

## ARTICLE

### THE PHILIPPINE VOYAGE INTO ELECTRONIC DISCOVERY: A MAP OF THE APPROACHING CROSSROADS OF ELECTRONIC EVIDENCE AND DISCOVERY

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A MAP OF THE APPROACHING CROSSROADS  
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*Edgardo Carlo L. Vistan II\**

**I. INTRODUCTION**

Tempting, as it is, to describe electronic discovery as an “emerging” field of law, such a description will be far from reality on at least two counts. First, American courts have grappled with electronic discovery since the late 1970’s,<sup>1</sup> and there have been a number of relevant decisions and orders in that jurisdiction since then. Second, in the Philippine context, one cannot say that electronic discovery is emerging, as there have been no published decisions of Philippine courts on the subject yet. Neither has there been any paper or any other written work dealing with the topic of electronic discovery by a Filipino legal scholar or practitioner.

A vast area in the realm of electronic discovery awaits exploration. What advantage do we gain from all this? As will be discussed shortly, the question is not really one of benefit but of necessity. Information technology has so permeated human activity that in many instances, the truth in any legal dispute will be stored in electronic form, in a long string of ones and zeros, locked up in a chest called a computer. In these situations, electronic discovery will be the key to unlocking the truth.

In our journey into the realm of electronic discovery, the Rules of Court provide us with the basic tools – the modes of discovery embodied in Rules 23 to 28 – although these tools are not as sharp and sturdy because they have not been sharpened and fine-tuned through jurisprudence. But then, there is bound to be some scattered tools left by other jurisdictions, some useful jurisprudence that will help us in our voyage.

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\* Associate, Ponce Enrile Reyes & Manalastas Law Office; LIB, College of Law, University of the Philippines (2003).

<sup>1</sup> See *Sanders v. Levy*, 558 F.2d 636, 648-49 (2d Cir. 1976).

In writing this paper, the author intended to provide a map into the realm of electronic discovery. Rough as the map is, the object is to acquaint the Filipino legal practitioner and scholar to the realm of electronic discovery, its labyrinth of issues, its spring traps and hidden pits, and its dark unexplored areas.

This map starts with a reminder of what his tools for discovery were meant to do – the purpose of the modes of discovery – so that a proper mindset can be instilled. The map also has inscriptions hinting about the immense value of the treasure that lies in wait – the value of electronic discovery. Most importantly, the rough diagram that will illuminate the path before us is shown – the issues and concerns relating to electronic discovery.

#### A. DISCOVERY IN THE PHILIPPINES

In the few cases that the Philippine Supreme Court had occasion to pass upon issues involving discovery, only one decision can be found that propounds a definition of the term "discovery." In *Insular Life Assurance v. Court of Appeals*,<sup>2</sup> the Supreme Court, citing Bouvier's Law Dictionary, said:

"Discovery, in general, is defined as the disclosure of facts resting in the knowledge of the defendant, or as the production of deeds, writings, or things in his possession or power, in order to maintain the right or title of the party asking it, in a suit or proceeding."<sup>3</sup>

Concise definitions of broad concepts, such as the one quoted above, are often exposed to the criticism of failing to fully capture the scope of the idea. Nonetheless, the definition of discovery quoted above captures the essence of discovery in using the word "disclosure." Disclosure is the *raison d'être* of discovery.

In *Republic v. Sandiganbayan*,<sup>4</sup> the Supreme Court took the opportunity to discuss discovery and its place in Philippine litigation practice. The Supreme Court emphasized the importance of the disclosure of relevant facts during trial, which is the end that was to be achieved through the use of the different modes of discovery in our Rules of Court, saying:

"The message is plain. It is the duty of each contending party to lay before the court the facts in issue - fully and fairly; i.e. to present to the court all the material and relevant facts known to him, suppressing or

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<sup>2</sup> G.R. No. 97654, November 14, 1994, 238 SCRA 88[1994].

<sup>3</sup> *Id.* at 92.

<sup>4</sup> G.R. No. 90478, November 21, 1991, 204 SCRA 212 [1991].

concealing nothing, nor preventing another party, by clever and adroit manipulation of the technical rules of pleading and evidence, from also presenting all the facts within his knowledge."

x x x    x x x    x x x

"Indeed, it is the purpose and policy of the law that the parties -- before the trial if not indeed even before the pre-trial -- should discover or inform themselves of all the facts relevant to the action, not only those known to them individually, but also those known to their adversaries; in other words, the desideratum is that civil trials should not be carried on in the dark; and the Rules of Court makes this possible through the deposition-discovery mechanism set forth in Rules 24 to 29."<sup>5</sup>

In the Philippine context, therefore, discovery can be broadly defined as the set of mechanisms provided in Rules 24 to 29 of the Rules of Court through which the disclosure of information relevant to an action is obtained. By providing lawyers with the tools of discovery, the Rules remind practitioners that "litigation is essentially an abiding quest for truth undertaken not by the judge alone but jointly with the parties."<sup>6</sup>

The information to be disclosed through discovery are "evidentiary facts" as opposed to "ultimate facts," the latter being the object of the rules of pleadings. Indeed, the rules on discovery were designed "to remedy the conceded inadequacy and cumbersomeness of the pre-trial functions of notice-giving, issue-formulation and fact revelation theretofore performed primarily by the pleadings."<sup>7</sup>

These underlying principles of discovery that highlight the importance of "ascertaining the truth" explain the contrasting attitudes of the judiciary, led by the Supreme Court, on one hand and a number of practicing lawyers on the other.

The Supreme Court is leading the way in promoting the use of discovery in litigation, with the view of facilitating the conduct of litigation through the parties' judicious use of discovery techniques. It has even expressed the view that discovery may even cut short if not altogether avoid litigation under the belief that when the parties play the game with their cards all laid on the table, the possibility of amicable settlement is increased.<sup>8</sup>

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<sup>5</sup> *Id.* at 222-23.

<sup>6</sup> *Security Bank Corporation v. Court of Appeals et al.*, G.R. No. 135874, January 25, 2000, 323 SCRA 330, 341[2000].

<sup>7</sup> *Republic v. Sandiganbayan*, *supra* at 223.

<sup>8</sup> *Id.*; *McPeck v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001).

At the other end of the spectrum is a number of practicing lawyers, joined surprisingly by some members of the judiciary, who view discovery with disfavor.<sup>9</sup> While due in part to unfamiliarity with the rules on discovery and probably some concerns regarding discovery's concomitant expenses, the unreceptive attitude seems to be largely attributable to an aversion against "fishing expeditions" of evidence, which label has been attached to discovery techniques. The issue here, however, is not whether the use of modes of discovery are "fishing expeditions," for the Supreme Court has candidly stated that discovery is essentially that.<sup>10</sup> The real issue that comes to fore is whether legal practitioners are willing and ready to accept the paradigm shift in litigation that discovery seeks to usher in – litigation guided by disclosure of truth and not by the inclination to suppress the truth.

It is ironic that such divergent and even contradicting outlooks on discovery exist in the legal profession, especially when one of the avowed duties of all practitioners of law is to uphold the truth.<sup>11</sup> Thus, despite the noble goals that propelled the incorporation of discovery techniques in our Rules of Court, members of the Philippine legal profession themselves will be the first to admit that the use of discovery in Philippine litigation is dismally sparse.

While the primary goal of this paper is not to change this unreceptive attitude towards discovery, this work predicts that there will be a positive change in the acceptance of discovery as a tool in litigation, particularly in cases involving electronic evidence. The demands of this age of information technology, coupled with the recently promulgated Rules on Electronic Discovery, will propel this development. Then again, in so far as this predicted change in attitude will be necessitated by this information age in which we now live, it may also be said that this work *urges* the legal profession to take a fresh look at discovery so that lawyers may respond to the demands of the times.

## B. AGE OF ELECTRONIC EVIDENCE

As stated earlier, "litigation is essentially an abiding quest for truth."<sup>12</sup> This jurisprudential adage provides a justification for the importance placed by the Supreme Court on discovery as a tool in litigation. Interestingly, this legal saw also brings to mind a question: where will litigation, as a quest for truth, lead us in this information age?

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<sup>9</sup> *Republic v. Sandiganbayan*, *supra* at 220.

<sup>10</sup> *Id.*, at 224.

<sup>11</sup> See CODE OF PROFESSIONAL RESPONSIBILITY Canon 1, Rule 1.01, and Canon 10; see also CODE OF JUDICIAL CONDUCT Canon 3, Rule 3.02.

<sup>12</sup> *Security Bank Corporation v. Court of Appeals et al.*, *supra* at 341.

It seems increasingly apparent that in the information age, the truth will be locked up in electronic form. As more and more people use computers and other electronic devices in their daily activities, information will increasingly be created, stored, transmitted and reproduced in electronic form. The advantages of the electronic media that explain this modern trend are so well known that they may be taken for granted.<sup>13</sup>

It must be emphasized, however, that because of this trend, information in electronic form will figure more and more prominently in litigation. The “abiding quest for truth” will take the legal profession to battles where information in electronic information will be the key to success, as it has in fact taken lawyers in other jurisdictions. The demands of the information age, therefore, will require lawyers to understand electronic evidence as well as electronic discovery and learn how to wield these vital tools.

An illustrative example of the potentials of electronic evidence will perhaps be appropriate at this point:

“E-discovery can produce a treasure trove of evidence. The discovery of just one e-mail message can transform a contentious legal battle into settlement discussions.

“For example, in *Linnen v. A.H. Robins Co.*, the family of a woman who died after taking the diet pill combination of the prescription drugs fenfluramine and phentermine (known as fen-phen) sued the drugs' makers. The plaintiffs claimed the drugs, taken in combination, caused the woman to develop a deadly lung disorder.

“Computer forensic engineers hired by the plaintiffs were able to recover an e-mail from one A.H. Robins employee to another that read: ‘Do I have to look forward to spending my waning years writing checks to fat people worried about a silly lung problem?’ Shortly after this revelation, the case settled.”<sup>14</sup>

Because of the sheer strength of the raging torrent that is the information age, it will only be a matter of time before electronic discovery will start holding its own in the Philippines, if it has not already done so. The private and public sector's push for economic development, with their thrust for international competitiveness, has resulted and will almost certainly sustain a technology surge in every sector of

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<sup>13</sup> See Shira A. Scheindlin & Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. Rev 327 [2000].

<sup>14</sup> Kristin M. Nimsger, *Digging for E-data*, 39-JAN Trial 56 [2003].

our society. Electronic information will therefore figure prominently as our country strives for economic progress and development, and so will electronic evidence. The Philippine legal profession has no alternative but to “grab the bull by its horns and conquer it.”

The field of electronic discovery and even electronic evidence is still in its infancy in this country. While we have our 2001 Rules on Electronic Evidence and the laws on evidence and discovery, these do not provide much guidance at this time for they have never been used in connection with electronic discovery. At the moment, the Supreme Court has not yet followed up on the Rules on Electronic Evidence, either through another administrative issuance further clarifying or explaining these Rules or through a decision applying them. Electronic discovery, for that matter, is virtually an unexplored concept in this jurisdiction. This study of electronic discovery, therefore, encounters an initial problem of dearth of “local raw materials.”

Being a newcomer in the field of electronic discovery, it will thus be helpful to learn from the experience of other jurisdictions that have gone a few if not several steps ahead in their journey into electronic discovery. Our country’s legal profession can benefit from the results of litigation involving electronic discovery in other countries, particularly by identifying issues and problems that have to be dealt with and by formulating a proper approach to electronic discovery in Philippine litigation. Our legal system therefore, stands on a better vantage point in so far as it can benefit from the experiences of other jurisdictions.

Because the objective of this work is to acquaint the reader with some of the technical issues involved in electronic discovery, the discussion of other issues belongs to a separate paper. Some of these issues involve the effects of electronic discovery on constitutional rights and privacy, topics that have received much attention from foreign authors. While these matters are no less important, it was deemed more appropriate to devote this work to some of the technical issues first since, after all, we have hardly ventured into the field of electronic discovery.

This paper will discuss the following issues:

1. the discoverability of electronic evidence;
2. the methods of electronic discovery (discovery of electronic evidence under the Rules of Court);
3. the Rule 27 standard of materiality;
4. the manner of production of electronic evidence in obedience to a discovery order;
5. the types of relevant information;
6. the Rule 27 requirement of “possession, custody, or control;”

7. discovery of computer systems;
8. limitations on electronic discovery;
9. enforcement measures relating to electronic discovery;
10. preservation and spoliation of electronic evidence; and
11. allocation of costs of electronic discovery.

In general, the methodology employed in discussing these issues is to frame and place in context the questions involved and attempt to answer them, first with the use of Philippine laws and jurisprudence, and then through a resort to American jurisprudence. The approach recognizes the scarcity of discovery jurisprudence in this jurisdiction, thus the need to look for answers or confirm proposed solutions through doctrines laid down by American courts. This resort to American jurisprudence is justified by the persuasive effect given to them by our courts, particularly in areas of law such as discovery that were developed from their American counterparts.<sup>15</sup>

## II. ELECTRONIC DISCOVERY ISSUES

Electronic discovery has attracted much attention in American legal circles as a number of cases have emerged involving the use of discovery to obtain crucial information stored in electronic form. The early development and continued use of electronic discovery as a dispute resolution technique in the United States point to the great potential of this tool in resolving legal disputes. At the same time, however, this development has presented certain issues and problems that are now finding their way into legal discussions and writings.

