DISCRETION TO TAX E-DISCOVERY COSTS

A NECESSARY REFORM?

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with a Preface by Rhonda Wasserman[*]

PREFACE

Corey Teitz's paper was written for my Electronic Discovery Seminar. In the seminar, I attempt to expose students to the law and rapidly changing technology that have transformed modern-day discovery. For the first eight weeks of the course, I introduce students to the most important cases and rules regulating electronic discovery; to new practices designed to facilitate such discovery, such as e-discovery special master programs and predictive coding; and to articles that explore some of the provocative issues surrounding e-discovery. I bring in guest lecturers – both lawyers and technical experts – who introduce students to the *practice* of e-discovery and offer them a hands-on lesson with an e-discovery review platform.

For his final paper in the seminar, Teitz chose to write about e-discovery costs and cost-shifting. As the volume of electronic discovery has skyrocketed and its costs have spiraled, litigants have sought to shift these costs onto their adversaries. Teitz asks whether Federal Rule 54(d) of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920 permit the taxation of e-discovery costs against the losing party at the conclusion of a lawsuit. After identifying the various stages of e-discovery and the associated costs, Teitz scrutinizes the text of Rule 54(d) and section 1920. He evaluates alternative

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interpretations of these texts offered by courts, and analyzes a recent Supreme Court decision that supports a narrow reading of the statute. Teitz proposes an amendment to section 1920 to permit greater cost-shifting, which he believes will create incentives for cooperation in e-discovery, reduce overly broad discovery requests, and ultimately reduce the cost of e-discovery.

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I.
INTRODUCTION

This paper proposes that federal district courts should have discretion to tax electronic discovery ("e-discovery") costs to a losing party in any litigation. An amendment to section 1920 of Title 28 of the United States Code ("section 1920") is necessary in order to grant this discretion to the courts. The amendment would represent a slight shift away from the traditional "American Rule" that each party pays its own costs in civil litigation. However, this shift is necessary due to the prevalence and ever-increasing costs of e-discovery in modern litigation.

Part II of this Note will discuss how discovery costs have been taxed historically, and the interplay between Rule 54(d) of the Federal Rules of Civil Procedure and section 1920. Part III will discuss how electronically stored information ("ESI") has affected discovery processes and describe the costs involved with producing ESI in the e-discovery context. Part IV will analyze the alternative approaches that lower federal courts have taken in taxing e-discovery costs and will show that the narrow approach is most consistent with recent Supreme Court precedent.[1] Part V will discuss the benefits of an

[1] A few other articles have identified the alternative approaches taken by courts, but have either advocated narrowing, rather than broadening, the availability of taxation of e-discovery costs, or have neglected the relevance of the recent Supreme Court precedent of *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012). *See, e.g.*, Patrick T. Gillen, *Oppressive Taxation: Abuse of Rule 54 and Section 1920 Threatens Justice*, 58 WAYNE L. REV. 235 (2012) (advocating narrow approach, based on *Taniguchi*); Jacqueline Hoelting, Note, *Skin in the Game: Litigation Incentives Changing as Courts Embrace a "Loser Pays" Rule for E-*

amendment to section 1920 and will address how the potential chilling effect this amendment may have on parties can be mitigated.

II.
DISCOVERY AND TAXATION OF COSTS HISTORICALLY

Discovery is a pretrial phase of litigation that allows each party to request and obtain information from the opposing party.[2] Prior to the advent of e-discovery, production of documents meant actually handing over physical copies of documents after manually screening them for relevance and privilege. The traditional "American Rule" is that each party pays its own costs of litigation, including the costs involved with requesting and producing information during discovery.[3] Limited exceptions to this rule have been established over time through amendments to the Federal Rules of Civil Procedure and related federal statutes.[4] The following two subsections discuss how these exceptions were applied to litigation prior to the advent of e-discovery.

A. Federal Rule of Civil Procedure 54(d)

Rule 54(d) governs costs that may be taxed to a losing party after a trial has been conducted and the court enters judgment in a case. The rule states: "Unless a federal statute, these rules, or a court order provides otherwise, costs – other than attorney's fees – should be allowed to the prevailing party."[5] This rule seems to grant district courts broad discretion in allowing all costs other than attorney's fees. However, the Supreme Court has announced that this discretion

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Discovery Costs, 60 CLEV. ST. L. REV. 1103 (2013) (advocating narrow approach, without mentioning *Taniguchi*); Emily P. Overfield, Comment, *Shifting the E-Discovery Solution: Why* Taniguchi *Necessitates a Decline in E-Discovery Court Costs*, 118 PENN. ST. L. REV. 217 (2013) (advocating narrow approach, based on *Taniguchi*).

