Aligning Incentives and Cost Allocation in Discovery

*Jonathan Remy Nash**
*Joanna Shepherd***

* Robert Howell Hall Professor of Law, Emory University School of Law; Director of the Emory University Center for Law and Social Science; Co-Director of the Emory Center on Federalism and Intersystemic Governance.

** Professor of Law, Emory University School of Law.

For valuable conversations and comments, we are grateful to participants in presentations at the *Vanderbilt Law Review* "Future of Discovery" Symposium, the American Law and Economics Association annual meeting at Boston University School of Law, the Midwestern Law and Economics Association annual meeting at Marquette Law School, and an Emory University School of Law faculty workshop. We thank Brian Fitzpatrick, Bruce Kobayahsi, Alexandra Lahav, Shay Lavie, and Kyle Rozema for helpful suggestions, and Avi Zemel for research assistance.

INTRODUCTION

Recent proposals to revise Federal Rule of Civil Procedure 26 to incorporate cost allocation of discovery have sparked considerable controversy. Advocates for reform argue that replacing the long-standing "producer-pays" presumption with something more akin to a "requester-pays" rule would better align economic incentives and reduce litigants' ability to wield discovery as an instrument to force settlement. Opponents argue that such a reform would limit access to justice by saddling requesters with an ex ante burden of funding the opposition's discovery.[1]

In this Article, we explain that either a rule requiring both parties to share the costs of discovery ("cost-sharing rule") or a rule creating a risk for both parties that they will bear the entire costs of discovery ("cost-shifting rule") would minimize many of the negative incentives that exist under either a strict producer-pays or requester-pays rule. Whereas the producer-pays rule creates incentives for excessive discovery because requesters can externalize the costs of requests and use discovery to impose costs on producing parties to force settlement, requesters under a cost-sharing or cost-shifting rule cannot externalize the costs of discovery requests and have no incentive to abuse discovery to force settlement because they bear the costs or risk of that impositional discovery. Similarly, whereas a requester-pays rule gives producers the incentive to drive up the costs of producing discovery, a cost-sharing or cost-shifting rule forces producers to either share the discovery costs or risk paying the entire cost, thereby reducing the incentive to drive up the costs of production to deter discovery requests. Moreover, while a requester-pays rule has the potential to create an access-to-justice problem if financially constrained litigants are overdeterred from making useful discovery requests or bringing claims altogether, we propose including an undue hardship exception to the default cost-sharing or cost-shifting rule to minimize access-to-justice issues. We also explain that different cost-allocation rules provide opportunities for litigants to signal the strength of their cases. Given concerns about the rising costs of discovery and debate over discovery's acceptable scope, the ability of litigation signals

1. It appears that the drafters of the original Federal Rules of Civil Procedure adopted the prevailing default rule—that the costs of discovery should fall on the party producing the discovery—without attention to the incentives to which the rule gives rise. *See* Martin H. Redish & Colleen McNamara, *Back to the Future: Discovery Cost Allocation and Modern Procedural Theory*, 79 GEO. WASH. L. REV. 773, 774 (2011) ("At the time of the Federal Rules' adoption in 1938, . . . apparently no attention, at any level of the process, was devoted to the question of to which party, in the first instance, the cost of discovery should be attributed.").

to convey relevant and important information without the expense of discovery is potentially invaluable. Finally, whatever the approach to the allocation of discovery costs, we argue in favor of greater clarity in order to reduce litigation over cost allocation and encourage private bargaining.

The Article proceeds as follows. Part I discusses current federal law governing discovery cost allocation, with a focus on the setting of electronically stored information—a setting in which discovery costs tend to be especially high. Part II explains the incentives created by the current producer-pays rule and how those incentives would differ under a requester-pays regime. In Part III, we present our proposal for cost-allocation rules that would minimize many of the negative incentives that exist under either a strict producer-pays or requester-pays rule.

I. THE FEDERAL LAW OF DISCOVERY AND COST ALLOCATION

Currently, in federal litigation, those who must comply with discovery requirements bear the costs of that discovery. This Part quickly canvases the governing law, with a focus on electronically stored information.

A. The Basics of Discovery Requirements and Requests

The Federal Rules of Civil Procedure ("the Rules") make some disclosure mandatory and leave some discovery to the discretion of the parties and the courts. First, Rule 26(a) makes pretrial disclosure of certain matters mandatory.[2]

Beyond that, the Rules allow for parties to lodge broad requests for discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.[3]

2. *See* FED. R. CIV. P. 26(a)(1)(A) (listing the information one party must provide to other parties); *see also* FED. R. CIV. P. 26(a)(1)(B) (detailing materials exempt from initial disclosure); FED. R. CIV. P. 26(a)(1)(C), (D) (setting out the timeframe for initial disclosure).

3. FED. R. CIV. P. 26(b)(1). Rule 26(b)(1) further clarifies: "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.*

In turn, the Rules allow for various discovery devices, including most prominently oral depositions,[4] written depositions,[5] interrogatories,[6] document requests,[7] and physical and mental examinations.[8] The Rules include some default limitations on the use of some devices,[9] which courts have discretion to amend.[10]

Rule 26 requires district judges to "limit the frequency or extent of discovery" if either "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (ii) the party seeking the discovery has already had "ample opportunity" to discover the same information; or (iii) the proposed discovery lies "outside the scope" of proper discovery as contemplated by Rule 26.[11]

A special regime governs limitations to the discovery of electronically stored information.[12] A party from whom discovery of electronically stored information is sought may defend against a motion to compel discovery or may affirmatively move for a protective order by establishing that "the information is not reasonably accessible because of undue burden or cost."[13] Even if the party successfully makes such a showing, the court nevertheless may order discovery of the electronically stored information, subject to conditions as the court may see fit to impose, "if the requesting party shows good cause."[14]

The 2006 Advisory Committee's Notes ("the Notes") provide additional context as to how a court should decide whether the party seeking discovery of electronically stored information has established sufficient "good cause" to warrant green lighting the discovery. The

4. *See* FED. R. CIV. P. 30.

