Discovery in the Paperless World: How Speed and East of Technology Has Slowed and Complicated the Process

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I. INTRODUCTION

The law is a fluid and ever-changing body of rules and precedents, unlike the legal profession, which is characterized by its procedures and processes and is recognized for rigidity and deliberateness. Courts are slow, consumed, and obsessed with a tedious process. Judges are deliberate and unbending when it comes to procedure, and they are often hostile to change. Similarly, lawyers are unwilling to push to make the process faster for fear of upsetting court officials or judges—but also because many lawyers bill by the hour.

The profession is also notorious for the tremendous amount of paper that typifies both the process and the substance of any legal work. Lawsuits begin with filing numerous pages and continue with the court recording excessive amounts of documents. And more documents are transmitted between the parties through discovery. Traditionally, the discovery process resulted in the exchange of innumerable documents; however, the rapid development of technology has brought about substantial change in this area.

Today, most businesses—including law firms—conduct many of their activities and produce much of their work electronically. In fact, it is now estimated that more than ninety-nine percent of new information is created and stored electronically.1 The nature of electronically stored information allows for easy manipulation of documents—for better or for worse—but what is often overlooked is the information maintained by computers that cannot be seen directly, even by the original user.2 Deleted information—as well as embedded data and metadata—pose significant obstacles for the doc-

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2. See Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 646 (D. Kan. 2005) (describing “metadata” as information about a particular data set which describes how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information”); further explanation notes “metadata to include all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records”).
ument's originators because they contain all the underlying information that would not be available in hard-copy form.3

Technology, while speeding up daily life and making certain routine activities more effortless, has also complicated discovery to the point that it significantly slows down the progression of cases through the courts' dockets. Confusion in the rules has led to a rise in litigation concerning several areas of electronic discovery (e-discovery), including: volume, accessibility, expert access, procedure, privilege, and cost.4 The primary difficulties arising out of e-discovery concern accessibility. And the complexities of data retrieval have caused a meteoric rise in costs and expenses. This paper will address how courts are dealing with e-discovery issues, the success of solutions, and the future of e-discovery as judges and rule-makers attempt to formulate a uniform manner and procedure to approach these disputes. The federal approach—or lack thereof—to e-discovery will be addressed in Section II, as will Texas lawmakers' and judges' rules and approaches to the same. Section II also includes recent decisions that compare the relative success of Texas in controlling expense and burden to that of the federal system. Part III will cover legislative and judicial reaction to technology's rapidly increasing role in litigation during the late 1990s and early 2000s. Part IV will address the 2006 amendments to the Federal Rules of Civil Procedure and the case law resulting from those changes. Part V will discuss the Texas Rules of Civil Procedure and analyze the most recent Texas Supreme Court decision on the matter of e-discovery under Rule 196.4: In Re Weekley Homes.5 Also included in Part V is a discussion of how In re Weekley Homes and other recent decisions mitigate the increased litigation, controversy, and cost stemming from the technological era. Part VI will provide a brief conclusion of the arguments.

II. THE FIRST WAVE OF E-DISCOVERY DISPUTES

The Federal Rules of Civil Procedure first officially recognized a method by which to deal with electronic discovery in the 1970 Amendment to Rule 34(a).6 The rule stated that for purposes of discovery, “information in electronic form is to be considered the same as information in conven-

3. See Fed. R. Civ. P. 26(f) advisory committee’s note (2006 amendment) (defining “embedded data” or “embedded edits” as “draft language, editorial comments, and other deleted matter”; defining “metadata” as “information describing the history, tracking, or management of an electronic file”).


tional paper form.” In explaining this rule, one court analogized computer memory to a file cabinet: if the requesting party would have access to the file cabinet, they should have access to the contents of the computer.8

Ken Withers has been one of the foremost experts on e-discovery from its infant stage continuing through today.9 Withers was among the first legal scholars to address the e-discovery predicament during the late 1990s. His continued work throughout the decade has been influential in bringing about recent rule changes and the shift in approaches to e-discovery. Withers argued that computers were different from typical filing systems and that this new technology, being heavily utilized by businesses throughout the country, needed new rules to address its unique characteristics.10 Scholars and courts differ on what constitutes these unique characteristics, and there is no doubt that this debate will continue through the years. The features of electronically stored information that have sparked the most controversy and have been the driving force behind recent changes are volume, accessibility, expert access, procedure, privilege, and cost.11 Before analyzing how these difficulties are handled under the current federal and state rules, it is important to discuss the approaches developed and modified by the experimental period of the late 1990s and early 2000s when the legal world was just beginning to embrace the understanding that “digital was different.”12 The difficulties with volume will be addressed briefly before delving into the more interesting issues of accessibility, experts, and cost.


9. Mr. Withers is currently Director of Judicial Education and Content for the Sedona Conference, a group designed as legal think tank to tackle the leading issues facing the legal community. In this position he is simply continuing his innovative work in the area of electronic discovery that he began as an attorney and advanced at the Federal Judicial Center where he published numerous articles pioneering the way the law treats such issues. The Sedona Conference, Kenneth J. Withers, http://www.thesedonaconference.org/people/profiles/WithersKenneth; Ken Withers Resume, http://www.kenwithers.com/about/index.html.

10. Withers 1, supra note 7.


12. Withers 3, supra note 11, at 180.
III. Volume

The problems posed by the extraordinary volume of electronic information in the modern era should be fairly obvious to anyone familiar with computers. The ease of creating, modifying, duplicating, and deleting electronic files—along with the modern dependence on technology—results in a tremendous volume of electronic data. On average, each person in the world produces approximately 800 MB of electronic information per year—an amount equal to about 50,000 pages of typewritten documents. Noting the quantity of electronic information produced in the business world, David Isom explains that “[o]ver three billion business e-mails, for example, are sent each day in the United States, most of which are archived. One large American company now backs up forty-five terabytes (a terabyte is equal to approximately a billion pages) of information daily, which may be typical of large companies.” Files are constantly moved around on personal computers or sent to business partners. However, these files are not technically moved; rather, they are replicated creating one or multiple copies of that same document in several different locations. Similarly important and possibly even more voluminous than files is electronic mail (e-mail), which has become one of the primary means of communication in the business world. Like electronic documents, every e-mail is saved to the computer from which it is sent and received. In addition, e-mails pass through servers in order to be correctly routed to the recipient and are similarly saved on each of the servers, creating further replication. A panel of judges described the complication of e-mail volume in the following remarks:

It has been estimated that an e-mail sent on January 1 will be copied 27,000 or 28,000 times by the end of the year, and not all on that particular computer system. The replications are not just redundant. Each e-mail transmitted may become a new piece of information that is potentially relevant in the litigation.

Another factor contributing to the excessive volume of electronic data is deleted information. In reality, deleted files are never truly removed from a computer. Rather, the files are simply removed only from the location where the user employs the “delete” function. Indeed, “[n]ot only can the deleted file be easily recovered, but the action of pressing the delete key does noth-

14. Id.
15. Isom, supra note 1, at *II.I.4.
17. Id.
18. Id.
ing for the dozens, scores, or hundreds of replicates existing elsewhere on the system, on the network, or on backup media."20 As one e-discovery scholar states, "[t]o effectively delete a document, an individual would have to take a hammer to the hard drive."21 In addition, there are the copies of electronic files that were actually intended to be made for backup or archiving purposes created on the network server or backup tapes.22 These backup mediums are not organized as normal electronic files, but rather they are kept for emergency purposes when full restoration is needed.23 When it comes to backup tapes, finding an individual folder or file is nearly impossible.24 Similarly, offsite and even offshore data storage facilities, internet service providers, and other third parties may also hold data subject to discovery.25 Forced discovery of such remote, obscure, and likely obsolete information will be addressed in the following section on accessibility as well as when courts should compel production despite the burden.