[2] BLACK'S LAW DICTIONARY 533 (9th ed. 2009) (*s.v.* discovery).

[3] 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2665 (3d ed. 1998 & Supp. 2012).

[4] *See* 28 U.S.C. § 1920 (2012); FED. R. CIV. P. 54.

[5] FED. R. CIV. P. 54(d)(1).

is limited by federal statute. In *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* the Court held that the discretion to tax costs allowed by Rule 54(d) is limited to the categories of costs enumerated in section 1920.[6]

B. Federal Statute Allowing for Taxation of Costs: 28 U.S.C. § 1920

Section 1920 lists six categories of costs that are taxable to the losing party in a case.[7] The only relevant category for the purpose of this Note is found in section 1920(4): "Fees for the exemplification and the cost of making copies of any materials where the copies are necessarily obtained for use in the case." Exemplification means an authenticated copy of a document from public records that may be used in the case.[8] Accordingly, this phrase has no relevance in determining whether courts have discretion to tax e-discovery costs to a losing party. Courts that have decided cases dealing with this issue have focused exclusively on whether e-discovery costs are taxable under the "cost of making copies" language of section 1920.[9]

Prior to its amendment in 2008, section 1920(4) allowed for only "the cost of making copies of papers," but this section was broadened to allow for the cost of making copies of electronic documents.[10] Some federal district courts have interpreted the 2008 amendments to mean that all costs involved with e-discovery are taxable to the losing party.[11] Part IV will explain why the broad approach of taxing all e-discovery costs is incorrect in light of recent Supreme Court precedent. First, however, a quick overview of e-discovery itself is necessary.

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[6] *See* 482 U.S. 437, 441-42 (1987) ("Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rule 54(d).").
[7] 28 U.S.C. § 1920(1)-(6) (2012).
[8] BLACK'S LAW DICTIONARY 653 (9th ed. 2009).
[9] *See infra* Parts IV.A & IV.B.
[10] Joshua A. Haft, Note *Section 1920 and E-Discovery*, 74 U. PITT. L. REV. 359, 370 (2012).
[11] *See infra* Part IV.A.

III.
THE RISE OF ESI AND E-DISCOVERY

Advances in technology over the last several decades have led to a rapid increase in the amount of ESI in existence. The sheer volume of ESI has made it impossible for parties to conduct discovery in the manner originally contemplated by the Federal Rules of Civil Procedure (copying or printing paper documents and manual review). For example, in 2011 the total amount of ESI created worldwide surpassed 1.8 zettabytes (1.8 trillion gigabytes).[12] This is the digital equivalent of 500 million billion files or 200 billion high definition movies (assuming a two-hour runtime for each).[13] To provide further illustration, this amount of information would fill 57.5 billion Apple iPads, each with thirty-two gigabytes of storage.[14] The amount of ESI generated worldwide has more than doubled every two years throughout the last decade and this trend is expected to continue for the foreseeable future.[15] Because of this rapid increase in ESI, e-discovery has become the dominant form of discovery.

A. Costs Involved with Producing ESI

There are many costs involved with the various phases of e-discovery. Generally speaking, litigants categorize costs into three categories: collecting, processing, and reviewing.[16]

1. Collecting

This phase involves identifying custodians and sources of relevant ESI and collecting that ESI. "Collecting" can mean making a digital copy of the relevant ESI on physical media or moving it to a secure

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[12] JOHN GANTZ & DAVID REINSEL, INT'L DATA CORP. 2011 DIGITAL UNIVERSE STUDY, EXTRACTING VALUE FROM CHAOS 1 (June 2011), *available at* perma.cc/NY4M-T36N.

[13] Press Release, EMC Corp., World's Data More than Doubling Every Two Years – Driving Big Data Opportunity, New IT Roles (June 28, 2011), *available at* perma.cc/C2YK-VMWM.

[14] *Id.*

[15] GANTZ & REINSEL, *supra* note 12, at 1.