5. *See* FED. R. CIV. P. 31.

6. *See* FED. R. CIV. P. 33.

7. *See* FED. R. CIV. P. 34.

8. *See* FED. R. CIV. P. 35.

9. *See, e.g.*, FED. R. CIV. P. 30(d)(1) (providing a default limit for the duration of oral depositions).

10. *See* FED. R. CIV. P. 26(b)(2)(A) ("By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30.").

11. *See* FED. R. CIV. P. 26(b)(2)(C).

12. *See* FED. R. CIV. P. 26(b)(2)(B).

13. *Id.* The Advisory Committee's Notes ("Notes") to the 2006 amendments to Rule 26 explain that a party responding to a discovery request that encompasses electronically stored information "must . . . identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. FED. R. CIV. P. 26 advisory committee's note to 2006 amendment. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." *Id.*

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

Notes explain that, in determining whether there is good cause, a court should

> balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.[15]

B. The Shifting of Cost

The astute reader will have noted that, to the extent it is a relevant consideration in the discovery calculus, "cost" may potentially limit the extent or scope of discovery.[16] Perhaps because the Rules governing discovery costs have traditionally been justified as providing access to justice for low-resource plaintiffs,[17] they do not themselves raise the prospect of shifting the cost of discovery from the party producing information to the requesting party.

The "American rule" governing the allocation of litigation costs, which generally applies in federal courts,[18] leaves the costs with the parties that incur them, regardless of who wins and who loses in the litigation.[19] Still, provisions of federal law leave the door open to cost shifting, though the extent to which these cost-shifting provisions apply to discovery costs remains unclear.

The possibility for cost shifting arises in two settings in the context of electronic discovery. First, some courts draw authority to assign the cost of production to the requesting party under certain

---

15. FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

16. *See, e.g.*, Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, 50 GA. L. REV. 1093, 1119 (2015) ("[T]he externalization of both costs and benefits plays a central role in our discovery system.").

17. Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769, 773 n.12 (2015) ("[T]he poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.").

18. *See, e.g.*, Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 253 (2010) (explaining that, under the American rule, "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise").

19. *See, e.g.*, Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2164 (2015) ("We . . . will not deviate from the American Rule 'absent explicit statutory authority.' " (quoting Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 602 (2001)) (internal quotation marks omitted)); *see also Hardt*, 560 U.S. at 253 (referring to the American rule as a "bedrock principle").

circumstances. Second, some courts include the cost of production among the costs that can be claimed by the prevailing party at the conclusion of litigation. We explore the legal underpinnings for each of these in turn.

1. Shifting Cost to the Requesting Party

It is possible for district courts in appropriate cases to shift the cost of producing discovery of electronically stored information to the requesting party. This power was not initially found in the Rules or any accompanying Notes; courts developed a test for cost shifting on their own.[20] The seminal case was *Zubulake v. UBS Warburg LLC*, which proffered a test for determining when cost shifting is appropriate.[21] The test consists of seven factors,[22] with the factors appearing earlier on the list enjoying more weight than those appearing later.[23]

Zubulake predated the 2006 amendments to the Rules that introduced special treatment for electronically stored information. While the amendments themselves do not speak directly to cost shifting,[24] the 2006 Advisory Committee Notes suggest a link between, on the one hand, the inquiry into whether a requester has "good cause" to obtain electronically stored information that is not reasonably accessible and, on the other hand, cost shifting. They explain that the good-cause inquiry is "coupled with the authority to set conditions for

---

20. In dicta in a 1978 opinion, the Supreme Court highlighted the power district courts had to shift the costs of discovery. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) ("[T]he 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.").

For whatever reason, cost shifting of the discovery of electronically stored information remained uncommon through the year 2000. *See* Vlad Vainberg, Comment, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1535 & n.65 (2010).

21. 217 F.R.D. 309, 322–23 (S.D.N.Y. 2003). The court in *Zubalake* built on an earliest test developed in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (setting out an eight-factor test).

22. *Zubalake*, 217 F.R.D. at 322. These factors are:

> (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 issue at stake in the litigation and; (7) the relative benefits to the parties of obtaining the information.

23. *Id.* at 322–23.

24. FED. R. CIV. P. 26; *see* Vainberg, *supra* note 20, at 1559–60 ("By presumptively prohibiting the production of data from costly inaccessible sources, the two-tiered system created by Rule 26(b)(2) lowered discovery costs rather than redistribute them.").

discovery"[25] and further specify that these "conditions may . . . include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible."[26] Indeed, the Notes assert that "[a] requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause."[27]

In the wake of the 2006 amendments, federal courts employ a variety of tests in deciding whether to allocate costs to discovery requesters.[28] Understanding the 2006 amendments to pertain solely to whether discovery of electronically stored information should take place at all (and not the question of cost shifting), some courts adhere to the seven-factor *Zubulake* test.[29] Other courts have instead employed the seven factors in the 2006 Advisory Committee Notes for determining the propriety of cost allocation.[30] Still other courts have noted a similarity between *Zubulake*'s seven factors and the Advisory Committee Notes' seven factors, concluding that factors from both sources are "instructive."[31]

The foregoing makes clear the difficulty faced by litigants and lawyers in trying to predict whether a court will reapportion discovery costs for electronically stored information to the requester. For one thing, courts are divided over the appropriate test. Indeed, with discovery issues not the subject of frequent appeal,[32] even courts within the same circuit differ on the proper test.[33] The various tests that courts do employ are all balancing tests that call on judges to weigh numerous factors. Such tests are the paradigm of judicial "standards" (as opposed

25. FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

26. *Id.* The Notes explain that these conditions also may "take the form of limits on the amount, type, or sources of information required to be accessed and produced." *Id.*

27. *Id.*

28. *See* Vainberg, *supra* note 20, at 1565 ("[W]hile the amended Rules have not brought uniformity, this Comment's survey suggests that in the wake of their adoption, courts have become more skeptical of cost shifting.").

