COST-SHIFTING IN E-DISCOVERY: REEXAMINING *ZUBULAKE* AND 28 U.S.C. § 1920

I. INTRODUCTION

The burden of e-discovery is familiar to the modern litigator.[1] Discovery costs have always dominated the cost of complex litigation, and despite advances in technology, this is unlikely to change.[2] While litigation has moved from paper discovery to electronic discovery, the net effect of the move to electronic format has been to raise, not lower, discovery costs.[3]

Recent changes in the Federal Rules of Civil Procedure have attempted to meet the challenges of e-discovery and minimize costs.[4] Notably, Rule 26(f) now requires early meet-and-confer sessions specifically to address e-discovery issues.[5] However, while the rules do encourage that litigants cooperate in e-discovery, it is difficult to ensure that litigants are truly cooperative in every case.

This Note focuses on unilateral solutions to high e-discovery costs: court-ordered remedies for when cooperation breaks down. This Note discusses two potential remedies. First, the Note discusses cost-shifting under Rule 26(b)-(c), and advocates a more flexible allowance of cost-shifting than is currently permitted under the still-dominant *Zubulake* test.

Second, the Note discusses a brand-new e-discovery issue, a kind of post-judgment cost-shifting, through the taxing of costs under Rule 54 and 28 U.S.C. section 1920. I suggest that current case law generally does not support this second approach; however, a change in the relevant statute is desirable.

In the age of e-discovery, more access to cost-shifting will lead to a fairer distribution of costs, and will discourage combative and wasteful discovery requests. Discussed below are two ways of getting there.

II. BACKGROUND

A longstanding presumption in discovery is that the responding party bears its own costs incurred in responding to discovery requests.[6]

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1. CBT Flint Partners, L.L.C. v. Return Path, Inc., 676 F. Supp.2d 1376, 1381 (N.D. Ga. 2009).

2. *See* Scott A. Moss, *Litigation Discovery Cannot Be Optimal But Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 894 (2009).

3. *See id.* at 896.

4. *See id.* at 899.

5. *See* FED. R. CIV. P. 26(f).

6. *See* Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 428 (S.D.N.Y. 2002).

However, as electronically stored information (ESI) has largely replaced paper in the discovery process, parties have increasingly sought cost-shifting.[7] This is because e-discovery presents unique challenges that have set it apart from conventional discovery, and have so far resulted in higher costs.[8]

The dominant approach to cost-shifting in e-discovery was set forth in *Zubulake v. UBS Warburg LLC.*[9] This approach allows cost-shifting only where the requested ESI resides in an "inaccessible" format.[10] "Inaccessible" essentially means the ESI is deleted (but still recoverable) or it exists only on emergency backup tapes, both of which are especially costly and time-consuming to restore to a useable form.[11] Conversely, the costs of producing "accessible" ESI, such as ESI stored on optical discs and non-deleted ESI on hard drives, is never subject to cost-shifting,[12] even if the request is unreasonably broad.[13]

A. Cost-Shifting and the Zubulake Rule

In *Oppenheimer Funds, Inc. v. Sanders* the Supreme Court set out the basic presumption of cost-bearing for the discovery process.[14] The Court explained that under the Federal Rules of Civil Procedure, "the presumption is that the responding party must bear the expense of complying with discovery requests," but that he may request that the district court grant orders protecting him from "'undue burden or expense.'"[15] These orders can include cost-shifting.[16]

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7. *See* Robert E. Altman and Benjamin Lewis, Note, *Cost-Shifting in ESI Discovery Disputes: A Five Factor Test to Promote Consistency and Set Party Expectations*, 36 N. KY. L. REV. 569, 569 (2009).

8. *See id.* at 571.

9. *See* Zubulake v. UBS Warburg, L.L.C. (*Zubulake I*), 217 F.R.D. 309, 317-24 (S.D.N.Y. 2003).

10. Zubulake v. UBS Warburg, L.L.C. (*Zubulake III*), 216 F.R.D. 280, 291 (S.D.N.Y. 2004) (citing *Zubulake I*, 217 F.R.D. at 216-220).

11. *See Zubulake I*, 217 F.R.D. at 318-20.

12. *See Zubulake III*, 216 F.R.D. at 291 (citing *Zubulake I*, 217 F.R.D. at 216-220).

13. *See* Jessica Lynn Repa, Comment, *Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in* Zubulake *Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257, 280-81 (2004).

14. Oppenheimer Funds, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

15. *Id.* (noting that "the presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.") The court referred to Rule 26(c) as the operative rule, but pursuant to the 2006 Amendments to the Rules, and that language is now contained in Rule 26(b)(2)(B).

In recent years, many parties responding to e-discovery requests have complained of the high costs of producing the requested ESI and have requested that courts grant cost-shifting.[17] In 2001, *McPeek v. Ashcroft*[18] became the first case to develop a test for determining when cost-shifting was appropriate in e-discovery.[19] The test in *McPeek*, also known as the Marginal Utility Test, was essentially as follows: The less likely the requested ESI would be relevant to a claim or defense, the more likely that cost-shifting was appropriate.[20]

In 2002, *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*[21] was the first case to establish a more intricate, multi-factor test for cost-shifting.[22] *Rowe* set out an eight-factor balancing test for determining whether cost-shifting was warranted.[23] The factors were the following:

> (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 benefit to the parties of 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.[24]

In 2003, the *Zubulake* series of cases handed down what soon became some of the most influential e-discovery decisions to date.[25] The *Zubulake* court reasoned that the *Rowe* decision was too preferential

16. *Id.* The court referred to "the requesting party's payment of the costs of discovery," but cost-shifting does not necessarily mean that one or the other party pays the entire cost of production. *See Rowe*, 205 F.R.D. at 430 (citing Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 649-50 (W.D. Ky. 1987).

17. *See* Altman & Lewis, *supra* note 7, at 569.

18. McPeek v. Ashcroft, 202 F.R.D. 31, 32 (D.D.C. 2001)

19. *See* Altman & Lewis, *supra* note 7, at 575. However, *McPeek* was certainly not the first case to embrace cost-shifting in discovery. *See Rowe*, 205 F.R.D. at 430.

20. *McPeek* 202 F.R.D. at 34.

