# A *BEST PRACTICES GUIDE* TO HELP PRACTITIONERS AVOID A COURT ORDER FOR COST SHIFTING

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*In civil litigation, practitioners and courts honor the presumption that the responding party to a discovery request bears the cost of production (the "discovery presumption"). However, the prominence of electronically stored information in everyday life has significantly increased the costs of discovery. In turn, courts have begun to embrace the theory of cost shifting to protect parties from incurring an undue burden or expense when complying with discovery requests.*

*While cost shifting may protect a responding party from incurring exorbitant costs when responding to a discovery request, it leaves some practitioners without notice that they may be required to foot some of the e-discovery bill. To ensure that the discovery presumption remains intact and that cost shifting does not become a common practice, practitioners should employ certain procedural safeguards that may help them avoid a court order for cost shifting altogether.*

*The Sedona Conference, the Seventh Circuit, and Arizona have implemented procedural safeguards for practitioners to use to help navigate e-discovery and cost shifting. By taking the most efficient safeguards from each jurisdiction and combining them into a* Best Practices Guide, *this Note will provide practitioners with a practical set of tools that can help them decrease the costs of discovery and avoid a court order for cost shifting.*

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## INTRODUCTION

In a world of expensive litigation, discovery has been a significant factor that drives up the cost of litigation. Courts have historically operated under the assumption that a responding party should bear the burden of complying and producing the documents associated with a discovery request.[1] This presumption guided the legal world through an age where fulfilling discovery requests consisted of law-firm associates fishing through bankers boxes filled with hard copy documents to find the requested information.[2] Due to technological advances and

1. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 348 (1978) (discussing that a responding party to a discovery request is presumed to bear the burden of producing the requested information).

2. Nathan A. Hacker, *Discourse on Discovery: Request for Production of Documents*, DADSDIVORCE (Oct. 1, 2016), http://dadsdivorce.com/articles/discourse-on-discovery-request-for-production-of-documents/.

the development of electronically stored information ("ESI"),[3] the costs of producing discovery and electronic discovery ("e-discovery") have skyrocketed.[4] In response, courts have begun to push back against the discovery presumption. Specifically, courts have begun to order cost shifting when producing e-discovery would cause a significant burden for the responding party.[5]

This Note analyzes jurisdictional responses to e-discovery and cost shifting in three parts. Part I discusses seminal case law that addressed cost shifting. Part II analyzes the impact that the case law has had on civil justice reform. For example, courts have begun to widely accept cost shifting as a mechanism to protect parties from incurring undue burden or expense during the discovery process. However, the Federal Rules Committee responded by urging courts that cost shifting should not become a common practice. Therefore, this Note discusses procedural safeguards that the Sedona Conference, the Seventh Circuit Discovery Pilot Program, and the restyled Arizona Rules of Civil Procedure have implemented to help practitioners navigate the world of e-discovery and cost shifting. Finally, Part III introduces a *Best Practices Guide* that incorporates the most effective procedures from these jurisdictions. This *Best Practices Guide* includes an expanded proportionality test,[6] a proactive meet-and-confer requirement,[7] and an e-discovery liaison.[8] This *Best Practices Guide* also notifies practitioners of the ramifications that they may face if the procedural safeguards fail. Practitioners that use this *Best Practices Guide* throughout the discovery process may avoid a court order for cost shifting.

## I. E-DISCOVERY AND THE EMERGENCE OF COST SHIFTING

The Federal Rules of Civil Procedure allow for liberal discovery requests between parties to a lawsuit.[9] The policy behind this rule is to allow a party to

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3. Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 7 SEDONA CONF. J. 1, 2–3 (2006) (defining the phrase *electronically stored information* as "information created, manipulated, communicated, stored, and best utilized in digital form, requiring the computer hardware and software").

4. Electronically stored information is commonly referred to as "ESI" and may be referred to as such throughout this Note. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 (S.D.N.Y. 2003); *see also* Wade Peterson, *ENF: It's Time to Shuck Outdated Technology and Adopt a File Format for Today's E-discovery Needs*, METROPOLITAN CORP. COUNS. (Dec. 2, 2015, 10:58 AM), http://www.metrocorpcounsel.com/articles/33319/enf-it's-time-shuck-outdated-technology-and-adopt-file-format-today's-e-discovery-nee.

5. *See Zubulake*, 217 F.R.D. at 324. *See generally* Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 429 (S.D.N.Y. 2002); McPeek v. Ashcroft, 202 F.R.D. 31, 34 (D.D.C. 2001); *infra* Sections II.B, II.C, II.D.

6. *See infra* Section II.B.2.

7. *See infra* Sections II.C.1, II.D.1.

8. *See infra* Section II.C.1.

9. The Rules allow parties to discover any nonprivileged document that is relevant to their case. FED. R. CIV. P. 26(b)(1); *see* Bennett B. Borden et al., *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery*

become familiar with the strengths and weaknesses of its case before trial.[10] These liberal discovery rules are also a significant factor that heavily contribute to the ever-increasing costs of litigation.[11]

### *A. How Technology and Electronically Stored Information Have Elevated the Costs of Discovery*

Historically, complying with a discovery request included producing hard copy documents.[12] In doing so, parties honored the discovery presumption.[13] This presumption arose because parties were expected to bear the cost of producing documents that they kept for their own benefit.[14] For example, prior to ESI, a party was presumed to retain information "because that information [was] useful to it, as demonstrated by the fact that it [was] willing to bear the costs of retention."[15]

Today, organizations conduct business primarily through electronic means[16] and amass ESI daily.[17] This change in technology has also allowed businesses to retain and store information for longer periods of time.[18] Information is no longer kept because it is useful to its owner; it is kept because there "is no compelling reason to discard it."[19] Even if an individual or company wanted to discard its information, ESI remains stored on backup tapes even after it is deleted.[20] Backup tapes are considered "inaccessible"[21] data because unlike "a

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*Landscape and are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH. 10, 10 (2011).

10. *See* FED. R. CIV. P. 1; Borden et al., *supra* note 9, at 10; *see also Zubulake*, 217 F.R.D. at 311 (citing Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (discussing the balance between simplified notice pleading and liberal discovery rules)).

11. *Zubulake*, 217 F.R.D. at 311 (claiming that "the more information there is to discover, the more expensive it is to discover").

12. Hacker, *supra* note 2; *see* Peterson, *supra* note 4.

13. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 348 (1978).

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

15. *Id.*

16. *Id.*

17. According to a study done at the University of California, Berkeley, in 2002, nearly five exabytes of information were created and approximately 92% of that was ESI. Louis R. Pepe & Jared Cohane, *Document Retention, Electronic Discovery, E-discovery Cost Allocation and Spoilation of Evidence: the Four Horsemen of the Apocalypse in Litigation Today*, 80 CONN. B.J. 331, 332 (2006) (citing Peter Lyman & Hal R. Varian, *How Much Information 2003* (Oct. 27, 2003), http://groups.ischool.berkeley.edu/archive/how-much-info-2003/execsum.htm).

18. *See Rowe*, 205 F.R.D. at 429.

19. *Id.*

20. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 314 (S.D.N.Y. 2003); *see also* McPeek v. Ashcroft, 202 F.R.D. 31, 32 (D.D.C. 2001) (discussing that the purpose of having backup tapes is to permit recovery from a disaster, not to preserve information).