Once we realize the value and potential of electronic discovery, this technique will start to gain a foothold in the Philippine legal system. In time, issues and problems similar to those that have been encountered elsewhere will arise. A great part of this work seeks to give the reader a feel for electronic discovery and its accompanying issues and problems. In the process, approaches to solving these questions are suggested with the view of providing possible "talking points" once we find ourselves confronted with these questions.

### A. DISCOVERABILITY OF ELECTRONIC EVIDENCE

So far, the term "electronic discovery" has been loosely used in this work on the premise that electronic evidence is discoverable. Indeed, the underlying

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<sup>15</sup> See *Insular Life Assurance v. Court of Appeals*, G.R. No. 97654, November 14, 1994, 238 SCRA 88 [1994].



principle in electronic discovery in American legal practice is precisely that – electronic evidence may be validly obtained for purposes of trial through the use of discovery techniques.<sup>16</sup> Before venturing further into the field of electronic discovery, it will probably be appropriate to first resolve the following question: Is electronic evidence discoverable under Philippine law?

The search for the answer logically begins with the Rules on Electronic Evidence. However, these Rules contain no express provision for discovery of electronic evidence. Certain provisions may be useful in leading us to the answer. Section 1 of Rule 3 states:

“Section 1. *Electronic Documents as functional equivalent of paper-based documents.* – Whenever a rule of evidence refers to the term writing, document, record, instrument, memorandum or any other form of writing, such term shall be deemed to include an electronic document as defined in these Rules.”

Section 2 of Rule 2, dealing with the interpretation of the Rules, provides:

“Section 2. *Construction.* – These Rules shall be liberally construed to assist the parties in obtaining a just, expeditious, and inexpensive determination of cases.

“The interpretation of these Rules shall also take into consideration the international origin of Republic Act No. 8792, otherwise known as the Electronic Commerce Act.”

Section 1 of Rule 3 could have provided an easy answer, were it not for the specification that there is a functional equivalence between electronic documents and paper-based documents whenever a “rule of evidence” refers to the term writing, document, record, instrument, memorandum, or any other form of writing. As the functional equivalent of paper-based documents, electronic documents are discoverable in so far as the modes of discovery under the Rules of Civil Procedure are applicable to paper-based documents. With the wording of Section 1 of Rule 3, however, the issue is whether the rules on discovery found in Rules 23 to 29 of the Rules of Court are “rules of evidence,” considering the fact that the said rules were incorporated as part of the Rules on Civil Procedure. Perhaps in using the phrase “rules of evidence,” the intention was to refer to any rule pertaining to evidence and not to limit it to the Rules on Evidence embodied in Rules 128 to 134.

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<sup>16</sup> See note 13, *supra* at 342-345, 350-351 for discussions on how the United States discovery rules were made applicable to electronic information.

The rule of construction stated in Section 2, Rule 2 of the Rules on Electronic Evidence helps in the analysis by pointing to Republic Act No. 8792 or the Electronic Commerce Act. Section 7 of the said statute is particularly useful: not only does it provide that “[e]lectronic documents shall have the legal effect, validity or enforceability as any other document or legal writing,” it further elaborates on this principle by stating in the third paragraph that:

“Section 7. x x x

“For evidentiary purposes, an electronic document shall be the functional equivalent of a written document under existing laws.”

It is submitted that electronic documents are discoverable based on the foregoing legal provisions, with the crucial link being the functional equivalence of electronic documents and paper-based documents. Section 7 of the Electronic Commerce Act clinches the case for it explicitly states that an electronic document shall be the functional equivalent of a written document under existing laws “for evidentiary purposes.” The said qualifier is general enough to include the purpose of discovery, and it will be extremely difficult to argue otherwise since the policy of the law is to confer upon electronic documents the same legal effect, validity, or enforceability as any other document or legal writing.

The solution found so far, however, is limited to electronic documents. Are other types of electronic evidence such as electronic data messages and ephemeral electronic communication susceptible to discovery? This concern arose because of the limited scope of the language of our discovery rules, which refer only to documents, papers, books, accounts, letters, photographs, objects, or tangible things. Since the Rules on Electronic Evidence provide for functional equivalence between paper-based documents and electronic documents only, questions might arise as to whether other types of electronic evidence such as electronic signatures and electronic data messages are susceptible to discovery.

It seems that when considering electronic discovery, the whole array of electronic evidence can be equated with electronic documents, effectively making all kinds of electronic evidence subject to discovery. This proposed approach, aside from simplifying matters, is legally justifiable under our Rules on Electronic Evidence.

The definitions of the different kinds of electronic evidence covered by the said Rules are as follows:

**Electronic document** - refers to information or the representation of information, data, figures, symbols or other modes of written

expression, described or however represented, by which a right is established or an obligation extinguished, or by which a fact may be proved and affirmed, which is received, recorded, transmitted, stored, processed, retrieved or produced electronically. It includes digitally signed documents and any print-out or output, readable by sight or other means, which accurately reflects the electronic data message or electronic document. For purposes of these Rules, the term "electronic document" may be used interchangeably with "electronic data message";<sup>17</sup>

**Electronic data message** - refers to information generated, sent, received or stored by electronic, optical or similar means;<sup>18</sup>

**Electronic signature** - refers to any distinctive mark, characteristic and/or sound in electronic form, representing the identity of a person and attached to or logically associated with the electronic data message or electronic document or any methodology or procedure employed or adopted by a person and executed or adopted by such person with the intention of authenticating, signing or approving an electronic data message or electronic document. For purposes of these Rules, an electronic signature includes digital signatures;<sup>19</sup>

**Digital Signature** - refers to an electronic signature consisting of a transformation of an electronic document or an electronic data message using an asymmetric or public cryptosystem such that a person having the initial untransformed electronic document and the signer's public key can accurately determine:

- (i) whether the transformation was created using the private key that corresponds to the signer's public key; and,
- (ii) whether the initial electronic document had been altered after the transformation was made;<sup>20</sup>

**Ephemeral electronic communication** - refers to telephone conversations, text messages, chatroom sessions, streaming audio, streaming video, and other electronic forms of communication the evidence of which is not recorded or retained;<sup>21</sup>

**Electronic key** - refers to a secret code, which secures and defends sensitive information that crosses over public channels into a form decipherable only with a matching electronic key.<sup>22</sup>

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<sup>17</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (h).

<sup>18</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (g).

<sup>19</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (j).

<sup>20</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (e).

<sup>21</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (k).

<sup>22</sup> RULES ON ELECTRONIC EVIDENCE, Rule 2, sec. 1, par. (i).

A thorough examination of these definitions reveals that the broad definition of an electronic document under the Rules can encompass the other types of electronic evidence. Thus, all types of electronic evidence in the Rules can be considered an electronic document and are therefore subject to discovery. This conclusion also finds support in the approach followed in the American courts, where electronic information in general is considered a proper subject of discovery.<sup>23</sup>

### B. THE TOOLS FOR ELECTRONIC DISCOVERY

Having found a solution to the primordial issue of discoverability of electronic evidence, the subject of how electronic discovery can be undertaken in the Philippine setting will now be examined. In particular, the modes of discovery in our Rules of Court that make electronic discovery possible will be considered.

Among the modes of discovery made available by the Rules of Court, it is principally through Rule 27, dealing with the production or inspection of documents or things, that discovery of an adverse party's electronic evidence can be achieved. American courts rely upon a similar rule for discovery of documents to justify discovery of electronic information.<sup>24</sup>

The singular section of Rule 27 states:

"SECTION 1. Motion for production or inspection; order. -- Upon motion of any party showing good cause therefore, the court in which an action is pending may (a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control; or (b) order any party or permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. The order shall specify the time, place and manner of making the inspection and taking copies and photographs, and may prescribe such terms and conditions as are just."

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<sup>23</sup> *Anti-Monopoly, Inc. v. Hasbro, Inc.*, No. 94 Civ 2120, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995).

<sup>24</sup> See SCHEINDLIN & RABKIN, *op. cit. supra* note 13 at 342-345, 350-351.

Under this rule, a party may be compelled to produce or allow the inspection of documents if the following six procedural requisites are complied with:

- (1) the party must file a motion for the production or inspection of documents or things, showing good cause therefor;
- (2) notice of the motion must be served to all other parties of the case;
- (3) the motion must designate the documents, papers, books, accounts, letters, photographs, objects or tangible things that the party wishes to be produced and inspected;
- (4) such documents, etc. are not privileged;
- (5) such documents, etc. constitute or contain evidence material to any matter involved in the action; and
- (6) such documents, etc. are in the possession, custody or control of the other party.<sup>25</sup>

The requirement of good cause in the first requisite above is not well elaborated in the Supreme Court's jurisprudence. In *Security Bank Corporation v. Court of Appeals et al.*, the Supreme Court seems to have equated good cause under Rule 27 with the fifth requisite of materiality.<sup>26</sup> The phrase "good cause" is not used in relation to discovery in American rules and jurisprudence, which primarily considers the relevance of the evidence to be discovered to the factual issues in the case. It seems therefore, that the requirement of good cause is satisfied if the materiality standard is met.

The second requisite, the notice requirement, is self-explanatory and will not be of much concern in this work. This will also be the last time that the third requirement – the designation of the document or other things to be produced or inspected – will be mentioned, since the rule has been interpreted liberally in that no particular designation is required. A general description of the evidence sought, usually indicating the particular factual issue to which they relate, seems to satisfy our courts.<sup>27</sup> American courts appear to have also accorded a liberal treatment of the word "designated" in Rule 34 of the Federal Rules of Civil Procedure, which

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<sup>25</sup> 2 VICENTE J. FRANCISCO, *THE REVISED RULES OF COURT IN THE PHILIPPINES*, 255 (1<sup>st</sup> ed.1963).

<sup>26</sup> G.R. No. 135874, January 25, 2000, 323 SCRA 330, 340 [2000].

<sup>27</sup> *See id.* at 334 where the motion for production of documents that was granted referred to "all documents, papers and instruments x x x on the evaluation, processing and approval of the loan x x x".

provides for the production of documents, considering that no published decision or opinion seems to have discussed the point.

It is the last two requisites of materiality and “possession, custody or control,” and the limitations on discovery, such as the rule on privilege, on which more extensive discussions will be given because they are involved in some of the more important concerns and issues in electronic discovery.

Though Rule 27 of our Rules of Court is the principal tool for electronic discovery, this does not mean, however, that the other modes of discovery have no role to play. In fact, Rule 27 is often the last step in a series of interrogatories, requests for admissions, and deposition employed in a typical discovery strategy for obtaining relevant electronic information from the adverse party. As will be shown in a case, these other modes of discovery are used at the outset to determine the types of relevant electronic information the adverse party may have, as well as the appropriate means of handling, analyzing, and using such information for purposes of the trial.

### C. THE RULE 27 STANDARD OF MATERIALITY

#### 1. Application of the Rule 27 Materiality Standard

Rule 27 provides that a court may “order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated document x x x which constitute or contain evidence material to any matter involved in the action.” As a preliminary observation, this Rule 27 standard of materiality seems to be broader than the standard of relevancy, which requires that evidence must have such a relation to the fact in issue as to induce belief in its existence and non-existence.<sup>28</sup> This observation is brought about by the approach adopted in Rule 27 of defining the standard of materiality in relation to “any matter involved in the action.”

It appears that the Rule 27 standard of materiality was intentionally broadened, as the Supreme Court itself affirmed in the case of *Security Bank Corporation v. Court of Appeals et al.*<sup>29</sup> In this action for the annulment of certain mortgages impleading the petitioner bank as one of the defendants, the trial court granted motions for the production and inspection of documents in the custody of the bank and relating to the evaluation, processing, approval, and execution of the

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<sup>28</sup> RULES OF COURT, Rule 128, Sec. 4.

<sup>29</sup> G.R. No. 135874, January 25, 2000, 323 SCRA 330 [2000].

mortgages and the secured loans. The bank's co-defendant, the agent of the plaintiff-mortgagors in the transaction, filed one of these motions, on the ground that he needed the described documents before he could file an answer to the complaint. The petitioner bank challenged the order granting the motions for discovery, which was nonetheless affirmed by both the Court of Appeals and the Supreme Court.

In ruling against the bank's arguments opposing the discovery allowed by the trial court, the Supreme Court reasoned:

"These arguments are not persuasive. Section 1 of Rule 27 clearly provides that the documents sought must be 'material to any matter involved in the action.' Respondents have shown that the subject documents are indeed material to the present action.

"Indeed, the factual backdrop of the case strengthens respondent's cause. The civil action instituted by the Spouses Uy sought the annulment of two deeds of Real Estate Mortgage between Jackivi and petitioner. They allegedly issued a Special Power of Attorney to Respondent Uy to mortgage their property only for their benefit, not for that Jackivi. Because he mortgaged the property as security for Jackivi's loan, they contend that he exceeded his authority and that the contracts of real estate mortgage were consequently invalid. Petitioner, on the other hand, filed a cross-claim against him, because it 'relied on the representations and documents submitted by [the latter] that he was duly authorized to mortgage the subject property'.