IV. ACCESSIBILITY

In early jurisprudence, electronic files on a computer were treated in the same manner as paper files in a cabinet. Therefore, when a production request called for documents, it included all e-mails and other electronic documents within this accepted interpretation of the rules.26 Under this approach, it became apparent that in addition to volume, accessibility of the electronic information would be a significant problem, as innumerable amounts of data are stored outside of the computer user's normal view.27 With no direction from the legislature, it was the task of the courts to determine a proper procedure for dealing with the issues that arose from this problem: when to compel production of electronic information not readily accessible, the method for accessing the information, and the form and extent to which that information would be produced for the opposing counsel.28

Prior to the 2006 Amendments to the Federal Rules of Civil Procedure, documents had been defined liberally and courts considered electronic information as equally accessible as paper and therefore discoverable. Rule 26 of

20. Withers 3, supra note 11, at 184.
22. Withers 1, supra note 7.
23. Withers 3, supra note 11, at 189.
24. Id.
27. Withers 1, supra note 7.
28. See Withers 3, supra note 11, at 171–72.
the Federal Rules of Civil Procedure provided that parties “may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation.” 29 A responding party’s only protection was through Rule 26(b)(2), which provided protection only when there was an undue burden or expense, or when privileged information would be at risk. 30

Another contentious issue with accessibility involves the question of who will access the information. Requesting parties do not trust the responding party’s employees to correctly or ethically conduct the search, restoration, or any other processes required to access the files. 31 Requesting parties want direct access so they can ensure it is done how they want and that they receive access to all available information, and not simply that which is hand-picked by opposing counsel. However, responding parties neither want nor trust employees of opposing counsel to access their own computer files. 32 In most cases, courts find such access to be too intrusive and rule in favor of responding parties. 33 The solution adopted by most courts has been appointment of an outside computer forensics expert to conduct the restoration. 34 Courts generally order that the parties conference to decide on an expert. 35 Frequently, these conferences are contentious, with issues that are intensely critical to the litigation and parties that are generally unwilling to cooperate. 36 In such situations, the court will usually appoint an expert of its choosing to carry out the process for purposes of fairness and efficiency. 37

There are several common contexts where these disputes arise. One of the more frequent situations is the attempted discovery of deleted electronically-stored information. In one of the first decisions concerning such a dispute, Playboy Enterprises v. Welles, the court ruled that despite the fact that e-mails had been deleted and were currently “impossible to produce . . . as a

29. FED. R. CIV. P. 26 (b)(1).
30. Playboy, 60 F. Supp. 2d at 1053-54 (explaining the protection provided in FED. R. CIV. P. 26(b)(2)).
32. See Withers 3, supra note 11, at 185.
34. See, e.g., Playboy, 60 F. Supp. 2d at 1054-55; see also mySimon, 194 F.R.D. at 641–42; see also Withers 4, supra note 25, at 5.
35. Playboy, 60 F. Supp. 2d at 1055; mySimon, 194 F.R.D. at 642.
36. Playboy, 60 F. Supp. 2d at 1055.
37. Id.
document,” the requesting party had shown a proper need for production. In the case, Playboy Enterprises alleged that one of its former Playmates had infringed on the Playboy trademark. Playboy moved for production of deleted e-mails from the defendant that it claimed to be relevant. In compelling production at Playboy’s request, the court stated that the “[p]laintiff needs to access the hard drive of [the d]efendant’s computer” because of the defendant’s decisions to recklessly delete e-mails. The court’s ordered method consisted of appointment of a computer expert who would then create a “mirror image” of the defendant’s hard drive. The mirror image was to be turned over to the defendant’s counsel for privilege review and to alleviate any other concern; however, following such review, the resulting relevant documents were to be produced for the plaintiff and the court.

A different approach was adopted by the court in McPeek v. Ashcroft, a sexual harassment case against the Department of Justice (DOJ) in which the plaintiff sought restoration of DOJ’s backup tapes to recover deleted information. The DOJ argued the task was too random because there was no way of knowing what information was contained on which tape, as it would depend on when the information was deleted and when the backup was run. Also, the DOJ did not actually know what they were looking for. The court, in describing the unorganized and random nature of the backup tapes, noted that “[i]t is therefore impossible to know in advance what is on these backup tapes.” In weighing the options in this case without “controlling authority,” the court ultimately ordered a “test run.” With a random sampling of tapes, the judge hoped to determine the cost of restoration and the

38. Id. at 1053.
39. Id. at 1051.
40. Id.
41. Id. at 1053.
42. Id. at 1055: “A mirror image is an exact duplicate of the entire hard drive, and includes all the scattered clusters of the active and deleted files and the slack and free space.” United States v. Triumph Capital Group, Inc., 211 F.R.D. 31, 48 (D. Conn. 2002).
43. Playboy, 60 F. Supp. 2d at 1055.
45. Id.
46. Id.
47. Id. at 33.
48. Id. at 33–34 (“Accordingly, I will order DOJ to perform a backup restoration of the e-mails attributable to Diegelman’s computer during the period of July 1, 1998 to July 1, 1999. I have chosen this period because a letter from plaintiff’s counsel to DOJ, complaining of retaliation and threatening to file an administrative claim, is dated July 2, 1998, and it seems to me a convenient and rational starting point to search for evidence of retaliation.”).
likelihood that any of the backup tapes would produce any relevant information.\(^4\) The contrast in these approaches shows the uniqueness in the discovery process of electronic information and the uncertainty courts recognize in determining the proper procedure to address these concerns. In \textit{Playboy}, the size of the files were not overwhelming, making production once the burden was met a less complicated process.\(^5\) However, \textit{McPeek} presented a different task entirely. The case challenged the court to decide not only whether to allow production, but the court also formulated an approach to discovery of the extensive backup files. These large databases, such as that of the DOJ, or other government agencies or corporations, present the difficulties at the forefront of the e-discovery debate.\(^6\) In addition to the difficulties with volume and accessibility, the huge electronic storage databases like that in \textit{McPeek} illustrate the potential for massive costs associated with a court's decision to order production of such electronically stored information.

V. Cost

The traditional rule of discovery is that each party must pay its own costs for locating responsive documents, assembling them, and then producing them in the requested form to the other party, who would then similarly bear its own costs in the review process and any further action taken with the produced documents.\(^7\) With the volume and accessibility issues mentioned above, and the illustrations put forth by the previous cases, it is obvious that the problem of cost in the e-discovery age is as troublesome an issue to deal with as any before the courts and rule makers. As Ken Withers notes, "the costs for the producing side, however, have increased dramatically, in part as a function of volume, but more as a function of inaccessibility and the custodianship confusion."\(^8\) In the mid 1990s, courts continued to treat electronic files the same as paper files stored in a cabinet and consistently treated discovery costs as the responsibility of the responding party.\(^9\) Judges, of course, possess the inherent power to shift the cost to the requesting party, but a decade ago this was only a tool used in the most extreme circumstances.\(^1\) The Advisory Committee decided that this cost-shifting power needed to be codified and authored Rule 26(b)(2) in 1999.\(^2\) Withers notes, "it soon became apparent that the assumptions underlying the conventional

\(^{49}\) \textit{Id.} at 34–35.