29. *See, e.g.*, Juster Acquisition Co. v. N. Hudson Sewerage Auth., No. CIV.A. 12–3427 JLL, 2013 WL 541972, at *4 (D.N.J. Feb. 11, 2013).

30. *See, e.g.*, Hudson v. AIH Receivable Mgmt. Servs., No. 10–2287–JAR–KGG, 2011 WL 1402224, at *1 (D. Kan. Apr. 13, 2011); *see also* BRITTANY K.T. KAUFFMAN, ALLOCATING THE COSTS OF DISCOVERY: LESSONS LEARNED AT HOME AND ABROAD 12 (2014), http://iaals.du.edu/sites/default/files/documents/publications/allocating_the_costs_of_discovery.pdf [https://perma.cc/VVQ5-FHVL] ("Given that they are listed in the notes rather than the rule, the factors are not binding. Nevertheless, they are highly informative and should be given weight in the analysis.").

31. Semsroth v. City of Wichita, 239 F.R.D. 630, 637 (D. Kan. 2006).

32. *See, e.g.*, Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 102 (2016) (explaining that the final judgment rule generally precludes appeal of discovery motions in federal court).

33. *Compare supra* note 30 and accompanying text (applying the seven factors in the 2006 Advisory Committee's Notes to cost allocation), *with supra* note 31 and accompanying text (noting that some courts use factors from both the Advisory Committee's Notes and *Zubulake*).

to bright-line rules) that invite considerable judicial discretion;[34] they yield results that are notoriously difficult to predict.[35]

Some courts, however, have employed more nuanced approaches to provide parties with more certain outcomes. For instance, some courts, relying upon Rule 26(f)'s requirement that the parties confer about and develop a plan governing discovery,[36] have directed the parties to try to resolve cost allocation themselves before seeking judicial intervention.[37] As another example, courts have made cost shifting turn on the propriety—and to some extent the value—of the information ultimately discovered.[38] Finally, courts seem amenable to the party requesting discovery voluntarily assuming the costs of production.[39]

2. Shifting Cost to the Losing Party at the Conclusion of Litigation

Besides shifting the costs of discovery of electronically stored information from discovery producers to discovery requesters, some courts shift costs from producers who ultimately win the litigation to those who lose. Two provisions work in tandem to justify (if arguably) such cost shifting. Rule 54 of the Federal Rules of Civil Procedure provides: "Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorneys' fees—should be allowed to the

---

34. *See, e.g.*, Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 521 (2012).

35. *See, e.g.*, *id.* at 522.

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

37. *See In re* Seroquel Prod. Liab. Litig., No. MDL 1769, 2007 WL 219989, at *5 (M.D. Fla. Jan. 26, 2007):

> To the extent that any Party requests data that is not readily accessible, the Parties shall comply with the Federal Rules of Civil Procedure in determining whether the inaccessible data is to be produced and which Party will bear what portion of the costs of production, if any, including the costs to process or review unique or nonstandard data. The Parties shall confer concerning inaccessible [electronically stored information] prior to seeking the Court's assistance.

38. *See* Boehm v. Scheels all Sports, Inc., No. 15-CV-379-JDP, 2016 WL 6462213, at *1 (W.D. Wis. Nov. 1, 2016):

> Several factors weigh in favor of granting plaintiffs' motion [on whether discovery is appropriate]. . . . So the court will order [Defendant] to permit a neutral third party e-discovery expert to inspect all electronic records and systems in [Defendant's] possession, custody, or control . . . . Plaintiffs must pay the costs associated with this inspection, but they may move to recover their costs as a sanction against [Defendant] if the inspection uncovers any discovery violations.

39. *See* Thielen v. Buongiorno USA, Inc., No. 1:06–CV–16, 2007 WL 465680, at *3 (W.D. Mich. Feb. 8, 2007) (permitting a defendant corporation, which had been sued for allegedly fraudulently enrolling the plaintiff in a cell phone text messaging subscription service, to image at its own cost the plaintiff's home computer to determine whether the plaintiff had visited the defendant's website or a website advertising the defendant's services).

prevailing party."[40] In turn, Section 1920 of Title 28 of the United States Code defines the costs that Rule 54 authorizes courts to shift.[41] As relevant here, Section 1920 allows courts to shift to a losing party the costs incurred by the prevailing party, including "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[42] Courts are divided as to which costs of copying electronically stored information fall within Section 1920's ambit. Some courts interpret the phrase "costs of making copies" broadly,[43] others narrowly.[44]

The foregoing highlights problems, similar to those we identified above in the context of cost shifting to requesters, that litigants and lawyers may encounter in trying to predict whether a court will reapportion to the prevailing party discovery costs for electronically stored information. For one thing, courts are divided over the appropriate scope of costs that are subject to shifting. And even where a court has the power to shift a cost, the court retains discretion to exercise that power, or not.

C. Summarizing the Problematic Unpredictability Under the Current Approach

Litigants and their attorneys face a daunting task in trying to predict whether current law will allow the costs of discovering electronically stored materials to be shifted. With respect to the shifting

---

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

41. *See* Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441 (1987) ("[Section] 1920 defines the term 'costs' as used in Rule 54(d).").