21. *Zubulake*, 217 F.R.D. at 320. A range of data from accessible to inaccessible includes the following: (1) active, online data (hard drives); (2) near-line data (optical disks); (3) offline storage archives (removable optical disk that can be labeled and stored on a shelf); (4) backup tapes; and (5) erased, fragmented, or damaged data. James M.

labeled file cabinet" of paper documents, backup tapes are generally randomly organized, and it is almost impossible to know what information is contained on each tape.[22] This makes locating and producing specific documents pursuant to a discovery request quite difficult.[23] The expenses of locating, extracting, and converting documents to an accessible format, and of reviewing documents for privilege is substantial.[24] Therefore, the rising cost of producing ESI, such as inaccessible data, forced courts to reevaluate the discovery presumption.[25]

### *B. Protecting a Party from Undue Burden or Expense*

Cost shifting is a mechanism that courts use to protect a party from bearing the substantial cost of producing enormous amounts of ESI.[26] According to the Federal Rules of Civil Procedure, a court may grant a protective order, such as a cost-shifting order, to protect a responding party from undue burden or expense.[27] Two seminal cases offered novel perspectives and analysis to the cost-shifting determination.[28]

In 2001, the court in *McPeek v. Ashcroft* addressed rising discovery costs of producing ESI and determined whether it was appropriate to shift the discovery costs from a responding party back to a requesting party.[29] In that case, the plaintiff, Steven McPeek, requested that his employer, the Department of Justice,[30] produce electronic records that had been deleted but were still stored on system

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Evangelista, *Polishing the "Gold Standard" on the E-Discovery Cost-Shifting Analysis:* Zubulake v. UBS Warburg, LLC, 9 J. TECH. L. & POL'Y 1, 8–9 (2004). A party to a lawsuit can request that a responding party produce inaccessible data in an accessible format. This request drives up the cost of producing ESI and can create an undue burden on the responding party. *See generally Zubulake*, 217 F.R.D. 309.

22. *McPeek*, 202 F.R.D. at 33 (addressing that backup tapes "capture all information at a given time and from a given server but do not catalogue it by subject matter").

23. *See generally id.* at 32.

24. "The costs associated with preservation and discovery of ESI have skyrocketed, often exceeding all other components of litigation expense." SUPREME COURT OF THE STATE OF ARIZONA, A CALL TO REFORM: THE COMMITTEE ON CIVIL JUSTICE REFORM'S REPORT TO THE ARIZONA JUDICIAL COUNCIL 1, 14 (Oct. 2016) [hereinafter COMMITTEE ON CIVIL JUSTICE REFORM], http://www.azcourts.gov/Portals/74/CJRC/Master%20CJRC%20Final%20Report%20and%20Recommendations.pdf; *see also Zubulake*, 217 F.R.D. at 311.

25. Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 431 (S.D.N.Y. 2002) (discussing that "a party that happens to retain vestigial data for no current business purposes . . . should not be put to the expense of producing it"); *see* United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 237 (S.D. Cal. 2015); *see also McPeek*, 202 F.R.D. at 34 (discussing a marginal-utility approach to a cost-shifting analysis). For an explanation of the discovery presumption, see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 348 (1978).

26. FED. R. CIV. P. 26(c)(1).

27. *Id.*

28. *Rowe*, 205 F.R.D. 421; *McPeek*, 202 F.R.D. at 31.

29. *McPeek*, 202 F.R.D. at 34.

30. *Id.*

backup tapes.[31] The defendant objected to the production and stated that the benefit that the information would bring to the plaintiff did not justify the burden on the defendant to produce the backup tapes.[32] The court employed a marginal-utility test to determine whether the issuance of cost shifting would be appropriate.[33]

One year after *McPeek*, the court in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.* analyzed a similar issue and found that it was appropriate to shift costs between the parties.[34] As part of a discrimination lawsuit, the plaintiffs in *Rowe* requested that the defendants produce emails located on system backup tapes, but the defendants objected alleging undue burden or expense.[35] The *Rowe* court determined the marginal-utility test was just one factor to consider when determining whether shifting the costs back to the requesting party was appropriate.[36] *Rowe* laid out an eight-factor balancing test.[37] The *Rowe* court found that several factors, including the lack of specificity in the plaintiff's discovery request along with the substantial cost that the responding party would incur, weighed in favor of shifting costs back to the requesting party (the plaintiffs).[38] The balancing test offered a temporary solution to managing the costs of e-discovery in circumstances where an undue burden is placed on the responding party.[39]

### *C. To Cost Shift or Not to Cost Shift?* Zubulake *Has the Answer*

In 2003, *Zubulake v. UBS Warburg LLC* addressed cost shifting and e-discovery.[40] In that case, Laura Zubulake sued her former employer for gender discrimination and illegal retaliation.[41] Zubulake requested that her former employer produce emails exchanged while she was employed. However, the emails were located on backup tapes in an inaccessible format.[42] Therefore, the

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31. *Id.*
32. *Id.* at 32.
33. The marginal-utility test stated that

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

*Id.* at 34.
34. Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 433 (S.D.N.Y. 2002).
35. *Id.* at 424.
36. *Id.* at 430.
37. The factors included the following: (1) the specificity of the discovery request; (2) the likelihood of finding responsive documents; (3) the accessibility of the information from different sources; (4) the reason the organization retained the documents; (5) the benefit to both litigants; (6) the total cost of production; (7) the ability to control production costs; and (8) the amount of resources each party has. *Id.* at 429.
38. *Id.* at 430.
39. *See generally id.* at 433.
40. *See* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 317 (S.D.N.Y. 2003).
41. *Id.* at 312.
42. *Id.* at 312–14.

*Zubulake* court was forced to consider whether shifting costs between the parties was appropriate because complying with the discovery request would have caused an undue burden for the responding party.[43]

The *Zubulake* court began by evaluating the *Rowe* cost-shifting analysis and criticized it on two grounds. First, *Zubulake* found that the *Rowe* eight-factor analysis unfairly favored cost shifting.[44] Nearly every court that used the *Rowe* test had found cost shifting to be appropriate.[45] Second, *Zubulake* found that some factors in the balancing test were more important than others and needed to be weighted in order of importance.[46]

With these critiques in mind, the *Zubulake* court devised a new balancing test.[47] The *Zubulake* test was comprised of seven factors: (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 incentives 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.[48] The court stated that the factors were to be weighted in "descending order of importance."[49] Utilizing this test, the *Zubulake* court found that shifting a percentage of the costs back to the requesting party was appropriate.[50]

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43. *Id.* at 312–13.

44. *Id.* at 323.

45. *Id.*

46. *Id.* (discussing how the first two factors in the analysis are among the most important). On the contrary, the court in *Rowe* weighed the factors equally, which may have caused the test to unfairly favor cost shifting. *Rowe* also failed to include certain factors that are identified in the Federal Rules of Civil Procedure. These factors included the amount in controversy and the importance of the issues at stake in the litigation. *Id.* at 321.

47. *Id.* at 322.

48. *Id.* The first two factors in the new test, make up the marginal-utility test from *McPeek v. Ashcroft*:

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

*Id.* at 323 (citing McPeek v. Ashcroft, 202 F.R.D. 31, 32 (D.D.C. 2001)). The next group of factors includes factors three, four, and five. This group of factors addresses cost issues and asks, "[h]ow expensive will this production be?" and "[w]ho can handle that expense?" *Id.* The third group includes factor six, and "will rarely come into play" but, when the factor is relevant, it will "predominate over the others." *Id.* The last factor, seven, is the least important. The court reasoned that it is "fair to presume that the response to a discovery request generally benefits the requesting party." *Id.*

49. *Id.*

50. *Id.* at 291.