\(^{50}\) \textit{Playboy}, 60 F. Supp. 2d at 1053–55, 1058.

\(^{51}\) \textit{McPeek}, 202 F.R.D. 31, 32–35.


\(^{53}\) Withers 3, \textit{supra} note 11, at 208.

\(^{54}\) \textit{See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.}, 1995 WL 360526 at *3 (N.D. Ill. 1995).

\(^{55}\) Withers 4, \textit{supra} note 25, at 5.

\(^{56}\) \textit{Id.}
cost paradigm did not apply in the electronic discovery context, and judges began to use their powers under Fed. R. Civ. P. 26(b)(2).”

After the amendment, courts began to use the cost-shifting power more liberally, including in *Playboy Enters. v. Welles* and *Simon Prop. Group v. MySimon*. In *Playboy*, the court found that the highly burdensome and intrusive nature and the lack of guarantee that the information sought existed or could be recovered all factored into a decision shifting the burden of paying for the process to the requesting party. The District Court in Southern Indiana agreed, ruling that even though the expert hired to retrieve the information was a neutral officer of the court, the requesting party was to pay for the costs of the inspection.

The most substantial expenses coming from e-discovery are restoration and recovery of data from backup tapes and the costs related to privilege review. As the *McPeek* and *MySimon* cases demonstrate, restoration of backup tapes is a controversial and expensive issue arising in many e-discovery disputes. All of the difficulties with backup tapes result in tremendously high costs that have become associated with suits against businesses and others whose information can be potentially accessed on backup tapes. Examples of cases with some of the more expensive restoration costs include *Murphy Oil USA, Inc. v. Fluor Daniel, Inc.* at $6.2 million; *Medtronic Sofamor Danek, Inc. v. Michelson* at “several” million dollars; and three cases which will be discussed in depth later in this paper: *Rowe Entertainment, Inc. v. William Morris Agency, Inc.* at $9.75 million; *Wiginton v. CB Richard Ellis, Inc.* at $249,000; and *Zubulake v. UBS Warburg LLC* (hereinafter *Zubulake III*) at $166,000.

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61. *Isom, supra* note 1, at *II.1.1.
62. *See MySimon, 194 F.R.D. at 640; see also McPeek, 202 F.R.D 31, 32 (U.S.D.C. 2001).*
63. *See, e.g., Rowe Entm’t, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (“The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system. Therefore, the organization of the data mirrors the computer’s structure, not the human records management structure, if there is one.”).
The other factor that adds to the high cost associated with the enormous volume of electronic production is the arduous and expensive task of privilege review. Ken Withers noted that “[o]f all the costs associated with electronic discovery, screening electronically stored information for privilege before production is emerging as the greatest.” He continued by pointing out what makes privilege review unique, stating:

[w]hile other costs can be mitigated by the use of technology or by shifting costs to the requesting party, no technology has yet to be developed that can make privilege decisions, and there is considerable authority for the proposition that privilege screening costs cannot be shifted to an opposing party.

Because of the cost and risk associated with privilege review, or more specifically, overlooking a privileged document in review, the parties generally agree on an approach to privilege review before discovery commences. Some possible approaches include the “call back” method where the parties agree that they will have a certain amount of time to claim privilege before accidental production is considered a waiver. Another approach is called “quick peek,” and it requires a “higher level of mutual trust and respect between counsel.” Using this approach, the requesting party reviews the information first for responsiveness and then those documents found responsive are reviewed by the responding party for privilege review. A different approach, as utilized by the Playboy court, calls for review by a neutral expert who assembles the responsive documents and sends them to the responding party for privilege review. While one of these approaches may be more cost efficient in some circumstances, the expense for this review is nonetheless out of control. The issue of who is left to bear the expense is one left largely unresolved from these cases of first impression.

VI. LANDMARK JUDICIAL APPROACHES

As the distinguishing characteristics of e-discovery became more apparent, ideas about how to deal with its complicated nature started to surface in both scholarly articles and judicial opinions. Three such instances were par-
particularly influential in the development of approaches to e-discovery. Those cases, Rowe Entertainment, Inc. v. The William Morris Agency, the line of Zubulake cases, and Wiginton v. CB Richard Ellis, Inc., set out the framework for dealing with many of the issues that had troubled courts in the past and served as the leading guide for development of the new federal rules adopted in 2006.

A. Rowe

The Rowe case concerned a group of black concert promoters who brought suit against numerous booking agencies and other promoters for discrimination and anti-competitive practices. During discovery, four defendants sought protection against plaintiffs' requests for e-mails stored on backup tapes and other places where recovery could have been difficult and expensive. The court first dispatched with the defendants' request for a blanket protective order, finding that the e-mails had the potential to be relevant and therefore were potentially discoverable. Next, the court threw out an argument that discovery of the e-mails would invade the privacy of employees, noting that any privacy warranting protection could and should be protected through privilege review. Finally, the court came to the issue of cost-shifting. Judge Francis first noted that "too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. As this case illustrates, discovery expenses frequently escalate when information is stored in electronic form." With that, he set out to establish a multi-factor test addressing the cost issue and expanded on the marginal utility test of McPeek. Noting the failure of other "bright-line" rules, the court considered the standards of McPeek and other courts and created a comprehensive approach composed of eight factors:

1. the specificity of the discovery request;
2. the likelihood of discovering critical information;
3. the availability of such information from other sources;
4. the purposes for which the responding party maintains the requested data;
5. the relative benefits to the parties of obtaining the information;
6. the total costs associated with production;
7. the relative ability of each party to control costs and its incentive to do so; and

73. Id.
74. Id. at 428.
75. Id.
76. Id. at 423.
77. Id. at 429.
8. the resources available to each party.\textsuperscript{78}

Recently, Ken Withers wrote, "the Rowe factors were hailed as the 'gold standard' of cost allocation adjudication when they were announced."\textsuperscript{79} The factors are fairly self-explanatory, but it is important to discuss how the factors were to be applied by subsequent courts. While the Rowe test was originally viewed as a balancing test with weighted factors, the standard was applied as more of a checklist to be employed when considering cost-shifting.\textsuperscript{80} Application of the Rowe test tends to lead courts toward employing cost-shifting in the case.\textsuperscript{81} While some courts still apply the test unintentionally or under the guise of more accepted standards, the Rowe factors "were quickly superseded by a modified seven-factor test articulated in the first reported decision in Zubulake v. UBS Warburg LLC (Zubulake I)."\textsuperscript{82}

B. Zubulake

Zubulake usually refers to a line of five decisions authored by Judge Scheindlin on several e-discovery issues that arose in one lawsuit.\textsuperscript{83} In discussing the groundbreaking nature of the decisions, it has been noted:

Zubulake I is generally considered the first definitive case in the United States on a wide range of e-discovery issues. These issues include:

- The scope of a party’s duty to preserve electronic evidence during the course of litigation;
- Lawyers’ duty to monitor their clients’ compliance with electronic data preservation and production;
- Data sampling;
- The ability for the disclosing party to shift the costs of restoring "inaccessible" backup tapes to the requesting party;

\textsuperscript{78} Id.

