BENDING THE RULES: THE CIRCUIT COURTS INCONSISTENT APPLICATION OF THE FEDERAL RULES AND SECTION 1920(4) IN COST SHIFTING AND TAXING ELECTRONIC DISCOVERY COSTS

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INTRODUCTION

While the Federal Rules of Civil Procedure direct courts to limit discovery, the process results in nearly eighty percent of the costs of litigation in the United States. In 2004, it was estimated that around ninety-five percent of all litigation documents were discovered electronically. One study indicates that electronic discovery ("e-discovery") costs for a typical midsize lawsuit run about three and a half million dollars. As the costs of discovery continue to skyrocket in federal court, the concerns over the allocation and taxation of those costs increase as well. As technology has developed, the cost associated with recovering electronically stored information ("ESI") also has increased. While discovery is costly and time consuming, the fact that nearly all discoverable information is amassed in some

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1 The information within this Article is current as of November 2015.
5 See generally id. at 18-19 (explaining how the volume of information available online drives discovery costs up).
variation of an electronic format is unavoidable and cannot be ignored.\textsuperscript{6}

E-discovery was the focus of the U.S. Supreme Court December 2006, amendment to the Federal Rules of Civil Procedure.\textsuperscript{7} The U.S. Supreme Court explicitly amended the Federal Rules of Civil Procedure to provide rules regarding electronic records and ESI.\textsuperscript{8} Similarly, Congress amended the United States Code to adjust for this technological advancement over time.\textsuperscript{9} These rules were amended, in part, in an attempt to meet the challenges of e-discovery and minimize costs.\textsuperscript{10} At the center of the controversy over the federal amendments was Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920(4) and their inconsistent application in varying jurisdictions across the United States.\textsuperscript{11} While not all jurisdictions have ruled on such an issue, established decisions vary greatly.\textsuperscript{12} Some jurisdictions interpret § 1920(4) narrowly as to award the prevailing party only those costs associated with making actual physical hard copies and reject the argument to allocate any other discovery costs to the prevailing party.\textsuperscript{13}

Conversely, a number of jurisdictions read § 1920(4) to allow prevailing parties to also recover costs associated with creating the discoverable documents, and with the rising cost of e-discovery, the outcome of these separate applications can vary significantly.\textsuperscript{14} The execution of the rules varies between jurisdictions, and some are caught

\textsuperscript{7} FED. R. CIV. P. 26(b)(2)(B).
\textsuperscript{8} 28 U.S.C. § 1920(4) (Supp. 2015); FED. R. CIV. P. 26(b)(2)(C) (limiting discovery for unreasonable requests otherwise allowed by local rules); Id. 54(d)(2)(D).
\textsuperscript{10} FED. R. CIV. P. 26(f) (requiring an early meet-and-confer session to specifically discuss the electronic discovery process and any potential issues that may arise).
\textsuperscript{12} See id. at 237, 246-47, 260, 277.
\textsuperscript{13} See Synopsys, Inc. v. Ricoh Co., 661 F.3d 1361, 1365-66 (Fed. Cir. 2011) (holding that absent an agreement between the parties, the cost of creating a database is recoverable).
\textsuperscript{14} Id. at 1365.
somewhere in the middle between a narrow application and a broad application. Less than four years after the enactment of these amendments, their application began to receive negative attention. The 2006 amendments to the Federal Rules of Civil Procedure were berated for the displeasure associated with the rising discovery costs and the taxes applicable to those costs. The laws surrounding the costs of electronic discovery are steadily developing; specifically in the area of who assumes the responsibility of paying these substantial costs and consequently the ascending taxes attached to them.

Taxing costs may seem like a minor concern, but in applying the current law those costs can reach upwards of a million dollars in sizeable litigation. Various legal professionals suggest, as a resolution, a revision of the Federal Rules and the U.S. Code addressing recent cost shifting, cost sharing, and taxation issues. I propose, in the alternative, applying the rules consistently with the assistance of a higher court ruling. Compare this alternative in the form of an analogy: instead of tearing down an entire house because of a noticeable hairline crack in the foundation, would you not see if the issue was cosmetic before calling in the bulldozers? Most jurisdictions do not dispute that both the Federal Rules and the U.S. Code have slight errors within their construction, but the key to uniformity in the federal courts’ application of these laws is to read the law as permanent. Thus, federal courts should make decisions around the already existing law rather than changing these well-founded rules on a regular basis to conform to the varying current jurisdictional opinions. Those who are educated about the rules and creative in their use will save themselves, their clients, and the courts a great deal of time and money. Those who are not will continue to blame the rules, never realizing that “The fault, [lies] not

17 Id. at 144.
19 Id. at 1.
This Article proposes that the Eleventh Circuit, Florida in particular, should mirror its methodology to that of the recent Third Circuit approach in *Race Tires America v. Hoosier*, in its determination that the Federal Rules and U.S. Code should be narrowly applied to the taxation of discovery costs accumulated in the recovery of ESI, a topic on which they have yet to provide substantial guidance or rationale. I propose maintaining the Federal Rules without amendment in accounting for e-discovery costs. Similarly, lowering the controversial *Zubulake* standard for cost-shifting decisions before or during discovery will reign in liberal requests initially and, with that, reducing the award of taxable e-discovery costs post judgment. Analogously, liberally, and consistently applying that interpretation for Rule 54(d) and § 1920(4), the allowance for taxing specified costs should, in effect, reduce the costs of e-discovery as a whole by acting as a deterrent against frivolous requests.

To properly frame the justification for why Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920(4) should be interpreted in direct accordance with the specific language as provided, Part I of this Article provides a description of the history and evolution that led to the enactment of the legislation and the chronological timeline of the justifications for proposing taxation of electronic discovery costs. Moreover, Part I includes a review of the significant issues that the current interpretation of the law poses for litigation in incurring substantial electronic discovery costs; including summations of the Federal Rules and statutes

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23 *See Zubulake v. UBS Warbrg LLC*, 220 F.R.D. 212, 216-18 (S.D.N.Y 2003) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure preservation of relevant documents.") (citing Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001); Kronish v. United States, 150 F.3d 112, 126 (2d Cir. 1998)).
25 See infra Part I.
Part II analyzes statutory authority generally and its ability to bind courts in hopes of resolving how far the statutes were intended to reach, pre- and postjudgment, and why their interpretation and application must be consistent. The purpose is to recognize the magnitude of the issue and the importance of uncovering a remedy. Part II concludes with an analysis of the proposals to amend these rules and statutes, and why those proposed resolutions are inapplicable and not necessary.

Part III provides a history outlining the application of cost-spreading and cost-shifting and their general functions among the circuits; which is critical in understanding the issue that taxation presents in conjunction with prejudgment costs. Decisions provided by the courts in milestone cases relevant to cost shifting and cost spreading offer a foundation for the justification of taxing the associated costs. Concluding with a look at the effect of the applicable taxes and their rapid escalation in the last few years.

Part IV expands upon the complete divide between circuits with a chronological view of the landmark cases on each side of the split to foster that understanding of the taxation issue. While some circuits are split, others have not addressed the issue of these escalating ESI discovery costs.