21. See *Rowe*, 205 F.R.D. at 430.

22. See Altman & Lewis, *supra* note 7, at 576. *Rowe* was also the first case to engage in burden-shifting analysis. *Id.*

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

24. *Id.*

25. *See* Altman & Lewis, *supra* note 7, at 579 (citing James M. Evangelista, *Polishing the "Gold Standard" on the e-Discovery Cost Shifting Analysis:* Zubulake v. UBS Warburg, L.L.C., 9 J. TECH. L. & POL'Y 1, 3 (2004)); *see, e.g.*, Proctor & Gamble Co. v. S.C. Johnson & Son, Inc., No. 9:08-CV-143, 2009 WL 440543 (E.D. Tex., Feb. 19, 2009) (using the *Zubulake* multi-factor test).

toward cost-shifting, and that the presumption that the responding party bear the costs of production should not be so readily disturbed.[26]

Therefore, the court made two major changes to the *Rowe* test. First, it modified the multi-factor test, reducing the test to seven factors.[27] Second, and most significantly, the court stated that there could be no cost-shifting unless the requested ESI was in an "inaccessible" format.[28]

The *Zubulake* approach to cost-shifting is widely followed by the courts,[29] but some commentators have criticized it as unduly restrictive, particularly with respect to its absolute "inaccessibility" requirement.[30] This Note joins in that criticism, and proposes new solutions.[31] But before taking on a proper analysis of the subject, one must provide some background on the economics of e-discovery.

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26. *See Zubulake I*, 217 F.R.D. at 320 (noting that of the handful of prior cases using the *Rowe* test, all of them had decided in favor of cost-shifting).

27. *See Zubulake I*, 217 F.R.D. at 322. The *Zubulake* court added a factor comparing the expected cost of production to the expected amount in controversy. *Id.* at 321. It then moved on to deleting unnecessary factors, finding that the first two *Rowe* factors were duplicative, and so combining them. *Id.* It also removed the fourth *Rowe* factor, relating to the purpose for which the data was stored. *Id.* at 321-22. The resulting seven-factor test contained the following 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 incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information.

Id. at 322.

28. *See id.* at 318, 324. First, the court noted that "[w]hether electronic data is accessible or inaccessible turns largely on the media on which it is stored." *Id.* at 318. Then it concluded that a "court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes." *Id.* at 324.

29. *See* Altman & Lewis, *supra* note 7, at 580 (citing James M. Evangelista, *Polishing the "Gold Standard" on the e-Discovery Cost Shifting Analysis:* Zubulake v. UBS Warburg, L.L.C.,9 J. TECH. L. & POL'Y 1, 3 (2004); *see, e.g.*, *Proctor & Gamble*, (using the *Zubulake* multi-factor test).

30. *See* Repa, *supra* note 13, at 259 and others.

31. This Note is not the first to criticize the *Zubulake* cost-shifting. *See, e.g.*, Altman & Lewis, *supra* note 7, at 599. But this Note is the first to argue that the "parties' resources" factor is sufficient to protect individual plaintiffs against cost-shifting abuses. *See, e.g.*, Altman & Lewis, *supra* note 7, at 593 (arguing that the *Zubulake* test is too anti-cost-shifting, but dismissing the "parties resources" factor as unnecessary).

B. The Economics of E-Discovery and Its Potential to Undermine the Traditional Cost-Bearing Presumption

1. E-Discovery Is Unique in that the Responding Party Cannot Externalize the Costs of Production

Some argue that e-discovery need not be more expensive than paper discovery.[32] And as technology and methods progress, this may someday become true,[33] but so far this is wishful thinking. Commentators consistently point out the greater challenges and expenses currently involved in e-discovery.[34]

But even if the costs of e-discovery were comparable to those of traditional discovery, the allocation of those costs is far more lopsided in e-discovery.[35] This is because in e-discovery, the responding party is the party responsible for all the work.[36] Unlike conventional discovery, e-discovery is not limited by the requesting party's ability to search through boxes of paper documents produced by the responding party.[37]

Conceivably, the responding party could allow the requesting party to inspect its computer systems, but this is impracticable for several reasons. Not only would this compromise privileged information and the privacy of employees and clients, it would also interfere with the responding party's use of its computers, without which business could not continue.[38] The task of reformatting, searching and organizing the ESI falls to the responding party.[39] Therefore, the benefit to the requesting party is great, and the cost is close to nothing.

2. The Economics of Data Storage Has Changed Dramatically

The digital age has turned the economics of data storage upside down. Twenty years ago, storing millions of pages of documents required significant floor space or costly electronic storage devices.[40]

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32. *See* Judge Shira Scheindlin on *Zubulake*, e-discovery, and compliance, PODTECH, *available at* http://www.podtech.net/home/ 1378/ (last visited Feb. 9, 2011).

33. *See* Mia Mazza, Emmalena K. Quesada and Ashley L. Sternberg, *In Pursuit of FRCP 1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 13 RICH. J.L. & TECH. 11, *76 (2007).

34. *See, e.g., id.* at 3-5.

35. *See* Manual for Complex Litigation § 11.446 (4th ed. 2004).

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. In 1990, the equipment needed to store a gigabyte of data cost $20,000. Michelle Kessler, *Days of Officially Drowning in Data Almost Upon Us*, USA TODAY (Mar. 3,

Today, the equivalent ESI can be stored on devices that are exceedingly small and inexpensive.[41]

At the same time, the disposal of data has become more challenging.[42] With paper documents, a waste basket or a dumpster is usually sufficient for disposal. The proliferation of paper documents is also simple, albeit requiring slightly more effort, usually by making photo-copies. By contrast, ESI is not only more difficult to permanently destroy, it also proliferates much more easily—and often without the user's knowledge.[43]

In short, with ESI it is far easier to store information than to dispose of it. Even assuming the user is aware of the masses of scattered or duplicative ESI in her system, it is usually not cost effective to find and remove it.[44] As the *Rowe* court stated, electronic "[i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it."[45] All of this often-unintentional data retention works to the advantage of the requesting party.

3. E-Discovery Undermines the Traditional Presumption that the Responding Party is Responsible for the Costs of Production

Rowe acknowledged that the traditional presumption of discovery costs resting solely with the responding party was based on an assumption that no longer held true in the age of ESI.[46] The assumption was that the responding party has retained the information because it finds the information useful.[47] This assumption was reasonably appropriate in the paper age—if the information was not useful to the owner, why else would the owner pay to keep it? And if it was useful to the owner, it would follow that the owner had an efficient method of retrieving it. But this is not often the case with ESI, where the responding party has a reduced incentive—and arguably, a reduced ability—to discard useless information.

2007) *available at* http://www.usatoday.com/tech/news/2007-03-05-data_N.htm (last visited Feb. 9, 2011).

41. Depending on the file type, over 600,000 pages can be stored on a single gigabyte of memory. Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 RICH. J.L. & TECH. 53, *13 n.59 (2004). Today, a gigabyte of storage costs less than a dollar. *See* Kessler, *supra* note 40.

42. *See* Altman & Lewis, *supra* note 7, at 571.

43. *See* Marnie. H. Pulver, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 CARDOZO L. REV. 1379, 1381-83 (2000).

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

45. *See id.* at 429.

