

# Raging Debate: Who Should Pay for Digital Discovery?

BY ERIC VAN BUSKIRK

**T**oo often discovery is not just about uncovering the truth but also about how much of the parties can afford....”

The general rule in civil discovery is that each party pays its own document production costs. Recently, however, legal commentators and burdened parties have attempted to dislodge this rule, complaining that the enormous growth of digital communications has increased the amount of discoverable information to such a degree that civil discovery is no longer affordable.

Digital discovery can indeed be enormously expensive. In some cases it costs millions of dollars to satisfy document production requests. In a recent case (*Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421 (S.D.N.Y. 2002)), a litigant estimated it would take \$9.75 million to satisfy a single document request. In such cases there may be millions of e-mails, backup tapes, and other responsive material to locate, sort, review and produce. Moreover, high costs are compounded by the fact that in some cases litigants must search offices located across the country or across the world in order to satisfy discovery requests.

Digital discovery is inherently more expensive than traditional, paper discovery for several reasons. First, it is more expensive because computer technology permits parties to retain greater amounts of data at a lower cost as compared with technology prior to the personal computer. Second, it is more expensive because

digital information is difficult to eradicate. Most people now know that the “deletion” of files is usually not equivalent to the permanent removal of them. Data that is difficult to eradicate lingers longer; the more data that builds up, the more data that is producible, and the more expensive production becomes. Third, in traditional discovery producing parties can conserve production costs by making documents “available for inspection” at the producing parties’ premises. However, with digital discovery, it is often unwise to allow an opponent onsite access to one’s file, e-mail, or backup servers because it can be very difficult to separate producible information from that which is irrelevant, confidential, or privileged.

## The Debate

The high costs of digital discovery have spurred a number of arguments supporting reformation of producing-party-pays rule (“PPPR”). Reformers argue the exorbitant costs of digital discovery can threaten the financial base of a company even before a determination of liability has been made. Further, they assert that PPPR is too burdensome given that, in addition to paying the costs to produce documents in readable format, producing parties must also bear the costs to screen producible documents for confidential information. In addition, reformers complain that the ability to request large amounts of information at the expense of the producer is improperly used in some cases to “blackmail” information-rich producing parties into unnaturally early settlements because it



is simply cheaper to settle than to produce. Further, in cases where both parties have large amounts of digital information, each party may inflict high costs on the other by issuing burdensome production requests. Some parties may drop out of litigation early because they cannot afford to remain. These “wars of attrition” can force some litigants to abandon suits based simply on a cost-benefit analysis, rather than based on merit. Finally, for defendants whose information technology systems are extensive and complex, reformers contend that PPPR permits unscrupulous litigants to engage in “fishing expeditions” at the expense of their opponent.

Supporters of PPPR counter that the cost-allocation rules are appropriate in current form because imposing heavier cost burdens on document requesters would preclude poorer litigants from access to the justice system. Supporters argue that if poorer litigants are unable to challenge well-heeled corporate defendants, society will lose an important safeguard on the misdeeds of corporate wrongdoers. It is often these poor litigants who bring corporate wrongdoers to account. Moreover, supporters contend, imposing production costs on those who are information-rich is fair and appropriate since they chose to use technology that makes it expensive to produce.

## The Reformers

Unhappy with the current scheme of cost-allocation, several commentators have asked that document requesters bear more of the cost burdens associated with their document requests.

In *Electronic Media Discovery: The Economic Benefit of Pay-Per-View* (Cardozo Law Review), Marnie H. Pulver calls for an amendment to RPPR. He argues for a new rule that requires requesting parties to “pay the [entire] cost for the production of . . . discovery because it will internalize costs.” Let’s call this proposed rule the “requesting-party-pays rule” or “RPPR.” To understand Pulver’s reasoning, it is necessary first to understand the Law and Economics tradition (“LE”) from which it is derived.

LE theories tend to favor rules of law that “internalize” costs on decision-makers in order to achieve economic efficiency. The rationale is as follows: Persons are presumed to act or make choices that are always in their self-interest. “Cost-internalization” means that the actor or chooser bears the costs of his actions or choices. “Cost-externalization” means costs of actions or choices are borne by other persons or society as a whole, rather than the chooser. Rational actors/choosers will make more “expensive” choices when they do not have to foot the bill, whereas they will make less expensive choices when they do. Therefore, LE theories generally hold that costs tend to rise under rules that allow choosers to externalize, while costs tend to fall under rules that force choosers to internalize. Since the goal of LE is to conserve costs (no matter who expends them), it generally supports rules that internalize costs on those who are in a position to control them...those who are responsible for causing the costs.

## The Reformers, Part II

Proponents of “RPPR” contend that the Rules should be revised to require requesting parties pay for (i.e., internalize) the costs to produce the documents they request. If requesting parties are forced to bear the costs of their choice to request documents, they will have incentive to limit discovery requests.