42. 28 U.S.C. § 1920(4) (2012). A 2008 amendment put the words "copies of any materials" in place of "copies of papers." Judicial Administration and Technical Amendments Act of 2008, Pub. L. No. 110-406, § 6, 122 Stat. 4291; *see* Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 674 F.3d 158, 165 (3d Cir. 2012) (tracing how this amendment originated from a recommendation to determine if expenses related to new courtroom technologies should be taxable).

43. *See, e.g.*, Hecker v. Deere & Co., 556 F.3d 575, 591 (7th Cir. 2009) (dismissing plaintiffs' argument that "it was improper to award [defendant] its costs for document selection, as opposed to document processing" on the ground that "[t]he record supports [defendant's] characterization of the costs" as having been incurred "for converting computer data into a readable format in response to plaintiffs' discovery requests" and thus "recoverable under 28 U.S.C. § 1920").

44. *See Race Tires Am.*, 674 F.3d at 167 ("[O]nly the conversion of native files to . . . the agreed-upon default format for production of [the electronically stored information] . . . , and the scanning of documents to create digital duplicates are generally recognized as the taxable 'making copies of material.' "); *id.* at 169:

> Section 1920(4) does not state that all steps that lead up to the production of copies of materials are taxable. It does not authorize taxation merely because today's technology requires technical expertise not ordinarily possessed by the typical legal professional. It does not say that activities that encourage cost savings may be taxed. Section 1920(4) authorizes awarding only the cost of making copies.

(footnote omitted).

of costs to the losing party at the conclusion of litigation, the statutory language "costs of making copies" is ambiguous, especially in the context of electronically stored information. Not surprisingly, courts have arrived at conflicting interpretations. Further, even if a court determines that an expense is potentially subject to cost shifting, it falls to the court's discretion whether in fact to shift the cost or not.

The prospect for shifting costs to the party requesting discovery is even less predictable. There are multiple tests for determining whether cost shifting is appropriate. Each of these tests is a balancing test; balancing tests are the prototypical standard-like legal test, the results of which are notoriously difficult to predict.[45] Moreover, each of the balancing tests that different courts employ is distinct—that is, the factors that are balanced vary from court to court.[46] Adding to the unpredictability is the fact that each of these balancing tests considers numerous factors. Finally, the division in the courts is not limited to mere circuit splits; different district courts within a circuit, and indeed different district judges within a judicial district, apply different tests. In sum, it is challenging for litigants and lawyers to predict the outcome of any balancing test. This is especially the case where, as here, a balancing test considers numerous factors and litigants and lawyers cannot be sure which balancing test the court will apply.

II. INCENTIVES UNDER PRODUCER-PAYS AND REQUESTER-PAYS RULES

The costs of civil discovery are not burdensome or excessive in the vast majority of federal cases.[47] In what we believe is the most recent large study of litigation costs in federal cases, the Federal Judicial Center ("FJC") found that median litigation costs (including discovery and attorneys' fees) in cases that involve discovery are only $15,000 for plaintiffs and $20,000 for defendants.[48] The median case, however, is a case involving relatively low stakes; according to the FJC study, the stakes in the median cases ranged between only $160,000 and $200,000.[49]

45. *See* Redish & McNamara, *supra* note 1, at 783 (noting "the complexity and unwieldiness of the balancing tests used to determine cost shifting").

46. *See supra* notes 27–32 and accompanying text.

47. *See* Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 779–82 (2010) ("The empirical studies of discovery costs, in short, indicate that in the typical case . . . one should expect discovery costs to account for more than 20 percent, on the lower end, and maybe, on the higher end, about half of the total litigation costs.").

48. EMERY G. LEE III & THOMAS WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 35–37 (2009), https://www.fjc.gov/sites/default/files/materials/08/CivilRules Survey2009.pdf [https://perma.cc/T3WV-H777].

49. *Id.* at 42.

Although they represent only a small percentage of overall litigation, large cases require very different discovery expenditures. In the FJC study, the five percent of cases with the highest litigation costs had costs of at least $280,000 for plaintiffs and $300,000 for defendants. When e-discovery was involved, the litigation costs nearly doubled to at least $500,000 and $600,000.[50] For the discovery-intensive cases in which the parties both requested and produced discovery, these costs increased again to $850,000 for plaintiffs and $991,000 for defendants.[51] The cases in the FJC study, however, are still not indicative of the largest complex commercial cases; the five percent of cases with the highest stakes still only involved stakes between $3.9 and $5 million.[52] In a study of litigation costs in commercial cases involving Fortune 200 companies, Lawyers for Civil Justice ("LCJ") found that average discovery costs per case ranged from $621,000 to almost $3 million over a three-year period. In some cases, the discovery costs were as high as $2.3 to $9.7 million.[53] Moreover, despite these exorbitant discovery costs, much of the concern about excessive discovery stems not from the reality of discovery costs but from the threat of extortionate discovery requests.[54] Many cases settle so that the producing party can avoid paying prohibitive discovery costs, and thus the threat of high discovery costs determines outcomes even if the high discovery costs are never actually incurred.

In these high-discovery-cost cases, the assignment of discovery costs to one party or the other can significantly impact the parties' incentives. This Part discusses the incentives created under both a producer-pays and a requester-pays rule.

A. The Producer-Pays Rule

The current default rule that generally leaves the costs of discovery with the producing party is justified primarily as an access-to-justice device; it allows plaintiffs to vindicate their rights even when they cannot pay for the evidence required to litigate their cases.[55] Although clearly effective in facilitating access for low-resource plaintiffs, this rule also incentivizes excessive discovery because the

50. *Id.* at 35–37.