46. *See id.*

47. *See id.*

In *Rowe*, the solution was to submit cost-shifting to an eight-factor balancing test.[48] But *Zubulake*, which was decided just one year later, found that the *Rowe* approach was too favorable to cost-shifting.[49] According to *Zubulake*, the actual purpose for which the responding party kept the information was not important in itself.[50] The ESI's purpose, or lack thereof, was important only to the extent that it actually resulted in the data being changed to an "inaccessible" format.[51] In other words, while there was often a correlation between the two, the format, not the purpose, of the ESI was the important factor.[52] As a result, the *Zubulake* rule, which is widely followed today, provides that cost-shifting is potentially available only for inaccessible formats.[53] In other words, the costs of providing "accessible" ESI will not even receive the multi-factor analysis.

C. Post-Judgment Recovery of Costs

One of the latest issues in e-discovery is post-judgment cost recovery under FRCP 54(d)(1).[54] Rule 54(d)(1) provides that after a judgment is rendered, the court may require the losing party to compensate the prevailing party for some of its costs.[55] Lately, a few courts have addressed the issue of whether this may include some costs related to electronic discovery.[56] This remains an uncertain area of the law. Unlike cost-shifting under FRCP 26, there is no well-established analysis akin to *Zubulake* from which courts can seek guidance.[57] However, there is some indication from the district courts that Rule 54(d)(1) may be a viable method for recovering at least some e-discovery costs.

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48. *See id.* at 429-32.

49. *See Zubulake I*, 217 F.R.D. at 320.

50. *See id.* at 321.

51. *See id.* at 321-22.

52. *See id.* at 322.

53. *See, e.g.*, Peskoff v. Faber, 240 F.R.D 26, 31 (D.D.C. 2007) (following *Zubulake I*). *But see* Ameriwood Indus. Inc. v. Liberman, No. 4:06CV524-DJS, 2007 WL 496716 (E.D. Mo. Feb. 13, 2007) (not following *Zubulake I*).

54. *See* Steve Puiszis, *What types of electronic discovery costs can a prevailing party recover under Fed. R . Civ. P. 54(d)?*, PRACTICAL EDISCOVERY (April 10, 2009) *available at* http://blog.hinshawlaw.com/practicalediscovery/2009/04 (last visited Feb. 9, 2011).

55. FED. R. CIV. P. 54(d)(1).

56. *See, e.g.*, Fells v. Va. Dep't of Transp., 605 F. Supp.2d 740 (E.D. Va. 2009).

57. As a district court case, *Zubulake* is not a controlling authority but for e-disc cost shifting under Rule 26 it is directly on-point and offers a comprehensive system, and for this reason it is the leading case in the field. Whereas with Rule 54 cost recovery in e-discovery, courts lack such comprehensive precedent and often must instead draw analogies to cases that do not even involve electronic discovery.

1. The Relevant Rules: FRCP 54(d)(1) and 28 U.S.C. § 1920

Courts have long held the ability to "tax as costs" some of the prevailing party's expenses.[58] This power currently exists under FRCP 54(d)(1), but courts have a long tradition of taxing costs, predating the Federal Rules.[59] The taxing of costs occurs after one party prevails.[60] Thereafter, the prevailing party maybe be able to recover some of its costs from the losing party, separately from whatever other judgment or remedy it receives.[61] The prevailing party must timely file a bill of costs, identifying and explaining her purported taxable costs, and the court may order that the losing party pay some or all of these costs to the prevailing party, subject to statutory limitations.[62]

The principal statutory limitation to the taxing of costs is 28 U.S.C. section 1920.[63] Section 1920 essentially enumerates what costs are taxable under Rule 54(d)(1).[64] But for many years after section 1920 was first adopted in 1948, many courts believed that the costs enumerated therein did not constitute an exhaustive list.[65] However, in *Crawford*

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58. Sarah Wise, Comment, *Show Me the Money! The Recoverability of Computerized Legal Research Expenses by the Prevailing Party in Federal Circuits*, 36 CAP. U. L. REV. 455, 460 (2007) (citing *In re* Paoli R.R. Yard PCB Litig., 221 F.3d 449, 456-58 (3d Cir. 2000) (tracing the history of awarding costs from its English inception)).

59. Predating the rules. *See, e.g.*, Singleton v. Smith, 241 F.3d 534, 539 (6th Cir. 2001).

60. *See* FED. R. CIV. P. 54(d)(1).

61. *See id.*

62. *See id.*

63. *See* 28 U.S.C.A. § 1920 (West 2009).

64. The costs enumerated in 28 U.S.C.A. section 1920 are as follows:

> (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; (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 U.S.C.A. § 1920.

65. Courts were encouraged in this belief by Rule 54(d)(1)'s mention of the court's "discretion." FED. R. CIV. P. 54(d)(1). There was also the Supreme Court's statement in a 1967 case that "the discretion given district judges [by Rule 54(d)] to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1967). The Supreme Court later dismissed the sentence as dictum, and a statement with which the Court no longer agreed. *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 443 (1987) (stating that the sentence was "classic *obiter:* something mentioned in passing, which is not in any way necessary to the decision of the issue before the Court. We think the dictum is inconsistent with the foregoing analysis, and we disapprove it.").

Fitting Co. v. J.T. Gibbons, Inc., the Supreme Court held that the list of taxable costs in § 1920 was indeed exhaustive.[66] Despite the language in both FRCP 54(d)(1) and section 1920 arguably suggesting otherwise,[67] the Court held that costs not explicitly enumerated in the controlling statutes (such as section 1920) were not within a court's discretion to tax.[68] Thus, it was within a court's discretion *not* to tax costs enumerated in section 1920, but it could never elect to tax costs that were not mentioned in the statute.[69]

The important question that remains is the extent to which courts can interpret section 1920's enumerated costs to include certain e-discovery costs.[70] It is generally recognized that courts can "'interpret the meaning of the items listed in . . . [section] 1920.'"[71] The next step is to review decisions from the few courts that have encountered this issue.

2. KBR

In *Kellogg Brown & Root International, Inc. v. Altanmia Commercial Marketing Co.* ("*KBR*"),[72] the U.S. District Court for the Southern District of Texas[73] faced the issue of permitting post-judgment

66. *See Crawford Fitting*, 482 U.S. at 441.

67. *See id.* at 445-46 (Marshall, J., dissenting). In his dissent, Justice Marshall wrote that the majority's "haste to extinguish all [of the court's] discretion to award" fees not expressly enumerated in a statute the Court "rendered Rule 54(d) a nullity." *Id.* at 446. The dissent pointed to the language of Rule 54(d), which provided that "[e]xcept when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *Id.* (quoting FED. R. CIV. P. 54(d)(1)). The dissent disagreed that this language could be somehow interpreted to ban taxing costs unless the costs were expressly condoned by statute. *Id.* Justice Marshall further explained that in fact, before the majority's opinion, most courts believed in the opposite view, that Rule 54(d) "'vest[ed] in the district court a sound discretion over the allowance, disallowance, or apportionment of costs in all civil actions.'" *Id.* at 446-47 (quoting 6 J. Moore, W. Toeggart, & J. Wicker, Moore's Federal Practice ¶ 54.70[5], p. 54-331 (2d ed. 1987).