\textsuperscript{79} Withers 3, supra note 11, at 210.


\textsuperscript{81} Id. (citing 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)).

\textsuperscript{82} Withers 3, supra note 11, at 210.

\textsuperscript{83} See Zubulake v. UBS Warburg LLC (Zubulake I), 217 F.R.D. 309 (S.D.N.Y. 2003); see also Zubulake v. UBS Warburg LLC (Zubulake II), 230 F.R.D. 290 (S.D.N.Y. 2003); see also Zubulake v. UBS Warburg LLC (Zubulake III), 216 F.R.D. 280 (S.D.N.Y. 2003); see also Zubulake v. UBS Warburg LLC (Zubulake IV), 220 F.R.D. 212 (S.D.N.Y. 2003); see also Zubulake v. UBS Warburg LLC (Zubulake V), 229 F.R.D. 422 (S.D.N.Y. 2004).
The imposition of sanctions for the spoliation (or destruction) of electronic evidence.\textsuperscript{84}

The dispute involved a sex discrimination suit against a financial services company with the discovery issue first arising when the plaintiff requested additional production beyond the 100 pages of e-mail previously produced by the defendants.\textsuperscript{85} Plaintiff produced evidence that e-mails on backup tapes and other electronic storage contained information relevant to the case and should therefore be retrieved by UBS.\textsuperscript{86} UBS objected to such production, however, estimating the cost to be approximately $300,000.\textsuperscript{87} The court found that the information requested was clearly relevant and discoverable, but the issue was the allocation of expenses.\textsuperscript{88} Both parties agreed that the court should apply the Rowe factors in determining whether or not to shift the costs.\textsuperscript{89} In an important point, Judge Scheindlin noted that many courts often assume undue burdens or expenses under the Rowe test.\textsuperscript{90} She continued that, in reality, cost-shifting should be used only in circumstances when the information is inaccessible, while accessible data would fall under the normal rules of discovery and the responding party would be responsible for the expenses.\textsuperscript{91} Judge Scheindlin went on to list the five types of typical electronic storage from most to least accessible: (1) active, online data; (2) near-line data; (3) offline storage/archives; (4) backup tapes; and (5) erased, fragmented or damaged data.\textsuperscript{92} The first three categories are considered "accessible" as they are in readily usable formats while the latter two are "inaccessible" and in need of restoration or reconstruction.\textsuperscript{93} This innovative approach and classification adopted by Judge Scheindlin would be crucial in this and future resolutions of e-discovery disputes, as it was the first attempt by a court to create any bright-line distinction between the different types of electronically-stored information.

Since ninety-four potentially responsive backup tapes were identified, the court found that "it is therefore appropriate to consider cost-shifting."\textsuperscript{94} In doing so, the court began with the Rowe test and determined that the fac-

\textsuperscript{84} Kroll OnTrack, “Zubulake v. UBS Warburg,” http://www.krollontrack.co.uk/zubulake/.
\textsuperscript{85} Zubulake 1, 217 F.R.D. at 312–13.
\textsuperscript{86} Id. at 313.
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 316.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 318.
\textsuperscript{91} Id. at 318–20.
\textsuperscript{92} Id. at 318–19.
\textsuperscript{93} Id. at 319–20.
\textsuperscript{94} Id. at 320.
tors were incomplete and a modification of the test was necessary. In discussing Rowe’s inefficiencies, the court noted its exclusion of the explicit Rule 26 factors stating, “Rowe makes no mention of either [the] amount in controversy or the importance of the issues at stake in the litigation.”

Therefore, Judge Scheindlin went on to create a new seven-factor test with unequal weight, listed below in order of importance:

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

Ultimately, the court decided on a “test run” similar to that utilized in McPeek, as the volume of backup tape at UBS was of the same class as that of the DOJ and full restoration would be unreasonable. The court also noted the empirical usefulness of a test run, stating that “by requiring a sample restoration of backup tapes, the entire cost-shifting analysis can be grounded in fact rather than guesswork.” In considering Judge Scheindlin’s footnote to the previous statement, it is hard to miss her tone as she goes out of her way to educate other jurists, pointing out the many errors that courts have made in their e-discovery analyses. The note states: “Of course, where the cost of a sample restoration is significant compared to the value of the suit, or where the suit itself is patently frivolous, even this minor effort [a test run] may be inappropriate.” Judge Scheindlin utilizes this particular tone throughout the decision when she refers to the way other courts have treated e-discovery. Perhaps she is justified in educating her colleagues, as her opinions in the Zubulake cases “have withstood the test of time” and

95. Id. at 321.
96. Id. at n.77 (emphasis in original).
97. Id. at 322.
98. Id. at 324.
99. Id.
100. See id.
101. Id. (emphasis in original).
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continue to factor into various courts’ treatment of e-discovery and heavily influenced the 2006 Amendments to the Federal Rules of Civil Procedure.102

C. Wiginton

Despite the Zubulake test being accepted as the dominant test for cost-shifting questions, not all courts felt that the test was comprehensive. In Wiginton v. CB Richard Ellis, Inc., the Northern District of Illinois modified the Zubulake test to include a statutory factor overlooked by the Rowe and Zubulake courts.103 The case involved a sexual harassment class-action suit against a large national real estate corporation, and the plaintiff sought an examination of backup tapes for discovery of e-mails containing pornographic material that was distributed to the defendant’s offices throughout the country.104 The defendant originally produced ninety-four backup tapes containing approximately 17,375 documents, with between 142 and 567 of those being responsive.105 The price tag for the expert to review and restore documents was reported to be $249,000.106 In determining the test to be applied, the court agreed “with both the Rowe court and the Zubulake court that the marginal utility test is the most important factor.”107 While accepting the Rowe and Zubulake factors as the guide, the court added that it found that “the proportionality test set forth in Rule 26(b)(2)(iii) must shape the test.”108 Therefore, the court modified the test to include a factor considering “the importance of the requested discovery in resolving the issues of the litigation.”109 The eight factors adopted by the Wiginton court are:

1. the likelihood of discovering critical information;
2. the availability of such information from other sources;
3. the amount in controversy as compared to the total cost of production;
4. the parties’ resources as compared to the total cost of production;
5. the relative ability of each party to control costs and its incentive to do so;
6. the importance of the issues at stake in the litigation;
7. the importance of the requested discovery in resolving the issues at stake in the litigation; and

102. Withers 3, supra note 11, at 211.
104. Id. at 569–70.
105. Id. at 570–72.
106. Id.
107. Id. at 572.
108. Id.
109. Id. at 572–73.
8. the relative benefits to the parties of obtaining the information.110

Addressing the “proportionality” test prescribed by Rule 26(b)(2)(iii) and articulated as factor seven in the test, the court stated, “[a]s there is reason to believe that the requested discovery would assist in resolving the issues at stake in this case, but because there is also other evidence to support Plaintiffs’ claims, we find that this factor weighs slightly in favor of cost-shifting.”111 This, along with the other factors, favored conducting a cost-shifting, but not so much as to totally overcome the presumption that the responding party pays discovery costs.112 Therefore, the court ordered that the plaintiffs pay 75% and CB Richard Ellis be responsible for 25%.113