Part V addresses how the Eleventh Circuit, Florida in particular, should interpret and apply the recent holdings on the taxation of e-discovery costs. While some lower courts have returned varying opinions, the Eleventh Circuit has yet to clearly establish whether its

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26 See infra Part I.
27 See infra Part II.
28 See infra Part II.
29 See infra Part II.
30 See infra Part III.
31 See infra Part III.
32 See infra Part III.
33 See infra Part IV.
34 See infra Part IV.
35 See infra Part V.
interpretation of Rule 54(d) and Section 1920(4) should be interpreted narrowly, as a recent Third Circuit opinion provides, broadly as a number of others, or fall somewhere in between.\textsuperscript{36} Or if in the alternative, the sunshine state should instead focus on a resolution through other means, cost shifting versus cost splitting, to reduce the tax burden for both parties in litigation for example.\textsuperscript{37}

To better illustrate the obstacle federal courts are encountering in failing to consistently apply the federal rules and the financial result, consider the following hypothetical:

Suppose John’s Drug Store, a local pharmacy, files suit against Big Pharma Corp. ("Big Pharma"), a large pharmaceutical corporation, for copyright infringement after discovering that Big Pharma had recreated and mass-produced an extremely effective and successful cough medicine that John’s created in a lab five years ago. John’s seeks ten million dollars in damages. Although they have no idea how Big Pharma obtained the recipe for this unique product, John’s Drug Store has established that it is an exact replica. To reach their burden of proof, John’s might request from Big Pharma all information regarding Big Pharma’s traditional acquisition of pharmaceutical and Big Pharma’s brand formulas and their production of the mock product in question, along with all financial information to determine the corporation’s projected profit margin on the product. The amount of information that must be provided or ultimately discovered is exorbitant. While John’s may be able to provide to Big Pharma proof of John’s invention quickly, meticulously, and possibly in hardcopy format, Big Pharma may have to produce a lot more, especially because John’s has no idea where the proof of infringement that they need is located in the Big Pharma database and thus his discovery requests are quite broad.

Because Big Pharma is a national pharmaceutical chain, they would not likely follow traditional discovery, which would provide John’s with access to all documentation requested in reference to the


\textsuperscript{37} See infra Part V.
alleged infringement. Allowing any public or private entity access to their computers and information is out of the question because the electronic storage devices that contain the information that the plaintiff requests also contain numerous classified documents. Thus, unlike traditional discovery where attorneys would provide the opposing party with boxes and boxes of information in the form of hard copies, which the requesting party then had to search through, Big Pharma will have the burden of searching for and uncovering the information requested by John’s in their electronic database.\textsuperscript{38} Similarly, the cost for Big Pharma to uncover the requested information within their own database could require an astounding amount of time, energy, and financial resources.\textsuperscript{39} There are a number of potential financial outcomes for both parties depending on whether the costs of discovery are shared or shifted and which of the discovery costs will be taxable to the losing party.\textsuperscript{40} The cost of discovery here presents a sharp contrast between the requesting party and the producing party.\textsuperscript{41} Consistent application of Fed. R. Civ. P. 54(d) and § 1920(4) will help answer the essential questions of who, why, and how subsequent costs of e-discovery are included, if at all, without being explicitly listed under those rules. Should John’s win, its costs would be minimal and Big Pharma would likely be able to cover those costs plus tax.\textsuperscript{42} Should Big Pharma win, it is highly unlikely that John’s Drug Store would be able to cover the taxable discovery costs incurred by Big Pharma.\textsuperscript{43} The decision may have a variety of serious consequences, and the result is ultimately based on the current jurisdictional approach in the application of the rules.

\textsuperscript{38} See generally Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 357-59 (1978) (acknowledging that the discovery costs associated with electronic documents may be shifted to the responding party where the burden would not be “substantially the same”).

\textsuperscript{39} Id. at 362.

\textsuperscript{40} Id. at 356-57, 363.

\textsuperscript{41} Id. at 357.

\textsuperscript{42} Id. at 361-62.

\textsuperscript{43} Id. at 363.
I. THE EVOLUTION OF ELECTRONIC DISCOVERY AND THE ASSOCIATED COSTS

For centuries England has provided statutory authorization to award all court costs, including attorney’s fees, to the prevailing party.44 Prior to the United States establishing any law on the matter, federal courts followed this English approach but have since abrogated that rule statutorily.45 Prior to Congress’ enactment of the Fee Act of 1853, federal courts’ taxation of costs against the losing party conformed to the state court rules, resulting in a diverse result among the different courts.46 The taxation of costs led to the losing litigants allegedly, “being unfairly saddled with the exorbitant fees for the victor’s attorney.”47

Historically, U.S. federal courts have followed the “American Rule” which provides that each party to litigation must generally pay their own discovery costs.48 The Supreme Court in *Oppenheimer Fund, Inc. v. Sanders* held that there is a presumption that the responding party must bear the expense of complying with discovery requests.49 *Oppenheimer Fund* is a landmark case in which the Court ultimately ruled that fees associated with discovery are typically to be allocated to each litigant for their self-incurred discovery costs.50

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47 Id.
48 See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (establishing the general rule that each party is typically required to pay for its own discovery production costs).
49 Id. at 360, 362.
50 Id. at 359.
Oppenheimer Fund case, a class action suit was brought against the defendants. The defendants requested the assistance of the plaintiffs in compiling a list of class members to satisfy the individual notice requirement under the federal rules. The Court ultimately held that because the identification of class action members was a necessary component to send notice and a typical requirement of discovery under Fed. R. Civ. P. 23(d), the defendants bore no great expense and were required to incur the expense of hiring a third party to compile the requested list. The Oppenheimer Fund opinion was founded on the "egalitarian concept of providing relatively easy access to the courts to all citizen and reducing the threat of liability for litigation expenses as an obstacle to the commencement of a lawsuit or the assertion of a defense that might have some merit." Simply put, the justification for this rule is that the producing party would pay their own discovery cost to avoid meritless claims from being filed and to limit excessive requests by the opposing party. There are some instances, as in our

51 Id. at 342.
52 Id.
53 Id.; FED. R. CIV. P. 23(d):
Conducting the Action. (1) In General. In conducting an action under this rule, the court may issue orders that: (A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument; (B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of: (i) any step in the action; (ii) the proposed extent of the judgment; or (iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action; (C) impose conditions on the representative parties or on intervenors; (D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or (E) deal with similar procedural matters. (2) Combining and Amending Orders. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

55 John F. Vargo, supra note 45 (providing background for the reasoning and functionality of the American rule); Charles S. Fax, A Trend Toward Cost-Shift into Discovery?, AM. B. ASS'N LITIG. NEWS, http://apps.americanbar.org/litigation/
hypothetical, in which applying that rule becomes inequitable because, depending on your jurisdictional view, parties to futile litigation may incur substantial costs at no fault of their own.

By incorporating the issue of taxation, § 1920, a codification of the Fee Act of 1853, allowed Congress to specify, in detail, the nature and amount of tax applied to recoverable fees in federal court.\textsuperscript{56} This section of the U.S. Code was only recently amended to encompass e-discovery as Congress acknowledged technological advancements in society.\textsuperscript{57} The language proposed by Congress describes the intended effect of the change as provided at the Judicial Conference proceedings in 2008 by the Committee on Court Administration and Case Management ("Committee") agreed that § 1920 did not address many of the technological expenses that are now frequently exhausted in federal litigation.\textsuperscript{58} One modification at issue here is the 2008 Amendment to 28 U.S.C. § 1920(2) and (4).\textsuperscript{59} The initial idea of an amendment by Congress originated from the Committee.\textsuperscript{60} The Committee was asked to consider whether the list of taxable costs should be amended to include expenses incurred and associated with the use of new courtroom technologies.\textsuperscript{61} The language Congress proposed described the effect that the change intended to make by acknowledging:

The Committee agreed that § 1920 does not address many of the technology expenses that are now

\textsuperscript{56} Vargo, \textit{supra} note 45, at 1578.
\textsuperscript{60} \textit{REPORT OF THE PROCEEDINGS, supra} note 58.
\textsuperscript{61} \textit{ld.} at 9-10.
often expended in federal litigation. The Committee was concerned, however, that the charges for these new expenses could dramatically expand the intention of the statute, which was to allow the taxing of costs in a very limited way. Therefore, the Committee decided to recommend that the Judicial Conference endorse two limited statutory amendments to 28 U.S.C. § 1920. The first would amend subsection (2) to recognize the availability of transcripts in electronic form. The second would expand the concept of "papers" in subsection (4) in order to reflect the decreasing use of paper and the increasing use of technology in creating, filing, and exchanging court documents.