68. *See id.* at 445 (majority opinion).

69. *See id.* at 337-38, 442, 445.

70. *See* Puiszis, *supra* note 54. *See also* Steve Puiszis, Electronic discovery costs recoverable by a prevailing party under 28 U.S.C. § 1920, Practical Ediscovery, (June 11, 2009) *available at* http://blog.hinshawlaw.com/practical ediscovery/2009/06/ (last visited Feb. 10, 2011).

71. Puiszis, *supra* note 54 (quoting BDT Prods., Inc. v. Lexmark Int'l, Inc., 405 F.3d 415, 419 (6th Cir. 2005)).

72. Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co. ("*KBR*"), 2009 WL 1457632 (S.D. Tex. May 26, 2009).

73. *KBR* is all the more noteworthy because the presiding judge in *KBR* was Lee H. Rosenthal, chair of the Judicial Conference Committee on Rules of Practice and Procedure. *See* Puiszis, *supra* note 54.

taxing of e-discovery costs under Rule 54(d)(1) and § 1920.[74] KBR and Altanmia were engaged in a contract dispute involving reimbursement for vehicles lost or damaged while transporting fuel from Kuwait to Iraq. KBR prevailed,[75] and submitted a bill of costs.[76]

The item in controversy was $19,799.86 for "exemplification and copies of papers necessarily obtained for use in the case," which is one of the six taxable costs enumerated in section 1920(4).[77] However, the fees KBR was trying to pass for "exemplification and copies of papers" did not involve paper at all.[78] Nor did it clearly qualify as "exemplification" under any definition recognized by the federal circuits.[79] Rather, KBR's costs were the result of fees paid to a third-partyparty vendor for the extraction and storage of ESI in responding to Altanmia's discovery requests.[80]

The court first performed a comprehensive review of courts' treatment of "exemplification and copies of papers" in the context of electronically stored information.[81] The court reasoned that:

> steps of extracting data from an electronic medium and storing that data for possible use in discovery is more like the work of an attorney or legal assistant in locating and segregating documents that may be responsive to discovery than it is like copying those documents for use in a case.[82]

In the court's view, unlike mere scanning or imaging of the documents, which would be more like "copying" or "exemplification," the costs at issue resulted from a kind of sorting the documents that was essentially a computer doing a lawyer's job.[83]

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74. *KBR*, 2009 WL 1457632 at *1.

75. *Id.* Altanmia disputed whether KBR had actually "prevailed under the meaning of rule 54(d), because KBR had not succeeded on every single front of the lawsuit. *Id.* But the court disagreed, stating that "whether a party has prevailed 'requires that the extent of a litigant's success be viewed in light of the entire litigation,'" and that viewed in this way, KBR was the prevailing party. *Id.* at *2 (quoting Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 713 F.2d 128, 132 (5th Cir. 1983)).

76. *Id.* at *1.

77. *Id.*

78. *KBR*, 2009 WL 1457632, at *1.

79. *See id.* The court acknowledged a circuit split on the meaning of "exemplifications."

80. *Id* at *3.

81. *Id.* at *4-5.

82. *Id.* at *5.

83. *See id.*

Furthermore, the court believed that this data management may not have been "necessarily obtained for use in the case," which is a prerequisite for invoking section 1920(4).[84] This was because Altanmia had claimed, and KBR had not refuted, that much of these costs had been incurred both before and after the discovery period, and so were unnecessary to the case.[85]

For these reasons, Judge Rosenthal denied KBR's section 1920 request.[86]

3. CBT Flint Partners

On December 30, 2009, the court in *CBT Flint Partners, LLC v. Return Path, Inc.*[87] held that the prevailing party's e-discovery costs were recoverable under 28 U.S.C. section 1920(4).[88]

Plaintiff CBT sued defendants Return Path and Cisco IronPlate for allegedly infringing its patent for an e-mail filtering system.[89] The court granted summary judgment for defendants, and Cisco IronPlate filed a bill of costs.[90] The costs included $243,453.02 paid to an e-discovery vendor retained to "'collect, search, identify and help produce electronic documents from IronPort's network files and hard drives in response to CBT's discovery requests.'"[91]

CBT objected that "fees associated with collecting documents for production" in discovery were not recoverable under section 1920.[92] The court found this objection worthy of deliberate consideration.[93]

The court acknowledged a "division of opinion" on whether such costs were recoverable under section 1920, citing *KBR*'s review of relevant cases.[94] Some courts permitted these costs as the "modern day equivalent of 'exemplification and copies'" under section 1920(4).[95] But other courts have disallowed these costs, likening them to attorney's fees, as the task of assembling requested documents—even electronic

84. *KBR*, 2009 WL 1457632, at *6.
85. *Id.*
86. *Id.*
87. *CBT Flint Partners*, 676 F. Supp.2d 1376 (N.D. Ga. 2009).
88. *Id.* at 1381.
89. *Id.* at 1377.
90. *See id.* at 1378.
91. *Id.* at 1380 (quoting CBT's motion to review costs).
92. *Id.* at 1381.
93. *CBT Flint Partners*, 676 F. Supp.2d at 1381.
94. *See id.* at *5.
95. *Id.* (citing *KBR*, 2009 WL 1457632, at *4).

documents—in discovery is the traditional work of lawyers and paralegals.[96]

But the *CBT Flint Partners* court distinguished these costs from the work of lawyers and paralegals.[97] The court found that the services provided by the e-discovery vendor were "not the type of services that attorneys or paralegals are trained for or are capable of providing."[98] The services were "highly technical," and also the "21st Century equivalent of making copies."[99]

The court also briefly discussed the larger issue of e-discovery.[100] First, such services were "certainly necessary in the electronic age."[101] Second, the court believed that taxing these costs would discourage unreasonable e-discovery requests.[102]

Accordingly, the court included the prevailing party's e-discovery vendor fees as recoverable costs under § 1920.[103]

III. ANALYSIS

This Note discusses two strategies for promoting fairness and efficiency by redistributing some of the high costs of electronic discovery[104] The first strategy is to increase pre-judgment cost-shifting by modifying the *Zubulake* rule.[105] The second strategy is to expand post-judgment cost recovery by allowing some electronic discovery costs to be recovered under FRCP 54(d).[106] While neither solution depends for

96. *See id.* (citing *KBR*, 2009 WL 1457632 at *5).

