, *supra* note 118, at 14.

[134] Intel asked the Committee to require a preservation order to sanction a party for losing information in the course of its regular retention and disposition system, the Committee declined the invitation. Public Hearing, *supra* note 8, at 18–19.

[135] *Panel Seven*, *supra* note 78, at 130.

[136] May 17 Report, *supra* note 32, at 54.

[137] *Id.*

[138] SEDONA CONFERENCE, COMMENTARY ON LEGAL HOLDS 5 (2007), *available at* http://www.thesedonaconference.org/dltForm?did=Legal_holds.pdf.

[139] Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 580 n.56 (D. Md. 2007).

the other hand, even if a party establishes prima facie "good faith,"[140] the opposing party, following the guidance of the comments to Rule 37, may try to rebut the presumption. If the party shows the producing party should have known the E.S.I. would have satisfied the Rule 26(b)(2) "good cause" provision, then it can establish that the producing party had a duty to preserve that information in, at least, its inaccessible form.[141] Finally, a judge, upon a finding of "extraordinary circumstances," can sanction a party that meets the general requirements of Rule 37.[142] Neither the Committee nor the courts have attempted to define this term; there is no sense of when, if, or how this term will take on meaning.

B. Enduring

When considering changes to Rule 34(a), which outlines discovery request procedure, the Committee aimed to keep from referencing specific technologies, concluding "[t]he list of forms, media, and technologies would be ridiculously long and would be superseded by new forms, media, and technologies by the time the reader was finished."[143] As a result, "Rule 34(a) shifts the focus from the discovery of artifacts that may convey information to the discovery of information, which may have any number of manifestations."[144] Likewise, when drafting the notes to Rule 26, the Committee originally listed back-up tapes as a medium that presumably was not reasonably accessible. Considering that future back-up tapes may be accessible, however, it opted to omit any reference to a specific technology.[145]

The Committee's restraint against named technologies avoided the risk of a rule that addresses outmoded technologies, but the extent to which the rules will continue to logically accommodate future technology remains an open question. Recall that e-discovery called for amendments largely because E.S.I. has fundamentally different characteristics than paper. The two-tiered system of Rule 26 treats accessible and inaccessible information differently. Future electronic media may differ sufficiently from those employed today; if future advances rendered essentially all E.S.I. accessible, the two-tiered approach would lose all legitimacy. Writing amendments without referring to specific technologies does not guarantee the rules will accommodate future technologies.

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[140] Allman, *supra* note 118, at 12.

[141] To satisfy the "good faith" standard, a judge may require that a party preserve "information on sources that the party believes are not reasonably accessible under Rule 26(b)(2)" when the "party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources." FED. R. CIV. P. 37(f) Advisory Committee Notes (2006 Amendment).

[142] May 17 Report, *supra* note 32, at 52.

[143] Withers, *Two Tiers*, *supra* note 3, at 32.

[144] *Id.*

[145] Rosenthal et al., *supra* note 28, at 12.

While the Committee ultimately avoided adopting overly specific language in providing guidance to litigants,[146] Rule 37 reveals that the Committee wrote the amendments anticipating large information producers, not individual litigants, on the producing end.[147] Whether an individual could take advantage of Rule 37, for example, seems unlikely. If an individual inadvertently destroyed E.S.I. such as voicemail, e-mail, or text messages produced for personal reasons, and did not have a regular, functioning, and enforced information management system, she could not satisfy the third prong of Rule 37. Most individuals manage this information as it conveniences them, not systematically. Most small businesses may also find the safe harbor provision does not serve them.

Finally, e-discovery may leave behind small litigants in a more fundamental way—beyond what the Rules can address. If electronic data issues, as some experts and judges suggest, become "more evidentiary issues long term than . . . discovery issues or spoliation issues,"[148] no amount of Rule reform will provide litigants sufficient guidance. Due to a lack of resources or IT expertise, small litigants may fail to properly preserve information, authenticate the data, or create a chain of custody, creating serious risk of spoliation and rendering the E.S.I. inadmissible under either the FRCP or FRE.[149] Or, to the contrary, consumer technologies may adapt to meet these needs. Perhaps future devices will include features that enable individuals to suspend automatic deletion of their voicemail, to authenticate data, and maintain it in a searchable format.

C. Uniformity

Prior to the amendments, local rules governing discovery management varied widely from state to state, district to district, and sometimes even within a district. The success of the Amendments in creating uniform rules is mixed. On one hand, the rules largely succeeded in addressing existing non-uniform rules by requiring a national baseline standard for important components like pre-trial conferences. Local district rules on pre-trial conferences, for example, provide a good illustration of the type of non-uniform rules that existed prior to the amendments and which the amendments made uniform.[150]

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[146] *Panel Seven*, *supra* note 78, at 132–33.