"In this light, the relevance of the documents sought by Respondent Domingo Uy is readily apparent. The papers executed by the petitioner bank in evaluating and processing the real estate mortgage are *manifestly useful* in his defense against its cross-claim. The trial court's ruling that he could file his answer without examining those documents does not prove that they are immaterial to the present action. The CA has held that those documents would *enable him to 'intelligently prepare his defenses against the cross-claim of Petitioner SBC'*.

"So also, the additional mortgage contracts executed by Jackivi are material to the present action. Because a witness of petitioner admitted in court that there was a third mortgage contract between Jackivi and the bank, fair play demands that herein respondents must be given the chance to examine such additional mortgage contracts. In so doing, they can determine why petitioner was going after their property which was invalidly mortgaged by Respondent Uy, while the properties of the actual borrower, Jackivi, have not been touched or foreclosed by the bank.

"*Indeed, the rule is that courts, in passing upon a motion for discovery, should be liberal in determining whether the documents in question are relevant to the subject matter of the action.* To repeat, the

rule on discovery 'requires the parties to play the game with cards on the table so that the possibility of fair settlement before trial is measurably increased'.<sup>30</sup> (Emphasis supplied.)

This extensive quotation of probably the only instance where the Rule 27 standard of materiality was tackled by the Supreme Court shows how wide a court's discretion is in allowing discovery under Rule 27. One might observe that there appears to be a tendency to equate relevance with materiality, although relevant evidence will definitely meet the standard of materiality set by Rule 27. Attention should also be directed to the reasoning that evidence "manifestly useful" in the preparation of an answer are discoverable under Rule 27, which appears to be an interpretation of the materiality standard of Rule 27 and a very liberal one at that.

## **2. The Relevance Standard in United States Discovery Jurisprudence**

The broad interpretation of the materiality standard by the Supreme Court, in its decision discussed above, accords with the trend in American courts regarding the interpretation of a similar standard in their rules on discovery. The Federal Rules of Civil Procedure's standard is relevance, a standard that is also applied in most of the state courts. The requirement is expressed in Rule 26 (b)(1) of their Federal Rules of Civil Procedure, which states the general scope of discovery:

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The phrase "relevant to the subject matter involved in the pending action" has been described as the "key phrase" in this Rule. This requisite for discovery has been construed broadly to "encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Notably, this relevance standard has been construed as not limiting discovery to the issues raised by the pleadings for the reason that "discovery itself is designed to help define and clarify the issues." Neither does this relevance standard limit discovery to the merits of the case, "for a variety of fact-oriented issues may arise

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<sup>30</sup> *id.* at 342-344.



during litigation that are not related to the merits," such as issues relating to jurisdiction and venue.<sup>31</sup>

To appreciate how broadly this relevance standard can be interpreted, the Partial Decision of a United States District Court in *Dunn v. Midwestern Indemnity*<sup>32</sup> is worth discussing. In this case, an African-American couple sued insurance companies that allegedly denied them homeowner's insurance on their residence. The plaintiffs alleged that the defendant insurance companies discriminated against them because they were "black" and lived in a predominantly "black neighborhood." To further bolster their allegation of discrimination and to prove, in particular, that the underwriting standards formulated and applied by the defendants are racially discriminatory, the plaintiffs propounded discovery requests seeking information regarding defendant's computer capabilities, including raw data, programs and data management systems.

The plaintiffs enumerated the purposes for their discovery requests as follows:

- "1. to determine what computer based data possessed by defendants support each of defendants' standards;
- "2. to determine what computer based models and analyses the defendants did construct and were capable of constructing from raw data;
- "3. to determine what computer based capacity each defendant possessed that would:
  - (a) justify or determine the validity of their standards;
  - (b) assess the impact of those standards of minority and integrated neighborhoods and evaluate the feasibility of less discriminatory alternatives;
  - (c) determine whether redlining is local or national in scope, that is, to what extent redlining pervades the industry; and
  - (d) the extent to which the data lends itself to model formulation and configurations which are less racially discriminatory; and
- "4. to determine the existence and merits of defendants' potential business judgment defense."<sup>33</sup>

In ruling that the requested discovery sought relevant information, the court reasoned as follows:

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<sup>31</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978).

<sup>32</sup> 88 F.R.D. 191 (S.D. Ohio 1980).

<sup>33</sup> *Id.* at 193.

“Stated in admittedly simplistic terms, plaintiffs are essentially alleging that the racial discrimination which caused them to be unable to procure insurance coverage on their residence in November and December, 1977, may, in some way, be built into the defendants' computer systems. *As the Court understands their reasons for the requests at issue, they are seeking to discover either: (1) something in defendants' computer systems that should not be there, but is; or (2) something that is not in their systems, which should be.* Although the Court expresses no opinion whatsoever on the merits of plaintiffs' allegations, it can envision several ways in which the alleged flaw may occur. For example, because of a man-made decision, the defendants may have developed or used programs in assessing raw data which contribute to the formulation or application of racially discriminatory standards, or, there may be a field in one or more of the defendants' computer programs or tapes which has influenced a man-made decision, the effect of which is to create a racially discriminatory standard or practice. Other possibilities could probably be suggested.

*“To the extent that defendants' computer capabilities may foster, contribute to, or reflect the formulation or application of the defendants' underwriting standards, which are the subject matter of this action, the plaintiffs' discovery requests are relevant under Rule 26(b), either because the information sought would be admissible at trial or because said information appears reasonably calculated to lead to the discovery of admissible evidence.* Because the production of or access to conventional files and computer print-outs does not provide the information herein sought in another form, the discovery which has thus far been completed is no substitute for the present requests.

“Additionally, the Court agrees that the present discovery requests are relevant under Rule 26(b), in order for plaintiffs to adequately prepare to meet a business judgment or necessity defense. Counsel for Midwestern conceded at the oral hearing that Midwestern intends to assert this defense. In response to the Court's direct inquiry about whether Commercial Union intended to waive the defense, counsel for Commercial Union reserved the right to assert the business judgment defense. In the Court's view, this defense is inherent in defendants' case, and counsel would be remiss in not asserting it. Consequently, unless assertion of said defense will in no way be supported by defendants' computer capabilities, the Court is wary of denying plaintiffs' full and adequate discovery of the defendants' computer systems, including access to and information about defendants' computer equipment, raw data, programs, data management systems, and the by-products of their analyses. To deny them this discovery may, in effect, be to deny them their day in Court.”<sup>34</sup> (Emphasis supplied)

Two things are to be noted in the above reasoning:

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<sup>34</sup> *Id.* at 195-96

First, discovery heightens the fact that relevance is a test that merely requires a *tendency* of the evidence sought to prove the facts in issue and *does not require* a showing that such evidence has an *actual connection* with the facts in issue. In the case discussed, the plaintiffs and even the court did not actually know if the information the former were seeking will help in the resolution of the case; but it sufficed that it *may* do so to justify discovery. Whether or not it will actually help in the resolution of the case does not matter.

Second, discovery need not relate to evidence tending to prove facts alleged by a particular party, for it may be resorted to in order to assess a possible defense that the adverse party may set up. The standard of relevance, therefore, is considered with respect to the *whole subject matter of the action* and does not limit discovery of evidence to matters that tend to prove a particular factual claim of a party.

That the relevance standard deals with possibilities, and how it relates to the whole subject matter of a case emphasize how broadly this standard can be interpreted. Courts in the United States have consistently sustained this liberal interpretation. Furthermore, it seems that there is no sign of any shift by United States courts from this liberal approach to a stricter construction of the relevance standard.

As we examine the prospects of the Philippine legal system's foray into the realm of electronic discovery, it will be useful to ask if we should follow the same path of liberal interpretation in our treatment of the materiality standard in Rule 27 of the Rules of Court.

It is submitted that the requirement of materiality in Rule 27 of our Rules of Court should be given the same liberal interpretation.

Much of the usefulness of discovery in American trial practice is attributable to a liberal interpretation of the parallel standard of relevance. As a matter of policy, therefore, a similar approach should be adopted lest we undermine the whole system of discovery that the Supreme Court has strived to nurture in Philippine legal practice.

More importantly, legal justification for this approach is extant in our jurisprudence, as shown by Supreme Court decisions that repeatedly pronounce

that discovery rules should be construed liberally.<sup>35</sup> Based on the continued adherence to this principle by the country's highest tribunal, the materiality standard should also be interpreted as broadly as the relevance standard has been construed in American courts. In this sense, the decision of our Supreme Court in the case of *Security Bank Corporation v. Court of Appeals et al.*<sup>36</sup> is a step in the right direction. It can be said that this decision has set the stage for a broad and liberal interpretation of the materiality standard.

Parties to whom requests for discovery under Rule 27 are made need not fret over the liberal interpretation of the materiality standard advocated above. A party requesting discovery is expected to stretch the limits of this standard. In fact, a District Judge commented in one opinion that "lawyers engaged in discovery have never been accused of asking for too little." The other party, however, is not without any safeguards. Protection from a possibly burdensome discovery may be had as the court directing the discovery is required by Rule 27 to "specify the time, place and manner of making the inspection and taking copies and photographs, and may prescribe such terms and conditions as are just." This will be further discussed in a latter part of this work.

### 3. Other Aspects of Materiality in Electronic Discovery

So far, this discussion about the materiality requirement of Rule 27 has focused on whether a liberal or strict standard should be applied in its interpretation. There are, however, other issues and considerations worth exploring in relation to the question of what may be material for purposes of electronic discovery.

It will be helpful to keep in mind that information other than the electronic evidence sought may be material. Often, this information will contribute tremendously in the use of discovered electronic evidence during the proceedings in a case. To give an idea of such other classes of information that will be useful in relation to electronic discovery, the following excerpt from the Manual for Complex Litigation cited in *Dunn* is instructive:

"Fifth Recommendation: Discovery requests relating to the computer, its programs, inputs and outputs should be processed under

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<sup>35</sup> *Republic v. Sandiganbayan*, G.R. No. 90478, November 21, 1991, 204 SCRA 212 [1991]; *Fortune Corporation v. Court of Appeals et al.*, G.R. No. 108119, January 19, 1994, 229 SCRA 355 [1994]; *Security Bank Corporation v. Court of Appeals et al.*, G.R. No. 135874, January 25, 2000, 323 SCRA 330 [2000].

<sup>36</sup> G.R. No. 135874, January 25, 2000, 323 SCRA 330 [2000].

methods consistent with the approach taken to discovery of other types of information.

"In many instances it will be essential for the discovering party to know *the underlying theory and the procedures employed in preparing and storing machine-readable records*. When this is true, litigants should be allowed to discover any materials relating to the *record holder's computer hardware, the programming techniques employed in connection with the relevant data, the principles governing the structure of the stored data, and the operation of the data processing system*. When statistical analyses have been developed from more traditional records with the assistance of computer techniques, *the underlying data used to compose the statistical computer input, the methods used to select, categorize, and evaluate the data for analysis, and all of the computer outputs normally are proper subjects for discovery*."<sup>37</sup> (Emphasis supplied.)

Information relating to electronic evidence beyond the electronic information itself will be helpful in establishing not only the materiality of the electronic evidence for purposes of discovery, but also the relevance of, as well as the evidentiary weight that can be given, to the evidence discovered. These matters will be important when the trial on the merits gets underway. This approach is apparent in the discovery by the plaintiffs of the computer capabilities of the defendant in the case of *Dunn v. Midwestern Indemnity*.<sup>38</sup> The Fifth Recommendation of the Manual for Complex Litigation quoted gives a label for this important class of information -- "information relating to the underlying theory and procedures used in the preparation and storage" of electronic evidence.<sup>39</sup>

It should also be noted that the matters relating to electronic evidence enumerated in the Fifth Recommendation include information that are not documentary or object evidence. Thus, they are not the proper subjects of Rule 27 discovery. In so far as discovery is used to gain information on how computer data is structured, for example, depositions of the personnel that designed or used such structure will clearly be material and useful. In *Dunn*, interrogatories were used as the discovery tool for obtaining information about the computer capabilities of the defendants.<sup>40</sup>

This observation emphasizes the point that in order to maximize the use of electronic discovery, a well-planned and integrated approach in resorting to the different modes of discovery is necessary.

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<sup>37</sup> *Dunn v. Midwestern Indemnity, Inc.*, 88 F.R.D. 191, 194 (S.D. Ohio 1980).

<sup>38</sup> See *id.* at 193.

<sup>39</sup> See *id.*, at 194.

<sup>40</sup> See *id.*, at 193.

#### D. MANNER OF PRODUCTION

Another issue that has emerged in relation to electronic discovery is the manner or the medium of production of the information stored in electronic form. The problem arises because information stored in electronic form may be produced either as a printed output containing the information or as copies of the electronic form itself, which may be transferred or stored through data storage media such as magnetic tapes, diskettes, and compact discs.

The question is usually whether the requesting party has the option to require any or all of the forms that the electronic information may take. This matter greatly affects the convenience or inconvenience of the requesting party in the use of the electronic evidence produced, as well as the expenses that will be incurred in connection with the discovery. It also affects the kinds of information that are made available, as the electronic form of the information usually contain other useful data in the form of embedded information or "metadata" that may or may not be displayed in the printed output.<sup>41</sup>

In American jurisprudence, there are decisions that support the proposition that the requesting party has a choice as to the medium of production. There is also jurisprudential support for the contrary position that once a requesting party has been provided with one usable form of electronic information, the requested party can no longer be compelled to produce the other forms in which the same information is stored. These are exemplified by the decisions in *National Union Electric Corp. v. Matsushita Electronic Industries, Co.*<sup>42</sup> and *Williams v. Owens-Illinois, Inc.*<sup>43</sup> In both cases, the requesting parties wanted the electronic form or computer-readable of the information although the printed form was already made available.