Many jurisdictions have adopted the analysis in *Zubulake*.[51] Legal scholars have even referred to *Zubulake* as the "seminal reference on this issue."[52] From the time the *Zubulake* opinion was issued, courts have continued to employ the seven-factor test to determine whether cost shifting is appropriate.[53]

Unlike the test in *Rowe*, the *Zubulake* test does not unfairly favor cost shifting.[54] The *Zubulake* test provides a more balanced and impartial approach for courts to determine whether cost shifting is appropriate.[55] The courts that have followed *Zubulake* order cost shifting only when appropriate, adhering to the original presumption that a responding party should pay the cost of production when ordering cost shifting would be inappropriate.[56]

## II. JURISDICTIONAL RESPONSES TO *ZUBULAKE*: IMPLEMENTING PROCEDURES THAT CAN GUARD AGAINST COST SHIFTING

The *Zubulake* test was an important contribution to civil litigation that aimed to protect responding parties from incurring an undue burden or expense when complying with discovery requests.[57] The test has undoubtedly influenced case law, the Federal Rules of Procedure,[58] the Sedona Conference,[59] and state rules of civil procedure.[60]

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51. *See* United States *ex rel.* Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 238 (S.D. Cal. 2015) (using the *Zubulake* test to determine whether cost shifting was appropriate); Semsroth v. City of Wichita, 239 F.R.D. 630, 640 (D. Kan. 2006); Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp., 222 F.R.D. 594, 603 (E.D. Wis. 2004); OpenTV v. Liberate Techs., 219 F.R.D. 474, 476–79 (N.D. Cal. 2003); Xpedior Creditor Tr. v. Credit Suisse First Bos. (USA), Inc., 309 F. Supp. 2d 459, 459 (S.D.N.Y. 2003); Medtronic Sofamor Danek, Inc. v. Michelson, 229 F.R.D. 550, 562 (W.D. Tenn. 2003).

52. Evangelista, *supra* note 21, at 3.

53. *See Carter*, 305 F.R.D. at 238; *Semsroth*, 239 F.R.D. at 640; *Hagenmeyer N. Am., Inc.*, 222 F.R.D. at 603; *OpenTV*, 219 F.R.D. at 476–79; *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 459; *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562.

54. *See Carter*, 305 F.R.D. at 247 (declining to order cost shifting); *Semsroth*, 239 F.R.D. at 640 (determining that cost shifting was appropriate); *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 603; *OpenTV*, 219 F.R.D. at 476–79 (finding cost shifting to be appropriate); *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 459 (finding cost shifting to be inappropriate); *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562 (finding cost shifting was appropriate).

55. *See Semsroth*, 239 F.R.D. at 640; *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 603; *OpenTV*, 219 F.R.D. at 476; *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 465–66; *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562.

56. *See generally Semsroth*, 239 F.R.D. at 640; *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 603; *OpenTV*, 219 F.R.D. at 476; *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 465–66; *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562.

57. *See generally* Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 314 (S.D.N.Y. 2003).

58. *See* discussion *infra* Section II.A.

59. *See* discussion *infra* Section II.B.

60. *See* discussion *infra* Sections II.C–D.

The *Zubulake* test does not, however, provide practitioners with a bright-line rule that dictates when courts will order cost shifting.[61] Practitioners are left without clear notice as to when costs may be shifted back to their clients.[62] This is partially due to the fact that courts must analyze seven different factors to determine whether a specific instance warrants cost shifting.[63] This lack of clarity creates a financial risk that practitioners expose their clients to if they make too broad or too duplicative of a discovery request.[64]

One way to minimize the risk associated with this test is to employ procedural mechanisms that aim to help practitioners avoid court orders for cost shifting. This Part will look at the different jurisdictional responses to the *Zubulake* opinion and will further examine the procedural safeguards that have been implemented in jurisdictions that aim to protect practitioners from facing court orders.

### *A. The Federal Rules are Amended in Response to the E-Discovery Movement*

Rule 26 of the Federal Rules of Civil Procedure was amended (the "Amended Rule") in 2006 and 2015.[65] The 2006 Amended Rule required that a party make ESI accessible if requested through discovery.[66] The Rule was amended to recognize the difficulty and substantial costs associated with the retrieval of certain types of ESI, namely inaccessible data.[67] The Amended Rule states that "[a] party need not provide discovery of ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost."[68] Moreover, the Amended Rule delves into protective orders as they relate to the production of inaccessible data;[69] however, even if a party files a motion for a

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61. *See, e.g.*, *Semsroth*, 239 F.R.D. at 640 (declining to order cost shifting); *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 603 (determining that cost shifting was appropriate); *OpenTV*, 219 F.R.D. at 476–79 (finding cost shifting to be appropriate); *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 459 (finding cost shifting to be inappropriate); *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562 (finding cost shifting was appropriate).

62. *See generally Semsroth*, 239 F.R.D. at 640; *Hagemeyer N. Am., Inc.*, 222 F.R.D. at 603; *OpenTV*, 219 F.R.D. at 476; *Xpedior Creditor Tr.*, 309 F. Supp. 2d at 465–66; *Medtronic Sofamor Danek, Inc.*, 229 F.R.D. at 562.

63. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 322 (S.D.N.Y. 2003).

64. *See infra* note 67 and accompanying text.

65. FED. R. CIV. P. 26.

66. *Id.* 26(a)(1)(A)(ii).

67. *Id.* 26(b)(2)(B). "In 2006, Rule 26(b)(2) was amended to limit the discovery of ESI deemed not reasonably accessible by reason of the costs and burdens associated with retrieving such information." *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 292 (Oct. 2010) [hereinafter *Conference Commentary*], http://www.discoverypilot.com/sites/default/files/Proportionality2010.pdf. For more information on inaccessible data, see generally discussion *supra* note 21.

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

69. *Id.*

protective order, a court may still require that the information be produced but "may specify conditions for the discovery."[70]

The Federal Rules were once again amended in December 2015 to further respond to ESI's effect on the discovery process.[71] There are two noticeable changes in the 2015 Amended Rule that reflect the *Zubulake* opinion.[72]

*1. A Push for Proportionality*

The proportionality test was present in the Federal Rules of Civil Procedure before the 2015 Amended Rule.[73] The test required practitioners to limit the scope of discovery and make discovery requests proportional.[74] For example, a proportional discovery request was one that did not produce duplicative or repetitive documents.[75] Additionally, courts would look to any undue burden or expense associated with producing the desired documents when determining whether a request was proportional.[76] Overall, the Federal Rules required that a discovery request be specifically tailored and proportional.[77] The proportionality test was a mechanism used to reduce the costs associated with discovery.[78] The 2015 Amended Rule brought about two noticeable changes to the test.[79]

First, the test was physically moved up within the sections of the Rule.[80] The test now finds its place in subsection (b) amongst the privilege and relevancy rules.[81] The move "restored the proportionality factors to their original place in defining the scope of discovery."[82] The move signaled to practitioners that the proportionality factors were among some of the most important components to consider when they make discovery requests.[83]

Second, the 2015 Amended Rule incorporated the language of the *Zubulake* seven-factor-cost-shifting test into the proportionality analysis.[84]

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70. For example, a court can order that costs be shifted between the parties as part of a conditional discovery request. *Id.*

71. FED. R. CIV. P. 26; *see also* COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 14 (stating that "the rules governing discovery of documents have not kept pace with the proliferation of electronic data").

72. FED. R. CIV. P. 26.

73. *Id.*

74. *Id.* 26(b)(1).

75. *Id.*; *see Conference Commentary*, *supra* note 67, at 300.