[147] *Panel Four*, *supra* note 63, at 84.

[148] *Panel Seven*, *supra* note 78, at 132.

[149] In a 2007 opinion, Judge Grimm reminded litigants that e-discovery did not begin and end with the Federal Rules of Civil Procedure when he refused to admit evidence that failed to satisfy the Federal Rules of Evidence, namely the authentication and the original writing rule; *see also* Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534 (D. Md. 2007) (fifty-two-page e-discovery opinion describing the failures of both parties to overcome four evidentiary hurdles: relevance, authenticity, hearsay, and original writing problems).

[150] *See* Ronald J. Hedges, *Discovery of Digital Information*, *in* LITIGATION AND

On the other hand, non-uniform rules still thrive because of the use of the amendments' broad language and reliance on their accompanying notes. For example, pre-amendment cases employed non-uniform cost-shifting rules derived from common law.[151] Although the amendments' notes set out factors similar to those in *Zubulake*, courts still use a variety of cost-shifting tests.

In pre-amendment cases, litigants frequently applied the *Rowe* or *Zubulake* test or a modification, perhaps unintentionally. The *Rowe* test, "hailed as the 'gold standard' of cost allocation adjudication when [it was] announced" has endured less well than the test established in *Zubulake I*.[152] Although the *Zubulake* factors have withstood the test of time, they have not been accepted universally by federal district courts across the country. In *Wiginton v. CB Richard Ellis, Inc.*, however, the court applied a modified test, considering factors from both *Rowe* and *Zubulake*.[153] It ultimately opted to modify the *Zubulake* factors to emphasize the proportionality test of Rule 26(b).[154] The judge ordered that the plaintiffs should bear 75% of the costs and the defendant only 25%.[155]

The Committee Notes to Rule 26(b)(2)(C) amendments outline seven factors a court *may* consider in deciding whether a responding party must search for and produce information that is not readily accessible, *including*:

> (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.[156]

In other words, post-amendment courts may still apply the proportionality test of their choice. The notes do not recommend for or against weighing the factors in a given manner. As a result, some post-amendment courts apply the *Zubulake* test (applying the factors in a

ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 41, 58–70 (2006).

[151] *Panel Seven*, *supra* note 78, at 126.

[152] Withers, *Two Tiers*, *supra* note 3, at 183.

[153] 229 F.R.D. 568, 571–77 (N.D. Ill. 2004).

[154] *Id.* at 572–73; FED. R. CIV. P. 26(b)(2)(iii).

[155] *Wiginton*, 229 F.R.D. at 577.

[156] FED. R. CIV. P. 26(b)(2)(C) Advisory Committee Notes (2006 Amendment).

hierarchical fashion).[157] Others apply the seven *Zubulake* factors or the note factors like a checklist.[158]

Still others apply similar factors without any indication as to whether the court weights the factors or views them as a sort of checklist. In *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC,* for example, the court employed the *Zubulake* factors, citing to the official comment to the amendment to Rule 26, which "to a large degree adopt[s] [*Zubulake*'s] seven-step analysis for purposes of determining whether a party should be required to search for and produce information that is not reasonably accessible."[159] Finally, some courts invent their own tests.[160] In *Guy Chemical Co., Inc. v. Romaco AG*,[161] the court considered whether a non-party, subject to a discovery request, should pay the costs of production.[162] Citing a litany of cases dealing with cost shifting, the court mentioned no factors other than the "crucial factor" that the request was made on a non-party.[163] According to the *Guy Chemical* court, the non-party status shifted the cost burden to the party requesting discovery, and to overcome the non-party factor, the requesting party would have had to show the burden of production was *de minimis*.[164]

The amendments, because of their broad language and heavy reliance on Committee notes, offer some guidance, but not uniform rules. Because cost shifting has received a fair amount of courts' attention both pre- and post-amendments, it demonstrates the manner in which courts consider Committee note guidance and how little the notes seem to reduce non-uniformity.

D. Managerial Role of the Judge

Although one of the aims of the rules was to offer instructive guidance to judges who are often "the last to know" when it comes to changed circumstances,[165] an interest in preserving significant judicial discretion drove the Committee away from providing specific direction in the Amendments.

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[157] *In re* Veeco Instruments, Inc. Securities Litigation, No. 05MD1695, 2007 WL 983987, at *1–*2 (S.D.N.Y. Apr. 2, 2007).

[158] *See Zubulake*, 217 F.R.D. 309, 322–23 (S.D.N.Y. 2003).

[159] W.E. Aubuchon Co., Inc. v. Benefirst, LLC, 245 F.R.D. 38, 42 (D. Mass. 2007).