[16] NICHOLAS M. PACE & LAURA ZAKARAS, RAND INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY, 12-13 (2012), *available at* perma.cc/TN8R-S7FH.

server or cloud server. Collection can be difficult and costly when a party requests information that is stored only on archival or backup tapes.[17] Costs also increase depending on the number of custodians holding relevant ESI and the number of sources of ESI.[18] In a recent study of large corporate litigants, collection was found to be the least costly for litigants, consuming less than eight percent of e-discovery expenditures on average.[19]

2. Processing

The processing phase involves several potential steps to make the ESI easier to review. These steps can include restoration of damaged files, conversion of files to a more usable format, indexing or cataloging files, decrypting secure files, as well as de-NISTing,[20] de-duplication, and validation.[21] This phase requires technical expertise, and many litigants hire outside vendors to process their collected data.[22] Processing consumes nineteen percent of e-discovery expenditures on average.[23]

3. Reviewing

Reviewing is the final phase of e-discovery prior to production. Review can occur either manually or through the use of technology assisted review, also known as predictive coding.[24] If the review is manual, attorneys or experienced legal assistants review each piece

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[17] *Id.* at 22.
[18] *Id.*
[19] *Id.* at xiv, 20.
[20] De-NISTing involves removing all files that are in a database maintained by the National Software Reference Library, a project of the National Institute of Standards and Technology (NIST). These are common files that are found on most computers, such as word processing or internet browsing applications. It is unnecessary to preserve these standard files for review. *See* NAT'L SOFTWARE REFERENCE LIBRARY, *available at* perma.cc/V8HV-JEL6 (archived Aug. 27, 2014).
[21] *Processing Guide*, ELECTRONIC DISCOVERY REFERENCE MODEL, perma.cc/G7WV-AHFQ (archived July 13, 2014).
[22] PACE & ZAKARAS, *supra* note 16, at 38.
[23] *Id.* at 42.
[24] Maura R. Grossman & Gordon V. Cormack, *Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*, 17 RICH. J.L. & TECH. 11, *3-4 (2011).

of ESI to determine whether it is relevant and whether it is privileged.[25] This is a labor-intensive process, which is why this is the most expensive phase of e-discovery. On average, review consumes seventy-three percent of total litigant expenditures on e-discovery[26].

Predictive coding is not widely used, and until recently no court approved it as an acceptable review practice.[27] The process involves manual review by an experienced attorney in conjunction with a computer that can "learn" what is relevant to the case based on the responses of the attorney.[28] This has the potential to save litigants significant amounts of money because the attorney only needs to review a fraction of the total documents that would otherwise need to be manually reviewed.[29] Predictive coding is likely to gain traction in the future because of the potential cost savings and the fact that recent studies have shown that it is at least as efficient and effective as teams of manual reviewers.[30]

B. A Note on Costs

The study used by this paper to detail what percentage of costs is allocated to each phase of e-discovery relied on the self-reporting of costs by litigants.[31] One major cost driver that was not reported by litigants is the cost of preservation of ESI. The reason for failing to report this cost is twofold. First, the cost of preservation is usually incurred internally, which means that a litigant has already incurred the costs of the people and equipment needed for preservation.[32] Second, there is no clear standard defining what costs should be classified as preservation expenses rather than ordinary business expenses.[33]

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[25] *Id.*
[26] PACE & ZAKARAS, *supra* note 16, at 41-42.
[27] *See* Da Silva Moore v. Publicis Groupe, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) (endorsing, for the first time in federal case law, the use of predictive coding as an appropriate method of reviewing ESI).
[28] *Id.* at 183-84.
[29] *Id.*
[30] Grossman & Cormack, *supra* note 24, at *3.
[31] PACE & ZAKARAS, *supra* note 16, at 5.
[32] *Id.* at 85-86.
[33] *Id.*

While these costs are not well tracked or managed, some litigants estimated that preservation costs were greater than the costs of collecting, processing and reviewing combined.[34] Concerns about these costs have led to a proposed amendment to Federal Rule of Civil Procedure 37(e).[35] The proposed amendment provides greater guidance as to when a duty to preserve begins and what must be preserved, and also provides safe harbor to litigants who attempt to preserve in good faith.[36] This paper proposes that the cost of preservation should be taxable just as any other cost of e-discovery, provided that the litigant seeking recovery tracks the cost so that the court has a reasonable basis to make an award.

C. Overall Costs and Projection of Future Costs

The global e-discovery market was valued at $3.6 billion in 2010, $3.0 billion of which was attributable to the United States market.[37] The market is expected to grow to $9.9 billion by 2017, with $7.2 billion attributed to the United States.[38] The likely reason that the American market for e-discovery products and services dwarfs the rest of the world is the tradition of allowing broad discovery. While this was a boon for attorneys in the days of manual discovery and paper documents, it is now a boon to e-discovery vendors instead.