The Committee, "[c]oncluding that adding the full range of such costs might go well beyond the intended scope of the statute," recommended that the legislature adopt the two limited amendments into 28 U.S.C. § 1920. The modified paragraph removed the term "copies of papers" and changed it to "the costs of making copies of any materials where the copies are." In removing the word "paper," some federal appellate and district courts have read the statute to allow for the specific recovery of e-discovery costs.

According to the Committee, the purpose of the first proposed amendment was to permit taxing amounts accumulated during litigation "associated with copying materials, whether they were copied in paper form" or electronically processed. That proposal now forms 28 U.S.C. § 1920(4), which is the section at the center of the taxation of e-discovery costs controversy. Rule 54(d) of the Federal Rules of Civil

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62 Id.; see also CBT Flint Partners, LLC v. Return Path, Inc., 737 F.3d 1320, 1326-27 (Fed. Cir. 2013).
63 REPORT OF PROCEEDINGS, supra note 58.
65 Joshua A. Haft, Section 1920 and E-Discovery, 74 U. PITT. L. REV. 359, 368 (2013) (discussing the significance of removing the word "papers" from section 1920).
66 REPORT OF PROCEEDINGS, supra note 58 (emphasis added).
67 Michelle Mantine & Caitlin Gifford, E-discovery: Which costs are recoverable by the prevailing party, INSIDE COUNS. (Nov. 4, 2016, 10:53 PM), http://www.insidecounsel.com/2012/06/27/e-discovery-which-costs-are-recoverable-by-the-pre.
Procedure is used as a litigation tool because it creates a presumption that the prevailing party can recover costs associated with litigation, and those costs can then be taxed under § 1920(4). Once the scope of statutory authority, according to the particular jurisdiction, is established through § 1920(4) however, the amount awarded is then reviewed only for abuse of discretion claims. Section 1920 limits the courts’ ability to award litigation costs. Because the e-discovery services are technically difficult for a proletarian to comprehend, and typically beyond the expertise of the prevailing party’s attorneys, the fees incurred in retaining experts to perform the services are unavoidable. For this reason, the Supreme Court reiterated their understanding of § 1920 as limiting the taxation of costs based on congressional policy of “placing ridged controls” on the ability to shift costs in federal courts. This acknowledgment by the Supreme Court did little to clarify what specific limits or controls are allowed in federal court. Under Fed. R. Civ. P. 54(d), federal courts have discretionary equitable power to award costs. The standard of review on the taxation of said costs is strictly abuse of discretion.

The House Judiciary Committee went so far as to suggest that § 1920 was written to work cohesively with Fed. R. Civ. P. 54(d). Similarly, providing that the substitution of the judge or clerk “shall” tax costs, for, the judge or clerk of court “may” tax costs, makes the taxation of electronic discovery costs a mandatory decision for the

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68 See Klein v. Grynberg, 44 F.3d 1497, 1506 (10th Cir. 1995); Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co., 854 F.2d 219, 221-22 (7th Cir. 1988).
69 In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 458 (3d Cir. 2000).
73 In re Paoli R.R. Yard PCB Litig., 221 F.3d at 458.
74 Id.
75 Haft, supra note 65, at 369.
courts rather than a discretionary option, yet still no direction. The intended result in amending the legislative authority was to create a harmony between the current rules of federal judiciary practice and the evolution of technology in judicial procedure, yet the outcome is not always that simple.

E-discovery is often used as a weapon to induce and persuade against litigation. Because the costs of e-discovery can be excessive, the threat of litigation is often enough to settle a case before it is even started, which is what most companies, like John's Drug Store in our hypothetical, are yearning for. Therefore, it is essential to correctly interpret the costs statute and ensure that the interpretation conforms to modern day technological developments and analogously serves as a tool for restricting excessive and inappropriate electronic discovery demands as well.

Before the 2008 amendment, the presumption of the Supreme Court was that the costs of meeting discovery requirements stayed with the litigant that incurred them. While the costs of copies were recoverable, the costs associated with the production of those copies were not. In other words, the work involved in recovering and producing discoverable materials related to the document compilation and review process would not be included in § 1920(4). Similarly, the costs associated with preparing to copy the material were not recoverable. Furthermore, "costs incurred in acquiring, installing, and configuring a new data[]ho[using] server," which were incurred would be something incurred for the convenience of a party and its counsel were not recoverable.

The taxation of expenses associated with e-discovery

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76 Id. at 369-70.
78 Id. at 571.
81 Id. at 1326.
82 Id. at 1330.
83 Id. at 1331.
encourages litigants to exercise restraint in the unlimited requests that they burden the opposing party with because they must pay tax on the "duplicated" discovery they receive.\textsuperscript{84} The general principle provided by the United States Court of Appeals for the Federal Circuit is that Rule 54(d) allows only the recovery of reasonable costs, as defined and taxable by 28 U.S.C. § 1920(4), of actually duplicating documents as a prelude of duplication.\textsuperscript{85} This is the general principle, not by selection, but solely because no legislative history provides reason to suggest otherwise.\textsuperscript{86} A deeper understanding of the rules may help to clarify the importance of an accurate interpretation and application.

\section*{II. The Pertinent Rules}

The ultimate goal is to reach an effective solution to the split between the courts in their application of the federal rules. To do so, one must first understand the entanglement of Rule 54(d) and § 1920(4) and the justification for the interplay between the two. Section 1920 of the United States Code defines the full extent of a federal court’s power to shift litigation costs absent express statutory authority.\textsuperscript{87} Whether a particular expense is taxable because it falls within § 1920 is an issue of statutory construction.\textsuperscript{88} While 28 U.S.C. § 1920 provides an imprecise

\begin{itemize}
\item \textsuperscript{84} \textit{Id.} at 1325.
\item \textsuperscript{85} 28 U.S.C. § 1920.
\item \textsuperscript{86} \textit{See CBT Flint Partners, LLC}, 737 F.3d at 1326.
\item \textsuperscript{87} 28 U.S.C. § 1920. The U.S. Code Service § 1920 Taxation of Costs provides:
\begin{quote}
A judge or clerk of any court in the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title [28 USCS § 1923]; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title [28 USCS § 1828]. Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title [28 USCS § 1828]. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.
\end{quote}
\item \textsuperscript{88} \textit{CBT Flint Partners, LLC}, 737 F.3d at 1325.
\end{itemize}
list of taxable expenses, courts have the authority to tax these expenses under Fed. R. Civ. P. 54, which specifically authorizes district courts to award costs, absent attorney’s fees, to the prevailing party. Explicitly, Fed. R. Civ. P. 54(d)(1) provides that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” In effect, § 1920 serves as a limitation on the federal courts’ ability to award costs under Rule 54. The problem with this intermingling is that it is nearly impossible for a majority of jurisdictions to apply § 1920(4)’s undefined “exemplification” standards and even more difficult to understand exactly what the “costs of making copies of any materials” includes.