VII. 2006 AMENDMENTS

In 1999, the Advisory Committee for the Federal Rules of Civil Procedure set out to address the new issues that were arising due to the difficulties incorporating electronic information into the traditional discovery process. Ken Withers described the Committee’s task as answering three questions:

The first question was, what are the differences between conventional and electronic discovery? The second question was, do these differences create problems that can or need to be addressed through changes in the Rules of Civil Procedure? And finally, if there are problems that rulemaking can or should address, what rules can be crafted to serve that purpose? The answers to these questions were far from obvious at the start, and well into the rulemaking process there were many who questioned the need for any rulemaking in this area at all.114

It is now obvious that conventional and e-discovery are indeed distinct, with many of the “fundamental” differences that define the gap described above. In addressing the second question posed by Withers, Congress has clearly answered in the affirmative, adopting several new provisions and altering a few existing parts of the discovery portion of the Federal Rules to help courts tackle both the new difficulties presented by e-discovery and the differences between paper-based discovery and electronically stored information.115 In its report on amendment progress, the Rules Committee set out its purpose to “determine whether changes could be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and

110. Id. at 573.

111. Id. at 577.

112. Id.

113. Id.

114. Withers 3, supra note 11, at *66.

115. Id. at *7.
to encourage the judiciary to participate more actively in case management when appropriate.”

With amendments to Rules 26, 34, and 37 of the Federal Rules of Civil Procedure, the Rules Committee and the Supreme Court attempted to address some of the most critical issues of e-discovery that courts have wrestled with over the past twenty years. Two such amendments include changes to Rule 34, the first change being a slight alteration to the definition of “document,” with the Committee finding the previous one generally effective. The second change to Rule 34 deals with forms of production, and although it will not be the focus of this paper, it is growing into a larger issue in e-discovery disputes. One brief note of importance on the amended Rule 34 is that a requesting party is still not allowed to search the responding party’s


117. See Withers 3, supra note 11, at *64–66.

118. See Fed. R. Civ. P. 34(a), advisory committee’s note (2006 amendment) (Section (a) changes only by adding electronically stored information to the definition of “document”, as the notes discuss the effectiveness of the “data compilations” provision added in 1970); Withers 3, supra note 11, at *64–116 (on Rule 34(a), Withers notes: “While it was clear that digital information could no longer be treated in Rule 34 as a subset of documents, there was little support for completely rewriting Rule 34(a) to eliminate all references to tangible media, although the suggestion was made. Instead, the language was updated slightly and the “data compilations” language which has served so well since 1970 was preserved. But the phrase “electronically stored information” was added on an equal footing with “documents,” both in the title of the new rule and in the text.”).

119. See Fed. R. Civ. P. 34(b) advisory committee’s note (2006 amendment)(Section (b) deals with form of production in a logical way noting: 1) Rule 26(f) encouragement that parties discuss form, 2) the requesting party specify a form, 3) a responding party may object and a hearing will likely result, and 4) if form is not specified by requesting party, “the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable.”); Withers 3, supra note 11, at *64–116 (on Rule 34(b), Withers notes: “Form-of-production disputes are becoming more frequent in discovery as more choices in the form of production become available to parties. In the context of electronic discovery the form of production becomes much more than a question of cost, convenience, or logistics. The forms in which electronically stored information can be produced become strategic decisions for both requesting and responding parties, as each form conveys different information and allows different levels of analysis, as well as logistical advantages and disadvantages.”).
computers or records. However, the restriction is not absolute, as the Advisory Committee Notes to the new rule make clear:

Inspection or testing of certain types of electronically stored information or of a responding party’s electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

An example of such circumstances: courts have found that such access is justified in cases involving both trade secrets and electronic evidence, and “granted permission to obtain mirror images of the computer equipment which may contain electronic data related to the alleged violation.”

The next amendment of note is a completely new provision that was added to Rule 37 stating:

(f) Failure to Participate in Framing a Discovery Plan. If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney’s fees, caused by the failure.

Rule 37(f) enacts a “safe harbor” provision meaning that “absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.” As Withers notes, “this short rule contains several puzzles to be worked out by judges on a case by case basis.” He continues with several examples of ambiguity:

“Absent exceptional circumstances . . . .” Perhaps this is an attempt to restore the factor of prejudice to the requesting party’s case.

“ . . . a court may not impose sanctions under these rules . . . .” A judge has inherent authority or contempt powers outside these rules, of course.

120. See Ameriwood Indus., Inc. v. Liberman, No. 4:06CV524-DJS, 2006 WL 3825291, at *2 (E.D. Mo. 2006).
123. Fed. R. Civ. P. 37(f) advisory committee’s note (2006 amendment) (The committee notes “Subdivision (f) is new.”).
124. Id.
125. Withers 3, supra note 11, at *109.
"... on a party ..." This phrase explicitly excludes the non-party served with a subpoena *duces tecum* for electronically stored information under Rule 45.

"... for failing to provide electronically stored information lost as a result of the routine, good-faith operation ... ." What is a routine, good-faith operation?

"... of an electronic information system." What is an electronic information system? Does it include the human beings who run it?126

Finally, the various changes to Rule 26 dealing with the burdens and expenses of privilege review, accessibility, and volume, as well as the encouragement of party agreements, are of the most importance to this paper.127

VIII. THE TWO-TIERS OF ACCESSIBILITY AND "GOOD CAUSE"

In balancing the burden and expenses of e-discovery, it is now codified under Rule 26(b)(2)(B) that courts must analyze the accessibility of the requested information under the two tiers established by the *Zubulake* court.128 The first tier includes that which is considered readily accessible due to where the data is being stored; therefore, this electronic information should be produced assuming no other limitations under the rules.129 Discovery issues arise with tier-two information labeled "inaccessible" by the *Zubulake* court.130 Under the new rule, responding parties are initially not required to produce upon a claim that the information requested is "not readily accessible because of undue burden or cost."131 Similar to how the *Zubulake* Court adopted the factor test in weighing the burdens and expenses of producing

126. *Id.* at *110–14.

127. Fed. R. Civ. P. 26(a), (b)(2), (b)(5), (f) advisory committee's note (2006 amendment) (26(a)(1)(B) was changed "to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information;" Rule 26(b)(2) addresses inaccessible data, adopting the two-tiered system of *Zubulake*, creating the "good cause" provision and dispatching the old proportionality test of section (b)(2)(C) in favor of the considerations and limitations stated in (b)(2)(C)(iii) that courts should consider when weighing good cause and cost-shifting analysis; 26(b)(5) deals with "the risk of privilege waiver, and the work necessary to avoid it," and how it "add[s] to the costs and delay of discovery;" 26(f) is added to order parties to discuss how they are going to handle the discovery of electronically stored information, as the notes state, "when the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.").


the information sought, Section (b)(2)(B) sets out further steps for considering the inaccessible information. First, the requesting party files a motion to compel in order to show that the information is not reasonably accessible because of undue burden or cost. However, even if the party meets its burden, the court can still compel production upon a showing of "good cause" by the requesting party, subject only to the limitations of Section (b)(2)(C). This ambiguous standard has caused a good deal of controversy and confusion among judges and lawyers attempting to decipher the cryptic message of the amended rule.