97. *See id.*

98. *Id.*

99. *CBT Flint Partners*, 676 F. Supp.2d at 1381 (citing Cargill, Inc. v. Progressive Dairy Solutions, Inc., No. CV-F-07-0349-LJO-SMS, 2008 WL 5135826, at *6 (E.D. Cal. Dec. 8, 2008).

100. *See id.*

101. *Id* at 1381.

102. *See id.* (explaining that "[t]he enormous burden and expense of electronic discovery are well known. Taxation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery.").

103. *See id.*

104. There are other potential solutions to high e-discovery costs that do not require change. *See* Scheindlin, *supra* note 32. Among these are better organizational methods and more effective uses of "meet and confer." *See id.* But these methods are beyond the scope of this Note.

105. Other authors have suggested modifying *Zubulake*. *See* Altman and Lewis, *supra* note 7. But the approach taken here is unique. This is the first Note to advocate removing the *Zubulake* inaccessibility threshold while preserving and relying on the parties' resources factor to prevent abusive cost-shifting of richer parties against poorer parties.

106. *See* FED. R. CIV. P. 54(d).

its success on the other's being implemented, they are potentially complimentary.[107] We will start with the modifying the *Zubulake* Rule.

A. The Zubulake Rule Needs Refining

The best way to modify the *Zubulake* approach to cost-shifting is to remove absolute the inaccessibility requirement, while maintaining a factor that considers each party's resources. This modified approach would account for the fundamental differences between electronic and traditional (paper) discovery, and would create more economic efficiency and positive incentives.[108]

1. Zubulake Got it Partly Right

One can see the wisdom in the *Zubulake* rule. First, *Rowe* pointed out the assumption underlying the responding-party-pays rule: that the potentially discoverable data only exists in the first place because it is useful to the responding party.[109] Then, *Zubulake* went a layer deeper, to the assumption underlying that assumption: that because the data is useful to the responding party, that party has a reasonably efficient way of retrieving that data.[110] Since there is no reasonably efficient way of retrieving deleted-but-not-destroyed data and data on emergency backup tapes, the *Zubulake* court was willing to put this data outside the reach of the traditional cost-bearing presumption, and so here the court held that some cost-shifting was potentially appropriate.[111]

A showing of "inaccessibility," as defined by *Zubulake*, has become the threshold that responding parties must pass before the court even considers cost-shifting.[112]

107. Both strategies are really two parts of a larger strategy of increasing the court's discretion in cost-shifting in e-discovery. Whether an increased ability to shift costs is indeed desirable is debated, and although this Note comes down on the affirmative side of that debate, this is not the main thrust of the Note's analysis. Rather, the main thrust is, assuming more cost-shifting is desirable, the way by which the courts can accomplish this equitably and what changes should be made in the law.

108. *See* discussion *supra* Part II.B.1-2.

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

110. *See Zubulake I*, 217 F.R.D. at 322.

111. *See id.*

112. *See* Altman & Lewis, *supra* note 7, at 579.

2. The Inaccessibility Threshold Creates Destructive Incentives

A strict inaccessibility threshold will likely increase e-discovery costs overall. First, it encourages the potential responding parties to "downgrade" information to "inaccessible" forms.[113] Under the current scheme, if the responding party shows that the requested ESI is inaccessible, the burden effectively shifts to the requesting party to show good cause.[114] Either the requesting party fails to show good cause, and the inaccessible ESI is not discoverable, or there is a showing of good cause, and the inaccessible ESI is discoverable, but likely with some cost-shifting or other limitations.[115] Because inaccessible ESI is so expensive to recover, this incentive to downgrade to inaccessible ESI will likely result in a more expensive e-discovery process for both parties.

Second, the current scheme encourages excessively broad discovery requests.[116] Courts have held that the "obvious negative corollary" to the inaccessibility threshold is that there can be absolutely no cost-shifting for ESI that is "accessible."[117] Given *Zubulake's* somewhat rigid definition of what is inaccessible, this may give requesting parties an unfairly wide berth.[118] The responding party's incentive to convert ESI into hard-to-reach formats, combined with the requesting party's incentive to go overboard on the other types of ESI, is a recipe for massive e-discovery costs.

B. One Solution: Change the Threshold to a Mere Factor—One of Several

Zubulake may have been correct in establishing accessibility as the most important factor in establishing cost-shifting.[119] However, in order

113. Kara A. Schiermeyer, Note, *The Artful Dodger: Responding Parties' Ability to Avoid Electronic Discovery Costs Under 26(b)(2)(B) and 26(b(2)(C) and the Preservation Obligation*, 42 CREIGHTON L. REV. 227, 261 (2009).

114. *See* FED. R. CIV. P. 26(b)(2)(B) (explaining that "[i]f [a] showing [that the requested ESI is inaccessible] is made, the court may nonetheless order discovery from such sources *if the requesting party shows good cause* . . . . The court may specify conditions for the discovery, [including cost shifting]." (emphasis added).

115. *See id.*

116. *See* Repa, *supra* note 13, at 280-81.

117. *See Peskoff*, 240 F.R.D at 31.

118. *See* Repa, *supra* note 13, at 280-81.

119. *See Zubulake I*, 217 F.R.D. at 318. The format of the requested ESI is arguably the most indicative factor concerning how expensive production of the ESI will be relative to its usefulness. *See id.* Naturally, the amount of data requested is also an important factor in determining expensiveness. *See, e.g.*, *CBT Flint Partners*, 676 F.

to reduce the negative incentives discussed above, it must not remain the *only* factor. A failure to show that the ESI exists only in inaccessible formats should not foreclose the possibility of cost-shifting.

The next level of inquiry must be the specificity of the discovery request. If the requested ESI is not inaccessible, but the request is unjustifiably broad, courts should be free to consider cost-shifting.

1. Potential Advantages: Reducing Destructive Incentives

This option would have several positive effects on the discovery process. First, it would reduce responding parties' incentive to downgrade data to inaccessible formats, since inaccessibility would no longer be the only means to a cost-shifting solution. In many cases, this could reduce the overall cost of discovery. Recovering ESI from inaccessible formats is typically the most expensive part of e-discovery.[120] Thus, reducing the incentive to downgrade likely will result in less costly discovery.

The second positive effect would be a reduction in the requesting party's incentive to make excessively broad requests. Under the *Zubulake* approach, as long as the requested ESI is not inaccessible, the requesting party can make all kinds of broad discovery requests without fear that the responding party will employ cost-shifting.[121] The more cost-shifting is available, the more sensitive the requesting party will be to the costs of e-discovery, and the less inclined parties will be to issue excessive discovery requests, and the lower e-discovery costs will be.