51. *Id.*

52. *Id.* at 42.

53. LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES, app. 1 at 15 fig.11 (2010), http://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf [https://perma.cc/PMG3-KXYG].

54. Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 637 (1989).

55. Benjamin Spencer, *Rationalizing Cost Allocation in Civil Discovery*, 34 REV. LITIG. 769, 773 (2015).

requesting party has little incentive to compare the costs of the discovery with the likely benefits from discovery.[56] The requesting party's marginal cost of demanding additional discovery is generally very low. The costs are typically limited to the attorneys' fees for drafting an additional discovery request—though, in limited situations, they may also include the fees of the producer's expert if an expert is required to assist the producing party in responding to discovery requests, the attorneys' fees for drafting a motion to compel, and the risk of losing the motion to compel and paying the producers' attorneys' fees for responding to the motion.[57] With the relatively low marginal costs associated with demanding additional discovery, the requester has the incentive to continue demanding discovery until the marginal benefit of that discovery is also very low.[58] That is, regardless of the cost of discovery to the producing party, the requester effectively has the incentive to request discovery for any piece of information that has the potential (regardless of how small the potential is) to have some positive value (regardless of how small that positive value is). As a result, the requester has the incentive to demand "too much" discovery from a social perspective—that is, an amount of discovery for which the marginal cost to the producer and requester exceeds the marginal benefit of the discovery produced.

The producer-pays rule thus presents a simple externality story: because the requesting party can externalize the costs of discovery, it is predictable that he will overrequest and demand discovery that is not cost-justified. Indeed, the empirical data illustrate that requesters demand discovery with little or no value, even though the producing parties certainly incur costs in producing it. In the LCJ study previously discussed, an average of 4.9 million pages of documents were produced in discovery requests in major cases at trial.[59] Only one-tenth of one percent of those documents, however, were actually used in trial.[60] Thus, the other 99.9 percent of discovery—information that cost the producing party thousands or millions of dollars to provide—was worthless to the requesting party.

Furthermore, because requesting parties can externalize the costs of discovery, they have the incentive to make discovery requests

56. *See* Redish & McNamara, *supra* note 1, at 792, 796–805 ("Because each party bears the costs of producing the information that will be used against it by its opponent, each party effectively subsidizes that portion of its opponent's case.").

57. FED. R. CIV. P. 26(b)(4)(E).

58. *See, e.g.*, Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 452 (1994).

59. LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 53, at 16.

60. *Id.*

solely to impose burdensome costs on producing parties.[61] Significant discovery costs can alter the producing parties' calculus of whether to proceed with discovery or settle a case and may often compel them to acquiesce to the settlement demands of requesting parties in order to avoid extortionate discovery costs. For example, the General Counsel of General Electric has publicly claimed that ninety percent of the company's settlement decisions are driven by the costs of discovery, not the merits of the cases.[62] Even the U.S. Supreme Court has recognized that discovery can be used for such *in terrorem* effect: "[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" summary judgment.[63]

This "impositional function"[64] of discovery—that is, discovery sought purely for the purpose of imposing costs on the producing party—can result in the settlement of meritless claims in which litigants not entitled to recover under the law nevertheless obtain a settlement. This can, in turn, overdeter parties from engaging in activities that might result in future meritless claims that would be settled in an effort to avoid discovery costs; because the parties cannot avoid incurring costs even when they are in the right, the only way to avoid costs is to refrain from the underlying activity altogether. For activities that are socially valuable, such as the production of medicines or efficiency-enhancing technology, a reduction in activity to avoid impositional discovery requests is harmful to society.

B. The Requester-Pays Rule

A rule that requires the requesting party to pay for the producers' costs of discovery would create very different incentives. First, a requester-pays rule would minimize requesters' ability to use discovery as an *in terrorem* device because requesters would not be able to impose costs on their adversaries through extortionate discovery demands. This would reduce the occasions in which litigants with meritless claims could force a settlement from an adversary attempting

61. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 603 (2001) ("[T]he fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests . . . .").

62. Jon Kyl & E. Donald Elliott, Comment to the Advisory Committee on Civil Rules Proposed Amendments to Rule 26 Federal Rules of Civil Procedure 2 (2013), http://www.lfcj.com/uploads/3/8/0/5/38050985/kyl_and_elliott_joint_comments.pdf [https://perma.cc/WJP6-Y8R3].

63. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

64. The term "impositional function" was first coined in John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. REV. 569 (1989).

to avoid discovery costs.[65] If litigants with meritless claims could no longer recover, this would, in turn, decrease the number of meritless or frivolous claims filed in the first place.

A rule requiring the requesting party to pay for discovery would also force the requester to consider the costs of the discovery production. Because the requesting party could no longer externalize the costs of his discovery requests, he would have the incentive to only request discovery for which he expected the benefits to exceed the costs. The externality that was created under the producer-pays rule by allowing requesting parties to impose costs on producing parties would be eliminated. Instead of "too much" discovery, the requester would have the incentive to request an amount of discovery closer to the socially optimum level—that is, the amount of discovery for which the marginal benefits are at least as great as the marginal costs.[66] Although the requester's perception of the likely value of discovery may not comport with its actual value, the requester would, at a minimum, only request discovery that he expected to have some non-negligible, positive value. Forcing the requesting party to confine its requests to only the discovery he thinks is worthwhile would minimize frivolous requests or requests that are nothing more than "fishing expeditions."