##### 1. Requesting Party's Preference for the Electronic form over the Printed Form

The decision of a United States District Court in *National Union Electric Corp. v. Matsushita Electronic Industries, Co.*<sup>44</sup> supports the proposition that a party that provided printed outputs of electronically stored information can, nonetheless, be

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<sup>41</sup> See Marron, *Discoverability of "Deleted" E-mail: Time for a Closer Examination*, 25 SEATTLE UNIV. L. REV. 895 (2002); also see note 24 *supra* at 335-41.

<sup>42</sup> 494 F.Supp. 1257 (E.D. Pa. 1980).

<sup>43</sup> 665 F.2d 918 (9th Cir. 1982).

<sup>44</sup> See note 42, *supra*.

required to produce the same information in a form readable by a computer, i.e. the information in its electronic form provided through a data storage device such as a magnetic tape or floppy diskette.

The defendants in that case requested the plaintiff National Union Electric Corporation to create a computer readable tape containing data that had been previously produced by the latter in printed form. The defendants sought the electronic version of the data in a computer readable tape so that they may effectively analyze the data through their own computer. To save them the effort of inputting the printed data in their computer one by one, the defendants moved that the plaintiff be directed to produce a computer-readable tape of the same set of data, offering to defray the plaintiff's expenses in producing such tapes.

In ruling against the plaintiff's objections to the plaintiff's motion, the district court reasoned as follows:

"[B]oth common sense and a growing body of precedent support defendants' request. While we can find no case, in which the court has ordered the programming of a computer to manufacture a computer tape not theretofore in physical existence, a number of cases have ordered the production, in the Rule 34 sense, of computer materials.

"In Quadrini v. Sikorsky Aircraft Division, United Aircraft Corporation, 74 F.R.D. 594 (D.Conn.1977) Judge Newman granted defendant's motion to compel plaintiff to produce, inter alia, data processing cards, which are a type of computer-readable materials. In Pearl Brewing Co. v. Jos. Schlitz Brewing Co., 415 F.Supp. 1122, 1134-41 (S.D.Tex.1976), Judge Bue allowed defendants under Rule 26(b)(4)(B) to inspect and copy "the entire system documentation" i.e., the underlying computer program which performed certain analysis prepared by certain experts for plaintiff's computer-generated model. In Adams v. Dan River Mills, Inc., 54 F.R.D. 220, 222 (W.D.Va.1972), the court ordered production of computer-readable data material, saying:

'Because of the accuracy and inexpensiveness of producing the requested documents in the case at bar, this court sees no reason why the defendant should not be required to produce the computer cards or tapes . . . to the plaintiff.'

"And, in United States v. Davey, 543 F.2d 996 (2d Cir. 1976), an Internal Revenue summons proceeding, the Court of Appeals ordered the respondent to produce magnetic tapes in its possession, which contained financial data, even though the same information had already been proffered to the Internal Revenue Service in printout form. The district court in Davey had ordered production of the computer tapes, commenting that their production would make unnecessary 'a great deal of manual examination of many thousands of printout pages.' The Second Circuit affirmed on this

point. It noted that 'inspection of the requested tapes . . . would . . . insure greater accuracy and a substantial saving in auditing time,' and held that the taxpayer could not 'give the IRS requested information in an inconvenient form with a view to immunizing itself from demands for other records containing the same relevant information in a more convenient form.'

"As some of the decisions have observed, the 1970 amendments to Rule 34 of the Federal Rules of Civil Procedure made it clear that computerized records are subject to requests for production. Those amendments added to the list in Rule 34(a)(1) of matters subject to production the language 'and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.' The 1970 Advisory Committee Notes explained:

"The inclusive description of 'documents' is revised to accord with changing technology. It makes clear that Rule 34 applies to electronic data compilations from which information can be obtained only with the use of detection devices, and that when the data can as a practical matter be made usable by the discovering party only through respondent's devices, respondent may be required to use his devices to translate the data into usable form. In many instances, this means that respondent will have to supply a print-out of computer data.'

"The Rule thus provides that data be produced in a 'reasonably usable form'. The Advisory Committee contemplated that this usable form would often consist of a printout of the data stored electronically, but did not preclude production of the information in an electronic medium. The Manual for Complex Litigation, on the other hand, views the production of computer data records in machine-readable form as primary in complex cases, with the production of printouts as a secondary alternative:

"In the computer context, the basic types of machine records commonly utilized include: (1) punched cards; (2) paper and magnetic tapes; and (3) a variety of other machine oriented components which record and store data. In the absence of special considerations such as privilege, work product immunity, or the presence of industrial or trade secrets in the machine, readable computerized data (including computerized analyses) in any of the above-mentioned forms should be freely discoverable. If the discovering party has data processing equipment that is compatible with that of the owners of the computer records, delivery of the machine-readable version of the information, or a copy thereof, will often be sufficient. When the discovering party's equipment is not compatible, or he has no computer



equipment, delivery of a print-out of the machine-readable records may provide a reasonable alternative mode of discovery.'

"While a printout might be 'reasonably usable' within the meaning of Rule 34, the production of a party's data in a form which is directly readable by the adverse party's computers is the preferred alternative, according to the editors of the Manual for Complex Litigation.

*"Although there may be some difference between requiring the production of existing tapes and requiring a party to so program the computer as to produce data in computer-readable as opposed to printout form, we find it to be a distinction without a difference, at least in the circumstances of this case. As we have noted, the defendants have expressed their willingness to pay the costs of whatever operations are necessary to manufacture a computer-readable tape. As a result, the problem of allocating the burden of discovery expense, which might be significant in otherwise similar situations is nonexistent here. Apart from the possible expense, the manufacture of a machine-readable copy of a computer disc is in principle no different from the manufacture of a photocopy of a written document, a common enough method of responding to a request for document production.*

"It may well be that Judge Charles E. Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age. However, we know we now live in an era when much of the data, which our society desires to retain, is stored in computer discs. This process will escalate in years to come; we suspect that by the year 2000 virtually all data will be stored in some form of computer memory. *To interpret the Federal Rules which, after all, are to be construed to 'secure the just, speedy, and inexpensive determination of every action,' in a manner which would preclude the production of material such as is requested here, would eventually defeat their purpose.*"<sup>45</sup> (Emphasis supplied; internal citations omitted.)

The above quoted reasoning in the *National Union* case was adopted in the subsequent case of *Anti-Monopoly, Inc. v. Hasbro, Inc.*<sup>46</sup>

A conclusion contrary to that reached in the *National Union* case was arrived at in the case of *Williams et al. v. Owens-Illinois, Inc.*<sup>47</sup> The plaintiffs here, who had sued the defendant corporation for employment discrimination, had already obtained wage cards produced by the defendant after an initial discovery request. Subsequently, the defendants moved for the discovery of defendant's computer tapes, fearing that the defendant had not revealed all the relevant information in its

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<sup>45</sup> *Id.* at 1261-63.

<sup>46</sup> No. 94 Civ 2120, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995).

<sup>47</sup> 665 F.2d 918 (9th Cir. 1982)

possession as they argued that the earlier discovery was inadequate and “resulted in a statistical case ‘prepared for them by [the] defendants.’”<sup>48</sup>

In ruling against the plaintiff’s request for further discovery of defendant’s computer tapes, the Court of Appeals for the Ninth Circuit affirmed the district court’s earlier denial of plaintiff’s motion, stating that:

“While it is true that computer tapes are not per se non-discoverable, *Dunn v. Midwestern Indemnity*, 88 F.R.D. 191, 194 (S.D. Ohio 1980) (“[d]iscovery requests relating to the computer, its programs, inputs and outputs should be processed under methods consistent with the approach taken to discovery of other types of information”), the facts here do not compel the granting of appellants request. *All information contained on the computer tapes was included in the wage cards which appellants discovered*. R.T. 6645-59. *Appellants were therefore not deprived of any data. While using the cards may be more time consuming, difficult and expensive, these reasons, of themselves, do not show that the trial judge abused his discretion in denying appellants the tapes.*”<sup>49</sup> (Emphasis supplied; internal citations omitted)

This ruling was subsequently adopted by at least two other district courts.<sup>50</sup>

Because the District Court in the *National Union* case and the Court of Appeals in the *Williams* case both perceived that the information already provided the requesting party was the same as those still requested in electronic form, the resulting decisions of the two courts indeed differ significantly in their conclusions on the requesting party’s access to all forms in which the electronic evidence sought may be produced. It is unfortunate, however, that unlike the *National Union* decision, the *Williams* ruling did not elaborate on the legal principles and precedents that it relied upon in reaching the conclusion that information already provided in printed form need not be produced again in electronic form. The impression cannot be resisted, therefore, that the *National Union* decision of the District Court carries more persuasive weight in so far as it based its conclusion on other decisions rendered by other courts.

It should also be noted that in the *National Union* opinion, the defendant’s convenient use of the discovered evidence was an important consideration. May other reasons justify the same ruling?

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<sup>48</sup> *Id.* at 932

<sup>49</sup> *Id.* at 933 (9th Cir. 1982).

<sup>50</sup> *Torrington Co. v. United States*, No. 91-08-00568, 1992 WL 40699, at \* 2 (Ct. Int’l Trade Feb. 21, 1992); *Malone v. Ford Motor Co.*, No. 12539, 1992 WL 885097, at \* 2-3 (Va. Cir. Ct. Dec. 31, 1992).

One such reason noted earlier is the desire of a requesting party to obtain relevant information such as embedded data or "metadata" that may not be displayed in the printed form of the electronic information.<sup>51</sup> In such a case, the electronic form of the information will be necessary to reveal such "hidden" information.

Another reason that may compel a requesting party to request for the electronic form of the information is the possible attempt of the requested party to conceal information by not producing the computer-readable electronic form and merely producing print outs of selected data. The Court of Appeals in the *Williams* case was apparently given this reason by the parties requesting the computer-readable form when they contended that the limited discovery order of the trial judge "did not permit them adequate discovery and therefore resulted in a statistical case 'prepared for them by (the) defendants.'" This contention of the requesting parties, however, was apparently glossed over by the court when it started explaining its ruling by saying that "all information contained on the computer tapes was included in the wage cards which appellants discovered." It is unfortunate that the Court of Appeals deciding the *Williams* case missed the opportunity to resolve the issue of incomplete disclosure that was raised by the requesting parties.

As can be gleaned from what has been said above, the position and approach taken in the *National Union*, i.e. that the requesting party can have access to the different media in which electronic information may be produced, should be preferred. The underlying concern for expeditious discovery justifies the approach taken in the said case. District Judge Edward R. Becker appropriately sums it up when he concluded his decision by saying:

"To interpret the Federal Rules which, after all, are to be construed to 'secure the just, speedy and inexpensive determination of every action,' in a manner which would preclude the production of material such as is requested here, would eventually defeat their purpose."

The *National Union* ruling, however, should not be relied upon haphazardly. As he was closing his opinion in the said case, District Judge Edward R. Becker warned that his ruling should be taken in light of the fact that the defendants requesting the computer-readable tape have expressed their willingness to pay the costs of whatever operations are necessary to manufacture the said tape.

In one case, concerns other than costs, such as lack of an expert that will carry out the discovery of evidence through the equivalent of 700,000 pages of hard copy records as well as security or confidentiality concerns, prevented a court from

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<sup>51</sup> See note 41 *supra*

otherwise directing the production of electronic information in addition to the printed form.<sup>52</sup>

## **2. Requesting Party's Preference for the Printed Form over the Electronic Form**

The above examples should not be taken to mean that in issues involving the manner or medium of production of electronic evidence, it is always a question of the computer readable form being preferred over the printed form. As the case of *Sattar v. Motorola*<sup>53</sup> decided by the Court of Appeals for the Seventh Circuit will show, there are instances when the printed form is preferred.

This was a case involving charges of religious discrimination committed by supervisors in the defendant corporation against the plaintiff Sattar, which discrimination was allegedly evidenced by some of the electronic mail (e-mail) messages exchanged by the parties. Sattar had filed a motion to compel Motorola to produce, at its own expense, around 210,000 pages of hard copy reflecting the e-mail that were sent. Motorola initially produced the requested e-mail messages in the form of 4-inch tapes. These, however, were inaccessible to Sattar because he lacked the equipment and software with which to read them.

The Court of Appeals sustained the solution reached by the district court in denying Sattar's motion, stating:

"The court decided that a more reasonable accommodation was some combination of downloading the data from the tapes to conventional computer disks or a computer hard-drive, or loaning Sattar a copy of the necessary software, or offering Sattar on-site access to its own system. If all of those options failed, the court ordered that the parties would each bear half the cost of copying. This seems to us an entirely reasonable resolution of Sattar's problem, and far from an abuse of discretion."<sup>54</sup>

Aside from presenting the issue of medium of production of electronic evidence in a different light, the *Sattar* decision also highlights an important dimension of the principle of liberal interpretation of discovery rules – flexible application. As can be gleaned from *Sattar*, problem-solving flexibility is a useful virtue when courts resolve issues involving the manner of producing electronic evidence. *Sattar* is worthy of note since the practical and flexible solution it upheld

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<sup>52</sup> *Jones v. Goord*, 2002 U.S. Dist. LEXIS 8707 (S.D.N.Y. May 16, 2002), as discussed in Lisa M. Arent et al., *Ediscovery: Preserving, Requesting & Producing Electronic Information*, SANTA CLARA COMPUTER & HIGH TECH. L.J. 131, 159-160.