A party may seek to recover costs expended in the e-discovery process after a judgment has been reached through the application of U.S.C. § 1920(4). Fed. R. Civ. P. 54(d) vests authority in courts to award costs while restraining those costs to the scope of Fed. R. Civ. P. 26(b) and further limited by 28 U.S.C. § 1920. Section 1920, the general statute on the taxation of costs recoverable by the prevailing party, also limits the types of costs a district court may award under Fed. R. Civ. P. 54(d), and thus the rules are intertwined. The costs associated with discovery became applicable to this issue when courts acknowledged that, at a minimum, some electronic discovery expenditures may be recoverable under § 1920, and specifically under § 1920(4) as exemplification and copies. This statutory factor expressly provides that the “fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case” and are thus recoverable by the prevailing party under Rule 54(d).

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90 FED. R. CIV. P. 54(d) (emphasis added).
93 FED. R. CIV. P. 54(d).
95 28 U.S.C. § 1920 (“(4) Fees for the exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case”); see also FED. R. CIV. P. 54.
Herein lies a stark division of courts in the application of § 1920(4). Some courts, like the Third Circuit in Race Tires,98 apply a

98 Third Circuit Addresses Taxable Costs: Vacates Award of The District Court, Remands With Instructions To Re-Tax Costs in Accordance with Opinion, K&L GATES ELECTRONIC DISCOVERY LAW BLOG:

On appeal, the Third Circuit vacated the District Court’s approval of taxable costs related to electronic discovery and remanded with instruction to re-tax in accordance with this opinion. Specifically, the court concluded that the relevant vendors’ charges “would not qualify as fees for ‘exemplification’” and that “of the numerous services the vendors performed, only the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD involved ‘copying’” and were thus recoverable. Following the District Court’s grant of the defense summary judgment motions, the Clerk for the District Court considered the Bills of Costs submitted by the defendants and ultimately concluded that “electronic discovery costs would be considered... taxable, as opposed to just... the cost of litigating.” In response, Plaintiff filed a Motion to Appoint a Special Master Regarding E-Discovery Issues and a Motion to Review Taxation of Costs. “[O]n May 6, 2011, the District Court declined to appoint a Special Master and affirmed the Clerk’s taxation of the electronic discovery vendor charges.” In so deciding, the court “essentially found that ‘the steps the third-party vendor(s) performed appeared to be the electronic equivalent of exemplification and copying.’” Plaintiff timely appealed. The question presented on appeal was whether 28 U.S.C. § 1920(4) “authorizes the taxation of an electronic discovery consultant’s charges for data collection, preservation, searching, culling, conversion, and production as either ‘exemplification [or] the... making [of] copies of any materials where the copies are necessarily obtained for use in this case.’” “[W]hether a particular expense falls within the purview of section 1920, and thus may be taxed in the first place, is an issue of statutory construction, subject to de novo review.” In short, the court held that none of the work performed by the vendors would qualify as “exemplification” and that only “the scanning of hard copy documents, the conversion of native files to TIFF, and the transfer of VHS tapes to DVD, involved ‘copying.’” Briefly summarizing its underlying analysis, the court stated:

Neither the language of § 1920(4), nor its history, suggests that Congress intended to shift all the expenses of a particular form of discovery—production of ESI—to the losing party. Nor can
narrow interpretation of the statute awarding the prevailing parties only those costs associated with actually making copies, like scanning, or converting native files to a tagged image file format ("TIFF"). The jurisdictions that adopted this limited view, including the Federal Circuit, refuse to include anything but the costs of the specifically listed items under § 1920. This narrow construal provides that courts lack the “statutory authority to award costs” of production to the prevailing parties.

such a result find support in Supreme Court precedent, which has accorded a narrow reading of the cost statute in other contexts. See, e.g., Crawford Fitting Co., 482 U.S. at 442. Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute. FN12

FN12. Cost-shifting may be effected during the course of litigation, either by agreement or pursuant to court order issued under the authority of Fed. R. Civ. P. 26. After litigation, cost-shifting may be ordered as a sanction for vexatious conduct that reflects bad faith, as opposed to “misunderstanding, bad judgment, or well-intentioned zeal.” LaSalle Nat’l Bank v. First Conn. Holding Grp., LLC, 287 F.3d 279, 289 (3d Cir. 2002) (citations omitted).

Accordingly, the court determined that “none of the charges imposed by [defendant] DMS’s vendor are taxable” and also reduced the award in favor of defendant Hoosier from $125,580.55 to $30,370.42, a difference of $95,210.13.


99 See id. at 160, cert denied. (defining TIFF as a method and industry standard used to store scanned and digital images in gray-scale, full color, and black and white).

100 Kohus v. Toys R Us, Inc., 282 F.3d 1355, 1361 (Fed. Cir. 2002).
party for anything except legally defined exemplifications. Those jurisdictions define exemplification as "an official transcript of a public record, authenticated as a true copy for use as evidence." Conversely, other courts have defined and applied the terms in a broader sense. For example, the United States District Court of the Southern District of California in Jardin v. DATAAlegro recently rejected the Race Tires holding. In the Jardin case, the defendant was granted summary judgment in a patent infringement case for noninfringement, and the court properly taxed plaintiff's costs under Fed. R. Civ. P. 54(d) because he did not appropriately rebut the presumption in favor of awarding costs. Similarly, holding that converting electronic data to the TIFF format was a necessary part of discovery and allowed for the costs for the electronic conversion of said data. The Jardin court found that U.S.C. § 1920(4) should be interpreted broadly with respect to production costs and include all costs related with the physical production of information and conversion of files, and not limited to only that used as evidence in court. Waiting to rely on § 1920 until a verdict has been reached, or after litigation, limits the recoverable costs sought in a Rule 26 motion filed for cost shifting to the costs associated to making copies. This award may

101 Id. at 1359.
104 Id. at 29-30.
105 Id. at 19.
106 Id. at 17-18.
107 Rule 26(b)(1) provides:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' 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. Information within this scope of discovery need not be admissible in evidence to be discoverable.

...
also be further restricted if the party looking to shift the costs at the close of the case raised no argument throughout litigation under Fed. R. Civ. P. 26(c) or otherwise at any time after judgment about the expensive or burdensome discovery requests by the opposing party. ¹⁰⁸

Furthermore, a substantial amount of disputed costs stem from vendor employment to uncover requested materials by the producing party. ¹⁰⁹ A narrow interpretation of § 1920 and Rule 54(d) would not allow for the recovery for activities undertaken by vendors, while the liberal jurisdictions would include aforesaid costs. ¹¹⁰ Because most e-discovery services are technically difficult for a layperson to comprehend and typically beyond the expertise of the prevailing party’s

Rule 26(b)(2)(B) allows a party not to produce “electronically stored information” if it would be unreasonably burdensome or expensive to produce it. It also establishes a process for asking the court to require the party to produce information withheld on this basis. See also Jeffery W. Stempel et al., Learning Civil Procedure 485-99 (2d ed. 2015); Fed. R. Civ. P. 26(b)(1), 26(b)(2)(B).


Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential, research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

See also Fed. R. Civ. P. 26(c)(A-H).