2. Addressing Parties' Resources and the Potential Abuse of Cost-Shifting Against Individual Plaintiffs

Critics of cost-shifting in e-discovery have warned that cost-shifting can be abused in litigation just like excessive discovery requests.[122] They

Supp.2d at 1381 (noting that the responding party produced "a massive quantity of data" and holding that justice required the requesting party to pay some of those costs, although in this case through post-judgment taxing of costs).

120. *See* Schiermeyer, *supra* note 113, at 248 (citing Phillip L. Gordon, *Document Retention In The Digital Age: How Long Is Long Enough?*, Findlaw, 2004, http://library.findlaw.com/2004/Sep/27/133589.html).

121. *See Peskoff*, 240 F.R.D at 31 (noting that the "obvious negative corollary [to the *Zubulake* "inaccessibility requirement] is that *accessible* data must [always] be produced at the cost of the producing party; cost shifting does not even become a possibility unless there is first a showing of inaccessibility.")

122. *See, e.g.*, Schiermeyer, *supra* note 113, at 259 (arguing that cost-shifting has the "ability to be abused by the responding party in the context of electronic discovery," especially in suits that pit an individual against a large corporation).

point out that this could be particularly problematic where individual plaintiffs, with their often limited resources, need to make broad discovery requests against large corporate defendants.[123] If even some of the costs are shifted to such plaintiffs, the critics say, these individuals could effectively be shut out of the litigation process.[124]

To some extent the *Zubulake* court was one of these critics, as it stated the following warning:

> Courts must remember that cost-shifting may effectively end discovery, especially when private parties are engaged in litigation with large corporations. As large companies increasingly move to entirely paper-free environments, the frequent use of cost-shifting will have the effect of crippling discovery in discrimination and retaliation cases. This will both undermine the "strong public policy favor[ing] resolving disputes on their merits," and may ultimately deter the filing of potentially meritorious claims.[125]

The *Zubulake* court addresses a valid potential problem, but glosses over what could be an easy solution. Like *Rowe*, *Zubulake* cites Rule 26, which says that courts must consider, among other things, "parties' resources" in determining whether a particular discovery requests presents an "undue burden."[126] The *Rowe* court included "parties' resources" as one of the eight factors in its multi-factor test.[127] When the *Zubulake* court modified the *Rowe* eight-factor test, creating a new seven factor test, "parties' resources" remained one of the factors.[128] The *Zubulake* court explained that it was important to compare each parties' resources relative to the total cost of production.[129]

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123. *See id.*

124. *See id.*

125. *Zubulake I*, 217 F.R.D. at 317-18.

126. *Id.* at 318 (citing FED. R. CIV. P. 26(c), although the relevant language is now contained in 26(b)(2)(C)(iii), pursuant to the 2006 Amendments).

127. *See Rowe*, 205 F.R.D. at 432. In light of the facts, the *Rowe* court found that the "parties' resources factor was "at most a neutral factor," because both parties were rich, powerful players in the music industry with sufficient resources for litigation. *See id.*

128. *See Zubulake I*, 217 F.R.D. at 322. The court reworded this factor but retained it. *See infra* note 128.

129. *See Zubulake I*, 217 F.R.D. at 321. The court reworded the fourth factor ("parties' resources") from simply "[t]he parties' resources" to "[t]he total cost of production, compared to the resources available to each party." *See id.* The court acknowledged that the comparison was probably implicit in *Rowe*, but that it was important enough to make explicit. *See id.*

Similarly, *Zubulake* says it is also important to compare the cost of production to the amount in controversy.[130] Thus, while production costs are usually large, they may ultimately be reasonable if the amount in controversy is also large, if the responding party's resources are extensive, or both.[131]

In *Zubulake III*, the court put these factors into practice.[132] The plaintiff was an individual who was suing her former employer, UBS Bank. The court allowed some cost-shifting only after it was satisfied that the plaintiff had access to considerable resources and that the potential amount in controversy was not particularly large relative to the cost of production.[133]

Thus, while the *Zubulake* decisions resulted in restricted access to cost-shifting, they demonstrate that increased access to cost shifting is not likely to result in big, rich defendants beating up on small plaintiffs. This is because the multi-factor test formulated in *Zubulake I* and applied in *Zubulake III* requires the court to take each party's resources into consideration in deciding how much cost-shifting, if any, is appropriate.[134]

Indeed, courts must be vigilant in protecting individual plaintiffs against abusive discovery counter-attacks in the form of cost-shifting.[135] But the inaccessibility threshold developed in *Zubulake* is not necessary to serve this sort of protection.[136] Rather, this protection should flow from the "parties' resources" factor of the multi-factor test. This part of

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130. *Id.*

131. *Id.*

132. *See Zubulake III,* 216 F.R.D. at 284-88. In *Zubulake III,* the defendant, UBS Bank, had obtained a production sample of the requested ESI from its backup tapes. *Id.* at 285. Examining the cost and utility of these samples against the multi-factor test laid out in *Zubulake I,* the court assessed some cost-shifting against the plaintiff. *See id.* at 284-88.

133. Before being fired by the defendant, the plaintiff in *Zubulake* had an annual salary of $650,000. *Id.* at 288. The high salary, combined with the probability of a high payout if she won the case (the amount in controversy was estimated at over $1.2 million), led the court to believe that some cost-shifting was appropriate. *Id.*

134. *See Zubulake III,* 216 F.R.D. 280; *Zubulake I,* 217 F.R.D. 309.

135. In *Zubulake I,* the court reasoned that too much use of cost-shifting could "deter the filing of meritorious claims" because of the prospect of plaintiffs having to pay for their own expensive discovery requests. *See Zubulake I,* 217 F.R.D. at 318. In *Zubulake III,* in imposing some cost-shifting burden on the plaintiff, the court was mindful that imposing too costly a cost-shifting share on the requesting party could "chill the rights of litigants to pursue meritorious claims." *See Zubulake III,* 216 F.R.D. 280 at 289.

136. The *Zubulake* "inaccessibility" requirement functions independent of the condition of any of the seven factors in the test, including the "parties' resources" factor. Therefore, it must be observed that this threshold allows or denies cost-shifting, no matter what the requesting party's ability to pay may be.

the test will remain when the inaccessibility threshold is removed, allowing greater access to cost-shifting, but not as a means to intimidate or shut out the requesting party.

3. Parties' Expectations

Another potential disadvantage to removing the inaccessibility threshold is that, at least in theory, it will be more difficult for courts to decide when cost-shifting is appropriate, and party expectation will suffer. That is, *Zubulake* at least encourages consistency by using a bright line rule like format-inaccessibility.[137] Without this bright line, courts must use a more nuanced balancing-test approach to determine whether or not cost-shifting will apply. Parties might not know what to expect.