<sup>53</sup> 138 F. 3d 1164 (7th Cir. 1998).

<sup>54</sup> *Id.* at 1171

conforms to the principle that discovery should secure the "just, speedy, and inexpensive determination of every action."

#### E. TYPES OF RELEVANT INFORMATION

Discovery opens a wide array of relevant data to one who is willing to harness its potential. Two general sets of relevant information may be distinguished from each other:

- (a) raw data; and
- (b) processed data, or data resulting from the classification, arrangement, analysis or other manipulation of raw or other processed data.

While the distinction is applicable to all forms of discovery, the distinction will probably receive much attention in electronic discovery, particularly because of the ability of devices such as computers to operate on raw data in electronic form in order to process them and produce a desired result through the operation of computer programs.

The classification of electronic information into raw and processed data is noted in this discussion because relevant information in both these forms may be in the possession of a party ordered to produce information. While such an order for discovery will usually describe the required information or evidence in relation to a particular issue in the case, the instructions in the order will usually be couched in rather general terms and will not really specify the kind of information to be produced. In such a situation, may the party possessing relevant information in both raw and processed form choose to produce the required information in only one form and not the other?

The United States Court of International Trade had occasion to deal with an aspect of the question in its Memorandum Opinion and Order of December 2, 1986 in the case of *Daewoo Electronics Company, Ltd. v. United States*.<sup>55</sup> In this case involving the U.S. Department of Commerce's review of an anti-dumping duty order covering color television sets from Korea, the defendant-intervenor Zenith Electronic Corporation moved to compel discovery and acquired an order from the court requiring the Department of Commerce to provide the intervenor with copies of computer tapes submitted to, or used by, it in arriving at the final results of its administrative review.

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<sup>55</sup> 650 F.Supp. 1003 (Ct. Int'l Trade 1986).

Although the Department of Commerce produced the required tapes, it refused, unless the court's order was amended, to provide material in the form of SAS data sets, which were the final, refined or processed form of the data in the original computer tapes it had initially produced. Furthermore, these data sets had to be converted into a form called sequential data files for Zenith to be able to use them in their system, which conversion the Department of Commerce also refused to do. In reaction to this refusal by the Department of Commerce ("Commerce"), Zenith moved for an order compelling production of these data sets.

In ruling in favor of Zenith, the court pronounced certain general rules relating to electronic discovery that will be very useful in guiding us as we explore electronic discovery. The court reasoned:

"The court is more troubled by indications that Commerce took an inordinately restrictive view of its obligations under the order. While there is undoubtedly an adversarial nature to these proceedings, the area of disclosure of the components of the administrative action is not where the extremes of adversarial technique ought to be displayed.

"Traditional pretrial discovery and the disclosure of administrative records are, at the very least, equivalent procedures. If anything, the duties of a party with respect to turning over the contents of an administrative record are more certain than the obligations of ordinary discovery. The administrative record is the explicit subject of a statutory mandate, the unique object of judicial review, and a matter of known importance at all times.

"The court ordered the government to turn over the computer tapes used in the administrative proceeding. The government took the most literal possible reading, saying that it meant only reels of tape and not the distillation of that data which resides in the further refined form of electronic impulses in the NIH computer. This could be taken for sophistry and obstructiveness. To say that the data sets into which the computer tapes were transferred are not governed by an order speaking of computer tapes is as if someone had said at the dawn of the era of typewriters that typed documents are not governed by a court order speaking of 'writings.' This sort of conduct led to sanctions for a defendant which argued that it could not comply with a request for its 'ledgers and journals' because its business records were computerized and available only in a 'codified computer printout.' Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir.1976).

"This court, in its original order, used 'computer tapes' to mean all forms of data which are uniquely subject to manipulation by computers, i.e., those forms that are electronic records. If this was technically imprecise, then Commerce has taken unfair advantage of the court's lack of familiarity with

the variety of further electronic refinements and embodiments of taped information.

*"It would be a dangerous development in the law if new techniques for easing the use of information become a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms.* This is within the plain contemplation of CIT Rule 34. It is also in consonance with Rule 34 of the Federal Rules of Civil Procedure, and the revision comments of the Advisory Committee which indicate that the rule is intended to keep pace with changing technology. *See* 48 F.R.D. 487, 527 (1970). It follows that court orders to disclose computer tapes used in the administrative proceeding should be understood to include disclosure of all further refined forms of electronic storage of the data involved.

"It appears to the court that the placing of this data into sequential files is comparable to the normal ordering of files which would have to be done by the respondent in routine discovery of documents. *The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship.* The government has made no such showing. Similarly, a normal and reasonable degree of direct communication and assistance to the discovering party is the unavoidable burden of the respondent, in the absence of a showing of extraordinary hardship. The government has made no such showing. This court is not requiring the government to create something new or to render exceptional assistance. It is simply requiring that an existing body of data be transmitted in a reasonably usable way with a modicum of cooperation.

"In concluding, the court notes that the government's attitude towards its obligation to transmit information and the characterization of that duty as an interference with, or unwarranted burden on normal administrative operation, has the potential to create very serious problems. It raises the specter of a society in which decisions may be unexaminable because they are accomplished by electronic means too complex and unique to be transmitted in a comprehensible way even to those citizens sufficiently knowledgeable to analyze the relevant data. In this cybernetic new world the effort needed to transmit and explain the basis for the decisions would interfere with the making of other decisions, so that all functioning comes to depend on insulation from critical examination. (Emphasis supplied; internal citations omitted.)

Noteworthy is the rule laid down in the above opinion to the effect that "[t]he normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship." While this passage was

applied to a situation involving different forms of the information itself, i.e. SAS data sets as against sequential data files, the rule seems to have implications on the issue discussed in the preceding section relating to the medium in which electronic information is to be produced. It supports the ruling in the *National Union*<sup>56</sup> case and weakens, in the same breath, the contrary rule stated in *Williams*.<sup>57</sup>

Although the *Daewoo* opinion dealt only with a party who opted to produce only raw data and refused to produce processed information from the same data, the reasoning adopted by the United States Court of International Trade in this decision will likely apply in a reverse situation where processed data is produced and raw data is not disclosed. Again, this conclusion is dictated by the guiding principle that discovery should be used as a means for achieving the just, speedy and inexpensive resolution of cases.<sup>58</sup>

#### F. THE REQUIREMENT OF "POSSESSION, CUSTODY, OR CONTROL"

When the production or inspection of a document or thing is ordered under Rule 27, the party so ordered will be required to produce or allow the inspection of such documents or things that are "in his possession, custody or control." Electronic discovery has given rise to the question of what documents are in a party's possession, custody, or control, an interesting twist, primarily in relation to certain types of information that are in a computer but which the party has no knowledge of or has already deleted. The question raised is whether such types of information should be considered within the party's possession, custody, or control.

No attempt is made here to discuss this issue in relation to all types of electronic information. For purpose of this survey of electronic discovery issues, we need only consider an example of such information – deleted files. The issue assumes more or less the same dimensions with respect to information that the party has no knowledge of.

Consider the following appreciation of the problem by Shira A. Scheindlin, a District Judge of the Southern District of New York, and his former law clerk Jeffrey Rabkin, in their article "Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?":

"Deleting' a file does not actually erase that data from the computer's storage devices. Rather, it simply finds the data's entry in the disk directory and changes it to a 'not used' status--thus permitting the computer

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<sup>56</sup> See note 42 *supra*.

<sup>57</sup> See note 43 *supra*.

<sup>58</sup> See *Dunn v. Midwestern Indemnity, Inc.*, 88 F.R.D. 191, 194 (S.D. Ohio 1980)



to write over the 'deleted' data. Until the computer writes over the 'deleted' data, however, it may be recovered by searching the disk itself rather than the disk's directory. Accordingly, many files are recoverable long after they have been deleted—even if neither the computer user nor the computer itself is aware of their existence. Such data is referred to as 'residual data.'<sup>59</sup>

x x x      x x x      x x x

"Residual data raises another definitional question. x x x [M]ay a respondent be said to be in the 'possession, custody or control' of the residual data stored on the computer? The resolution of that question is important because it determines whether a respondent is obliged to search for and produce such information under the terms of Rule 34(a)."<sup>60</sup>

The problem exists because there are ways to recover deleted or residual data from a computer and view otherwise inconspicuous information. One United States District Court judge had in fact remarked that the inability to destroy electronic files may be the computer's ultimate flaw.<sup>61</sup> For the party ordered to produce electronic documents under Rule 27, the problem is of particular importance because such methods of recovery and viewing may entail additional expense and effort. With respect to deleted information, the issue assumes an added twist if the deletion was made in anticipation, or during the pendency, of a suit because the discovery of the deception may give rise to court sanctions and even criminal prosecutions.

Courts in the United States have ruled that deleted files or information is discoverable under their rules on discovery.<sup>62</sup> Notably, this conclusion was reached without a consideration of the "possession, custody or control" requirement and only a general reference to Rule 34 of the Federal Rules of Civil Procedure is made to justify such a conclusion. It seems, therefore, that American courts assumed that such deleted information is under the possession, custody, or control of the requested party.

While no decision by our Supreme Court has interpreted the phrase "possession, custody or control," the same conclusion can be justified under Rule 27. The word "possession," in its ordinary meaning, should include any

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<sup>59</sup> SCHEINDLIN & RABKIN, *op. cit. supra* note 13 at 337.

<sup>60</sup> *Id.* at 365.

<sup>61</sup> See MARRON, *op. cit. supra* note 41, at 908; *but see id.* at 931

In apparent anticipation of future rulings that deleted information is discoverable, technical solutions in the form of software that permanently delete unwanted files have emerged for those who want to "delete with impunity."

<sup>62</sup> *E.g. Simon Property Group L.P. v. MySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000); *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp. 2d 1050 (S.D. Cal. 1999).

information residing in the computer. As the word is used in Rule 27, there seems to be no special requirement of intent to possess similar to that required in criminal law in relation to illegal possession offenses.<sup>63</sup> This interpretation has the added benefit of helping address the possible circumvention of any order for discovery under Rule 27 through the deletion of files by the party ordered to produce, or allow the inspection of, certain documents.<sup>64</sup>

The discoverability of deleted information has given rise to problems because in cases involving deleted information, discovery will entail examining the information in the requested party's computer or the analogous task of copying the computer's hard disk and then examining the same. The examination of a party's computer for discovery purposes is examined in the next section. As will be revealed shortly, this discovery technique has given rise to important privacy and privilege concerns.

### G. DISCOVERY OF COMPUTER SYSTEMS

As we contemplate the possibilities of electronic discovery, one prospect seems to stand out with the serious privacy issues it raises – the inspection of a computer or its hard drive to obtain information residing therein. This prospect already became reality in the United States through cases that involve the examination of computers or their hard disks to discover deleted information. Before we move on, however, we must examine whether or not the rules will allow such a computer inspection in the first place.

#### 1. Inspection of Computer or Hard Disks under Rule 27

The first question that anyone will probably ask is whether or not discovery through computer inspection is possible under the law. American courts have held that such computer inspection is allowable under their discovery rules, invoking both Rule 26 and Rule 34 of the Federal Rules of Civil Procedure. The inspection is usually carried out by first replicating the hard disk of the subject computer to avoid inconvenience to the party. A neutral computer expert is then directed to examine such duplicate hard disk to search for relevant evidence.<sup>65</sup>

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<sup>63</sup> E.g. *People v. De Gracia*, G.R. No. 102009-10, July 6, 1994, 233 SCRA 716 [1994]; *People v. Estaña*, G.R. No. L-5739, August 27, 1953, 93 Phil. 647 [1953].

<sup>64</sup> See *Playboy Enterprises, Inc. v. Welles*, *supra*, where the court ordered a discovery of a party's computer for deleted e-mail after she had deleted some messages she had received during the litigation.

<sup>65</sup> See note 63 *supra*.

This approach, however, cannot be easily adopted in this jurisdiction. For one thing, our Rules of Court do not have a provision similar to Rule 26 of the Federal Rules of Civil Procedure, which embodies a general rule on discovery that applies to all modes of discovery. Secondly, our Rule 27 is not fashioned in the same way as Rule 34 of the Federal Rules of Civil Procedure, at least in so far as our Rule 27 does not seem to allow the duplication of a computer's entire hard disk for purpose of discovery. While we maintain a policy of liberal interpretation of the rules on discovery, we are nonetheless constrained by how our rules were fashioned because interpretation or construction cannot go beyond the clear meaning of the law. We must therefore examine the relevant provisions of our rules closely to determine if computer or hard disk inspections such as those allowed by American courts can likewise be allowed in this jurisdiction.