Attorneys recognize that e-discovery has become unnecessarily expensive.[39] Costs have been described as skyrocketing, exploding, and spiraling.[40] Some attorneys have called for wholesale discovery reform because of the costs involved with e-discovery.[41] While the

[34] *Id.* at 87-88.
[35] COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY AND CIVIL PROCEDURE 314-28 (2013).
[36] *Id.*
[37] TRANSPARENCY MARKET RESEARCH, EDISCOVERY (SOFTWARE AND SERVICE) MARKET: GLOBAL SCENARIO, TRENDS, INDUSTRY ANALYSIS, SIZE, SHARE AND FORECAST, 2010-2017, at 4 (2011), *available at* perma.cc/TAT3-5EAN.
[38] *Id.*
[39] PACE & ZAKARAS, *supra* note 16, at 1.
[40] *Id.*
[41] *Id.*

need for some change is obvious, this paper proposes that an overall reduction in e-discovery costs can be achieved through less radical means than wholesale discovery reform.

The next section discusses how courts have taxed e-discovery costs in recent cases and argues that the narrow approach to taxing costs is correct under current Supreme Court precedent.

IV.
APPLICATION OF FRCP 54(D) AND § 1920 TO E-DISCOVERY

The federal district courts have used two distinct approaches when deciding whether the costs of e-discovery should be taxed to the losing party: the broad approach and the narrow approach.[42] These approaches stand in opposition to each other. The broad approach allows the winning party to recover all costs associated with e-discovery.[43] The narrow approach allows for recovery of only a small subset of costs involved with e-discovery: the actual costs of duplicating a native electronic document or the costs of converting an electronic document to a PDF, TIFF, or other requested form.[44] These competing approaches are explained in detail below, and sub-section C will explain why the narrow approach is the correct approach.

A. The Broad Approach

Three cases decided after the 2008 amendment to section 1920 espouse the broad approach to taxing e-discovery costs. The first is *CBT Flint Partners, LLC v. Return Path, Inc.,* decided in 2009 by the United States District Court for the Northern District of Georgia.[45]

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[42] *See* Hoelting, *supra* note 1, at 1119-22.

[43] *Id.* at 1121.

[44] *Id.* at 1119-22. PDFs and TIFFs are the two most-used file formats for the production of ESI. These formats allow the requesting party to view a file as an un-editable static image and also usually include a text-searchability function for ease of use.

[45] 676 F. Supp. 2d 1376 (N.D. Ga. 2009), *vacated on other grounds*, 654 F.3d 1353 (Fed. Cir. 2011).

There, the court allowed the taxation of $243,453.02 in fees paid to the defendant's e-discovery vendor in response to plaintiff's discovery requests.[46] The fees were for services including collecting, searching, identifying and producing relevant documents.[47] The court's reasoning was based on the facts that plaintiff requested a "massive quantity" of data (over 1.4 million documents) and that the services performed in culling this data were not the type of services normally performed by an attorney in the course of discovery.[48] The court also mentioned in its justification for allowing taxation that the use of an e-discovery vendor most likely reduced the overall cost of discovery in the case.[49] The court did not state whether the fees for these services were equivalent to "fees for exemplification or the cost of making copies" for use in the case. Only these or equivalent costs are taxable under § 1920.

The second case supporting the broad approach is *In re Aspartame Litigation*, decided in 2011 by the United States District Court for the Eastern District of Pennsylvania.[50] In that case the court allowed several defendants to recover costs related to collecting, preserving, processing, sorting, de-duplicating, converting, reviewing and privilege-screening electronic documents.[51] The court relied on reasoning similar to that in *CBT Flint Partners* to justify taxing these costs: there was a massive amount of data involved, the parties agreed that e-discovery was appropriate, the functions performed were not those typically performed by a lawyer in the context of discovery, and the services performed reduced the overall cost of discovery.[52] The court, like the *CBT Flint* court, did not attempt to reconcile its decision with the statutory language of section 1920.

Lastly, *In re Ricoh Co., Ltd. Patent Litigation* suggests that the United States Court of Appeals for the Federal Circuit may support the

[46] *Id.* at 1380-81.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] 817 F. Supp. 2d 608 (E.D. Pa. 2011).
[51] *Id.* at 614-16.
[52] *Id.*

broad approach to taxing e-discovery costs.[53] In that case the court stated, "The act of producing documents is not so narrowly construed as to cover only printing and Bates-labeling a document."[54] The court also noted that it did not consider the costs of hosting an online database for document review "to fall into the unrecoverable category of 'intellectual efforts.'"[55] The court did not ultimately decide the question of whether these costs could be properly taxed under section 1920, because the parties in the case entered into a detailed fourteen-page cost sharing agreement prior to trial and the Federal Circuit held that the district court erred awarding costs to the winning party because the agreement was controlling.[56] The court's reasoning, however, suggests that it would have upheld the district court's taxing of costs to the losing party in the absence of the cost-sharing agreement.