In considering whether "good cause" can be shown, courts look to the factors noted in Section (b)(2)(C)(iii): "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." While not a complete list of the factors considered in Zubel-lake, Rowe, or Wiginton, advisory committee notes provide seven "appropriate considerations" including:

1. the specificity of the discovery request;
2. the quantity of information obtainable 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 from 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.

A tremendous problem arises if courts use these factors to interpret good cause: "[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."

132. Id.
133. Id.
134. Id.
137. FED. R. CIV. P. 26(b)(2) advisory committee's note (2006 amendment).
Even when employed properly, the good cause analysis gives little to no guidance, making some judges and scholars wonder whether they should ignore the "changes" and simply apply the previous standards of Rowe, Zubulake, Wiginton, and other courts that provide greater direction for analysis of electronically stored information.\footnote{139} One association of judges wonders whether there is any sense in analyzing the good cause standard as it appears to simply refer to the factors in Section (b)(2)(C), noting, "the proposed amendment is potentially redundant . . . [I]t is unclear whether the good cause analysis is intended to be something different than what courts already are doing under Rule 26(b)(2)(C)]."\footnote{140}

Given the numerous criticisms of the 2006 Amendments, it is fairly certain that the courts will adopt a variety of interpretations. Uniformity will be addressed, but it should be noted here because of the ambiguity of any "good cause" and the uniformity issues that it has and will cause as long as district courts decide almost all decisions on e-discovery issues.\footnote{141} Because of the nature of this procedure, the opinions of the district court "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."[142] Until a clear standard is created by the rules committee, or these issues begin to reach the appellate courts, the “good cause” standard will remain ambiguous and continue to spark controversy.

IX. PRIVILEGE REVIEW

Privilege review and protection are rarely considered to have the same significance as issues of accessibility, but as the Advisory Committee notes, “the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery.”[143] In the e-discovery era, the risks and costs are greater: “When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed.”[144]

In Rule 26(b)(5), the Advisory Committee deals with these difficulties by creating, in subsection (A), a provision to deal with information withheld because it is deemed privileged by the responding party and, in subsection (B), by addressing accidental production of information later claimed to be privileged.[145] Subsection (A) is fairly straightforward; it allows parties to withhold information that they claim is privileged, requires the requesting party to challenge the claim, and allows a court to determine the final validity of the privilege claim.[146] Subsection (B) is the more controversial provision as it provides a procedure for dealing with a post-production claim of privilege by the responding party.[147] The Committee’s approach to privilege review, working in conjunction with Rule 26(f), strongly encourages parties to discuss how they are going to deal with the issue throughout discovery and the rest of the litigation.[148] A couple of different types of agreements were used by parties to limit problems and risk during the years before the 2006 Amendments.[149]

These agreements have faced mixed reactions from courts. Many courts, including Zubulake, encouraged such agreements, while others ex-

142. Id. at 78–79 (citing Pauline T. Kim, Lower Court Discretion, 82 N.Y.U. L. REV. 383, 425–26 (2007)).
143. FED. R. CIV. P. 26(b)(5) advisory committee’s note (2006 amendment).
144. Id.
145. See FED. R. CIV. P. 26(b)(5).
146. See id.
147. See id.
149. Withers 3, supra note 11, *93–95.
pressed hostility toward this approach.发动机。Two agreements in particular received the most attention and were considered by the Advisory Committee.发动机。The first is the “open peek” agreement where “[t]he parties agree to an ‘open file’ review of each other’s data collections prior to formal discovery, reserving all rights to assert privilege when responding to the actual document request.”发动机。Following this review, “the parties designate the files or data sources that they believe are most relevant to their case, and submit a formal Rule 34 request listing those items.”发动机。This type of agreement promotes efficiency and “the parties can dramatically reduce the scope and cost of privilege review, and the scope and cost of discovery itself.”发动机。

Despite these advantages, “open peek” agreements are rare because they “demand the highest degree of trust between opposing counsel, and [are] open to attack from the parallel litigant in another jurisdiction, who may claim that the very existence of such an agreement is evidence that the parties willingly and knowingly waived privilege by opening their files to opposing counsel.”发动机。The 2006 Amendments encourage parties to enter into open peek agreements, but in recognition of the potential risk, the rule makers drafted Rule 26(b)(5)(B) as the default provision for dealing with privilege in the form of what was called a “clawback” agreement in pre-amendment case law.发动机。

Subsection (B) states:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified informa-

150. See, e.g. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) ("Indeed, many parties to document-intensive litigation enter into so-called “claw-back” agreements that allow the parties to forego privilege review altogether in favor of an agreement to return inadvertently produced privileged documents. The parties here can still reach such an agreement with respect to the remaining seventy-two tapes and thereby avoid any cost of reviewing these tapes for privilege.”); Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D 109, 118 (D.N.J. 2002) ("the court observes that such blanket provisions, essentially immunizing attorneys from negligent handling of documents, could lead to sloppy attorney review and improper disclosure which could jeopardize clients’ cases").

152. Withers 3, supra note 11, *94.
153. Id.
154. Id.
155. Id. at *95.
156. Id. at *96; see also Fed. R. Civ. P. 26(b)(5) advisory committee’s note (2006 amendment).
tion and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.\textsuperscript{157}

This codification of the clawback method leaves out many of the provisions that made the agreement appealing to parties and courts in preventing future disputes. In fact, while it is the default rule under the amendments, the clawback method functions best when entered into between the parties because the details are ironed out prior to discovery, and as some encourage, included by the judge in the case-management order.\textsuperscript{158} Agreements between parties would generally stipulate a reasonable amount of time, acceptable to both parties, for the clawback to be asserted by the producing party.\textsuperscript{159} Even those issues supposedly accounted for in the amendments leave questions unanswered, which can lead to even more disputes than the rules were created to prevent, including what to do with information once privilege is claimed and the numerous risks that have caused courts to reject clawback agreements pre-amendment. A published comment by the Sedona Conference, a group of leading experts on e-discovery, states that “there are a host of risks and problems that make ‘clawback’ productions impracticable and for most cases, ill-advised.”\textsuperscript{160} These problems should have been an indicator to the Advisory Committee that it was not in the interest of efficiency and improvement in the area of e-discovery for such a method to be the default rule. The issues mentioned above, along with a number of unanswered ques-

\begin{footnotes}
\item FED. R. CIV. P. 26(b)(5)(B).
\item Withers 3, supra note 11, *93.
\item THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 5 (2d ed. 2007) [hereinafter THE SEDONA CONFERENCE], http://www.sedonaconference.org/publications-html (Comment 10d: stating four problems with the agreements including “inconsistent with the tenets of privilege law,” possible non-effect in other jurisdictions, contradiction with lawyer’s duty to guard client’s secrets, Pandora’s box of possible third party issues; “Given these concerns, and the due process issues attendant to the potential deprivation of privilege and property rights that could accompany a waiver determination, courts should not compel use of a ‘clawback’ procedure over the objection of a producing party. Even when large volumes of electronic documents are involved, parties are well-advised to search for privileged documents before production, while obtaining a court order that inadvertent production of privileged material does not waive privilege.”); See, e.g., Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, at 562 (W.D. Tenn. 2003).
\end{footnotes}
tions regarding the effectiveness of the method in preventing waiver, should have raised a red flag for the Committee, and it should have stopped them before they started.161