However, in practice, the advantages would outweigh the damage to party expectations, since party expectations are not solidly formed as it is. After all, even under the *Zubulake* test, when the court finds requested ESI inaccessible, it must still use the multi-factor balancing test in order to determine whether and to what extent cost-shifting will apply.[138] In other words, a finding of inaccessibility does not guarantee that cost-shifting will apply; rather, it only indicates that cost-shifting *might* be appropriate, and that the multi-factor analysis is the necessary next step.[139] Thus, the removal of the inaccessibility threshold would only introduce the uncertainty of the balancing test in the cases where the requested ESI is not inaccessible. This uncertainty already exists where there is inaccessibility.

One might also argue that cost-shifting is not needed to protect against excessively broad discovery requests because Rule 26(b)(2)(C)(i) already protects against requests that are "unreasonably cumulative or duplicative."[140] But the *Zubulake* inaccessibility threshold prohibits cost-shifting for ESI that is "accessible," even if the request is excessively broad (i.e. cumulative or duplicative),[141] so the court can choose to allow the overbroad request, or limit its scope. But some requests are necessarily broad.[142] Here, allowing the broad request with cost-shifting would be a good option, but if the ESI is in "accessible" formats, this

137. *See Zubulake III*, 216 F.R.D. at 291.

138. Under the *Zubulake* approach, the court must find inaccessibility *before* considering a multi-factor cost-shifting analysis. *See Zubulake I*, 217 F.R.D. at 324.

139. *See id.*

140. FED. R. CIV. P. 26(b)(2)(C)(i).

141. *See Zubulake I*, 217 F.R.D at 324.

142. *See* Schiermeyer, *supra* note 113, at 264.

option is unavailable under the inaccessibility threshold.[143] Removing inaccessibility as an absolute prerequisite to cost-shifting would allow the middle ground of allowing broad, expensive discovery with costs shared by the parties.

C. A Second Solution: Allowing the Prevailing Party to Tax Some of its E-Discovery Costs Under 28 U.S.C. § 1920

1. Section 1920 Recovery of E-Discovery Costs Is Desirable

In some ways, recovering costs under 28 U.S.C. section 1920 is considerably different from cost-shifting under FRCP 26. Unlike Rule 26 cost-shifting, recovery under section 1920 takes place after the judgment rather than during discovery, and is only available to the prevailing party.[144]

However, section 1920 recovery of costs has the potential to play a role in electronic discovery that is similar to Rule 26 cost-shifting. If prevailing parties can recover some of their e-discovery costs under § 1920, this would discourage litigants from abusing the discovery process in causing the responding party to amass huge discovery costs.[145] The deterrent would be particularly appropriate where the requesting party, quite aware of the weakness of its case, uses massively expensive discovery requests as an attempt to pressure the responding party into settlement.[146]

Also, as in the discussion of Rule 26 cost-shifting, critics of cost-shifting will worry about adverse effects on well-meaning individual plaintiffs that make large e-discovery requests of large corporate defendants, perhaps in an employment dispute.[147] The worry would be that these plaintiffs, often having scant resources, would be forced to shoulder their opponent's large e-discovery costs. However, as with Rule 26 cost-shifting, courts have broad discretion to deny as well as grant costs taxable under section 1920, whether based on party resources, general principles of fairness, or other factors.[148] Thus, section 1920

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143. *See Zubulake I*, 217 F.R.D. at 324.

144. FED. R. CIV. P. 54(d)(1).

145. *CBT Flint Partners*, 676 F. Supp.2d at 1381.

146. *See id.* It seems that *CBT Flint Partners* may have been just such a case. *See id.* at 1379, 1381 (observing that the plaintiff and counsel "exercised poor judgment in pursuing this action," and that they requested from the defendant a "massive quantity" of discovery).

147. *See* Schiermeyer, *supra* note 113, at 261 (making a similar argument against Rule 26 cost-shifting).

148. *See Crawford Fitting*, 482 U.S. at 441.

recovery of e-discovery costs would deter abuse, keep discovery costs down, and the court's discretion would safeguard against unfair or unnecessary cost-shifting.

2. Section 1920 Recovery Is Not Well Supported Under the Current Case Law

Despite the preceding endorsement, under the current law, litigators cannot rely on section 1920 recovery as a primary means of controlling e-discovery costs. While there are no appellate cases directly on point, the federal district court case of *KBR* probably provides more persuasive authority against section 1920 recovery than *CBT Flint Partners* provides in favor of it.

KBR and *CBT Flint Partners* both dealt with prevailing defendants attempting to recover fees paid to e-discovery specialists to extract, store and search their ESI.[149] Defendants in both cases were attempting to recover under section 1920(4) as costs for "exemplification and [making] copies."[150] The *KBR* court denied the prevailing party these costs,[151] and the *CBT Flint Partners* court allowed them.[152]

The *KBR* court had two reasons for denying the costs. One reason was circumstantial to the facts of the case, and the other was more fundamental and damaging to the overall argument for section 1920 recovery.[153] The first reason was that some of the defendant's claimed costs may have been incurred after summary judgment was granted, when it was clear that production of the ESI was no longer necessary.[154] This meant that the costs were not "necessarily incurred," and thus not recoverable under section 1920.[155]

The court's second line of reasoning applied more broadly, and effectively discouraged section 1920 recovery of e-discovery costs relating to extracting, storing or searching ESI.

Here, the court's initial review of the case law showed that several courts, including the Sixth Circuit, have held that electronic scanning and imaging of paper documents could be recoverable under § 1920(4), if

149. *See KBR*, 2009 WL 1457632 at *3; *CBT Flint Partners*, 676 F. Supp.2d at 1379-80.

150. *See KBR*, 2009 WL 1457632, at *1.

151. *See id.* at *7.

152. *CBT Flint Partners*, 676 F. Supp.2d at 1381.

153. *See KBR*, 2009 WL 1457632, at *3.

154. *See id.* at *3.

155. *See id.*

necessarily performed in response to discovery requests.[156] Courts have reasoned that scanning is akin to copying, which is covered in § 1920(4), and may also qualify as "printing," thus falling under § 1920(3).[157]

However, further manipulation beyond mere scanning and imaging, such as file conversion for purposes of searchability, had been found not to be recoverable.[158] Further, recent federal district court cases had found that other forms of electronic data extraction and storage are not recoverable, because in the paper world, these tasks would be performed by lawyers and paralegals.[159] Therefore, courts have reasoned that allowing these costs as taxable under section 1920 would be akin to awarding attorney's fees, which section 1920 does not allow.[160] The *KBR* court concluded that this was indeed the type of costs sought by the prevailing party, and therefore held that these costs were not recoverable.[161]

In *CBT Flint Partners*, the prevailing defendant claimed basically the same costs as in *KBR*: the fees of "a computer consultant [hired] to collect, search, identify and help produce electronic documents from [the defendant's] network files and hard drives in response to [the plaintiff's] discovery requests."[162] But in this case, there were differences that, while not explicitly included in the court's reasoning, probably tipped the scales toward allowing the very same costs that *KBR* denied.