76. FED. R. CIV. P. 26(b)(1). Disproportionate discovery requests lead to shifting costs back to the requesting party. *Id.* (discussing the Advisory Committee Notes to 2006 Amendments to FED. R. CIV. P. 26(b)(2)).

77. *See id.*

78. *Id.*

79. *See infra* notes 80–86 and accompanying text.

80. *See* FED. R. CIV. P. 26(b)(1).

81. *Id.*

82. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

83. *Id.*

84. The proportionality test states that a party can obtain information that is proportional to the needs to the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties'

However, the change was not intended to place the burden on the requesting party to consider all the proportionality factors prior to making a request.[85] The Rules Committee urged that "the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider [the factors] in resolving discovery disputes."[86]

The proportionality test is an important procedural mechanism that the amendment strengthened.[87] If practitioners strive to make proportional requests, this could reduce the need for court intervention and may reduce the likelihood that a court will order cost shifting.[88] Therefore, this mechanism is beneficial to incorporate into this *Best Practices Guide* and is discussed in Part III.

*2. Cost Shifting Should Not Become a Common Practice*

The Amended Rule also granted courts the express authority to order cost shifting.[89] Under Amended Rule 26(c), litigants have the opportunity to file a protective order should the party feel that complying with a discovery request would cause them an undue burden or expense.[90] Courts may respond to a protective order by requiring parties to shift discovery.[91] In conjunction with this amendment, the Advisory Committee noted that cost shifting should not become a common practice.[92] The Committee warned that a court's willingness to shift discovery costs between parties should not replace limited and specifically tailored discovery requests that comply with the proportionality test in Rule 26(b)(1).[93] Thus, although courts are expressly authorized to issue cost shifting, a party should

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> relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

FED. R. CIV. P. 26(b)(1).

85. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

86. *Id.*

87. *See* discussion *supra* notes 80–86.

88. *See* discussion *infra* Section III.A.

89. FED. R. CIV. P. 26(c)(1)(B); *see also* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

90. FED. R. CIV. P. 26(c)(1). The Rules Committee commented that the amendment was not intended to allow responding parties to be able to refuse to comply with discovery requests "simply by making boilerplate objections." FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

91. FED. R. CIV. P. 26(c)(1)(B); *see* FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

92. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment. During the Duke Conference, the attendees suggested that Rule 26 "be amended to make reasonable costs of preserving, collecting, reviewing, and producing electronic and paper documents the responsibility of requesting parties." Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 1, 22 (2015). While the Federal Rules Committee was not necessarily enthusiastic about the proposition, the Committee stated that the "requester pays" topic continues to be a "topic on its agenda." *Id.* at 24.

93. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

first employ the proportionality test to minimize the costs associated with e-discovery production.[94]

The 2015 Amended Rule offered further support of the promise laid out in Rule 1 of the Federal Rules of Civil Procedure. The Rules were amended to comply with the promise that litigants should be ensured a just, speedy, and inexpensive court proceeding.[95] The amended proportionality test will promote the ideals laid out in Federal Rule of Civil Procedure 1; yet, when discovery requests are unreasonable and disproportionate in scope, courts are now expressly authorized to order cost shifting to protect parties from incurring an undue burden or expense.[96]

### *B. The Sedona Conference—Contributions to E-Discovery*

Following *Zubulake*, the Sedona Conference[97] ("the Conference") discussed and circulated a guide directed at addressing issues relating to ESI such as discovery requests and e-discovery production.[98] Additionally, the Conference issued a commentary on the principles of proportionality which describes how those principles intersect with reducing the costs of e-discovery.[99]

#### *1. Cost Shifting—A Fairly Straightforward Approach*

The Conference's e-discovery guide provides a relatively straightforward solution for when courts should shift costs between parties.[100] The guide suggests that "absent special circumstances, costs of electronic discovery involving extraordinary effort or resources to restore data to an accessible format should be allocated to the requesting party."[101] Otherwise, the responding party should bear the costs associated with producing accessible ESI.[102] Similar to *Zubulake*, the Conference continues to honor the discovery presumption. However, the

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94. *Id.*

95. FED. R. CIV. P. 1.

96. FED. R. CIV. P. 26(b)(1); FED. R. CIV. P. 26(c)(1)(B).

97. The Sedona Conference is an education and legal research institute that discusses hot button topics in the legal community. One of the Sedona Conference's working groups continues to be the topic of electronic discovery. The Conference continues to offer insight on the topic. THE SEDONA CONFERENCE, https://thesedonaconference.org (last visited Apr. 15, 2017).

98. *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, SEDONA CONF. WORKING GROUP SERIES, (Jan. 2004) [hereinafter *Sedona Principles*], https://thesedonaconference.org/publication/The%20Sedona%20Principles. "With regard to electronic discovery many courts have looked to the Sedona Principles and Sedona Commentaries thereto, which are 'the leading authorities on electronic document retrieval and production.'" DeGeer v. Gillis, 755 F. Supp. 2d 909, 918 (N.D. Ill. 2010) (quoting Romero v. Allstate Ins. Co., 271 F.R.D. 96, 106 (E.D. Pa. 2010)).

99. *See Conference Commentary*, *supra* note 67.

100. *See Sedona Principles*, *supra* note 98.

101. *Id.* at 44.

102. *Id.*

Conference recognizes that costs should be shifted when production will cause the responding party to incur an undue burden or expense.[103]

*2. An Expanded Analysis of the Proportionality Test*

Although the Conference expressly recognizes cost shifting as a mechanism to protect parties from being exposed to an undue burden or expense, the Conference also urges practitioners to continue to limit the scope of discovery requests via the proportionality test.[104] The Conference, much like the Advisory Committee's note to the Amended Rule, believes that cost shifting should not replace specifically tailored discovery requests.[105] Practitioners should first make discovery requests proportional in an effort to guard against producing superfluous amounts of ESI.[106] The Conference promotes the use of the proportionality test to help manage "large volume[s] of ESI."[107]

The Conference also issued a commentary detailing key issues to consider when determining whether a discovery request is proportional.[108] The issues include the following: (1) the availability of the information from other sources; (2) waiver and undue delay; and (3) burden versus benefit of the requested information.[109]

First, the Conference supports the Federal Rules' interpretation of the proportionality test and states that if the information is available from a different and less-expensive source, the discovery request will be limited to the latter source.[110] Second, the Conference states that an untimely discovery request may be denied if a party could have made the request earlier.[111] This rule encourages parties to make discovery requests as early as possible because a party's untimely request may be waived.[112] Third, a court should consider whether "the burden or expense of the proposed discovery outweighs its likely benefit."[113] To do so, a court will analyze several factors to determine whether the benefit of the information acquired outweighs the burden of producing the discovery.[114] These factors closely mimic the language from *Zubulake* and the proportionality test laid

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103. *Id.*
104. *Id.* at 45.
105. *Id.*
106. *Conference Commentary*, *supra* note 67, at 292. Parties should first strive to make proportional discovery requests. If requests are not proportional, then the parties should employ additional methods to avoid a court order of cost shifting.
107. *Id.* at 293.
108. *Id.* at 293–94.
109. *Id.*
110. *Id.* at 293.
111. *Id.*
112. *Id.* The Commentary provides that "courts must limit discovery where 'the party seeking discovery has had ample opportunity to obtain the information by discovery in the action.'" *Id.*
113. *Id.* at 294.
114. *Id.*

out in the Amended Rule 26(b)(1).[115] The Conference discusses how a court has the authority to order cost shifting back to the requesting party if the court finds, after applying these factors, that the discovery request was disproportional.[116]

The Conference's expanded analysis of the proportionality test gives practitioners greater clarity as to what constitutes a proportional discovery request.[117] This expanded analysis will be beneficial to incorporate into this *Best Practices Guide*, and its applicability is discussed in more depth in Part III.