¹⁰⁹ Hecker v. Deere & Co. 556 F.3d 575, 591 (7th Cir. 2009).

attorneys, the fees incurred in retaining experts to perform the services are unavoidable. The costs of e-discovery can be astronomical and it becomes obvious why the threat of litigation is often enough to settle a case before it is even started. Consequently, cost shifting is often used as a weapon to induce early settlements or persuade against litigation and therefore only applied in specific instances. Therefore, it is essential to correctly interpret the costs statute to ensure that the construal conforms to modern day technological developments but also serves as a tool for restricting excessive and inappropriate electronic discovery demands.

An example of these demands would be the approval of broad discovery requests submitted blindly by John's Drug Store before specified information and the narrower topics at issue are identified.

The view provided by the Federal Circuit and the Ninth Circuit is to strictly follow the rules as constructed because if Congress intended a different result then they would have provided different terms; "If possible, we must give effect to every clause and word of a statute . . . and be reluctant to treat statutory terms as surplusage."

Consequently, the cost statute only allows for the recovery of the reasonable costs of actually duplicating documents as a prelude of duplication, and nothing may be implied. This is the general principle, not by selection, but solely because no legislative history provides reason to suggest otherwise. The recent varying court decisions, discussed below, on the allocation of e-discovery costs focus wholly on the language of the above rules.

111 Id. at 168.
113 Id. at 539.
114 Tavarez v. Kligensmith, 372 F.3d 188, 190 (3d Cir. 2004).
117 See infra Part IV.
III. THE COURTS’ APPLICATION OF COST SHIFTING AND COST SHARING: SHOULD DISCOVERY BE DELIVERED TO OPPOSING COUNSEL WITH A BILL?

The growing problem with the traditional approach is that in a large suit, Fed. R. Civ. P. 26(b)(2)(C)(i-iv), which allows for the objection to questionable costs, does not provide enough protection to parties. John’s Drug Store must determine the extent of their claim through discovery. In doing so, John’s Drug Store will need to restrict their discovery as to not be overly broad or excessive, because the current scope of discovery is too expansive in reference to exactly what information is needed, from Big Pharma, to prepare its case.

Proportionality is an emerging problem; for example, if a small partnership sues a large corporation, the costs incurred by the corporation may be substantially higher than those incurred by the small business. While objectively this seems like a way to reign in unnecessary discovery costs and reduce the caseload of federal courts, it is an inequitable remedy for corporations, who are then resigned to settling a majority of the suits, including meritless claims, against them to avoid the costs of discovery and the taxation of those costs.

Fed. R. Civ. P. 26(b)(1) serves as the broad scope under which discovery is allowed and is restricted by the cost consciousness of Fed. R. Civ. P. 26(b)(2). The federal rules, frequently criticized for their

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Discovery Scope and Limits When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

119 Crawford-El v. Britton, 523 U.S. 574, 598-99 (1998) (holding Rule 26(b) confers broad discretion to control the combination of interrogatories, requests for admissions, requests for production, and depositions permitted in a given case; the sequence in
relaxed pleading requirements, allow for claims to easily reach the
discovery phase of litigation to uncover the substance and merit of the
claim, which has resulted in the liberal use of discovery currently in
place. Fed. R. Civ. P. 26(c) provides the solution enacted to reign in
the newly broadened scope of discovery via court order. This rule is
a protective order narrowing the scope of discovery when negotiations
between litigants cannot establish restrictions. A court will be more
likely to grant this protective order when the parties have attempted to
cooperate prior to filing the motion. When a Rule 26(c) motion is
filed, the court must determine what the recourse will be and must come
to a definite result, so courts have implemented a solution. This
solution is referred to as cost shifting, meaning the court orders the
requesting party to completely bear the costs of recovery rather than the
responding party, as is traditionally the case.

In opposition of § 1920, Fed. R. Civ. P. 26(c) is a remedy to
recover court costs while litigation is pending. The burden of proof
is on the responding party to demonstrate that costs should be shifted.
For example, when the requests made by John's, the small local
pharmacy, begin to reach beyond the scope of the information's origin,
Big Pharma must file to request that the court implement restrictions on the scope of discovery under Rule 26(c).\textsuperscript{128} It is in this instance that the application of the cost-shifting analysis, discussed later, must be applied to determine the result.\textsuperscript{129} Courts do in fact consider the total costs related to e-discovery at the close of the case to be shifted, even when a Rule 26 motion is filed during litigation.\textsuperscript{130}

The shifting of discovery expenditures should only be considered when the e-discovery expenses are \textit{unduly burdensome or expensive} to the responding party.\textsuperscript{131} The standard involves analyzing how important the requested information is in comparison to the cost of the production of the information.\textsuperscript{132} Whether the production of documents is unduly burdensome generally turns on whether the information is maintained in an accessible or inaccessible format.\textsuperscript{133} For data that is maintained in an accessible format, the producing party is responsible for the costs of production and the default discovery rules apply.\textsuperscript{134} Inaccessible data can be difficult to identify but, based on case law, includes documents converted to microfiche and not easily readable, documents kept unsystematically with no index or organized record, and other documents that are stored in difficult areas for the opposing party to reach.\textsuperscript{135}

\textbf{A. The Rowe Test}

Courts that must make a determination based on cost shifting can take a multitude of approaches, including applying the refined Rowe test, the most recent Zubulake test, or Rule 26's narrower

\begin{itemize}
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\item \textsuperscript{131} Fed. R. Civ. P. 26(b)(2)(B) (shifting discovery expenditures should be considered on a case by case basis and certainly not each and every discovery action).
\item \textsuperscript{132} Id. 26(b)(1)
\item \textsuperscript{133} \textit{See} Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003).
\item \textsuperscript{134} Gutman, \textit{supra} note 130.
\item \textsuperscript{135} Id.
\end{itemize}
proportionality test found under Fed. R. Civ. P. 26(b)(2)(C). Because of this wide selection, it raises a question as to which approach is the correct cost-shifting analysis. If the correct approach can be selected here, the argument for amending the Federal Rules can be silenced in return for a more conventional alternative.

Traditionally, in determining whether cost shifting is an appropriate remedy a majority of courts have applied the eight factors of the test presented in the Rowe Entertainment case. In Rowe Entertainment, Inc., v. The William Morris Agency Inc., the plaintiffs, two African American concert promoters, alleged that they were frozen out of the promotional marketing of Caucasian bands by anti-competitive and discriminatory practices. The defendants included booking agencies and other promoters. The plaintiffs made excessive discovery demands, particularly for ESI in the form of e-mail communications, and each defendant sought a protective order pursuant to Fed. R. Civ. P. 26(v)(2)(iii)(c). The court considered an eight factor balancing test and ultimately determined that the plaintiffs demands were generally relevant.

This test heavily favors cost shifting. The court stated that the factual situation was analogous to a company failing to shred its confidential paper documents and intermingling them with nonconfidential and discoverable documents. The expense of sorting such documents is correctly borne by the responding party and the same principle should be allotted to e-discovery. Ultimately, the plaintiffs bore the general discovery costs, but the defendants remained responsible for the expense in reviewing any privileged or confidential materials, to which the plaintiff had no access.