B. The Narrow Approach

Several federal district court cases decided after the 2008 amendments to section 1920 support the narrow approach to taxing e-discovery costs,[57] as do two recent decisions from the Courts of Appeals. This section focuses on these two recent decisions as illustrations of the narrow approach.

In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.,* the Third Circuit held that decisions allowing taxation of essentially all costs involved with e-discovery "are untethered from the statutory moorings" of section 1920.[58] The court also pointed out that saving costs is not an appropriate basis for allowing taxation of costs and that section 1920(4) authorizes only the taxation of costs for exemplifica-

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[53] 661 F.3d 1361 (Fed. Cir. 2011).
[54] *Id.* at 1365.
[55] *Id.*
[56] *Id.* at 1366-67.
[57] *E.g.*, Fast Memory Erase, LLC v. Spansion, Inc., No. 3-10-CV-0481-M-BD, 2010 WL 5093945 at *5-6 (N.D. Tex. Nov. 10, 2010); Kellogg Brown & Root Int'l, Inc. v. Altanmia Commercial Mktg. Co., No. H-07-2684, 2009 WL 1457632 at *5-6 (S.D. Tex. May 26, 2009); Fells v. Va. Dep't of Transp., 605 F. Supp. 2d 740, 743 (E.D. Va. 2009).
[58] 674 F.3d 158, 169 (3rd Cir. 2012).

tion or making copies.[59] The court upheld the district court's taxation of costs for converting ESI into TIFFs and for converting VHS tapes to DVDs.[60] These services were viewed as the digital equivalent of making paper copies; therefore taxing these costs was not an abuse of discretion.[61] But, the court held, the district court *did* abuse its discretion in taxing $95,210.13 in vendor costs for collecting, searching, identifying, and producing electronic documents because they were not the equivalent of making paper copies.[62]

The second case is from the Fourth Circuit Court of Appeals. In *Country Vintner of North Carolina, LLC v. E. & J. Gallo Winery, Inc.*, the district court adopted the Third Circuit's reasoning and allowed taxation only of the costs of TIFF and PDF conversion and the cost of copying the digital files to a compact disc.[63] The Fourth Circuit affirmed the district court's holding, citing to the plain meaning and legislative history of section 1920.[64] The court also cited Supreme Court case law holding that there is a presumption that the party producing information must bear the expense of production.[65] In this case the winning party was able to recover only $218.59 of $111,047.75 spent on e-discovery.[66]

C. The Narrow Approach is Correct Under Current Law

The previous discussion shows that federal courts have not yet reached a consensus as to whether the broad or narrow approach to taxing e-discovery costs is correct. However, a recent United States Supreme Court case involving a different subsection of section 1920 indicates that the narrow approach is correct.

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[59] *Id.*
[60] *Id.* at 167-68.
[61] *Id.*
[62] *Id.* at 171-72.
[63] 718 F.3d 249, 253 (4th Cir. 2013); 28 U.S.C. 1920(6) allows district courts to tax as costs: "Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title."
[64] *Id.* at 260.
[65] *Id.* at 261 (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978)).
[66] *Id.* at 252-53.

1. Recent Supreme Court Decision: Taniguchi v. Kan Pacific Saipan, Ltd.

Taniguchi involved section 1920(6), which specifically authorizes the compensation of interpreters as taxable costs.[67] The Court held that section 1920(6) should be read narrowly, and that costs for translation of written documents do not fall under the category of "compensation of interpreters."[68] The Court reviewed the legislative history[69] and amendments to section 1920 as well as the plain meaning of the word "interpreter." More directly relevant to the broader question of e-discovery, the Court also noted that its decision was "in keeping with the narrow scope of taxable costs" historically,[70] and that "taxable costs are limited by statute and are modest in scope." Thus it did not make sense to read a broad definition of "interpreter" into the statute.[71] The Court reasoned in addition that if Congress had intended costs of written translation to be taxable under section 1920(6) it would have stated so explicitly.[72]

2. *Taniguchi* Ratifies the Narrow Approach

The Supreme Court's decision in *Taniguchi* interpreted section 1920(6), not section 1920(4), but it is very unlikely that the Court would treat these subsections differently. One commentator has suggested that the Court's holding in *Taniguchi* is unrelated to the issue of taxing e-discovery costs and that the legislative history of the 2008 amendments to section 1920 supports the broad approach to taxing e-discovery costs.[73] Both of these propositions are incorrect. *Taniguchi*