### *C. The Seventh Circuit Electronic Discovery Pilot Program*

In 2009, the Seventh Circuit Electronic Discovery Committee ("the Pilot Program") was formed and tasked with creating procedures aimed to produce efficient litigation while simultaneously reducing costs.[118] The Pilot Program created the *Principles Relating to the Discovery of Electronically Stored Information* with the intent of creating a guide for lawyers to follow while managing the burdens and costs associated with e-discovery.[119] The Pilot Program urges practitioners to follow these principles before court intervention and before a court considers cost shifting.[120] If after following the principles the parties fail to find common ground, they can bring the matter before a court that, in turn, may order cost shifting.[121] Courts also have the discretion to order cost shifting for parties who fail to cooperate with the principles in good faith.[122]

#### *1. The Principles*

The Pilot Program is comprised of many principles, several relevant to this Note. First, Principle 1.03 requires a party's discovery request to be proportional.[123] This Principle directs a party to apply the proportionality standard

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115. *See* FED. R. CIV. P. 26(b)(1); Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).

116. Allman, *supra* note 92, at 23 (discussing that there is ample Supreme Court case law to support cost shifting as a means of protecting a party from an undue burden). A disproportional discovery request produces duplicate and repetitive information. *Conference Commentary*, *supra* note 67, at 292.

117. *See* discussion *supra* notes 108–16.

118. *About the Committee*, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM, http://www.discoverypilot.com/about-us (last visited Nov. 10, 2016).

119. SEVENTH CIRCUIT ELECTRONIC DISCOVERY COMMITTEE, PRINCIPLES RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 1 (Aug. 1, 2010) [hereinafter PILOT PRINCIPLES], http://www.discoverypilot.com/sites/default/files/Principles8_10.pdf.

120. *Id.* at 1–2.

121. *Id.* at 2.

122. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: REPORT ON PHASE ONE, at 5 (2010) [hereinafter PHASE ONE REPORT], http://www.discoverypilot.com/sites/default/files/phase1report.pdf; *see also* Osborne v. C.H. Robinson Co., No. 08 C 50165, 2011 WL 5076267, at *3–5 (N.D. Ill. Oct. 25, 2011); IWOI, LLC v. Monaco Coach Corp., No. 07-3453, 2011 WL 2038714, at *5 (N.D. Ill. May 24, 2011); DeGeer v. Gillis, 755 F. Supp. 2d 909, 914 (N.D. Ill. 2010).

123. PILOT PRINCIPLES, *supra* note 119, at 1.

codified in the Amended Rule.[124] A discovery request and response should be specifically tailored to keep the scope reasonable and not duplicative.[125] This Principle should be employed before court intervention.[126]

Second, Principle 2.01 requires the parties to meet and confer.[127] At this meeting, the parties are responsible for discussing potential e-discovery issues.[128] For example, the parties should discuss issues including "relevant and discoverable ESI," "the formats for . . . production of ESI," and "the potential need for a protective order."[129] If the parties are unable to agree on certain issues during the meet and confer, then they should notify the court.[130] A court that finds that a party was uncooperative during the meet and confer has the authority to impose sanctions on the uncooperative party.[131] These sanctions can include cost shifting.[132]

Third, Principle 2.02 builds upon Principle 2.01 and requires parties to appoint an E-Discovery Liaison to help facilitate issues that arise during the meet-and-confer process.[133] This Principle states that when an e-discovery-related issue arises, the parties shall appoint an individual to act as a liaison for "the purposes of meeting, conferring, and attending court hearings on the subject."[134] The liaison is responsible for knowing "about the party's e-discovery efforts"; for being "familiar with the party's electronic systems and capabilities" to accurately and intelligently discuss those systems; and for being aware of the "technical aspects of e-discovery, including electronic document storage, organization, format issues, and relevant information retrieval technology."[135] In essence, the liaison helps facilitate efficient and cost-effective litigation.

Fourth, Principle 2.04(d) discusses and provides a list of discoverable types of data.[136] This list does not include backup tapes. However, the principles

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124. *Id.*

125. *Id.* (discussing that "requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as practicable").

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1–2.

130. *Id.* at 2.

131. PILOT PRINCIPLES, *supra* note 119, at 1; *see generally* Osborne v. C.H. Robinson Co., No. 08 C 50165, 2011 WL 5076267 (N.D. Ill. Oct. 25, 2011); IWOI, LLC v. Monaco Coach Corp., No. 07–3453, 2011 WL 2038714 (N.D. Ill. May 24, 2011); DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

132. *See Osborne*, 2011 WL 5076267, at *3–5; *IWOI, LLC*, 2011 WL 2038714 at *5; *DeGeer*, 755 F. Supp. 2d at 929.

133. PILOT PRINCIPLES, *supra* note 119, at 2. An e-discovery liaison can be "an attorney (in-house or outside counsel), a third-party consultant, or an employee of the party." PHASE ONE REPORT, *supra* note 122, at 5. Each party is responsible for designating its own e-discovery liaison. *Id.*

134. PHASE ONE REPORT, *supra* note 122, at 5.

135. *Id.*

136. *Id.* at 7.

state that a party should notify the other party during the meet and confer if they intend to request backup tapes.[137] This means that if a party intends to request certain types of inaccessible data that require a greater amount of effort and cost to produce, it is important that the requesting party provide notice of this intent.[138]

Fifth, the Pilot Program principles require parties to "discuss potential methodologies for identifying ESI for production" to minimize duplicative searches.[139]

These principles demand party compliance and cooperation so that parties can agree on a narrow scope of relevant ESI available for production.[140] Parties who cannot agree on discoverable ESI, the scope of discovery, or the method of production must notify a judge who can take steps to resolve the discovery dispute.[141] Generally, judges use the *Zubulake* test to determine whether cost shifting is appropriate. However, courts under the Pilot Program also look to other factors including violations of these principles as grounds for ordering cost shifting.[142]

*2. Good-Faith Compliance May Help Parties Avoid a Court Order of Cost Shifting*

Since the Pilot Program began, practitioners have implemented these principles into their case management, and courts have analyzed discovery disputes based on the principles.[143] In some cases, courts have ordered cost shifting for parties who failed to comply and cooperate with these principles in good faith.[144]

For example, in *DeGeer v. Gillis*, the court ordered the parties to share costs associated with producing backup tapes because they failed to cooperate with one another.[145] The court noted that it found "itself immersed in a discovery dispute that could likely have been avoided by the exercise of a little more cooperation and compromise among counsel."[146] The court found that the parties failed to comply with the meet-and-confer requirement and did not enter into the discovery negotiations with a spirit of cooperation.[147] The court noted that this case

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137. *Id.*

138. *Id.*

139. PILOT PRINCIPLES, *supra* note 119, at 7.

140. *See generally id.*

141. *Id.* at 4–5.

142. *See generally* Osborne v. C.H. Robinson Co., No. 08 C 50165, 2011 WL 5076267 (N.D. Ill. Oct. 25, 2011); IWOI, LLC v. Monaco Coach Corp., No. 07–3453, 2011 WL 2038714 (N.D. Ill. May 24, 2011); DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

143. *See generally Osborne*, 2011 WL 5076267; *IWOI, LLC*, 2011 WL 2038714; *DeGeer*, 755 F. Supp. 2d 909.