136 Id.
138 Id. at 427.
139 Id. at 426.
140 Id. at 424.
141 Id. at 429.
142 Id. at 428-29.
143 Id. at 432.
144 Id. at 433.
The eight factors include:
(1) The specificity of the discovery requests;
(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 of the parties obtaining the information;
(6) The total cost associated with production;
(7) The relative ability of each party to control costs and its incentive to do so; and
(8) The resources available to each party.\(^\text{145}\)

Though accepted in a majority of jurisdictions, the *Rowe* test is not always the most appropriate consideration because it "favors" cost shifting, and the factors are all weighed equally instead of carrying different weight based on importance.\(^\text{146}\) A test that is heavily in favor of cost shifting is inappropriate because its results are in opposition of the default presumption, which is that the costs incurred in the discovery process belong to the producing party.

**B. The Zubulake Test**

As a result of the *Rowe* controversy, recent courts have substituted the *Rowe* test for the *Zubulake* test.\(^\text{147}\) Both tests are similar, but the court in *Zubulake* made a point to distinguish a few factors, and for good reason.\(^\text{148}\) In *Zubulake v. UBS Warburg LLC*, the plaintiff brought a wrongful termination and gender discrimination suit with the EEOC\(^\text{149}\) against her employer, defendant.\(^\text{150}\) This was a landmark case

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\(^{145}\) *Id.* at 429.


\(^{149}\) *What You Should Know*, EEOC, https://www.eeoc.gov/, (last visited Nov. 11, 2016). The U.S. Equal Employment Opportunity Commission ("EEOC") is a federal law enforcement agency that enforces laws against workplace discrimination. *Id.*

in the e-discovery world because it was the first time courts directly addressed the scope of discovery in reference to electronic evidence.\textsuperscript{151} Plaintiff submitted discovery requests for all of the defendants' email correspondence referencing her in any way.\textsuperscript{152} After initially agreeing to the scope of discovery, defendants did not comply with discovery because after realizing that the cost of recovering such ESI would be in excess of $175,000, exclusive of attorney's fees and costs.\textsuperscript{153} The court looked to the proportionality test of Fed. R. Civ. P. 26(b)(2) but determined that they had to implement a different test to determine which rules apply to less accessible data.\textsuperscript{154} The court ultimately held that an extensive number of factors applied that should be analyzed on a case-by-case basis.\textsuperscript{155}

The court in \textit{Zubulake} rejected the \textit{Rowe} test for three reasons: the \textit{Rowe} test was incomplete, gave equal weight to all of the factors when the factors need to be weighed against predominating factors, and courts that apply that test do not necessarily develop a full factual record.\textsuperscript{156} The \textit{Zubulake} court modified \textit{Rowe} by proposing a new test that is similar to \textit{Rowe} but added two factors, eliminated two factors, and listed the factors in descending order from heaviest weighted to the least substantial.\textsuperscript{157} Based on the modifications to the \textit{Rowe} test, the new seven-factor test provided in \textit{Zubulake} consists of:

(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;

\begin{itemize}
\item \textsuperscript{151} Li, supra note 147.
\item \textsuperscript{152} Zubulake v. UBS Warburg LLC, 229 F.R.D. 422, 425 (S.D.N.Y. 2004).
\item \textsuperscript{153} \textit{See} Zubulake, 217 F.R.D. at 312.
\item \textsuperscript{154} \textit{Id.} at 316.
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.} at 320.
\item \textsuperscript{157} \textit{Id.} at 321-22.
\end{itemize}
(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 obtaining the information.\(^{158}\)

These factors should not be weighed equally but are listed in descending order of importance, applying a "balancing approach."\(^{159}\) The modifications to the \textit{Rowe} factors included the importance of the issues at stake in the litigation language, the amount in controversy, the importance of the proposed discovery in resolving the issues presented, and the parties' resources as found under Fed. R. Civ. P. 26; the \textit{Rowe} considerations are devoid of these \textit{Zubulake} modifications.\(^{160}\) The modification of the \textit{Rowe} factors by the \textit{Zubulake} court results in a balanced test instead of lending favor to cost shifting.\(^{161}\) A court need not consider the relative wealth of the parties and ability to pay, as proposed in \textit{Rowe}, but instead consider the total costs of production versus the resources for discovery available to each party.\(^{162}\)

Analogously, according to the court in \textit{Zubulake}, two \textit{Rowe} factors also needed to be eliminated.\(^{163}\) The specificity requirement should be removed; the specificity of the test is important but is already addressed in two of the remaining factors and consequently combined to create the first factor.\(^{164}\) Next, because accessibility is the test for undue burden or expense, the fourth \textit{Rowe} factor is irrelevant in the determination of whether cost shifting is appropriate.\(^{165}\)

As should now be obvious, the financial result in litigation

\(^{158}\) See id. at 322.

\(^{159}\) Id. at 323; Rowe Entm't, Inc. v. William Morris Agency, 205 F.R.D. 421, 429 (S.D.N.Y. 2002).

\(^{160}\) Zubulake, 217 F.R.D. at 327.

\(^{161}\) Id. at 321.


\(^{163}\) Id. at 424.

\(^{164}\) See id.

\(^{165}\) Id. at 421, 426.
differs significantly depending on whether the court applies the *Rowe* factors or the amended *Zubulake* test. Under the *Rowe* factors, should Big Pharma from our hypothetical succeed in their litigation, John’s Drug Store would bear the immense e-discovery costs for all materials not included in the scope of general discovery.\(^{166}\) Said costs would be astronomical because as a national chain convenience store and a pharmacy, much of Big Pharma’s discoverable material would be private, safeguarded, and consequently inaccessible discoverable material.\(^{167}\) The application of the *Rowe* factors result in a converse conclusion than the existing default presumption under the rules; the producing party would bear all costs generated in the discovery process.\(^{168}\) Under *Zubulake* on the other hand, the balancing test would require weighing the factors and thus the default presumption applies and consequently favors the small businesses.\(^{169}\)

In summary, the court in *Zubulake* set forth a systematic approach to resolving disputes concerning the scope and cost of discovery of electronically stored information in a three step analysis.\(^{170}\) First, a court must only permit cost shifting when electronic data is “relatively inaccessible.”\(^{171}\) That is why significant importance is placed on the necessity of understanding the respondent’s computer system because typically, accessible materials are governed by the general discovery rules and not even considered in a cost-shifting analysis.\(^{172}\) Secondly, before ordering a complete overhaul for discovery purposes, a small sample of the discoverable information is necessary to determine what exactly is to be found within the inaccessible materials.\(^{173}\) Lastly, the courts should apply and weigh the
seven factor cost-shifting analysis presented above in order of significance before it can make a determination on shifting costs to the requesting party. Making that determination is an extremely fact-intensive analysis and thus places a heavy burden on the court to act in the best discretion of the parties, and it should be particularly careful in determining which test to apply based on what data may be found on the inaccessible media.

It has become apparent that the trouble with the Zubulake test is that it may be too restrictive as opposed to the Rowe factors, which are viewed as too liberal. Because Zubulake presents an “inaccessibility” standard, any accessible material, even when it is outside the general scope of discovery, will be governed under the general discovery rules and thus a cost-shifting analysis would not be applicable. The parties are consequently responsible for their own costs incurred in complying with discovery requests, absent extenuating circumstances, regardless of the monetary amount. Under most circumstances the results could be unjust against either party. There is in fact an alternative to the cost-shifting approach.