First, in *CBT Flint Partners*, the e-discovery fees in question totaled a whopping $243,453.02, rather than the mere $17,846.02 in *KBR*.[163] In addition, plaintiff's counsel, who argued against taxing the costs, had thoroughly annoyed the court by wasting time, among other things.[164] For instance, counsel filed a full thirty-five pages of objections to the prevailing party's bill of costs, including a full page objecting to the inclusion of a $146.82 fee for an unsuccessful attempt to serve a

156. *See id.* at *4 (citing *BDT Products*, 405 F.3d at 419-20 (finding no abuse of discretion in the lower court's taxing of copying costs based on electronic scanning and imaging) and Brown v. McGraw-Hill Cos., 526 F.Supp.2d 950, 959 (N.D. Iowa 2007)).

157. *See id.*

158. *See id.* at *5 (citing *Fells*, 605 F. Supp.2d 740; Klayman v. Freedom's Watch, Inc., No. 07-22433-CIV, 2008 WL 5111293 (S.D. Fla. Dec. 4, 2008); and Windy City Innovations, L.L.C. v. Am. Online, Inc., 2006 WL 2224057, at *3 (N.D. Ill., July 31, 2006)).

159. *See KBR*, 2009 WL 1457632 at *5 (citing *Windy City Innovations*, 2006 WL 2224057, at *3).

160. *See id* at *5 (citing *Windy City Innovations*, 2006 WL 2224057, at *3).

161. *See id.*

162. *See CBT Flint Partners*, 676 F. Supp.2d at 1380.

163. *See id.* at 1380; *KBR*, 2009 WL 1457632 at *3.

164. *See CBT Flint Partners*, 676 F. Supp.2d at 1380.

subpoena.[165] As the court put it plainly, "What an incredible waste of time!"[166]

It seems likely that these factors weighed into the court's decision to award costs, since the court spent only a few short sentences reasoning that awarding these costs was appropriate, even after acknowledging that doing so was controversial.[167] The thrust of the court's somewhat abrupt reasoning was that the prevailing party's e-discovery vendor provided highly technical services, which lawyers and paralegals did not have the computer skills to perform.[168] Therefore, awarding these costs was not akin to awarding attorney's fees.[169]

However, it seems unlikely that this is what *KBR* and its predecessors meant when it drew the connection between costs for extracting, storing and searching ESI and the traditional role of lawyers and paralegals in performing the analogous task of searching and sorting paper documents.[170] It seems the technical-skills line of reasoning is unique to *CBT Flint Partners*, as the court, unlike the *KBR* court with its analogous-task line of reasoning, cited no cases in support of its rationale.[171]

The *CBT Flint Partners* court also briefly mentioned that producing the massive amount of requested ESI (1.4 million electronic documents, plus six versions of source code) would have cost much more than the costs sought to be recovered here.[172] It also reasoned that "[t]axation of these costs will encourage litigants to exercise restraint in burdening the opposing party with the huge cost of unlimited demands for electronic discovery."[173] The author fully agrees with these points, and a litigator attempting to recover e-discovery costs under section 1920 would be well-advised to use them in her argument.

However, one must acknowledge that *KBR*'s reasoning was better-cited, and had the assistance of a much more thorough review of the case law. In addition, as noted earlier, the *KBR* judge was Lee H. Rosenthal, who chairs the Judicial Conference Committee on Rules of Practice and Procedure.[174]

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165. *See id.*

166. *See id.*

167. *See id.* at 1381 (acknowledging the division of the courts summarized in *KBR*, then taking only one additional paragraph to completely resolve the $243,453.02 issue).

168. *CBT Flint Partners*, 676 F. Supp.2d at 1381.

169. *See id.*

170. *See KBR*, 2009 WL 1457632 at *5.

171. *See CBT Flint Partners*, 676 F. Supp.2d at 1381.

172. *See id.*

173. *See id* at 1379.

174. *See* Puiszis, *supra* note 54.

In short, while *CBT Flint Partners* signals a welcome application of section 1920 in e-discovery cost-shifting, *KBR* is probably the more formidable of the two opinions. Therefore, lawyers attempting to tax e-discovery costs can expect to face an opposing party armed with a substantial, though not insurmountable, arsenal of persuasive authority.

Perhaps the next step is to modify the language of section 1920 itself. As *KBR* the court admitted, section 1920 was "developed in the world of paper," which leaves courts to speculate as to its digital-age manifestations.[175] Updating section 1920 to account for modern technology would be wise. Such a revision would relieve the courts of having to award or deny costs based on complicated analogies and statutory terminology, such as "exemplification" and "copies," that is quickly becoming outdated. Precisely the terms of what this revision would entail is a topic for another paper.

IV. CONCLUSION

This Note has suggested two solutions to the rising cost of electronic discovery.[176] First, remove the inaccessibility threshold in the *Zubulake* test.[177] Second, allow at least some electronic discovery costs to be recovered under Rule 54(d)(1) and 28 U.S.C. § 1920.[178]

Removing the *Zubulake* inaccessibility requirement would have several benefits in e-discovery. It would reduce the requesting party's incentive to use e-discovery requests as a weapon in litigation, and would reduce the responding party's incentive to downgrade ESI to inaccessible formats. It would also provide courts with more options in dealing with broad e-discovery requests that do not involve "inaccessible" formats, while offering protection to individual plaintiffs and doing little to harm the predictability of the court's cost-shifting decisions.

Furthermore, advocating for post-judgment recovery of some electronic discovery costs appears at least a somewhat hopeful cause. The successful case for section 1920 recovery of such costs in *CBT Flint Partners* is at least mildly encouraging, and shows that the struggle to apply the paper-oriented section 1920 to an increasingly paperless world is not an impossible one. However, there is a strong argument that the *KBR* decision is more in line with both the language of the statute and the balance of the case law.

175. *See KBR*, 2009 WL 1457632, at *4.
176. *See* discussion, *supra* Part III.
177. *See* discussion, *supra* Part III.A.
178. See discussion, *supra* Part III.B.

There is also a strong argument that the law of post-judgment recovery should change with respect to e-discovery costs. Steps should therefore be made to modify § 1920 language to reflect the modern landscape of electronic data management, and perhaps to properly define—or eliminate—"exemplification and copies" in § 1920(4).

These improvements should go a long way to ensure electronic discovery costs are more efficiently managed and more fairly distributed.

ANDREW MAST