Another group of reformers have suggested a different alternative to the

current cost-allocation scheme. In *Electronic Discovery Issues for 2002: Requiring the Losing Party to Pay for the Costs of Digital Discovery* (Barbara Caulfield, et al, presented at Third Annual Sedona Conference on Complex Litigation), the authors suggest a proposal that would require the losing party to reimburse its opponents for all or a part of its production costs at the end of judgment. This may be termed the “losing-party-pays rule,” or “LPPR”. Under this proposal, the requesting party would not be automatically required to pay for all costs associated with their requests. Instead, courts “would have discretion to determine the amount that should be shifted based on the economic resources of the [requesting] party, the expenses incurred, and the degree to which the requests were frivolous or irrelevant.”

In addition to addressing the problems of fishing expeditions, wars of attrition, and litigation blackmail, this proposal would force requesting parties to “particularize” their discovery requests in order to conserve costs they might be required to pay at the end of judgment. It would also force requesting parties to “seek only truly relevant information.” Further, it is maintained that “LPPR” would encourage requesting parties to “self-regulate the scope and content of the requests, likely making the process more efficient and perhaps less contentious.” Finally, “LPPR” “would not preclude litigants with fewer resources from discovering relevant information, as a court could still require the producing party pay for the production up front.”

Both of the proposals above derive from legitimate concerns about the rising costs of digital discovery. Ideally, it should not cost millions of dollars to satisfy a typical discovery request. Further, discovery should not threaten the financial viability of litigants, or permit one party to blackmail another, engage in fishing expeditions and wage wars of attrition.

## Viable Alternatives?

The question thus presented is two-fold: first, are courts unable to control the perceived unfairness and abuse such that the current Rules should be amended; and second, if courts are unable to control the abuse, are the above alternatives viable?

Some have argued that the “RPPR” theory is the weaker of the two alternatives. Aside from its highly ideological nature, these parties feel this theory is structurally unsound. The crux of their argument is that if requesting parties cause high costs through production requests, then production costs can be reduced by imposing costs on those who cause them, i.e., document requesters. It’s argued that this view is naïve, in that it fails to recognize that we live in a complex world and causation is multidimensional. The objection is that it is just as plausible to blame corporate planners who chose technology that was ill-adapted for litigation purposes as it is to blame document requesters. After all, if corporate planners had chosen differently, discovery might not be so expensive. A similar argument can be made against those who design and manufacture technology; had technology been designed differently, discovery costs might not be so high. If we are to take “RPPR” at face value, so the objection goes, then shouldn’t corporate planners and technology manufacturers internalize production costs as well?

For many, “LPPR” is preferable because it does not rest on a simple view of causation and responsibility. Moreover, a rule requiring the loser to pay will likely be more palatable to most if courts have discretion to refuse to shift all or a portion of costs if the document requesters are impoverished or if their pleadings are meritorious. What is likely to be the major problem with “LPPR” is that it makes a controversial value judgment — that discouraging litigation blackmail, fishing expeditions and wars of attrition is more important than keeping corporate defendants in check and giving

impoverished plaintiffs their day in court. “LPPR” will discourage suits against corporate wrongdoers because impoverished plaintiffs and contingent-fee lawyers will be unwilling in many cases to “roll the dice” with respect to the costs of production.

It may very well be that neither “RPPR” nor “LPPR” are necessary to reduce problems associated with the high costs of digital discovery. Rules 26 (b) & (c) already give courts the authority to shift costs, and recent cases demonstrate that courts are capable of dealing with the cost burdens of digital discovery in practical, judicious ways. *Rowe Entertainment Inc., v. William Morris Agency Inc.* provides an excellent example. Instead of relying on ideology or inflexible rules, the Rowe court took a common sense, multifactor balancing approach in order to determine whether production costs should be shifted. The court’s approach required that costs be shifted depending on the following considerations:

1. Specificity Of Discovery Requests: Are the requests too broad?
2. Likelihood Of Finding “Critical” Information: Is there a low probability of a successful search?
3. Availability From Other Sources: Is the requested material available from another source at less expense?
4. Purpose Of Retention: Was the requested data retained for purposes of ongoing activities?
5. Benefit To Requesting Party: Is the requesting party the only party to benefit from the requested production?
6. Total Costs: Are the production costs substantial?
7. Ability And Incentive To Control Costs: Is the requesting party in a position to control the costs of production?
8. Resources Of Each Party: Do the resources of each party suggest that the requesting party should pay?

The more these questions have answers in the affirmative, the more appropriate it is to shift production costs to the requesting party.

An analysis such as the one given by *Rowe* is likely to become the standard. The Rules’ treatment of digital discovery is not likely to be revised any time soon because the Rules already permit cost-shifting. *Rowe* is important because it reminds us that the Rules in current form already permit cost-shifting. It demonstrates courts are capable of developing practical and fair solutions to free producing parties from the sometimes-overwhelming costs of digital discovery. It also shows us that the question of whether to shift costs requires consideration of a number of factors, rather than application of a rigid rule.

One important point left unresolved by *Rowe* is whether or not cost-allocation law should emphasize the plight of the poor versus the need to avoid litigation blackmail. And this point is unlikely to be resolved with any degree of satisfaction any time soon.

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