By requiring the requesting party to pay for the production of discovery, however, a requester-pays rule may overdeter discovery requests. Trying to reduce their costs, requesters may narrow their requests to only the discovery with the highest likely value. If, in turn, these narrow requests miss some piece of useful information, the requester-pays rule would hinder the ability of the parties and the court to resolve the dispute on its merits. This would, in turn, impair both the compensatory and deterrent functions of civil litigation.[67]

Furthermore, knowing they would have to pay to produce the discovery necessary to prove their case, some requesting parties may refrain from bringing claims in the first place. Although, as previously

---

65. On the other hand, litigation is costly to both the litigants and society, so fewer prediscovery settlements may increase trials and overall litigation expenses. Jonah Gelbach, Discovering Coase 24–25 (2015) (unpublished manuscript), http://www.law.northwestern.edu/research-faculty/colloquium/law-economics/documents/2015_%20Fall_Gelbach-Discovering.pdf [https://perma.cc/EV7G-XGSQ].

66. *See* Ronald J. Allen, *How to Think About Errors, Costs, and Their Allocation*, 64 FLA. L. REV. 885, 894 (2012) ("[P]lacing the costs of discovery provisionally on the person asking for it . . . may . . . give incentives for the optimal production of information . . . ."). The amount of discovery may actually be "too low" or below the social optimum if the information revealed during discovery creates a positive externality for third parties. *See* Jonah Gelbach, *supra* note 65, at 22–23 (discussing how the "aggressively pursued discovery" in Minnesota tobacco litigation resulted in the release of numerous industry reports that likely contributed to reduced tobacco consumption in the United States).

67. Spencer, *supra* note 55, at 803.

discussed, some of the deterred claims may be frivolous or meritless, others may be legitimate claims. A requesting party would have little incentive to file a legitimate claim if either the party could not afford to pay the costs of discovery production or the expense of pursuing the claim outweighed the potential recovery. The failure to bring legitimate claims would mean that some legitimate injuries would go uncompensated and some wrongful behavior would go unpunished and, in turn, undeterred.

Finally, in the same way that some requesters exploit the current producer-pays rule to drive up discovery costs for their adversaries, producers could exploit a requester-pays rule to increase costs for their adversaries. Producers would have the incentive to maintain information in a way that makes its production cost-prohibitive to a requesting party.[68] If the producing party can increase the costs of producing the discovery to a sufficient level, they may deter the requesting party from seeking the information or from pursuing a claim altogether. As previously discussed, for useful information and legitimate claims, precluding this discovery or the entire claim would detract from the compensatory and deterrent functions of civil litigation.

In sum, both producer-pays and requester-pays regimes create negative incentives that can affect litigants' abilities to vindicate their rights. As we explain in the next Part, a rule requiring both parties to share the costs of discovery (cost-sharing rule) or a rule creating a risk for both parties that they will bear the entire costs of discovery (cost-shifting rule) would ameliorate some of these negative incentives.

III. A COST-SHIFTING OR COST-SHARING PROPOSAL

As we discussed in Part I, the current regime for allocating the costs of discovering electronically stored information lacks clarity along almost every possible metric. First, the governing precedent is remarkably cloudy. The governing Federal Rule of Civil Procedure does not speak to the allocation of costs.[69] The Advisory Committee Notes allude to the allocation of costs but leave it ambiguous exactly how the balancing test announced by the Notes for determining good cause to obtain electronically stored information should apply to cost allocation.[70] Courts remain divided over whether the Notes' balancing test applies, the common law test that predates the 2006 amendment

68. *Id.* at 804.

69. *See supra* notes 12–15, 24.

70. *See supra* note 13 (discussing FED. R. CIV. P. 26 advisory committee's note to 2006 amendment).

applies, or some amalgam of these tests applies.[71] And, whichever version of the test a court chooses to apply, it will be a balancing test,[72] which is the paradigm for an unpredictable standard (as opposed to a rule).[73] Finally, the scope of the statute governing the shifting of costs to the losing party in the context of electronically stored information is also subject to debate. In short, the question of shifting the costs of discovering electronically stored information is unpredictable in numerous ways.[74]

Moreover, as the current approach often results in producers paying the costs of discovery, it creates incentives for excessive discovery requests. Because requesters can externalize the costs of discovery, they have the incentive both to demand discovery that is not cost-justified and to make discovery requests solely to impose costs on producing parties.

In this Part, we propose reforming the allocation of discovery costs to reduce both the unpredictability of and the incentives for excessive discovery requests.

A. Our Proposal

We propose that the current approach be replaced with a clear default rule under which discovery costs are either shared or shifted among the litigants, unless imposition of such a rule would create an undue hardship for one of the parties. To determine whether an undue hardship would be created, a court might consider whether a party is proceeding pro bono or *in forma pauperis*; whether a party is an individual or class representative (as opposed to a legal entity); whether a party is sophisticated, a repeat litigant, or wealthy; and whether third-party investors are funding a litigant's case.[75]

We believe this rule mirrors the type of private arrangement governing cost allocation that parties would choose to enter voluntarily. In an ex ante setting before the parties know whether they will be a requesting party or producing party, their overarching goal would be to provide efficient incentives to both requesters and producers. The parties would prefer discovery cost-allocation rules that do not provide

71. *See supra* notes 29–32 and accompanying text.

72. *See supra* notes 35–36.

73. *See, e.g.*, Nash, *supra* note 34, at 521.

74. Also crowding the landscape are local court rules. *See* Richard L. Marcus, *E-Discovery Beyond the Federal Rules*, 37 U. BALT. L. REV. 321, 339 (2008).

75. *Cf.* Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 THEORETICAL INQUIRIES L. 151, 188–89 (2018) (noting the risks undertaken by class representatives under Israeli, but not U.S., law, pursuant to which "class representatives risk paying the defendants' costs if defendants prevail").

requesters with incentives to seek excessive discovery nor provide producers with incentives to drive up the costs of producing discovery.