Before a court order and the discovery process begin, in an attempt to avoid seeking a court order of the payment of inaccessible costs, if both parties know that the cost of discovery will be astronomical before the start of the case, both the requesting party and respondent may enter into a cost-sharing agreement. Courts may also order the sharing of costs between parties if an existing agreement is defective or the entire amount of e-discovery costs are proportionally delegable to both parties. Typically with a cost-sharing agreement, the court spreads or shares the costs of discovery at the end of the discovery process, amongst the parties. The agreement should be well written by an attorney to avoid potential disputes on the allocation

174 \textit{Id.} at 11.
175 \textit{Id.} at 9.
177 Stinneford & Emmons, \textit{supra} note 173, at 9.
178 \textit{FED. R. CIV. P.} 34.
179 \textit{WORKING GROUP SERIES, supra} note 176.
of costs, and when the costs should be allocated. If in fact the court must intervene because the parties never had a true meeting of the minds as to what the allocation would be, the court looks to the totality of the circumstances before making a determination on the distribution of costs.\textsuperscript{180}

Though the costs associated with e-discovery may seem insignificant in small suits, extensive litigations with monumental discovery expenditures rely heavily on the courts’ decision regarding the fees. Courts in most jurisdictions have a wide variety of options in the allocation of the costs associated with e-discovery.\textsuperscript{181} As e-discovery takes over nearly the entire process of discovery, there is a rising importance for attorneys and judges alike to be informed on the law concerning the process and the pertinent restrictions presented as well as versed in the applicable law. The critical importance of whether costs will be shifted or shared amongst the parties is the core of the taxation discussion because the costs after allowing for taxation in broad jurisdictions have to be allotted to whichever party the jurisdiction decides.\textsuperscript{182} After those extensive costs are assessed against the assuming party the clerk of court taxes them.\textsuperscript{183} When the parties are aware of the financial consequences before litigation, they are less likely to abuse the rules.\textsuperscript{184} Determining whether the costs should be shifted or shared is seemingly the prejudgment resolution of costs while taxation of the remaining costs and the application of both Fed. R. Civ. P. 54(d) and § 1920(4) is postlitigation.

Until recently, the Supreme Court was silent on the issue of taxing discovery costs.\textsuperscript{185} While a majority of the circuit courts are split, the remaining circuits have not addressed the issue. In June 2012, \textit{Hoosier Racing Tire Corp.}, one party to a Third Circuit decision, filed a

\begin{itemize}
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} John M. Barkett, \textit{Un-taxing E-Discovery Costs: Section 1920(4) After Race Tire Amer. Inc. and Taniguchi} 8 (2012).
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textbf{WORKING GROUP SERIES, supra note 176.}
  \item \textsuperscript{185} \textit{See generally Mark Austrian, Getting Your E-Discovery Money Back: Taxation of Costs and Offer of Judgment,} \textit{DEFENSE} 12 (2012) (analyzing an overview of lower court decisions on discovery taxation).
\end{itemize}
petition for a writ of certiorari providing the Supreme Court with an opportunity to resolve this conflict between the circuits. In early October 2012, the Supreme Court denied the petition for writ of certiorari, leaving the circuits spilt and the matter of taxing e-discovery costs unsettled.

IV. THE COURT SPLIT

The recent court decisions on the taxation of e-discovery costs focus wholly on the language of Fed. R. Civ. P. 54(d) and § 1920(4). It is important to keep in mind that taxing these costs seems \textit{de minimis} but in large litigation suits the tax alone can be upwards of a few million dollars. The "exemplification" language provided by the § 1920(4) creates the issue as it is inconsistently applied among the circuits. Some jurisdictions use § 1920(4) as a channel to allow recovery of any and all plausible costs that the legislature may have intended to include. With the remaining courts focusing strictly on the language included in § 1920, preventing recovery in those processes not specifically listed. The courts disagree as to whether all costs associated with the copied material itself, the production, and presentation of discoverable material shall be taxable and may be awarded to one party, or whether the law strictly provides for the taxation of "copies" made of the discoverable material. The inconsistency arises from the varying approaches attempting to define Congress' intent.

Compare, for example, the application of exemplification in the Seventh Circuit as "the act of illustration by example . . . includ[ing] a wide variety of exhibits and demonstrative aids[,]" a definition that is broad enough to include the taxation of a wide variety of awarded costs.

\begin{itemize}
\item[188] Austrian, \textit{supra} note 185, at 15-19.
\item[189] \textit{ld.} at 13-19.
\item[191] \textit{See generally} Haft, \textit{supra} note 65, at 359 (discussing the taxation of e-discovery costs to litigants).
\item[192] \textit{ld.} at 360, 363.
\end{itemize}
and not just the process of copying. This Seventh Circuit interpretation differs from the Federal and Sixth Circuit’s interpretation which submit a narrow definition of the term, defined as “an official transcript of a public record, authenticated as a true copy for use as evidence.” These circuits were then followed by the controversial Third Circuit opinion Race Tires, in which the court declined a determination of how the term exemplification can be defined, allowing for the ultimate judgment to depend on the specific courts interpretation of § 1920. Therein lies the problem because no two courts seem to have the same interpretation. In our hypothetical, the result of applying the narrow interpretation of the Third, Sixth, and Federal Circuits would be the taxation on only the portion of the discovery process that is allocable to making copies, which may amount to 1/15th Big Pharma’s total cost of discovery. And a broad interpretation of the law could place the entire financial obligation incurred in discovery on either Big Pharma or John’s Drug Store pending the outcome of litigation.

In Race Tires, the plaintiff, a tire distributor brought suit against the defendants, a retail competitor and a motorsports company. The Plaintiff asserted violations of the Sherman Act after an alleged

193 Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 427 (7th Cir. 2000).
196 Austrian, supra note 185, at 13.
197 Id. at 13, 16-17.
198 Id. at 13, 16.
199 Racing Tires Am., 674 F.3d at 160.
   Trusts, etc., in restraint of trade illegal; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said
violation of exclusive supply contracts for racing tires.\footnote{201} Both litigants understood the magnitude of engaging in extensive discovery of ESI.\footnote{202} At the direction of the United States District Court for the Western District of Pennsylvania, the parties attempted to agree upon a cost-sharing list of reasonable restrictions and allowances for producing discoverable ESI via e-discovery vendors.\footnote{203} At the conclusion of discovery, the defendants moved for summary judgment, and the District Court granted the motion.\footnote{204}

At the close of all litigation, including appeals, pursuant to Fed. R. Civ. P. 54(d), both defendants presented their applicable “Bill of Costs” to the “Clerk for the District Court.”\footnote{205} On the applicable form, pursuant to 28 U.S.C. § 1920(4), defendants listed as “[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in this case,” a total of $472,058 as traditionally taxable and awarded to the prevailing party.\footnote{206} After correcting some calculation errors, the Clerk for the District Court noted that this is the first instance for which it must decide whether to tax e-discovery costs.\footnote{207} The court ultimately determined that the costs were reasonably and necessarily incurred.\footnote{208} In their narrow decision, the Third Circuit Court of Appeals reduced the recovery amount to $30,370, the actual costs incurred in strictly applying the language of § 1920(4), and consequently the Clerk could only tax that amount, not the

punishments, in the discretion of the court. . . . Monopolization trade

a felony; penalty: Every person who shall monopolize, or attempt to

monopolize, or combine or conspire with any other person or

persons, to monopolize any part of the trade or commerce among the

several States, or with foreign nations, shall be deemed guilty of a

felony, and, on conviction thereof, shall be punished by fine not

exceeding $100,000,000 if a corporation, or, if any other person,

$1,000,000, or by imprisonment not exceeding 10 years, or by both

said punishments, in the discretion of the court.