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[67] 132 S. Ct. 1997, 2000 (2012).
[68] *Id.* at 2006-07.
[69] One of the main reasons Congress passed the 1853 Fee Act was that losing litigants were facing exorbitant fees in some jurisdictions. The Fee Act was intended to be far-reaching and it specified the exact nature and amount of items that can be taxed in the federal courts. Costs that may be taxed to a losing litigant are limited to those specifically contained in the Fee Act and its successor, section 1920. *See* Taniguchi v. Kan Pac. Saipan, Ltd., 132 S. Ct. 1997, 2001 (2012) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-48 (1975)).
[70] *Id.* at 2006.
[71] *Id.*
[72] *Id.* at 2006-07.
[73] *See* Haft, *supra* note 10, at 371 n.81.

is related to the issue of taxing e-discovery costs because the Supreme Court held that section 1920 as a whole, and not just section 1920(6), should be interpreted narrowly.[74] *Taniguchi* therefore provides insight into how the Supreme Court would likely interpret *any* provision under section 1920, including section 1920(4).[75] It is both reasonable and logical to assume that the Court would consistently apply this reasoning and interpret section 1920(4) narrowly when deciding a case involving e-discovery taxation issues.

In addition, the legislative history cited by the commentator as support for the broad approach to taxing e-discovery costs is both weak and inconclusive. There is no doubt that the 2008 amendments to section 1920(4) were intended by Congress to specifically account for some costs associated with e-discovery and that the amendment was titled "Assessment of Court Technology Costs."[76] However, these facts do not evidence a clear Congressional intent to break from the longstanding rule that taxable costs under section 1920 are narrow in their scope.[77] Finally, the commentator relies on the statements of a sole member of the House of Representatives as "strong evidence of congressional intent to allow the taxation of e-discovery costs, despite the legislative history's lack of clarity regarding the scope of taxation."[78] The Supreme Court has used statements made during Congressional hearings and debates as evidence of legislative intent.[79] But it is unlikely that the Court would

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[74] 132 S. Ct. at 2006:

> Our decision is in keeping with the narrow scope of taxable costs. . . . Taxable costs are limited to relatively minor, incidental expenses as is evident from § 1920, which lists such items as clerk fees, court reporter fees, expenses for printing and witnesses, expenses for exemplification and copies, docket fees, and compensation of court-appointed experts.

[75] Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 258 (4th Cir. 2013) ("Although the ordinary meaning of ['copies'] is expansive, its application is limited by the 'broader context of [§ 1920] as a whole.' The Supreme Court has observed that taxable costs under the statute are 'modest in scope' and 'limited to relatively minor, incidental expenses.'" (quoting *Taniguchi,* 132 S. Ct. at 2006; *In re Total Realty Mgmt., LLC,* 706 F.3d 245, 251 (4th Cir. 2013)).

[76] *See* Haft, *supra* note 10, at 370-71.

[77] *See Taniguchi*, 132 S. Ct. at 2006-07.

[78] *See* Haft, *supra* note 10, at 370-71.

[79] David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legisla-*

find the statements of one member from one branch of Congress to be strong enough evidence to control the interpretation of an admittedly ambiguous statute in a manner that overturns a longstanding rule requiring a narrow interpretation of section 1920. This is especially true considering that the statements themselves are vague and could reasonably be construed as supporting the narrow approach to taxing e-discovery costs.[80] Accordingly, it is very likely that the Supreme Court would apply the reasoning from *Taniguchi* and narrowly interpret section 1920 in a future case involving taxation of e-discovery costs.

3. Federal Cases Decided Subsequent to *Taniguchi* Support the Narrow Approach

The cases supporting the broad approach to taxing the costs of e-discovery were all decided prior to *Taniguchi*. The two cases decided after *Taniguchi* both support the narrow approach. The first case is *Country Vintner*, discussed above. In that case the Fourth Circuit relied heavily on the reasoning of the Third Circuit in *Race Tires*, but it did cite to *Taniguchi* for the proposition that the plain meaning of "making copies" should be applied.[81] While the Fourth Circuit did not recognize *Taniguchi* as a direct authority on this matter, it did ultimately reach the conclusion that the narrow approach is appropriate.[82]

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tive History, 51 WM. & MARY L. REV. 1653, 1665 (2010).

[80] Haft states:

> Representative Zoe Lofgren of California urged the passage of "noncontroversial measures proposed by the judicial conference to improve efficiency in the [f]ederal courts." Representative Lofgren also specifically referenced the amendment to § 1920(4) in stating that one of the proposed statutory amendments "mak[es] electronically produced information coverable in court costs."