X. OTHER PROVISIONS AND GENERAL THOUGHTS ON THE AMENDMENTS

Rule 26(f), ordering parties to conference to discuss issues relating to e-discovery and to prepare a discovery plan, is perhaps the amendment best set to resolve the volume, accessibility, cost, and time problems presented by e-discovery.162 While the amendments are at places unhelpful, and possibly exacerbate the problems, it is hard to criticize a task as difficult as tackling these complicated, constantly changing, and extremely fact-sensitive issues. The goal of the Advisory Committee was to create rules that could endure changes in technology, provide uniformity in approach to e-discovery, and in turn, codify a set of guideposts for courts to look to in addressing these complicated issues.163 Only the most unrealistic or stubborn person would argue that they fully achieved these goals and that work on these issues is done. In reality, the discovery plan ordered by Rule 26(f) will be the most effective in limiting the burdens and expenses of e-discovery on a case by case basis.164

It may be that it is impossible to codify federal rules incorporating the differences in every forum that endure the constant change of technology and provide uniform guidance for courts across the country to apply the same standards in dealing with the expense and burdens that are unique to e-discovery. In considering the approach taken by the Texas rules and case law, it is apparent that the size and nature of the jurisdiction governed by these rules certainly plays a part in the relative success Texas has had in the area.

XI. TEXAS RULES AND IN RE WEEKLEY HOMES, L.P.

In 1999, the Advisory Committee to the Federal Rules set a plan in motion to amend some of the rules of civil procedure governing e-discovery in order to help with a growing problem of tremendous burden and expense

161. Fed. R. Civ. P. 26(b)(5) advisory committee’s note (2006 Amendment; The Advisory Committee justifies the rule with an argument that the “clawback” method is enacted by rule and therefore cannot constitute a waiver, but the official note admits “Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information.”).
to parties with the subsequent effect of slowing discovery.\textsuperscript{165} While the Amendments were not released until the end of 2006, it turns out that the Advisory Committee was far behind before it started.

Texas had already taken the lead in handling the issues posed by e-discovery, adopting rule changes in 1999, becoming one of the first states to amend its rules to face these new issues.\textsuperscript{166} Texas does not appear to have dealt with the same level of difficulties and criticism that the federal rules have faced as a result of its amendments. However, Texas does not face all of the issues that federal rules must account for including uniformity, diversity of citizenship, federal questions, and uncapped damages. Additionally—and significantly—the number of cases filed in federal court dwarfs the relatively few cases that Texas courts have faced on the issues.\textsuperscript{167} Texas courts have the added advantage of being able to look to the federal rules and federal case law to aid in e-discovery analysis.\textsuperscript{168} As one would expect, the federal rules and Texas rules governing e-discovery are generally decisions that courts come to in addressing similar questions.\textsuperscript{169}

The first difference of note is the similarity of Rule 192.3 of the Texas Rules to the old federal rules in that it contains no reference to electronically stored information like the amended Federal Rule 26, which now includes a provision referencing "electronically stored information."\textsuperscript{170} In fact, the

\footnotesize{\textsuperscript{165} Withers 3, supra note 11, at *24.}


\footnotesize{\textsuperscript{167} Texas Municipal League, E-Discovery, Fighting Over “Smoking Gun” Emails: The Nightmare Begins at 8 (Sept. 26, 2007), http://www.tml.org/legal_pdf/E-Discovery.pdf.}

\footnotesize{\textsuperscript{168} See id.; see, e.g., In re Weekley Homes, L.P., 295 S.W.3d 309, 316–20 (Tex. 2009); In re Honza, 242 S.W.3d 578, 582–84 (Tex. Civ. App.—Waco 2008).}

\footnotesize{\textsuperscript{169} See Texas Municipal League, supra note 167, at 9.}

\footnotesize{\textsuperscript{170} C.f. Fed R. Civ. P. 26(a)(1)(A)(ii) (stating “Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties . . . a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.”) with Tex. R. Civ. P. 192.3(b) (“A party may obtain discovery of the existence, description, nature, custody, condition, location, and contents of documents and tangible things (including papers, books, accounts, drawings, graphs, charts, photographs, electronic or videotape recordings, data, and data compilations) that constitute or contain matters relevant to the subject matter of the action. A person is required to produce a document or tangible thing that is within the person’s possession, custody, or control.”).}
Texas rule governing scope includes the same provision as the old federal rules for “data and data compilations.” However, lawmakers felt no need to amend the rule because Texas courts have consistently found that this provision recognizes electronic information as within the scope of discovery. This rule may work for Texas, but it is a provision proven too broad for the decisiveness and uniformity that the federal rules require to be effective.

As previously mentioned, privilege review has been an immense problem for the federal courts. Texas has not had similar problems due to the narrow and comprehensive drafting of Rule 193 governing the issue of privilege review. Specifically, the rule governing waiver was cited during the federal rule drafting process as a model for federal privilege review. The provision provides that when a party accidentally produces privileged material, the party:

- does not waive [the privilege] claim under these rules or the Rules of Evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted.

The rule continues with a clawback type order stating that “[i]f the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.”

XII. In re Weekley Homes, L.P.

In one of the few Texas Supreme Court cases dealing directly with e-discovery, the court addressed the issues of specificity of request, accessibility, and access. Alleging fraud, real estate developer HFG brought suit against another real estate developer, Enclave, who had sold its properties

171. Tex. R. Civ. P. 192.3.
172. See In re Weekley Homes, L.P., 295 S.W.3d at 313–314 (citing Tex. R. Civ. P. 192.3(b) cmt.—1999); In re CI Host, Inc., 92 S.W.3d 514, 516 (Tex. 2002).
173. Hytken, supra note 163, at 885.
174. See supra Part III.B.
176. The Sedona Conference, supra note 160.
177. Tex. R. Civ. P. 193.3(d).
and later defaulted on its obligations in a development where homebuilder Weekley Homes owned the other lots. HFG subpoenaed documents from Weekley that led it to believe Weekley had similarly made material misrepresentations. HFG then added Weekley to the suit and served the homebuilder with several requests including "a broad variety of emails to and from Weekley and its employees relating to Enclave, the subdivision and the Builder Contract." Out of thirty-one responsive emails, Weekley produced only one regarding a $92,000 expense used to correct safety issues. Unconvinced there was only one responsive email, HFG moved to compel production and upon denial, moved for access to four Weekley employees' computers for an expert to conduct forensic imaging searching for twenty-one specified terms. The trial court granted access, and Weekley filed for mandamus relief. The court of appeals denied the motion, but the Texas Supreme Court granted oral argument.

Weekley argued—and the court agreed—that Rule 196.4 governs requests for electronic production, stating "[e]-mails and deleted e-mails stored in electronic or magnetic form (as opposed to being printed out) are clearly 'electronic information.'" Rule 196.4 states that "[t]o obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced." Weekley challenged the request by HFG because the real estate developer did not specifically request deleted e-mails. The court agreed that the request was not specifically tailored but stated that Weekley clearly understood the scope of the request given the circumstances of the case. The court set a strong precedent and put future parties on notice by cautioning that "[t]o ensure compliance with the rules and avoid confusion, however, parties seeking production of deleted e-mails should expressly request them."

The second part of Rule 196.4 is similar to Federal Rule 26(b)(2) in that it codifies the two-tier test described previously, stating:

181. Id. at 311–12.
182. Id. at 312.
183. Id.
184. Id.
185. Id. at 312–13.
186. Id. at 313.
187. Id.
188. Id. at 314.
189. TEX. R. CIV. P. 196.4.
191. Id.
192. Id. at 315.
If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.  