\footnote{201}{Racing Tires Am., 674 F.3d at 160.}
\footnote{202}{Id. at 170-71.}
\footnote{203}{Id. at 161.}
\footnote{204}{Id. at 162.}
\footnote{205}{Id.}
\footnote{206}{Id. at 159, 162.}
\footnote{207}{Id. at 162.}
\footnote{208}{Id. at 163.}
initial $472,058.209.

Should the statute be applied “in the broader sense adopted by the Seventh Circuit,” the entire amount of uncovering all relevant ESI to the issue at hand, may be taxable to the corporation, thus a harsher result against the nonprevailing party than that of Race Tires. In applying our hypothetical, without such agreement either Big Pharma or John’s would bear the entire monetary amount.

V. FLORIDA AND THE ELEVENTH CIRCUIT: A BETTER APPROACH?

The Eleventh Circuit took a particularly narrow stance in 2001. Mindful of the general preference for a narrow construction and interpretation of § 1920(4), the Circuit was unwilling to break new ground. Specifically, in the Arcadian Fertilizer case, the United States Court of Appeals for the Eleventh Circuit held that e-discovery costs are not taxable under its narrow definition of exemplification. Particularly, the costs incurred for the convenience of the litigant are not going to be recoverable. This convenience standard encompasses anything that does not fit the above-mentioned “exemplification”

209 Id. at 171.

Neither the language of § 1920(4), nor its history, suggests that Congress intended to shift all the expenses of a particular form of discovery—production of ESI—to the losing party. Nor can such a result find support in Supreme Court precedent, which has accorded a narrow reading of the cost statute in other contexts. See, e.g., Crawford Fitting Co., 482 U.S. at 442. Although there may be strong policy reasons in general, or compelling equitable circumstances in a particular case, to award the full cost of electronic discovery to the prevailing party, the federal courts lack the authority to do so, either generally or in particular cases, under the cost statute.

210 Id. at 166.

211 Arcadian Fertilizer, L.P. v. MPW Indus. Serv., Inc., 249 F.3d 1293, 1297-98 (11th Cir. 2001).

212 Id.

213 See id. at 1296-97 (holding that because videotape exhibits and computer animation are neither copies of paper nor exemplification within § 1920(4), taxing was an error).

214 Id.
definition provided by the Third Circuit, the Sixth Circuit, and the Federal Circuit.215 A number of Eleventh Circuit opinions provide that Fed. R. Civ. P. 54(d) only give district courts discretion as to costs and not the use of that discretion as a power to evade specific congressional commands.216

In complete distinction from the Seventh Circuit opinion, the Eleventh Circuit in Arcadian Fertilizer held that the costs incurred to increase the efficiency of the defendant’s own litigation work are not taxable; any costs that are incurred at the convenience of the counsel shall not be taxable as costs.217 This approach was deemed a narrow, traditional approach, with a strict interpretation of § 1920.218 After such a strong stance against the broad interpretation of the rules, the Eleventh Circuit refused to include an award for the costs of creating electronic exhibits and, in effect, until the legislature specifically amended § 1920(4) to include such (not addressing the 2008 amendment of the code to account for the evolution of technology).219

VI. WHAT’S NEXT FOR THE ELEVENTH CIRCUIT?

Without addressing the 2008 amendment, Florida and the Eleventh Circuit are behind the eight ball during the discovery phase of trial, and as technology consistently advances, a determination must be made to ensure consistency in the jurisdiction’s opinions. I propose that the Eleventh Circuit join the Third Circuit in the Race Tires opinion until the Supreme Court grants certiorari to review the issue. I similarly propose the endorsement of cost sharing agreements before litigation and the strict adherence to said agreements when possible. In larger suits, the threat of sanctions via cost shifting should be enforced as a standard, by which large suits should not be dismayed by the mere threat of litigation, if in fact the requesting party is making unnecessary demands. An overall reduction by threat of sanctions or cost shifting should help reduce the astronomical discovery request by small parties in large suits.

215 Id.
217 Arcadian Fertilizer, 249 F.3d at 1296-98.
218 See id.
219 Id. at 1296-97.
In the case of Big Pharma and John’s Drug Store, the best outcome will rely on the cooperation of the parties. A cost-sharing agreement seems ideal in that Big Pharma, with a surplus of resources, will help to narrow the scope of discovery that John’s Drug Store may request before the start of official discovery. Instead of blindly making a demand for all discoverable information electronically stored in reference to Big Pharma’s production practices, the two may work together pretrial to come to a decision. But while that alternative seems beneficial in theory, its application is unrealistic. It is nearly impossible to establish an accurate approximation as to what discovery is ultimately going to cost the parties until the discovery process is underway, and oftentimes it’s too late. All agreements would likely at some point become unfavorable to one party or the other. In a minimal number of instances cost sharing could be successful and should serve as an applicable alternative option made publically known to the parties.

Cost shifting also seems like an adequate remedy in complex litigation. By placing stricter standards on discovery requests, harsh punishments, and sanctions on parties, cost shifting should act as a deterrent. As of yet, sanctions are rarely imposed for making meritless requests. Specific bright line enforcement rules in reference to these requests should be implemented. Between the Zubulake and Rowe tests, a combination of both ought to be the best way to balance the costs. If the parties are unable to come to a decision, and cost shifting becomes the pre-trial result, Big Pharma may be responsible for astronomical discovery costs for general discovery alone. In the alternative, if a court deemed the ESI in Big Pharma’s possession inaccessible, this would require the use of a vendor to recover. In this situation, should John’s Drug Store lose, this small business absolutely lacks the ability to pay the clerk for any costs, taxable or not, regardless of the exact discovery encompassed under the rules of that jurisdiction. In consideration of the size of Big Pharma’s ESI database, a small business owner is likely unable to even cover the tax on these discovery costs, much less pay the prevailing parties’ integrated costs.

The Federal Rules of Civil Procedure and the U.S. Code can

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See generally LaSalle Nat. Bank v. First Conn. Holding Grp., 287 F.3d 279, 288-89, 292 (3d Cir. 2002) (finding that sanctions are used sparingly and only in cases where an attorney has not acted in good faith).
settle the costs allocable under the Rowe and Zubulake tests. A number of ranging outcomes present themselves depending on the jurisdiction in which the suit is brought, and that inconsistency is a major issue that will only continue to spread to issues like forum shopping by the petitioner for the most favorable outcome. Cost shifting is ultimately going to be the prejudgment resolution, while postjudgment determinations on taxing ESI are going to be decided through the consistent application of the rules under the narrower interpretation of the law. Allowing Big Pharma, before disclosure, to balance for themselves what information they are willing to provide on a narrower scope against the possibility of unrestricted access to all documents and the potential costs associated with that allowance narrow the ambiguous search for information. In not wanting to reveal a majority of their information for confidentiality purposes, Big Pharma hurts themselves if they lose the suit, and absorbs all discovery costs when cooperation between the parties, voluntarily or court ordered, would have prevented the unrestrained to be free for all for information.

It is unlikely that Congress intended this hotchpot result between jurisdictions interpreting the amended laws. Eventually the impact of taxation and costs shifting associated with discovering ESI will result in immense calamity due to the continued inconsistent application of the rules between jurisdictions; that something must provide a reprieve. As an alternate resolution to further amending the U.S. Code and the Federal Rules of Civil Procedure, we can only hope that the U.S. Supreme Court will soon grant certiorari to ultimately provide answers, or a solid and consistently applicable rule, as to how federal courts are to rule on these ever-changing issues.