See Haft, *supra* note 10, at 370-71. The use of the word "noncontroversial" in the first statement could be interpreted to imply that the amendment is not designed to overturn the longstanding rule that section 1920 should be interpreted narrowly, as overturning the rule would likely lead to controversy. The use of the word "produced" in the second statement could be interpreted to mean that the amendment to section 1920 covers only costs for the production phase of e-discovery, not costs associated with collecting, processing, reviewing, or storing ESI.

[81] Country Vintner of N.C., LLC v. E. & J. Gallo Winery, Inc., 718 F.3d 249, 258 (4th Cir. 2013).

[82] *Id.* at 261.

The second case decided subsequent to *Taniguchi* is *Ancora Technologies, Inc. v. Apple, Inc.*[83] In that case the United States District Court for the Northern District of California cited directly to *Taniguchi* in holding that storage and hosting costs involved with producing documents are not compensable under section 1920.[84] The district court stated that even though *Taniguchi* did not address the issue of taxing e-discovery costs, the Supreme Court put forth "the principle that section 1920 does not cover all costs that are necessarily incurred in litigation, but only a narrow subset."[85] Accordingly, the court reduced the clerk's order taxing costs by $71,611.52, the amount of fees for hosting the documents in the case.[86]

V.
PROPOSED AMENDMENT TO § 1920

In light of the Supreme Court's decision in *Taniguchi*, the federal district courts are likely to deny the taxation of e-discovery costs unless section 1920 is amended. After proposing specific language for such an amendment, I will consider arguments for and against adopting it.

A. Language of the Proposed Amendment

Below is my proposed amendment to section 1920. The amendment grants federal district judges broad discretion to tax costs related to e-discovery. It also contains provisions that mitigate the potential negative effects of such a rule. Parties can avoid application of this rule by entering into a cost sharing agreement. Losing parties will not be forced to pay the often-high costs of e-discovery if they are unable to do so. Lastly, federal district judges will also have the discretion not to tax e-discovery if justice so requires.

The proposed amendment to section 1920 provides:

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[83] No. 11-CV-06357 YGR, 2013 WL 4532927 (N.D. Cal. Aug. 26, 2013).
[84] *Id.* at *3.
[85] *Id.*
[86] *Id.* at *4.

> § 1920. Taxation of costs. A judge or clerk of any court of the United States may tax as costs the following: . . .
>
> (7) Fees for the production electronically stored information, including fees for collection, processing, and technology assisted review of such information. These fees may be taxed only if (a) there is no cost-sharing agreement regarding electronically stored information between the parties; (b) the losing party has the ability to pay such costs; and (c) it is in the interest of justice to tax such fees and costs."

B. Benefits of the Amendment

1. Encourages Cooperation Between Parties Before Discovery Begins

The Federal Rules of Civil Procedure, specifically Rules 16 and 26(f), require the parties to meet and confer regarding the scope of e-discovery.[87] These meetings have also been used recently to discuss the potential for sharing costs of e-discovery. An amendment to section 1920 allowing district courts to tax e-discovery costs fosters such agreements. It would create an incentive for requesting parties to work with the producing party to find the most cost-effective ways to meet the goals of the discovery request. It would also likely lead to more focused requests in cases in which the parties do not agree to a cost-sharing agreement because the requesting party will know that it might potentially be taxed for the full costs of producing ESI.

2. Promotes Cost-Effective E-Discovery Processes

Part III of this Note showed how litigants spend their money during e-discovery. Allowing courts to tax the costs of e-discovery would likely lead to more focused discovery requests, and costs of collection and processing would be reduced by a corresponding amount. Review constitutes the larges portion of e-discovery expenditures, at seventy-three percent on average.[88] Under the current system, a requesting party has an incentive to demand manual

[87] FED. R. CIV. P. 16(b)(3)(B)(iii), 16(c)(2)(F), 26(f).
[88] *See* PACE & ZAKARAS, *supra* note 16, at 42.

review, because that review drives up the costs of e-discovery and makes a settlement more appealing to the responding party. Allowing taxation would likely result in more parties agreeing to use predictive coding, because requesting parties would have an incentive to reduce the overall costs of e-discovery: the potential threat of being stuck with the bill. It has been shown that predictive coding is as efficient and effective as manual review, if not more so, while also being less expensive.[89] Review is by far the most expensive phase of e-discovery, and widespread adoption of predictive coding offers one of the most effective ways to reduce these costs.