[160] In PSEG Power N.Y., Inc. v. Alberici Constructors, Inc., No. 1:05-CV-657, 2007 WL 2687670, at * 9, *11 (N.D.N.Y. Sept. 7, 2007), Magistrate Treece declined to shift costs to the plaintiff while citing *Rowe* for the principle that "[t]oo often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter." *Id.* at 9. There, the court applied a hybrid of the *Rowe* and *Zubulake* factors, declining to use the hierarchical approach prescribed in *Zubulake*.

[161] 243 F.R.D. 310 (N.D. Ind. 2007).

[162] *Id.* at 312–13.

[163] *Id.* at 312–13.

[164] *Id.* at 313.

[165] *Panel Eight*, *supra* note 10, at 135.

The amendments succeed in allowing judges tremendous discretion. They may take minor steps like requiring IT people to come to the meet and confer,[166] or they can play a larger role. Judge Grimm has said that "[u]nder Rules 26(b)(2) and 26(c), a court is provided abundant resources to tailor discovery requests to avoid unfair burden or expense and yet assure fair disclosure of important information. The options available are limited only by the court's own imagination . . . ."[167] *Qualcomm, Inc. v. Broadcom, Inc.* illustrates Grimm's point.[168] In *Qualcomm*, the court interpreted broadly the Rules' provisions which allow a court to extend sanctions to attorneys who did not directly manage e-discovery and relied on another attorney's bogus e-discovery findings.[169] The *Qualcomm* court sanctioned six attorneys altogether—the attorney who signed the discovery responses and all the attorneys who "rel[ied] on discovery responses executed by another attorney."[170] Reading Rules 11, 26, and 37 together, the court reasoned:

> Under a strict interpretation of these rules, the only attorney who would be responsible for the discovery failure is Kevin Leung because he signed the false discovery responses. However, the Court believes the federal rules impose a duty of good faith and reasonable inquiry on all attorneys involved.[171]

Other factors also drove the Committee toward providing broader guidance. First, to use the rules as a teaching mechanism generated some criticism within the Committee; after all, practitioner guides exist for that reason. Rather than use the rules to educate players about electronic discovery, one member suggested that the Committee must teach judges through leadership and through practitioner manuals like the Manual for Complex Litigation.[172]

Second, those Committee members with a strong interest in providing the most specific guidance possible to be helpful also worried technological advances would render specific guidance outmoded. Due to the rapid advance in technology, the Committee "resist[ed] thinking about the problems solely in terms of the way they appear today, based

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[166] Rosenthal et al., *supra* note 28, at 15.

[167] David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, 1 (2005), http://www.fclr.org/2005fedctslrev1.htm. Judge Grimm served as the technology specialist on the Sedona Project; he highlighted the question of authentication in a recent case in which neither party disputed the authenticity of the documents.

[168] Qualcomm, Inc. v. Broadcom, Inc., No. 05cv1958-B, 2008 WL 66932, (S.D. Cal. Jan. 7, 2008), *vacated in part*, 2008 WL 66932 (S.D. Cal. Mar. 5, 2008) (remanded to permit sanctioned attorneys to raise self-defense objection to attorney client privilege).

[169] *Id.* at *13.

[170] *Id.* at *13 n.9.

[171] *Id.* (citation omitted).

[172] *Panel Eight*, *supra* note 10, at 146.

on the ways most people generate and store electronic information in commercial systems."[173]

Of course, judicial discretion may serve or harm a party's interest depending on its form. The amendments demonstrate a strong reliance on judges to spot "opportunities for—or pitfalls in—electronic discovery where counsel do not."[174] A judge with a good deal of insight into the burdens and expenses e-discovery imposes upon parties may come out with a "fairer" result by virtue of the generous portions of judicial discretion the rules offer. By contrast, a judge who does not understand the technology in a case may accidentally create problems. Judges should use caution to "keep the court in a position of resolving controversies, rather than creating them."[175]

The discretion with which a judge can issue preservation orders, for example, illustrates the potential risks and benefits judicial discretion brings. Preservation orders, often a powerful tool to help manage discovery, can also set parties up for failure when used imprudently.

Prior to the rules, courts "split . . . as to the burden of proof for issuance of a preservation order."[176] Some courts used the good cause standard from Rules 16(b) or 26(c); others relied on preliminary injunction standards, requiring a showing that a party would, absent an order, disregard its preservation duties and likely lose E.S.I.[177]

To the extent possible, judges "may help ensure that parties meet their responsibilities for preserving information and avoid allegations of spoliation by reviewing with them steps for establishing and implementing an effective data-preservation policy."[178] Judge Francis commented that with the "expanded role federal judges will have . . . while preservation orders are not automatic, they are increasingly routine in electronic discovery cases."[179] Because of the possibly devastating effects of an overbroad preservation order, Rule 26 has tried to discourage judges from trending toward judicial preservation orders by requiring "good cause."