Section 1 (b) of Rule 27 seems to allow such inspections of computers or hard drives when it states:

“SECTION 1. Motion for production or inspection; order. -- Upon motion of any party showing good cause therefore, the court in which an action is pending may x x x (b) order any party or permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon. x x x.”

On the assumption that the proper foundation is established, the computer or its hard drive may be considered a relevant object inside a party's property and, as such, may be inspected. Furthermore, nothing in Rule 27 seems to limit such inspection to the computer as a physical object so that inspection of the information stored in the computer appears to be sanctioned by Rule 27.

It is also worth examining whether Rule 27 allows the inspection of a computer, and the obtaining of information from the computer inspected by copying files. It seems that inspection is all that can be done under Section 1 (b) of Rule 27 and no file or document can be obtained by copying files from the computer during the process of inspection under the said paragraph. However, Section 1(a) invoked in conjunction with Section 1 (b) of the same Rule may work to allow the inspection of a party's computers as well as the copying of designated files from the said computer.<sup>66</sup>

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<sup>66</sup> Section 1 (a) of Rule 27 of the Rules of Court provides:

“SECTION 1. Motion for production or inspection; order. -- Upon motion of any party showing good cause therefore, the court in which an action is pending may (a) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which

While this use of Rule 27 was probably not contemplated when the rule was first drafted, its language may be reasonably construed to allow such use, as discussed above. The principle of liberal construction of discovery rules will also support this proposition.<sup>67</sup> To complete the picture, however, the possible counter-argument should be given equal consideration.

This counter-argument states that a close examination of Section 1(b) will reveal that it was meant to allow the inspection, measurement, survey, or photography of property, or relevant objects, or operation - an examination and measurement of the subject - and was never intended for the procurement of copies of documents, much less the copying of electronic documents directly from the opposing party's computer itself.

Section 1(a) will be cited to support this interpretation because under the said provision, when documents are to be discovered, the opposing party will only be required to produce the designated document and allow its inspection, copying or photographing. Section 1(a) was never intended to allow the requesting party to go the opposing party's premises and look for the designated document himself. As can be seen from the reasoning just elucidated, a literal and strict interpretation of Rule 127 will carry the day for this counter-argument.

Assuming that the inspection of a computer will be allowed under Section 1 (b) of Rule 27, it seems that the counter-argument just discussed will be sustained, and courts will be inclined not to allow the simultaneous inspection of a computer and the copying of files from the same. Such a ruling will be aided by the principle that while liberal interpretation may be allowed, it cannot be carried out to such an extent as to add to what the language of the law provides. Even then, however, a requesting party may still obtain the documents discovered during the inspection by filing a motion under Section 1 (a) of Rule 27 *after* the inspection has been conducted. In fact, a single motion may be fashioned invoking both Section 1(b) and 1(a) in succession to achieve the same end.

To recapitulate, it seems that under Section 1(b) of Rule 27, an inspection of a computer or a hard disk may be allowed but no copying during such inspection of any computer file will be permitted. Such copying can be made under Section 1(a) of the same Rule for the production of the desired computer. In other words,

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constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control; x x x"

<sup>67</sup> See note 35 *supra*.

a requesting party may be allowed to inspect the computer or hard disk and indicate the desired information, which the requested party will subsequently produce.

Surprisingly, this procedure substantially mirrors some of the procedures or protocols adopted by American courts in carrying out discovery through the inspection of computers or hard disks. Like the procedure above described that was derived from an analysis of Rule 27, court-sanctioned protocols for the inspection of computers or hard disks do not permit the requesting party to freely access the other party's files and copy with impunity. The American approach, however, usually entails the intervention of a neutral computer expert who will examine the computer or hard disk, usually for deleted information. This neutral computer expert will turn over whatever files are recovered by him to the requested party, who will be the one to produce the required information for the requesting party after screening them for possible privileged or confidential material. For illustration, one such protocol is reproduced in the next section.

## 2. Protections during Computer or Hard Disk Inspections

In the United States, inspections of computers or hard disks as part of discovery have been allowed in situations involving deleted information. Before allowing such examinations in these cases, American courts impose two requirements: (1) proof that the burden and intrusion are justified by the need; and (2) a showing that a reasonable basis for concluding that the search will turn up otherwise unavailable, responsive information.<sup>68</sup>

In situations where inspections of computers or hard disks are allowed, American courts have been concerned about the burdens such inspections may impose on the requested party, including disturbance of the latter's privacy.<sup>69</sup> Thus, courts allow such discoveries only if done by a neutral expert and in accordance with a protocol that protects the requested party against unnecessary burden and intrusions. An example of one such protocol that shows the effort a court exerts to protect the requested party is that established in the case of *Playboy Enterprises, Inc. v. Welles*<sup>70</sup> which involved a search for deleted e-mail messages. The protocol is reproduced below:

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<sup>68</sup> ARENT ET AL., *op. cit.* *supra* note 52 at 144.

<sup>69</sup> See *Southern Diagnostic Association v. Bencasme*, 2002 WL 31422863 (Fla. Dist. Ct. App. Oct. 30, 2002); *Playboy Enterprises, Inc. v. Welles*, 60 F.Supp. 2d 1050 (S.D. Cal. 1999); *Simon Property Group L.P. v. MySimon, Inc.*, 194 F.R.D. 639 (S.D. Ind. 2000).

<sup>70</sup> 60 F.Supp. 2d 1050 (S.D. Cal. 1999).

"Considering these factors, the Court determines that the need for the requested information outweighs the burden on Defendant. Defendant's privacy and attorney-client privilege will be protected pursuant to the protocol outlined below, and Defendant's counsel will have an opportunity to control and review all of the recovered e-mails, and produce to Plaintiff only those documents that are relevant, responsive, and non-privileged. Any outside expert retained to produce the "mirror image" will sign a protective order and will be acting as an Officer of the Court pursuant to this Order. Thus, this Court finds that Defendant's privacy and attorney-client communications will be sufficiently protected. Further, Plaintiff will pay the costs associated with the information recovery. Lastly, if the work, which will take approximately four to eight hours, is coordinated to accommodate Defendant's schedule as much as possible, the Court finds that the "down time" for Defendant's computer will result in minimal business interruption.

"The Court ORDERS the parties to follow this protocol:

"1. First, the Court recognizes Defendant's concern, and argument, that the e-mail recovery simply is not feasible. x x x However, this Court believes that the probability that at least some of the e-mail may be recovered is just as likely, if not more so, than the likelihood that none of the e-mail will be recovered. To some degree, the burden of attempting the recovery must fall on Defendant as this process has become necessary due to Defendant's own conduct of continuously deleting incoming and outgoing e-mails, apparently without regard for this litigation. (This Court notes that Defendant's declaration did not indicate that Defendant has considered the subject matter of any e-mail, and its relationship to this litigation, before deleting it.) However, to ensure that this Court's assumption is correct, Plaintiff shall, as a predicate to further discovery, submit a declaration from the expert on which it relied in making this motion, to address both Defendant's and the Court's feasibility concerns. Plaintiff shall submit such a declaration by *August 6, 1999*. Presuming Plaintiff can provide the Court with sufficient evidence that recovering some deleted e-mail is just as likely as not recovering any deleted e-mail, and that no damage will result to Defendant's computer, the Court will direct the parties to follow this outlined protocol.

"2. The Court will appoint a computer expert who specializes in the field of electronic discovery to create a "mirror image" of Defendant's hard drive. The Court requests the parties to meet and confer to agree upon the designation of such an expert. If the parties cannot agree on an expert, the parties shall submit suggested experts to the Court by *August 13, 1999*. The Court will then appoint the computer specialist.

"3. The Court appointed computer specialist will serve as an Officer of the Court. To the extent the computer specialist has direct or indirect access to information protected by the attorney-client privilege, such "disclosure" will *not* result in a waiver of the attorney-client privilege. Plaintiff herein, by requesting this discovery, is barred from asserting in this litigation that any such disclosure to the Court designated expert constitutes any waiver by

Defendant of any attorney-client privilege. The computer specialist will sign the protective order currently in effect for this case. Lastly, any communications between Plaintiff and/or Plaintiff's counsel and the appointed computer specialist as to the payment of fees and costs pursuant to this Order will be produced to Defendant's counsel.

"4. The parties shall agree on a day and time to access Defendant's computer. Plaintiff shall defer to Defendant's personal schedule in selecting this date. Representatives of both parties shall be informed of the time and date, but only Defendant and defense counsel may be present during the hard drive recovery.

"5. After the appointed computer specialist makes a copy of Defendant's hard drive, the "mirror image" (which the Court presumes will be on or transferred to a disk) will be given to Defendant's counsel. Defendant's counsel with print and review any recovered documents and produce to Plaintiff those communications that are responsive to any earlier request for documents and relevant to the subject matter of this litigation. All documents that are withheld on a claim of privilege will be recorded in a privilege log.

"6. Defendant's counsel will be the sole custodian of and shall retain this 'mirror image' disk and copies of all documents retrieved from the disk throughout the course of this litigation. To the extent that documents cannot be retrieved from defendant's computer hard drive or the documents retrieved are less than the whole of data contained on the hard drive, defense counsel shall submit a Declaration to the Court together with a written report signed by the designated expert explaining the limits of retrieval achieved.

"7. The Court orders that the "mirror image" copying of the hard drive, and the production of relevant documents, shall be completed by *September 10, 1999.*"

While discoveries such as the ones described above usually involve searches for deleted information, there is one case where an attempt was made to inspect a computer for information that had not been deleted – *Fennel v. First Step Designs*<sup>72</sup>. In this case, the requesting party had already obtained the desired computer file in a disk but she still sought an examination of the said computer file as it resided in the requested party's computer hard drive. The requesting party contended that certain information was discoverable only through such an examination. However, this request for further discovery through the inspection of the computer was denied on the ground that: (1) the risks and costs of further discovery were substantial, and (2) that the requesting party had not demonstrated a particularized likelihood of discovering appropriate information.<sup>73</sup>

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<sup>71</sup> *Id.* at 1054-55.

<sup>72</sup> 83 F.3d 526 (1st Cir. 1996).

<sup>73</sup> *Id.* at 533 (1st Cir. 1996).

## H. LIMITATIONS ON DISCOVERY

Despite the liberality with which courts are encouraged to interpret and apply discovery rules, limitations on discovery have been recognized. In the case of *Republic v. Sandiganbayan*<sup>74</sup> earlier discussed, the Supreme Court said:

"Of course, there are limitations to discovery, even when permitted to be undertaken without leave and without judicial intervention. As indicated by (the) Rules x x x, limitations inevitably arise when it can be shown that the *examination is being conducted in bad faith or in such a manner as to annoy, embarrass, or oppress the person subject to the inquiry*. And x x x further limitations come into existence when the inquiry touches upon the irrelevant or *encroaches upon the recognized domains of privilege*."<sup>75</sup>

However, apart from passing remarks made in decisions touching upon discovery, our Supreme Court has not had occasion to discuss these limitations in any published decision.

Presumably, the relevant jurisprudence on privileges and confidentiality, such as the attorney-client privilege, will come into play once a party invokes these privileges in relation to discovery. While this is beyond the scope of this work, it should be noted that privilege as a limitation need not totally preclude discovery, as courts have the authority to control discovery in such a way as to allow it to proceed to some extent without violating the claims of privilege.<sup>76</sup> For this purpose, the Court may issue the so-called protective orders. When electronic discovery under Rule 27 of our Rules of Court is involved, authority for such protective order is given by the last sentence of the said Rule:

"[T]he order shall specify the time, place and manner of making the inspection and taking copies and photographs, and may prescribe such terms and conditions as are just."<sup>77</sup>

The court may also issue such protective orders to allow electronic discovery and at the same time protect the requested party against discovery that is annoying, embarrassing or oppressive or is otherwise conducted in bad faith. An

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<sup>74</sup> G.R. No. 90478, November 21, 1991, 204 SCRA 212 [1991].

<sup>75</sup> *Id.* at 225-26.

<sup>76</sup> See note 70 *supra*.

<sup>77</sup> RULES OF COURT Rule 27, sec. 1.



example of such a protective order in the form of a protocol for discovery was given in the preceding section.

The importance of protective orders was emphasized in the case of *Southern Diagnostic Association v. Bencosme*,<sup>78</sup> where the District Court of Appeals quashed the trial court's order against Southern Diagnostic, compelling discovery of certain contents of its computer. The appellate court found that the trial court's order was overly broad, as it set no parameters or limitations on the inspection of the subject computer and failed to consider the fact that the computer contained confidential and privileged communication.

Also relevant to this discussion of limitations on discovery is the principle of proportionality applied to discovery cases by American courts. This principle is found in Rule 26 (c) of the Federal Rules of Civil Procedure, which allows a court to either limit production of certain documents or shift the cost of production to the requesting party, upon a finding that the burden or expense of production is disproportionate to the value of the information to the particular case, the amount at stake, the parties' resources, and the importance of the issues raised in the case.

The standard of undue burden or expense of the proportionality principle is not exactly the same as the first limitation to discovery recognized by our Supreme Court above, which refers to bad faith and discovery that is annoying, embarrassing, and oppressive. This does not mean however, that our courts cannot apply the same standard as a limitation on discovery. Room for the application of the proportionality principle in this jurisdiction is made available again by the last sentence of Rule 27 when it allows the court to "prescribe such terms and conditions as are just" in connection with electronic discovery.