3. Promotes the Fundamental Purpose of the Federal Rules of Civil Procedure

Those who oppose granting district courts the discretion to tax e-discovery costs often point to the "American Rule" that each side pays its own costs of litigation. They argue that allowing taxation of e-discovery costs will upset the fundamental balance of power in American law. While this might be true to some extent, allowing taxation of e-discovery costs would serve the fundamental purpose of the Federal Rules of Civil Procedure: "to secure the just, speedy, and inexpensive determination of every action and proceeding."[90] As noted, allowing taxation would result in parties choosing more cost-effective e-discovery processes. It would also lead to more just results because it would impair a party's ability to use extensive e-discovery requests as a tool to force a settlement. Parties are less likely to pursue this strategy if there is a possibility that the costs involved with extensive production could be taxed to them after the court has decided the case. Cases would also likely be resolved in a speedier fashion if predictive coding were to become the standard form of review for e-discovery.[91] In short, Congress should recognize that the discovery process has changed significantly in recent decades due to the volume of ESI and the costs involved with pro-

[89] *See* Grossman & Cormack, *supra* note 24, at *3, *43-44.
[90] FED. R. CIV. P. 1.
[91] *See* Grossman & Cormack, *supra* note 24, at *2.

ducing it. Litigants must often rely on outside vendors to perform the most basic tasks of discovery such as locating digital files and producing them in a usable form.[92]

C. Concerns About a Potential Chilling Effect on Plaintiffs Can Be Mitigated

Several law review articles on this topic have argued that the broad approach to taxing e-discovery costs would have a chilling effect on plaintiffs.[93] The authors reason that allowing taxation of e-discovery costs might leave a plaintiff with few resources stuck with a large bill of costs that he or she cannot pay. The mere threat of being saddled with such costs might deter some plaintiffs from filing meritorious claims. This is a valid concern, but it can be mitigated.

1. Taxing E-Discovery Would Be Discretionary, Not Mandatory

The proposed amendment to section 1920 would grant discretion to federal district courts to tax the costs of e-discovery but would not require them to do so. It is true that there is a strong presumption in favor of granting all costs allowable under Rule 54(d)(1).[94] However, the presumption is a policy decision by Congress and can be changed at any time. The proposed language of the amendment (at 7(c)) makes clear that the presumption does not necessarily apply to e-discovery costs. Under that language, courts have discretion to award these costs only if it would be in the interest of justice in a given case.

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[92] *See* PACE & ZAKARAS, *supra* note 16, at 38.

[93] *See generally, e.g.,* Gillen, *supra* note 1; Hoelting, *supra* note 1.

[94] *See, e.g.,* Reger v. Nemours Found. Inc., 599 F.3d 285, 288 (3d Cir. 2010) ("[T]here is a 'strong presumption' that costs are to be awarded to the prevailing party. . . . This is so because the denial of such costs is akin to a penalty."); *In re* Derailment Cases, 417 F.3d 840, 844 (8th Cir. 2005) ("A prevailing party is presumptively entitled to recover all of its costs."); Save Our Valley v. Sound Transit, 335 F.3d 932, 944-45 (9th Cir. 2003) ("Rule 54(d) creates a presumption for awarding costs to prevailing parties; the losing party must show why costs should not be awarded."); Cefalu v. Vill. of Elk Grove, 211 F.3d 416, 427 (7th Cir. 2000) ("Rule 54(d)(1) establishes a presumption in favor of a cost award.").

2. Mitigating the Potential Chilling Effect on Plaintiffs

The proposed amendment also includes two provisions that avoid a potential chilling effect on plaintiffs. The first (in 7(a)) is that costs can be awarded only when no cost-sharing agreement regarding e-discovery exists between the parties. This provision would promote early discussion and agreement between the parties. It would also create certainty for litigants that a cost-sharing agreement would be controlling and they would not be stuck with the full bill of costs if they lose a case. The second provision (7(b)) conditions the award of costs on the losing party's ability to pay. The losing party should have the burden of proving inability to pay; this could be accomplished by any means that the district court finds appropriate. One likely doctrinal development would be to require parties who desire to avoid being liable for costs raise this issue as early in the litigation as possible.

VI.
CONCLUSION

The volume of ESI and the corresponding costs of producing it have changed the discovery phase of litigation over the last few decades. The amendment to section 1920 proposed in this paper recognizes this change and deals with the exploding costs the change has created. The proposed amendment is an exception from the general American Rule requiring each party to bear its own costs. But it is consistent with the fundamental purpose of the Federal Rules of Civil Procedure and would lead to reduced costs for litigation overall. We should not adhere blindly to the American Rule in every circumstance when a different rule will produce better results.

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