144. *See Osborne*, 2011 WL 5076267, at *8; *IWOI, LLC*, 2011 WL 2038714, at *5; *DeGeer*, 755 F. Supp. 2d at 914.

145. 755 F. Supp. 2d at 929.

146. *Id.* at 912.

147. *Id.* at 929 (noting that neither party "approached production . . . with a spirit of cooperation or efficiency").

demonstrated "the importance of candid, meaningful discussion of ESI at the outset of the case . . . ."[148] *DeGeer* demonstrated the importance of compliance with the principles of the Pilot Program: because judges have the discretion to order cost shifting if parties fail to comply in good faith with these principles.[149]

Additionally, in *IWOI, LLC v. Monaco Coach Corp.*, the court ordered cost shifting where the parties declined to meet and confer and failed to identify potentially discoverable ESI.[150] The court heard the matter specifically to resolve a dispute over emails that were allegedly missing from discovery production.[151] The court granted the plaintiff's motion to search the defendant's hard drive for the missing emails.[152] However, the parties failed to meet and confer, and thus failed to reach a compromise on the terms for the hard-drive search.[153] The defendants argued that the failure to produce the missing emails was the plaintiff's fault, because the plaintiff failed to identify the email as discoverable pursuant to Principle 2.01 of the Pilot Program.[154] The court rejected this argument.[155] The court found that sanctions were necessary to remedy the discovery violations and ordered cost shifting.[156] The court ordered half of the costs be shifted to the defendants because of the defendants' failure to produce the relevant email; however, the court did not shift the entire burden to the defendants because the plaintiff's search only revealed one relevant document.[157]

Finally, in *Osborne v. C.H. Robinson Co.*, a dispute arose over a party's failure to search for and produce relevant information pursuant to a discovery request.[158] The court used the Pilot Program principles and the Conference principles as guides to resolve the dispute.[159] The court found that the parties would have been able to resolve their disputes if they had conferred in good faith.[160] The court ultimately found that the defendant was deliberately evasive in failing to produce e-discovery and did not comply with "the letter or spirit of the Federal Rules of Civil Procedure, the [Pilot Program principles], or the [Conference principles]."[161] The court ordered the plaintiff's attorneys fees shifted to the defendant.[162]

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148. *Id.* at 930.
149. *See generally* DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010).
150. IWOI, LLC v. Monaco Coach Corp., No. 07-3453, 2011 WL 2038714 (N.D. Ill. May 24, 2011).
151. *Id.* at *1.
152. *Id.*
153. *Id.*
154. *Id.* at *3.
155. *Id.* at *4.
156. *Id.* at *5.
157. *Id.*
158. Osborne v. C.H. Robinson Co., No. 08 C 50165, 2011 WL 5076267, at *8 (N.D. Ill. Oct. 25, 2011).
159. *Id.* at *2.
160. *Id.* at *7.
161. *Id.* at *8.
162. *Id.*

The parties in these cases failed to comply with the spirit of[163] the Pilot Program and the Conference principles, which resulted in cost shifting.[164] The main factors that contributed to these court orders were the parties' failure to do the following: (1) meet and confer or confer in good faith;[165] (2) identify or produce discoverable ESI;[166] (3) discuss the production format of ESI;[167] and (4) set parameters for the scope of discovery.[168] Moreover, the courts stated that most of these issues could have been resolved earlier had the parties cooperated and conferred in good faith during the meet-and-confer process.[169] These cases demonstrate that courts are compelling parties to cooperate during the discovery process more often in an effort to reduce the costs of litigation resulting from the production of ESI.

*3. The Pilot Program Reports*

The Pilot Program was introduced in a multi-year, multi-phase process.[170] After each phase was implemented, the Pilot Program compiled a report that evaluated the success of the Principles in practice and discussed the effectiveness of the Pilot Program.[171] The Pilot Program surveyed the judges and lawyers who participated in the Pilot Program following the implementation of Phase One.[172] The judges overwhelmingly agreed that the Pilot Program principles promoted cooperation among counsel and an awareness of the procedures surrounding e-discovery issues.[173] In addition, counsel reported that even though Phase One was relatively short, the principles had a positive effect "in terms of promoting fairness, fostering more amicable dispute resolution, and facilitating advocacy on behalf of their clients."[174]

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163. *Id.*

164. *See generally Osborne*, 2011 WL 5076267; IWOI, LLC v. Monaco Coach Corp., No. 07-3453, 2011 WL 2038714 (N.D. Ill. May 24, 2011); DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010).

165. *See Osborne*, 2011 WL 5076267, at *7; *IWOI, LLC*, 2011 WL 2038714, at *1 (parties' failure to effectively meet and confer resulted in them failing to reach a compromise over search terms); *DeGeer*, 755 F. Supp. 2d at 929 (reasoning that the discovery dispute could have been resolved if the parties cooperated or compromised).

166. *See generally Osborne*, 2011 WL 5076267, at *8; *IWOI, LLC.*, 2011 WL 2038714, at *4.

167. *See Osborne*, 2011 WL 5076267, at *7–8.

168. *See generally IWOI, LLC*, 2011 WL 2038714, at *3.

169. Principle 1.02 states that "an attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner." PILOT PRINCIPLES, *supra* note 119, at 1; *see Osborne*, 2011 WL 5076267, at *7; *IWOI, LLC*, 2011 WL 2038714 at *1; *DeGeer*, 755 F. Supp. 2d at 929.

170. SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM: FINAL REPORT ON PHASE TWO 1–2 (2012) [hereinafter PHASE TWO REPORT], http://www.discoverypilot.com/sites/default/files/Phase-Two-Final-Report-Appendix.pdf.

171. *Id.* at 1.

172. *Id.* at 2.

173. *Id.* at 4.

174. *Id.* at 1–2.

The Pilot Program developed many effective procedures including requiring an e-discovery liaison be appointed to help resolve e-discovery disputes. This requirement should be incorporated into this *Best Practices Guide* and is discussed in more depth later in Part III.

### *D. The Restyled Arizona Rules of Civil Procedure*

For more than 25 years, "Arizona has . . . been a leader in civil justice reform."[175] For example, in 1992, Arizona issued the Zlaket Rules which were aimed at bringing efficiency to the pretrial discovery phase of litigation.[176] Arizona's innovation has historically and unmistakably influenced a national trend towards discovery reform to make the process more efficient and inexpensive.[177]

In December 2015, the Arizona Supreme Court formed the Arizona Committee on Civil Justice Reform ("the ACCJR") to comprehensively restyle the Arizona Rules of Civil Procedure.[178] In October 2016, the ACCJR issued a report to the Arizona Judicial Committee comprised of four reforms, most notably, a discovery reform detailing various ways to simplify e-discovery disputes.[179] These common-sense reforms were compiled, in part, to reduce the costs associated with burdensome discovery phases of litigation.[180] The e-discovery reforms focus on procedures that will produce fair and cost-efficient litigation.[181] The report also discusses numerous opportunities that courts would have to shift costs to make the discovery process more efficient.[182]

In the report, the ACCJR lists procedural requirements that practitioners should use to create an inexpensive and efficient discovery process.[183] First, a party must determine whether the information sought is proportional.[184] The ACCJR incorporated the *Zubulake* test into the restyled Arizona Rules to determine whether discovery requests are proportional.[185]

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175. COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 1.

176. The Arizona Supreme Court issued the Zlaket Rules to make pretrial procedure more efficient. The Zlaket Rules require "mandatory, relevance-based disclosures intended to scale back civil discovery." *Id.*

177. *Id.*

178. Press Release, State Bar of Ariz., Arizona Supreme Court Approves Rewriting of Rules of Civil Procedure (Sept. 7, 2016), http://www.azbar.org/media/1193898/supremecourtapprovesrestylingofcivilrules.pdf.