Wachtel v. Health Net, Inc.[180] provides a good example of good discretion. In *Wachtel*, rather than issue a preservation order to require

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[173] Rosenthal et al., *supra* note 28, at 5. "When we started to look at the ways in which the rules could be amended to give judges, lawyers, and litigants more predictability and better guidance for dealing with these distinctive features of electronic discovery, we also became aware of a very interesting challenge for rule drafting . . . the pace in which technology changes . . . . Striking that balance proved both fascinating and very difficult." Id.

[174] Isom, *supra* note 167, at 6.

[175] *Id.*

[176] *A Magistrate Judge's Perspective on Electronic Discovery: An Interview with Ronald J. Hedges*, N.J. LAW., Aug. 2007, at 8, 10.

[177] *Id.* at 11.

[178] ROTHSTEIN ET AL., *supra* note 94, at 17.

[179] Withers, *Two Tiers*, *supra* note 3, at 171.

[180] 239 F.R.D. 81 (D.N.J. 2006).

good management, the court used sanctions to punish mismanagement. The court, initially persuaded that it should not issue a preservation order, later levied heavy sanctions and reserved the right to issue a default judgment—pending the resolution of class action issues—against the defendant when it discovered that Wachtel had persisted in obstructionist tactics.[181]

To lessen the need for judicial intervention, the amendments encourage parties to address preservation issues during the pre-trial conference to limit the need for judicial preservation orders. In other words, when parties agree, they have no basis for seeking a preservation order from a judge. Provided the parties observe their agreed terms, a judge has no cause to intervene. In fact, the amendments urge judges to use great restraint in issuing preservation orders, noting:

> Complete or broad cessation of a party's routine computer operations could paralyze the party's activities .... The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored.[182]

Most judges, habituated to the idea that parties are in the best position to manage their own discovery responsibilities, would hesitate to intervene even if they did see that a party was creating future problems for themselves.

V. CONCLUSION

The amended discovery rules have advanced their identified goals to some degree. First, the rules have provided a means to diminish the burdens and costs of e-discovery by creating a two-tiered system of discovery, providing a safe harbor from sanctions, and encouraging claw-back agreements. While each of these measures may successfully diminish the burdens and expenses to a producing party, the three measures have their defects. Under the two-tiered system, courts have applied the proportionality standard unpredictably and they have given almost no effect to the "good cause" standard of Rule 26(b)(2)(B). The safe harbor has provided some protection, but those falling outside the safe harbor are in grave danger of sanctions. As for claw-back agreements, they may not receive any effect in court since some jurisdictions will deem privilege waived notwithstanding an agreement of the parties to protect privilege.

As states create and revise e-discovery rules, they should take a lesson from the federal model. To encourage claw-back agreements, states should consider revising their rules of evidence to limit inadvertent

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[181] *Id.* at 102.

[182] FED. R. CIV. P. 26(f) Advisory Committee Notes (2006 Amendment) (internal citations omitted).

waiver, like FRE 502 proposes. Moreover, upon future revision, the rules should include more definition to proportionality standards so that the parties can better predict their litigation costs at the outset of trial. States planning to model their e-discovery rules after the 2006 amendments should also consider providing more specificity.

Second, the Committee has primarily succeeded in creating technology-neutral amendments by avoiding terms that technology would soon surpass. If improved technologies provide a world without inaccessible data, however, the Committee will likely have to revisit the two-tiered system. Additionally, because the provisions deal with the current e-discovery landscape, involving larger litigants on the producing side, the Committee may have to reconsider the formulation of the safe harbor as smaller litigants find themselves on the producing side of e-discovery cases. Because these litigants lack the resources that many large information producers have available, e-discovery leaders should work to provide more specific guidance, through the rules and practitioner guides, so litigants can navigate e-discovery.

Third, the rules generally succeed in creating uniform standards where local district rules once stood. Non-uniform common law, however, will continue to thrive in post-amendment discovery as district courts have difficulty generating uniform law. To limit inconsistencies and offer litigants predictability, the Committee must provide greater clarity in the rules.

Finally, the Committee has had limited success in providing judicial guidance. Because the managerial role and other more minor factors pushed the Committee to favor broad judicial discretion over specific guidance, the amended rules lack specifics. Judicial discretion can be a blessing or a curse, depending on the judge and his understanding of e-discovery and the technologies involved. As parties learn how to handle their own e-discovery duties, judges will hopefully have little cause to use their managerial tools.