As the Texas rules do not state an approach for dealing with “inaccessible” electronically stored information, the court looked to the federal rules and other approaches taken by federal courts.  

One possible solution discussed by courts deals with finding scope, “which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.” In considering this and other options, the court made two crucial points. First, “[t]o the extent possible, courts should be mindful of protecting sensitive information and should choose the least intrusive means of retrieval.” The second point the court noted is “when the court orders production of not-reasonably-available information, the court ‘must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.’” Noting the trial court’s decision to grant access to the computers, it must have been found that “the deleted emails were not reasonably available and required extraordinary steps for their retrieval and production.” Essentially accepting the information as “inaccessible,” the court described its duty as determining whether the procedure crafted by the trial court was an appropriate means of accessing information not readily accessible.  

The court continued by reviewing the relevant federal rules and approaches taken by several federal cases and concluded its review by noting its hesitance to approve such a method. First, the court cited the federal rules, stating, “[t]he comments to the federal rules make clear that, while direct ‘access [to a party’s electronic storage device] might be justified in

193. TEX. R. CIV. P. 196.4.  
194. In re Weekley Homes, L.P., 295 S.W.3d at 315–16.  
195. Id. (citing FED R. CIV. P. 26(b)(2)(B) advisory committee’s note (2006 amendment)).  
196. Id. at 316.  
197. Id. (citing TEX. R. CIV. P. 196.4).  
198. Id.  
199. Id.  
200. See id. at 317.
some circumstances,' the rules are 'not meant to create a routine right of direct access.'” The court continued, articulating that “[p]roviding access to information by ordering examination of a party’s electronic storage device is particularly intrusive and should be generally discouraged, just as permitting open access to a party’s file cabinets for general perusal would be.”

Ultimately finding that HFG did not meet its burden, the court noted the excessive intrusiveness in the method adopted by the trial court and that circumstances justifying such a procedure are narrow, extreme fact-specific cases.

The court went on to set out the method to address Rule 196.4 e-discovery issues in what will be the procedure for addressing Texas e-discovery:

i. the party seeking to discover electronic information must make a specific request for that information and specify the form of production. TEX. R. Civ. P. 196.4.

ii. The responding party must then produce any electronic information that is “responsive to the request and . . . reasonably available to the responding party in its ordinary course of business.” Id.

iii. If “the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested,” the responding party must object on those grounds. Id.

iv. The parties should make reasonable efforts to resolve the dispute without court intervention. TEX. R. Civ. P. 191.2.

v. If the parties are unable to resolve the dispute, either party may request a hearing on the objection, TEX. R. Civ. P. 193.4(a), at which the responding party must demonstrate that the requested information is not reasonably available because of undue burden or cost, TEX. R. Civ. P. 192.4(b).

vi. If the trial court determines the requested information is not reasonably available, the court may nevertheless order production upon a showing by the requesting party that the benefits of production outweigh the burdens imposed, again subject to Rule 192.4’s discovery limitations.

vii. If the benefits are shown to outweigh the burdens of production and the trial court orders production of information that is not reasonably available, sensitive information should be protected and the least intrusive means should be employed. TEX. R. Civ. P. 192.6(b). The requesting party must also pay the reasonable ex-

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201. Id. (citing FED. R. CIV. P. 34 advisory committee’s note (2006 amendment)).
202. Id.
203. Id. at 319–20.
penses of any extraordinary steps required to retrieve and produce the information. Tex. R. Civ. P. 196.4.

viii. Finally, when determining the means by which the sources should be searched and information produced, direct access to another party’s electronic storage devices is discouraged, and courts should be extremely cautious to guard against undue intrusion.204

Procedures numbered one through four are largely self-explanatory and simplistic so as to guide the parties through the initial stages of any e-discovery without having to involve the courts. Number five is the first point at which the courts become involved with one party bringing forward its objection to the discovery. As the court’s summary notes, the burden falls upon the responding party to prove an undue burden or cost or that the information is not reasonably available.205 The court accepts the trial court’s finding on this issue as they do not have the facts before them to determine whether Weekley has met this burden.206 While it is unlikely this would be considered an incredibly high burden given the sensitivity of the information that could possibly be at stake, the burden that falls upon the requesting party in procedure number six must be far more significant.

It is a natural result in this balancing test that because of the intrusive method and sensitive information inherent in such an inquiry, the burden placed upon the requesting party is elevated to show a high level of need and benefit that will result from ordering such production. The court rather quickly finds that HFG has not met this burden due to the gap in information and suspicion that this information exists is simply not great enough for them to meet that high burden.207 While the analysis of this case is less than helpful in attempting to determine the factors to be used in a future balancing test, the court’s discussion of Honza as a comparison helps to flush it out better.208

In briefly distinguishing what allowed the requesting party in Honza to meet its burden, the court gives three main reasons: (1) the documents requested were previously proven to exist; (2) the information sought from the hard drives had a direct and undeniable relationship to the requesting party’s claims; and (3) the requesting party already had a forensics expert who had testified as to the qualifications and method of retrieval.209 The first two reasons demonstrate that the court has adopted a burden that requires a fairly strong link between the claims and the requested information must have already been proven for any court to order such production. The third and final note deals more with procedure numbers seven and eight, which are not re-

204. Id. at 322.
205. Id.
206. Id. at 316.
207. Id. at 319–20.
208. See id. at 320–21.
209. Id.
ally discussed by this opinion given the court found that HFG did not meet its burden.

From some of the brief mentions of method and cost allocation, it appears the court has gone as far as it will go for now in discussing those matters. However, given the reliance on federal law, there seems to be reason to believe that the guidelines described above arising from the federal rules and federal case law should direct lower court’s inquiries until such a time when the Supreme Court needs to step in again to bring uniformity to any chaos that may exist.

XIII. CONCLUSION

While the Texas Rules appear to address the complications and problems presented by e-discovery sufficiently, and while the newest amendments of the Federal Rules in many ways mirror the Texas rules enacted seven years earlier,\(^\text{210}\) the reality is that these cases are very fact-specific. Unsurprisingly, the number of e-discovery disputes arising in Texas is far fewer than those seen in federal courts; however, the size and issues are also more easily managed and controlled where rules are uniform and authority is centralized.\(^\text{211}\) The complications of e-discovery do not fit well under narrow rules, as the unique facts of each case present different challenges than the case before it.

Uniformity will continue to be an issue, and the 2006 Amendments currently mandating the federal approach to e-discovery will probably need to be altered in favor of a different, more case-specific approach with numerous broad guidelines covering certain situations. Texas is not in the clear either. Texas has not changed its rules since 1999, and the Texas Supreme Court claims those rules fit current needs.\(^\text{212}\) However, the nature of technology requires constant adaptation of different forms of technology, including electronic storage and communication. This means that any approach adopted in the future will likely require alteration only a few years later. This type of constant change is not normal practice for rule makers; especially those who have become accustomed to the rigidity of the process throughout the decades of little to no change.

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\(^{210}\) Texas Municipal League, supra note 167, at 9.

\(^{211}\) See id. at 8.

\(^{212}\) See In re Weekley Homes, L.P., 295 S.W.3d 309, 316–17 (Tex. 2009).