179. Specifically, the reform takes note of "how the explosion in ESI has created a corresponding explosion in discovery costs for parties and nonparties alike." COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 14.

180. *Id.* at 25.

181. *Id.* at 14.

182. The proposed reforms to Rule 11 would allow courts to shift costs back to a requesting party when a "colorable" request is made. The term *colorable* demands a higher standard than the nonfrivolous standard. *Id.* at 13, 24.

183. These factors should be applied prior to a court considering cost shifting. *Id.* at 24.

184. *Id.*

185. *Id.* at 46; *see also* FED. R. CIV. P. 26(b)(1).

Second, the parties must determine whether the sought-after information is reasonably accessible.[186] The proposed rule states that a party does not need to comply with a discovery request when the desired information is not accessible because of an undue burden or expense.[187]

Third, the ACCJR compiled a list of factors to consider when determining whether a party has made a showing of an undue burden or expense.[188] These factors include the following: (1) the estimated expense of the discovery; (2) the potential disruption to the responding party's business operations in complying with the request; (3) any additional efforts the parties underwent to obtain the information from other sources; (4) the expense associated with reviewing the production for privilege; and (5) whether the expense associated with the discovery is attributable to any discovery violation.[189]

Despite a showing of an undue burden or expense, a court may order disclosure if a party shows good cause.[190] Factors contributing to a showing of good cause include the following: (1) the likelihood of finding relevant information that cannot be obtained from other sources; (2) a narrowly tailored discovery request; (3) the importance of the information to a fair resolution of the case; and (4) the litigants' resources.[191] If a court finds good cause, the court may grant disclosure with conditions[192] which can include cost shifting.[193]

Finally, the ACCJR infused a meet-and-confer requirement into the rules reform.[194] During the meet and confer, parties must discuss various issues including the following: where relevant ESI is located, if the ESI is better produced in phases, what parts of the request may not contain discoverable information, how the ESI should be produced, and how the costs of the production should be allocated.[195] Additionally, parties must discuss "sharing or shifting costs incurred by the parties for disclosing and producing the information."[196]

Arizona provides practitioners many procedural safeguards and the Arizona meet-and-confer requirement pushes beyond the scope of other jurisdictions.[197] In this regard, the Arizona meet and confer would be effective to incorporate into a *Best Practices Guide* for reasons discussed in the following Part.

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186. COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 51.
187. *Id.*
188. *Id.* at 52.
189. *Id.*
190. *Id.*
191. *Id.* at 52.
192. *Id.*
193. *Id.*
194. *Id.* at 55.
195. *Id.* at 15.
196. *Id.* at 55.
197. *See generally* discussion *supra* Section II.D.1.

## III. THE *BEST PRACTICES GUIDE*

Cost shifting is alive and well in the world of e-discovery. However, it is important to promote certain procedural safeguards to help practitioners avoid a court order for cost shifting. These procedures will aim to ensure that the discovery presumption remains intact and that cost shifting does not become a common practice.[198] If these safeguards fail, then courts should look to cost shifting as a mechanism to protect parties from an undue burden or expense.[199]

Since the *Zubulake* opinion, jurisdictions have embraced, promoted, and even codified cost shifting.[200] However, these jurisdictions approach cost shifting in a variety of ways.[201] This Note examined the way that the Conference, the Pilot Program, and the restyled Arizona Rules of Civil Procedure address the issue.[202] There are some similarities in the ways that the jurisdictions approach the issue.[203] For example, the jurisdictions uniformly agree that a proportionality test is necessary to protect parties from producing cumbersome discovery requests and to guard against the premature issuance of cost shifting.[204] The jurisdictions also agree that practitioners should use the proportionality test first before using other procedural mechanisms.[205]

Although jurisdictions may agree on which procedures to adopt, some have a more effective way to implement the procedures than others. Therefore, to provide practitioners with a *Best Practices Guide*, it is necessary to combine the most effective procedures from each jurisdiction. Doing so creates a master outline of procedural safeguards that practitioners can employ to avoid a court order for cost shifting. This *Best Practices Guide* also protects the presumption that the responding party to a discovery request bear the cost of production. Therefore, this *Best Practices Guide* will contain the following: (1) a proportionality test; (2) a meet-and-confer requirement; and (3) an e-discovery liaison.

### *A. Proportional Discovery Requests: A First Line of Defense*

Proportional discovery requests are the first procedure that practitioners should use to help control the costs associated with discovery requests.[206] The Conference, the Pilot Program, and the restyled Arizona Rules of Civil Procedure all incorporate a proportionality provision into their procedures.[207] Both the Pilot Program's and Arizona's proportionality tests mimic the language of the Amended Rule. The Conference's principles on proportionality also shadow the federal

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198. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.

199. *Conference Commentary*, *supra* note 67, at 298; PILOT PRINCIPLES, *supra* note 119, at 1; COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 2.

200. *See* discussion *supra* Section II.A.

201. *See* discussion *supra* Sections II.B–D.

202. *See* discussion *supra* Sections II.B–D.

203. *See* discussion *supra* Sections II.B–D.

204. *See* discussion *supra* Sections II.B–D.

205. *See* discussion *supra* Sections II.B–D.

206. FED. R. CIV. P. 26(b)(1).

207. *See Conference Commentary*, *supra* note 67, at 294; PILOT PRINCIPLES, *supra* note 119, at 1; COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 24.

proportionality test; however, the Conference expanded the proportionality analysis to include additional factors to determine whether discovery requests are proportional.[208] The key issues to consider include the following: (1) the availability of the information from other sources; (2) waiver and undue delay; and (3) burden versus benefit.[209] Expanding the analysis should provide practitioners with a better understanding of whether a request is proportional.

Although adding extra factors[210] to an already-lengthy proportionality test may leave practitioners wondering what really constitutes a proportional discovery request, the expansion actually provides clarity. Therefore, the benefit that the expansion provides outweighs the burden of this longer analysis.

Further, the Conference principles decipher the lofty verbiage of the Federal Rules into easy-to-follow directions, enabling practitioners to clearly understand what is required to keep discovery requests proportional.[211] The Conference principles also explain how the factors are used in everyday practice.[212]

Practitioners' use of the proportionality test can help lower the costs of discovery because practitioners will make more specifically tailored discovery requests which in turn should require the opposing party to produce fewer documents.[213] If parties make proportional discovery requests, it may be unnecessary for a court to order cost shifting between the parties.[214] Because the proportionality test is an important procedure that can help reduce discovery costs and practitioners can use it to avoid a court order for cost shifting, it is imperative that practitioners clearly understand how to use this procedure. The clarity that the Conference principles provide to practitioners is crucial to incorporate into this *Best Practices Guide* to help practitioners understand what the proportionality test asks of them. Therefore, this *Best Practices Guide* will include a proportionality test that mimics the Conference's expanded explanation of the proportionality test.

What happens if a discovery request is found to be disproportional? The Pilot Program and the restyled Arizona rules make it clear that discovery requests should be proportional, yet both fail to mention what happens when a request is found to be disproportional.[215] Unlike those jurisdictions, the Conference is clear that cost shifting should be used when discovery requests are disproportional.[216] This *Best Practices Guide* also incorporates the Conference's directions to put practitioners on notice that cost shifting may be employed if their discovery requests are found to be burdensome or duplicative. If practitioners are aware that

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208. *See Conference Commentary*, *supra* note 67, at 293–94.
209. *Id.*
210. *See id.*
211. *See generally id.*
212. *Id.*
213. *Id.*
214. *Id.* at 292.
215. PILOT PRINCIPLES, *supra* note 119, at 1; COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 46.
216. *Conference Commentary*, *supra* note 67, at 292.

disproportional discovery requests will result in cost shifting, it may incentivize them to make specifically tailored discovery requests to avoid having costs shifted back to their clients.