The importance of a default rule producing efficient incentives is demonstrated by the Coase Theorem,[76] which, despite Professor Jonah Gelbach's efforts,[77] has not sufficiently been applied to discovery (nor, indeed, to civil procedure writ large). A central tenet of the theorem is that clarity will enhance the prospect for the parties to bargain to an efficient outcome. Another of the theorem's central tenets is that, because transaction costs are often high enough to prevent bargaining, it is important to have default rules in place that come as close as possible to the efficient outcome were bargaining to have occurred.[78]

A cost-shifting rule would tie cost reversal to success at a stage of litigation relatively close to discovery. For example, cost reversal could be tied to success at summary judgment.[79] Of course, even though success at summary judgment is more likely to be tied to successful discovery than is ultimate success at trial,[80] the fact remains that discovery could generate information that bolsters the requester's legal arguments and yet still finds the requester losing at summary judgment. A preferable, yet more costly, system might tie cost reversal to a determination by a neutral third party, such as an arbitrator or magistrate judge, that the requested discovery in fact generated, or did not generate, valuable information for the requester. At least one court has invoked such an arrangement.[81]

---

76. *See* Ronald H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960).

77. *See* Gelbach, *supra* note 65.

78. *See* Coase, *supra* note 76, at 19.

79. Cameron Norris analyzes this possibility in detail in another contribution to this symposium. *See* Cameron Norris, *One-Way Fee Shifting After Summary Judgment*, 71 VAND. L. REV. 2117 (2018).

80. First, summary judgment turns entirely on evidence obtained in discovery, while judgment at trial turns on additional evidence introduced (specifically, testimony of witnesses); some would also argue that the jury introduces its own element of unpredictability, at least in some cases. Second, there is an argument that the further a case proceeds in the litigation process, the closer the likelihood that either side could prevail. *See* Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 125–26 (2016). If that is true, then winning at trial may be probabilistically a very close call; in that case, the real focus should be on whether discovery produced information that *produced* a setting in which the case was a close call. That would seem to be a difficult determination to make in many cases.

81. *See* Boehm v. Scheels all Sports, Inc., No. 15-CV-379-JDP, 2016 WL 6462213, at *1 (W.D. Wis. Nov. 1, 2016):

> Several factors weigh in favor of granting plaintiffs' motion [on whether discovery is appropriate] . . . . So the court will order [Defendant] to permit a *neutral third party e-discovery expert* to inspect all electronic records and systems in [Defendant's] possession, custody, or control . . . . *Plaintiffs must pay the costs* associated with this inspection, *but they may move to recover their costs* as a sanction against [Defendant] if the inspection uncovers any discovery violations.

The move toward greater managerial judging also offers opportunity for cost shifting (and cost sharing).[82] Judges can structure discovery to proceed in stages.[83] A judge might leave the producer-pays rule in effect for the initial stage but then introduce cost shifting in later stages.[84] Alternatively, a judge might provide for cost shifting in a subsequent stage if an earlier stage did not produce information that justified further stages of discovery.

Such a system need not be overly costly if it is used by numerous litigants over time. Just as private arbitration systems (including arbitrators) have arisen in other contexts where there is demand,[85] one can imagine such an arbitration system arising here. If a court is unwilling to delegate such authority outside the judicial system,[86] however, a magistrate judge presents a viable alternative. District judges already use magistrate judges to manage discovery on a regular basis.[87] And to the extent there is concern that the magistrate judge already handling discovery in a case or recommending the disposition of a future summary judgment motion[88] might be compromised by conducting such a review, another magistrate judge could be selected to perform just the cost-reversal determination.

Another possibility would be a cost-sharing rule that requires requesters and producers to share the cost of discovery. The exact share born by each party is not so important as long as each side incurs a material burden in the discovery process. Indeed, the share may vary by the types of litigants involved, nature of the claims, relative size of discovery, and other factors. A cost-sharing rule would generally be less

---

(emphasis added).

82. *See generally* E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306 (1986).

83. *See, e.g.*, Judicial Conference of the United States, *The Civil Justice Reform Act of 1990 Final Report*, 175 F.R.D. 62, 70 (1997) ("[T]he principle of staged discovery management was included in the 1993 amendments to F.R.Civ.P. 26.").

84. *See, e.g.*, Fed. Circuit Advisory Council, *An E-Discovery Model Order*, 21 Fed. Cir. B.J. 347, 349 (2012) (proposing that "a discovering party should [not] be precluded from obtaining more e-discovery than agreed upon by the parties or allowed by the court," and "[r]ather [that], the discovering party shall bear all reasonable costs of discovery that exceeds these limits"). We are grateful to Professor Bruce Kobayashi for this example.

85. Cameron Norris analyzes this possibility in detail in another contribution to this symposium. *See* Norris, *supra* note 79.

86. *See* Matthew A. Shapiro, *Delegating Procedure*, 118 COLUM. L. REV. 983, 993–1014 (2018) (describing how many extant procedural devices, including discovery, can be recast as delegations by courts on litigants).

87. *See, e.g.*, David A. Bell, *The Power to Award Sanctions: Does It Belong in the Hands of Magistrate Judges?*, 61 ALB. L. REV. 433, 433 (1997) ("Magistrate judges are often called upon . . . to rule on discovery and suppression of evidence motions . . . .").

88. *See, e.g.*, *id.* ("Magistrate judges are often called upon . . . to . . . issue reports and recommendations on dispositive motions . . . .").

costly to administer than a cost-shifting rule that requires third parties to determine whether discovery has yielded valuable information.

B. Benefits of Our Proposal

Our proposal offers several advantages over the current discovery cost-allocation rule that is somewhat unpredictable but typically results in producers paying the costs of discovery.