This suggestion, however, should not be interpreted as an advocacy of the untrammelled application of the proportionality principle to defeat the object of our rules on discovery. On the contrary, what is suggested is that our courts adopt the reluctant attitude of American courts in applying the principle to defeat or restrict discovery. The *Dunn*<sup>79</sup> court manifested this typical attitude when it stated:

"In *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D.Mass.1976) x x x [t]he Court stated, 'merely because compliance with a "Request for Production" would be costly or time-consuming is not ordinarily sufficient reason to grant a protective order where the requested material is relevant and necessary to the discovery of evidence.'"<sup>80</sup>

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<sup>78</sup> See note 70 *supra* 002 WL 31422863 (Fla. Dist. Ct. App. Oct. 30, 2002)

<sup>79</sup> 88 F.R.D. 191 (S.D. Ohio 1980).

<sup>80</sup> *Id.* at 197-98

Furthermore, attempts of parties to resist discovery on the ground of difficulty in retrieving the information usually receive a stinging rebuke:

"The defendant may not excuse itself from compliance x x x by utilizing a system of record keeping which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of documents an excessively burdensome and costly expedition. To allow a defendant whose business generates massive records to frustrate discovery, by creating an inadequate filing system, and then claiming under burden, would defeat the purposes of the discovery rules."<sup>81</sup>

With respect to electronic discovery, objections harping on the difficulties of producing the required information will probably have no persuasive weight at all, considering that one of the significant attributes of electronic information is the relative ease with which such information may be used, stored and managed.

In considering the imposition of limitations on discovery, the policy of liberal interpretation of discovery rules should be foremost in the mind of courts dealing with the matter. This is probably what the Supreme Court had in mind when, after stating the limitations of discovery in the *Republic v. Sandiganbayan*<sup>82</sup> case above quoted, it immediately followed through with the following passage:

"In fine, the liberty of a party to make discovery is well nigh unrestricted if the matters inquired into are otherwise relevant and not privileged, and the inquiry is made in good faith and within the bounds of the law."<sup>83</sup>

### I. ENFORCING DISCOVERY

While discovery was designed to serve the noble purpose of seeking the truth for the just, speedy, and inexpensive determination of cases, parties are not usually inclined to strive for the same end. Discovery in this jurisdiction as well as in the United States has often met resistance ranging from bad faith or delay in complying with orders for discovery to outright refusal to comply with such orders, to the point of destroying the evidence.

The necessity for enforcement measures is therefore apparent, and these measures are provided in Rule 29 of the Rules of Court. Sanctions for failure to

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<sup>81</sup> *Id.*

<sup>82</sup> G.R. No. 90478, November 21, 1991, 204 SCRA 212 [1991]

<sup>83</sup> *Id.* at 226 [1991]

comply with an order for the production or inspection of electronic evidence under Rule 27 are spelled out in Section 3 of Rule 29, which states:

“Section 3. *Other consequences.* — If any party or an officer or managing agent of a party refuses to obey an order made under section 1 of this Rule requiring him to answer designated questions, or an order under Rule 27 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property or an order made under Rule 28 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and *among others* the following:

“(a) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

“(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

“(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; and

“(d) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.”

It should be noted, as the emphasis placed in the above quotation shows, that the enumeration of penalties in the above provision is merely illustrative. The court has ample discretion to impose other sanctions that may be reasonable under the circumstances.

The above-enumerated sanctions are to be contrasted with those that American courts have imposed in relation to discovery,<sup>84</sup> which include:

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<sup>84</sup> See Iain D. Johnston, *Federal Court's Authority to Impose Sanctions for Prelitigation or Pre-Order Spoliation of Evidence*, 156 F.R.D. 313, 14-15 (1994); *Capellupo v. FMC Corporation*, 126 F.R.D. 545, 552-53 (D.Minn. 1989).

- (a) monetary sanctions, including attorney's fees and costs and the imposition of all the expenses of discovery to the requested party that would have otherwise been allocated;<sup>85</sup>
- (b) evidentiary sanctions, such as adverse inference instructions and preclusion orders; and
- (c) dispositive sanctions, such as dismissals.

The authority for the imposition of such sanctions as well as the kinds of sanctions that may be imposed are not derived from any particular rule but is based on the wide discretion of the court in ensuring compliance with discovery.<sup>86</sup> It seems, therefore, that Philippine and American courts have the same latitude in determining the type of sanction to be imposed on a party that fails to comply with orders for the production of electronic evidence.

Based on relevant published decisions and orders, American courts have generally been more vigorous in enforcing their discovery orders than their Philippine counterparts.<sup>87</sup> This observation is brought about by the decision of the Philippine Supreme Court in the case of *Insular Life Assurance v. Court of Appeals et al.*<sup>88</sup>

In this case, the petitioner bank had sent written interrogatories to the plaintiffs, which the latter did not answer arguing that the modes of discovery should not be utilized as to permit, in effect, unrestricted "fishing expeditions." The petitioner bank moved for the dismissal of the complaint alleging the plaintiff's failure to answer the written interrogatories. In upholding the trial court's refusal to dismiss the case, the Supreme Court, after noting the available sanctions for a party who fails to answer written interrogatories, reasoned:

"The matter of how, and when, the above sanctions should be applied is one that primarily rests on the sound discretion of the court where the case pends, having always in mind the paramount and overriding interest of justice. *For while the modes of discovery are intended to attain the resolution of litigations with great expediency, they are not contemplated, however, to be ultimate causes of injustice.* It behooves trial courts to examine well the circumstances of each case and to make their considered determination thereafter. It is only in clear cases of grave abuse of that discretion when appellate courts will interfere in their judgment."<sup>89</sup>

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<sup>85</sup> *Linnen v. A.H. Robbins Company, Inc.*, 1999 WL 462015 10 Mass. L. Rptr. 189 (Mass.Super. June 16, 1999).

<sup>86</sup> *Capellupo v. FMC Corporation*, *supra* at 550-51.

<sup>87</sup> See note 85 *supra*, *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, 89 Cal.Rptr.2d 353, 360-61 (Cal. Ct. App. 1999).

<sup>88</sup> G.R. No. 97654, November 14, 1994, 238 SCRA 88 [1994].

<sup>89</sup> *Id.* at 93.

It is of course true that the imposition of sanctions will ultimately depend on the discretion of the court and it is only when there is grave abuse of discretion that higher courts should intervene. However, one cannot resist the thought that through the above quoted passage in the *Insular Life* case, the Supreme Court, by giving trial courts an excuse not to be more vigorous in their use and enforcement of discovery, has weakened the system of discovery as well as its own stand of advocating its use. The suggestion that discovery can cause an injustice to a party does not help at all. This is unfortunate considering that as things stand, discovery does not have much of a following in the Philippine legal profession. With the right opportunity perhaps, the Supreme Court can correct this impression created by its pronouncements in the *Insular Life* case.

## J. PRESERVATION AND SPOILIATION OF ELECTRONIC EVIDENCE

Another concern that has attracted renewed interest with the rise of electronic discovery in the United States is the matter of preservation and spoliation of electronic evidence. Spoliation or destruction of evidence has become an increasing problem in state and federal courts. It has been observed that while the problem can arise in any type of case, spoliation seems to occur more often in product liability, medical malpractice, and employment discrimination.<sup>90</sup> The apparent ease with which electronic information may be destroyed has proven to be an invitation to spoliation of electronic evidence. American courts have resorted to precedents relating to traditional documentary evidence in handling concerns relating to the preservation and spoliation of electronic evidence.<sup>91</sup>

### 1. Preservation and Spoliation of Evidence

Preservation and spoliation of evidence are twin concepts. It is well established in American jurisprudence that a party as well as his counsel has a duty to preserve potentially relevant evidence such that the intentional destruction or spoliation of evidence entails the imposition of sanctions by the court upon the erring party or counsel.<sup>92</sup>

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<sup>90</sup> JOHNSTON, *op.cit. supra* note 85 at 313-14.

<sup>91</sup> *R.S. Creative, Inc. v. Creative Cotton, Ltd.*, *supra* at 360-361; *Lexis-Nexis v. Beer*, 41 F.Supp. 2d 950 (D. Minn, 1999); *Pennar Software Corp. v. Fortune 500 Systems Ltd.*, 2001 U.S. Dist. LEXIS 18432 (N.D. Cal. 2001).

<sup>92</sup> See JOHNSTON, *op. cit. supra* note 85; *Mathias v. Jacobs*, 197 F.R.D. 29, 36 (S.D.N.Y. 2000).

A party is obligated to retain evidence that it knows or reasonably should know may be relevant to pending or future litigation. Therefore, the threshold question is a party has any obligation to preserve the evidence. As soon as the party has been notified that the documents and information in its possession are relevant to any litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, the obligation to preserve such evidence arises.<sup>93</sup>

In most cases, the duty to preserve the evidence arises when a court issues an order to preserve evidence<sup>94</sup> or where the party receives a discovery request.<sup>95</sup> Additionally, knowledge of a potential claim is deemed sufficient to impose a duty to preserve evidence.<sup>96</sup> When no court order to preserve evidence has been issued, a duty to preserve evidence arises when the following conditions concur:

- 1) pending or probable litigation involving the defendant;
- 2) knowledge of the existence or likelihood of litigation;
- 3) foreseeable prejudice to the other party if the evidence were to be discarded; and
- 4) evidence relevant to the litigation.<sup>97</sup>

Thus, a duty to preserve evidence may arise even before an action is instituted as long as the party had notice of or had anticipated future litigation.

From the different cases that affirm and apply the above doctrines, it can be concluded that American courts have been persistent in the exercise of its authority to impose sanctions for spoliation of evidence. At least two sources for such authority have been identified. For spoliation that constitutes a violation of a discovery order, Rule 37 of the Federal Rules of Civil Procedure provides the textual authority for the imposition of sanctions.<sup>98</sup> Outside the context of discovery, the court's authority to impose sanctions for spoliation is derived from its "inherent power to regulate regulation, preserve and protect the integrity of proceedings before it, and sanction for abusive practices."<sup>99</sup> This inherent authority has been invoked to justify the imposition of sanctions on spoliation during the pendency of litigation and even before the institution of an action, when it is shown that the duty to preserve evidence has attached to the guilty party.

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<sup>93</sup> *McGinnity v. Metro-North Commuter Railroad*, 183 F.R.D. 58, 60 (D.Conn. 1998).

<sup>94</sup> *Winters v. Texdon*, 187 F.R.D. 518, 520 (M.D. Pa. 1999).

<sup>95</sup> *Mathias v. Jacobs*, 197 F.R.D. 29, 37 (S.D.N.Y. 2000).

<sup>96</sup> See note 95 *supra*.

<sup>97</sup> *Id.*

<sup>98</sup> JOHNSTON, *op. cit. supra* note 85 at 315-19.

<sup>99</sup> *Id.* at 319-23.

As the Philippine legal profession gears itself for electronic discovery, it is important to determine whether our courts should be similarly minded in order to guard against and punish spoliation of electronic evidence and whether authority to do so exists under our laws, and to what extent.

The question of policy posed above is easily answered in the affirmative. Spoliation of evidence undermines the authority of courts. The more challenging question is that which relates to the source of authority to punish spoliation under Philippine law, and the corollary question as to the extent of such authority.

## **2. Prospects of Preservation and Spoliation of Electronic Evidence in the Philippines**

The Rules of Court grants authority to punish spoliation of evidence in defiance of a Rule 27 order for discovery. In so far as spoliation will result in a failure to comply with a discovery order, Section 3 of Rule 29 quoted above provides the requisite authority.

In a situation where a Rule 27 discovery order has not been issued, it can be reasonably argued that the contempt powers of courts under Rule 71 provides the authority to punish spoliation that is committed not only during a trial but also before an action is instituted. Such spoliation of evidence can be considered a form of indirect contempt falling under the broad language of Section 3 (d), Rule 71 of the Rules of Court:

“Section 3. Indirect contempt to be punished after charge and hearing. -- After a charge in writing has been filed, and an opportunity given to the respondent to comment thereon within such period as may be fixed by the court and to be heard by himself or counsel, a person guilty of any of the following acts may be punished for indirect contempt:

x x x      x x x      x x x

“(d) Any improper conduct tending, directly or indirectly, to impede, obstruct, or degrade the administration of justice;”

Our rules only require that notice and hearing is afforded to the party alleged to be guilty of spoliation. It is worth noting that in so far as our Rules of Court provide for textual authority to punish spoliation outside the context of discovery, our courts are in a sense better off than their American counter parts.

The problem with this interpretation, however, is that punishing spoliation based on the contempt power of the court limits the possible sanctions that a court may impose. Under Section 7 of Rule 71, a person adjudged guilty of indirect contempt may be sentenced to imprisonment or required to pay a fine. While an adverse inference may still be attached to the spoliation of evidence on the presumption that evidence willfully suppressed would be adverse if produced,<sup>100</sup> a number of the other sanctions that American courts have been imposing, such as cost-shifting, will not be available under the contempt powers of our courts. While we have our own concept of the inherent authority of courts,<sup>101</sup> there is no certainty that such inherent authority will be interpreted as broadly as in the United States so as to provide our courts with a great range of discovery sanctions for spoliation outside a Rule 27 discovery order.