### *B. Meet and Confer in Good Faith*

The next procedure that is included in this *Best Practices Guide* is a meet and confer between the parties. Both the Pilot Program and the restyled Arizona Rules of Civil Procedure include this requirement.[217] The requirement mandates that parties shall meet in good faith to discuss issues that include relevant and discoverable ESI[218] and the format for production of ESI.[219]

Arizona pushes beyond the traditional meet-and-confer procedure and requires parties to discuss how to allocate the costs associated with the production of ESI.[220] Essentially, Arizona requires parties to proactively discuss cost shifting.[221] This *Best Practices Guide* will incorporate Arizona's approach regarding a meet-and-confer procedure for two reasons. First, the idea of cost shifting cuts against the discovery presumption;[222] therefore, a party should be put on notice that some of the costs might be shifted back to it if the parties do not meet and confer in good faith. This requirement will allow parties to work together to determine the fairest way to distribute the costs.[223] Second, this requirement is efficient. If the parties are required to confer in good faith about sharing costs between the parties, it might prevent a future dispute. This frees up judicial resources.

The Seventh Circuit also incorporates an interesting requirement into its meet-and-confer procedure. Its Pilot Program includes a warning that parties who fail to cooperate will face sanctions,[224] which can include cost shifting.[225] This language is important to this *Best Practices Guide*, because it puts the parties on notice of their obligations to confer in good faith and the consequences of failing to do so. Additionally, a party's knowledge that cost shifting is a potential sanction may encourage parties to meet and confer in good faith to avoid their clients potentially being required to pay large e-discovery bills.

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217. *See supra* Sections II.C, II.D.

218. PILOT PRINCIPLES, *supra* note 119, at 1–2; COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 15.

219. PILOT PRINCIPLES, *supra* note 119, at 1–2; COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 15.

220. COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 15.

221. *Id.*

222. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 348 (1978) (holding that a responding party to a discovery request is presumed to bear the cost associated with producing the requested information).

223. COMMITTEE ON CIVIL JUSTICE REFORM, *supra* note 24, at 15.

224. PILOT PRINCIPLES, *supra* note 119, at 2.

225. In *DeGeer*, the court ordered costs to be shifted after finding that the parties failed to comply with the meet-and-confer requirement. DeGeer v. Gillis, 755 F. Supp. 2d 909 (N.D. Ill. 2010). The court discussed the importance of candid discussions within these meetings. *Id.* at 930. The court found that the dispute could have been avoided if the parties had conferred in good faith. *Id.*

### *C. E-Discovery Liaisons*

The last procedure that should be implemented comes from the Pilot Program. The Pilot Program requires parties to appoint an e-discovery liaison when a discovery dispute arises.[226] The e-discovery liaison should have "specific knowledge of the electronic discovery matters in the case"[227] and will be able to communicate "the technology issues that are the subject of the dispute" to the court and the opposing party.[228] This procedure is implemented into this *Best Practices Guide* because it promotes efficient litigation. Additionally, this procedure will benefit attorneys who are not familiar with the technological intricacies of e-discovery and will allow an expert to speed up the discovery process.[229]

Requiring parties to appoint an e-discovery liaison may impose additional expenses on the parties.[230] However, the e-discovery liaison should help drive down the overall cost of the discovery process,[231] and therefore the benefit that the liaison will provide greatly outweighs the burden of parties paying to appoint an e-discovery liaison. Therefore, this *Best Practices Guide* will incorporate a requirement for an e-discovery liaison.

The Conference's detailed explanation of the proportionality test, Arizona's procedure requiring parties to discuss cost allocation during the meet-and-confer process, the Pilot Program's language explaining the assessment of sanctions for parties who fail to meet and confer in good faith, and the Pilot Program's e-discovery-liaison requirement are incorporated into this *Best Practices Guide* for navigating e-discovery and cost shifting. This *Best Practices Guide* should help practitioners familiarize themselves with the concepts associated with e-discovery. Moreover, this *Best Practices Guide* gives practitioners a set of tools that will enable them to keep the costs of discovery low, will encourage them to communicate with their adversaries to resolve e-discovery areas of dispute, and will incentivize them to proactively discuss the possibility of sharing costs. This *Best Practices Guide* makes the discovery process more efficient and more cost effective. Overall, this *Best Practices Guide* will ensure that cost shifting does not become a common practice.

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226. PILOT PRINCIPLES, *supra* note 119, at 2; *see* discussion *supra* Section II.C.

227. Laura D. Cullison, *The Seventh Circuit's E-Discovery Pilot Program*, A.B.A. SEC. LITIG., Spring 2010, at 20.

228. Michael D. Gifford, *7th Circuit Pilot Program Moves to Stage 2*, STOUT RISIUS ROSS (Mar. 1, 2011), http://www.srr.com/article/7th-circuit-pilot-program-moves-stage-2.

229. Neda Shakoori, *The eDiscovery Liaison: A Necessity in Today's Litigation Landscape*, MCMANIS FAULKNER (June 27, 2013), http://www.mcmanislaw.com/blog/2013/The-eDiscovery-Liaison-A-Necessity-In-Todays-Litigation-Landscape.

230. *See* PILOT PRINCIPLES, *supra* note 119, at 2.

231. Shakoori, *supra* note 229.

## CONCLUSION

The world of e-discovery has presented practitioners with expensive and challenging problems. In civil litigation, it is important to honor the presumption that the responding party to a discovery request bears the cost associated with complying with the request.[232] Doing otherwise would be unfair to practitioners who do not know that the presumption has changed or could change. Courts have the discretion to deviate from the discovery presumption and order cost shifting to alleviate the burden on a responding party. Cost shifting may be ordered if parties fail to make proportional discovery requests or fail to comply in good faith with procedural safeguards in the rules of civil procedure.

This *Best Practices Guide* incorporates the Conference's principles-of-proportionality explanation, Arizona's meet-and-confer discussion requirements, the Pilot Program's warning that sanctions may be assessed to parties who fail to meet and confer in good faith, and the Pilot Program's e-discovery-liaison requirement. Practitioners who follow this guide will be equipped with a toolbox that can help them navigate their way through the e-discovery process. This *Best Practices Guide* provides practitioners with a cost-efficient discovery process, could help practitioners avoid a court order of cost shifting, and helps prevent clients from having to foot large e-discovery bills.

This *Best Practices Guide* will put practitioners on notice that cost shifting may result if they fail to comply with the procedural safeguards set forth here or if they fail to comply with the procedures in good faith. Either way, this *Best Practices Guide* seeks to protect parties from incurring an undue burden or expense associated with producing cumbersome e-discovery requests. Overall, this *Best Practices Guide* encourages practitioners and courts to issue cost shifting as a last resort. This approach ensures that the *Best Practices Guide*'s procedural safeguards have been exhausted prior to courts ordering cost shifting between the parties.

As the Advisory Committee of the Federal Rules noted, cost shifting should not become a common practice.[233] This *Best Practices Guide* ensures that it will not be.

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232. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 348 (1978).

233. FED. R. CIV. P. 26 advisory committee's note to 2015 amendment.