First, both the cost-shifting and cost-sharing rules minimize many of the negative incentives that exist under either a strict producer-pays or requester-pays rule. Recall from our earlier discussion that a producer-pays rule creates incentives for excessive discovery because requesters can externalize the costs of requests and use discovery to impose costs on producing parties to force settlement. On the other hand, although a requester-pays rule minimizes the incentives for excessive discovery, it gives producers the incentive to drive up the costs of producing discovery and has the potential to create an access-to-justice problem if financially constrained litigants are overdeterred from making useful discovery requests or bringing claims altogether. Either of our proposals would minimize these negative incentives. By either requiring both parties to share the costs of discovery or creating a risk for both parties that they will bear the entire cost of discovery, the proposals minimize the risk of both excessive discovery requests and inflated production costs. Because the requester either shares the costs of discovery or risks paying the entire cost of discovery, he has the incentive to consider the costs of his requests. He can no longer externalize the costs of his discovery requests and can no longer abuse discovery to force settlement because he must either bear the cost or risk impositional discovery. Similarly, because the producer either shares the discovery costs or risks paying the entire cost, he has little incentive to drive up the costs of production to deter discovery requests. Finally, by including an undue hardship exception, this proposal also minimizes access-to-justice issues because both parties will generally be able to afford the discovery costs.

Second, compared to the current approach, our proposal would result in a more predictable rule governing discovery cost allocation. Clarity is essential for successful bargaining between the litigants.[89] Only if both parties are reasonably certain what rule the court will apply if their bargaining fails will one party be able to assess the *value*

89. *See generally* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) (discussing the influences on pretrial bargaining).

of an offer made by the other party or, for that matter, be able to formulate its own economically rational offer. Clarity reduces the transaction costs to bargaining and thus, as demonstrated by the Coase Theorem,[90] assists the parties in bargaining to reach the most efficient outcome.[91] To be sure, we need not—and do not—call for absolute clarity. Some ambiguity in the outcome of cost shifting laudably would discourage parties from seeking discovery right up to the cost-shifting line.[92] Essentially, however, the existing tests for cost shifting are abysmally unclear; our proposal would introduce far greater clarity.

Finally, our proposed default rule is one which parties are free to opt out of in favor of an alternative regime of their own choosing. In settings where transaction costs make bargaining difficult, the default rule would resemble regimes to which parties would freely bargain—either a cost-shifting or cost-sharing rule—unless such a rule would create an undue hardship for one of the parties. In low transaction cost settings, however, litigants would be free to opt out of the default rule.

Opting out of the default rule may produce more efficient outcomes in some circumstances. Opting out may free litigants to engage in litigation signaling.[93] Under either a cost-shifting or cost-sharing rule (or a requester-pays rule, for that matter), a strong defendant could try to signal his strength by opting out of the default rule and offering to take on the plaintiff's share of discovery costs if the defendant loses. Giving strong defendants an opportunity to signal the strength of their cases reduces uncertainty about likely case outcomes and mitigates asymmetric information among litigants. This facilitates settlement, limiting the number of cases that proceed to trial and helping plaintiffs avoid many cases for which they would otherwise incur litigation costs but lose at trial. In contrast, no such signaling opportunity exists under a producer-pays default rule because the defendant would pay discovery costs whether he won or lost under such a rule. As such, a voluntary offer to shift costs would not impose any additional burden on a losing defendant, making it meaningless and devoid of any signal.

---

90. *See* Coase, *supra* note 76.

91. *See, e.g.*, Peter H. Huang, *Reasons Without Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435, 465–66 (2000) (discussing the efficiency and invariance claims of the Coase Theorem).

92. *Cf.* Superior Oil Co. v. Mississippi *ex rel.* Knox, 280 U.S. 390, 395–96 (1930) ("[T]he very meaning of a line in the law is that you intentionally may go as close to it as you can if you do not pass it.").

93. *See generally* Shay Lavie & Avraham Tabbach, *Litigation Signals*, 58 SANTA CLARA L. REV. 1 (2018).

CONCLUSION

The current regime for allocating the costs of discovery, and of discovering electronically stored information in particular, is unpredictable in numerous ways. The governing Federal Rule of Civil Procedure does not speak to the allocation of costs, and the Advisory Committee Notes allude to the allocation of costs but do not clarify how costs should be allocated. Courts contribute to the uncertainty by disagreeing about whether the Advisory Committee Notes' call for cost allocation should apply and by employing balancing tests that reach unpredictable conclusions. This lack of clarity impedes bargaining among the litigants because they are unable to reasonably ascertain which rule will apply.

Moreover, because the current approach to allocating discovery costs often results in producers paying the costs of discovery, it creates incentives for excessive discovery requests. Because requesters can externalize the costs of discovery, they have the incentive both to demand discovery that is not cost-justified and to make discovery requests solely to impose costs on producing parties.

In this Article, we proposed reforming the allocation of discovery costs to reduce both the unpredictability of and the incentives for excessive discovery requests. We propose that the current approach be replaced with a clear, default rule under which discovery costs are either shared or shifted among the litigants, unless imposition of such a rule would create an undue hardship for one of the parties. Our proposal would result in a more predictable rule governing discovery cost allocation, facilitating bargaining between the parties. Moreover, by either requiring both parties to share the costs of discovery or creating a risk for both parties that they will bear the entire cost, the proposal reduces the risk of excessive discovery requests. In contrast to the current rule, a cost-sharing or cost-shifting rule can also provide potentially useful litigation signaling that could reduce overall litigation costs. Given concerns about the rising costs of discovery and debate over discovery's acceptable scope, the ability of litigation signals to convey relevant and important information without the expense of discovery is potentially invaluable.