#### K. ALLOCATING COSTS

In a much cited and discussed opinion of Judge Francis of the United States District Court for the Southern District of New York, he begins by saying:

"Too often, discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter. x x x [D]iscovery expenses frequently escalate when information is stored in electronic form."<sup>102</sup>

We now reach the last issue that is to be discussed in this work – the matter of allocation of discovery expenses. This was also the problem Judge Francis grappled with when he wrote the above quoted passage. How Philippine courts will assign or allocate the costs of electronic discovery may affect the way lawyers as well as litigants view electronic discovery. A system through which discovery costs can be equitably apportioned among the parties involved will aid in the promotion of discovery as a viable tool in dispute resolution. The necessity for such a system is highlighted by the fact that, as mentioned in the excerpt above, and as will be shown by the cases to be discussed shortly, electronic discovery and its methods are steeply priced.

Relevant American jurisprudence on the issue of which party, whether the requesting party or the requested party, should bear the costs of electronic discovery reveal a change in attitude of courts: from a view that favors the

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<sup>100</sup> RULES OF COURT Rule 131, Sec. 3(e).

<sup>101</sup> *E.g. People v. Godoy*, G.R. No. 115908, March 29, 1995, 243 SCRA 64, 76 [1995] where contempt power was recognized as an inherent power of courts.

<sup>102</sup> *Rowe Entertainment, Inc. v. The William Morris Agency, Inc.*, 205 F.R.D. 421, 423 (S.D.N.Y. 2002).



imposition of the burden on the requested party to one that puts both parties in relatively more equal footing. In both views, however, the analysis starts from the presumption that the requesting party should bear the costs,<sup>103</sup> thus, the concept of "cost-shifting" which entails transferring the costs of discovery to the requesting party.

Traditionally, the decision of whether or not to shift the cost to the requesting party is arrived at by determining whether or not the discovery requested will result in an "undue burden or expense" to the requesting party – the so called "proportional principle" in discovery. American courts find basis for such an analysis in Rule 26 (c) of the Federal Rules of Civil Procedure, which allows a court to either limit production of certain documents or shift the cost of production to the requesting party, upon a finding that the burden or expense of production is disproportionate to the value of the information to the particular case, the amount at stake, the parties' resources, and the importance of the issues raised in the case.

This proportionality principle was discussed earlier with respect to how it can be used to limit production of documents subject of discovery. At this point, focus is given to its cost-shifting effects.

Before proceeding to a discussion of the two views on electronic discovery cost-shifting earlier mentioned, it will be useful to discuss a representative case illustrating the traditional notions on cost-shifting in relation to the proportionality principle applied to electronic discovery – *Bills et al. v. Kennecott Corporation*.<sup>104</sup>

In the said case, the plaintiffs sued the defendant corporation who had dismissed them as employees. Alleging age discrimination as the basis of their suit, plaintiffs sought production of documents containing detailed information regarding defendant's employees. Giving the plaintiffs the choice, the defendant corporation offered to produce the information either in electronic form through a computer tape or in printed form, conditioned however on the requirement that plaintiffs pay the costs of generating the information amounting to approximately \$5,400. The plaintiffs elected to receive the requested data in hard copy, but stated that they would not pay for the cost of its production unless ordered to do so by the court. The defendant produced the hard copy and then moved for the shifting of costs under Rule 26(c).

The matter of cost shifting was disposed of in *Bills* through the following discussion:

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<sup>103</sup> *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

<sup>104</sup> 108 F.R.D. 459 (D.Utah 1985).

"This Court does not attempt to set forth an ironclad formula into which the facts of this or another case can be placed for determination of what 'undue' means under Rule 34. Such a formula would be judicially imprudent and wholly impractical in view of the diverse nature of the claims, discovery requests and parties before the Courts in a variety of cases and situations. The question must be resolved on a case-by-case basis. See Adams v. Dan River Mills, Inc., 54 F.R.D. 220 (W.D.Va.1972). However, certain propositions will be applicable in virtually all cases, namely, that information stored in computers should be as freely discoverable as information not stored in computers, so parties requesting discovery should not be prejudiced thereby; and the party responding is usually in the best and most economical position to call up its own computer stored data.

"In the instant action, this Court has been persuaded by the following additional factors in exercising its discretion to deny defendant's motion to shift the costs of discovery: (1) *The amount of money involved is not excessive or inordinate*; (2) *The relative expense and burden in obtaining the data would be substantially greater to the requesting party as compared with the responding party*; (3) *The amount of money required to obtain the data as set forth by defendant would be a substantial burden to plaintiffs*; (4) *The responding party is benefited in its case to some degree by producing the data in question.*"

"After weighing the factors, we conclude that the Court should not shift the cost of production to the plaintiffs in this case. Accordingly, defendant's Motion for Payment of Discovery Costs is denied."<sup>105</sup>

Aside from the affirmation of the role of Rule 26 (c) of the Federal Rules of Civil Procedure in cost shifting, the following observations are likewise apparent in the *Bills* decision:

First, the notion of cost shifting is indeed premised on a presumption that the requested party should bear the costs of discovery.

Second, that the usual way by which the requested party can shift costs to the requesting party is to produce the required documents for inspection and let the requested party do the copying.

Third, protective orders have a role to play in regulating what may be an undue burden or expense imposed upon the requested party by discovery.

Fourth, that cost-shifting issues analyzed through the proportionality principle are to be resolved on a case-to-case basis, as there is no fixed formula for

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<sup>105</sup> *Id.* at 463-64.

determining whether or not there is an undue burden or expense on the requesting party.

The cost-shifting factors considered in the penultimate paragraph of the *Bills* decision, which relate to the expenses to be incurred in discovery, the relative capabilities of the parties to defray such expenses, and the benefit to be gained by the requested party through the discovery, should also be noted.

The notion of cost shifting, however, should not be limited to the idea that only one of the parties should bear the costs of discovery. The *Sattar* case earlier discussed shows that a court may consider the option of allocating the costs to both parties.<sup>106</sup> Furthermore, while the *Sattar* court considered an equal division of costs, nothing seems to prevent a proportional allocation of costs where the parties capacity to pay such costs will be factored in.<sup>107</sup> Indeed, "cost allocation" may be the proper term for the current issue being discussed, and it is this term that will be used in substitution of the traditional "cost-shifting" reference.

The *Bills* decision shows how the allocation of discovery costs is generally tackled in American courts. Other cases dealing with electronic discovery cost allocation, however, reveal that the issue of allocating costs in electronic discovery was given a distinct treatment that reflects a parallel development in society – the proliferation of computers and its integration into many aspects of human activity. We refer to the two views mentioned earlier, where one view disfavors cost allocation and effectively imposes the costs of electronic discovery to the requested party and the more recent view that does not impose such a heavy presumption against the requested party.

The earlier view is represented by the opinion in the case of *In re Brand Name Prescription Drugs Antitrust litigation*.<sup>108</sup> In this class action, the plaintiffs had requested the production of a large number of e-mails from a defendant drug manufacturer. The costs for the discovery was estimated to reach between \$50,000 and \$70,000 as it will require the drug manufacturer to search, compile, and format responsive e-mails from backup tapes that contained roughly 30 million separate messages. The defendant drug company thus sought an order for the shifting of discovery costs to the plaintiffs.

While the District Court that rendered the Opinion on the above matter went through the traditional cost allocation analysis, anchored on the

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<sup>106</sup> *Sattar v. Motorola, Inc.*, 138 F. 3d 1164, 1171 (7th Cir. 1998).

<sup>107</sup> *Id.*

<sup>108</sup> 1995 WL 360526 (N.D.Ill. June 15, 1995).

proportionality principle embodied in Rule 26 (c), the Court made the following remarks in reaching its conclusion not to shift all but the \$ 0.21 per page cost of copying e-mail messages the requesting party selects:

"Central to any determination of whether a cost should be shifted to a producing party is the issue of whether the expense or burden is 'undue.' In the context of the retrieval and production of computer-stored information issues of 'undue burden' become complicated. On the one hand, it seems unfair to force a party to bear the lofty expense attendant to creating a special computer program for extracting data responsive to a discovery request. *On the other hand, if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk.* Faced with considerations similar to the ones presently confronting us, the United States Court of International Trade remarked:

"It would be a dangerous development in the law if new techniques for easing the use of information became a hindrance to discovery or disclosure in litigation. The use of excessive technical distinctions is inconsistent with the guiding principle that information, which is stored, used, or transmitted in new forms, should be available through discovery with the same openness as traditional forms.

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"The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship."

*Daewoo Electronics Co. v. United States*, 650 F.Supp. 1003, 1006 (Ct.Int'l Trade 1986).<sup>109</sup>

The reasoning in the above quoted opinion has been criticized for failing to realize that the use of computer technology has become a matter of necessity rather than choice. By imposing costs of electronic discovery on the requested party on the ground that "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk," the requested party seems to be penalized for employing computer technology. The aversion to this reasoning will be appreciated if we realize how commonplace computers have been and how it has been integrated in almost all human endeavors.<sup>110</sup>

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<sup>109</sup> *Id.* at 2.

<sup>110</sup> MARRON, *op. cit. supra* note 41 at 916-17.

Moreover, anchoring such a rule on the *Daewoo* opinion that was discussed earlier hardly helps in quelling this criticism of the *In re Brand Name Prescription Drugs* opinion. It will be recalled that the excerpt quoted from the *Daewoo* opinion was used in a different context, i.e. to resolve whether or not the requesting party had the right to copies of both the raw and processed data that was the subject of the discovery.<sup>111</sup> A long stretch of reasoning seems to be required for the *Daewoo* opinion, which was concerned with discoverability of different forms of related information, to be able to justify effectively imposing electronic discovery costs on the requested party simply because the said party chose to store and use information in electronic form. By invoking *Daewoo* to reach the conclusion that traditional discovery rules are to be applied to electronic discovery, the court in fact begged the cost-shifting question raised by the defendant.

This view expressed in *In re Brand Name Prescription Drugs* opinion was repudiated later on by District Courts in other jurisdictions. The first to do so was the District Court for the District of Columbia in its August 1, 2001 opinion in the employment retaliation case of *McPeck v. Ashcroft*<sup>112</sup> where the court was concerned with cost allocation in discovery that entailed recovering information stored in back-up tapes. The discussion of the court is extensively quoted because aside from rejecting the *In re Brand Name Prescription Drugs* approach, it gives a useful discussion of the nature of back-up tapes, which is often the subject of discovery requests upon institutional parties such as corporations and government agencies. More importantly, it offers an analysis of the cost allocation issue from an "economic perspective" as well as an interesting "test run" approach in arriving at a cost allocation decision, demonstrating the wide discretion given to judges in determining cost issues in discovery. The court's cost allocation analysis is reproduced below:

"Using traditional search methods to locate paper records in a digital world presents unique problems. In a traditional "paper" case, the producing party searches where she thinks appropriate for the documents requested under Fed.R.Civ.P. 34. She is aided by the fact that files are traditionally organized by subject or chronology ("chron" files), such as all the files of a particular person, independent of subject. Backup tapes are by their nature indiscriminate. They capture all information at a given time and from a given server but do not catalogue it by subject matter.

"Unlike a labeled file cabinet or paper files organized under an index, the collection of data by the backup tapes in this case was random. It must be remembered that the DOJ's use of a backup "synch" software system was not for the purpose of creating a perfect mirror image of each

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<sup>111</sup> *Daewoo Electronics Company, Ltd. v. United States*, 650 F.Supp. 1003 (Ct. Int'l Trade 1986).

<sup>112</sup> 202 F.R.D. 31 (D.D.C. 2001).

user's hard drive. Instead, the system was designed to prevent disaster, i.e., the destruction of all the data being produced on a given day if the network system crashed. Once the day ended and the system had not crashed, the system administrator could breathe a sigh of relief. x x x

"It is therefore impossible to know in advance what is on these backup tapes. There is a theoretical possibility that there may be something on the tapes that is relevant to a claim or defense, for example, a subsequently deleted e-mail that might be evidence of a retaliatory motive. That possibility exists because other information establishes that the persons, who the plaintiff claims retaliated against him used their computers for word processing and e-mail, and the backup tapes may have captured what those persons have since deleted from their computer files.

"DOJ has chosen not to search these backup tapes and therefore runs the risk that the trial judge may give the jury an instruction that this failure to search permits the inference that the unfound files would contain information detrimental to DOJ. Conversely, the trial judge may ultimately determine that an instruction should not be given, and therefore DOJ lacks any incentive to conduct a search. Given the potential costs involved, a defendant may be more than willing to decline to search the backup tapes and take the chance that either the court will not give such an instruction at trial, or that if such an instruction is given, defendant will still prevail. In any event, a substantial number of civil cases settle and discovery advances the prospects of settlement. Any potential advancement of settlement would be foregone if the defendant has the option of choosing not to do the search and there is good reason to think that information on the backup tapes might induce one party or the other to settle.

"There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case. The Federal Rules of Civil Procedure do not require such a search, and the handful of cases is idiosyncratic and provides little guidance. The one judicial rationale that has emerged is that producing backup tapes is a cost of doing business in the computer age. In re Brand Name Prescription Drugs, 1995 WL 360526 at \* 3 (N.D.Ill., June 15, 1995). *But, that assumes an alternative. It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer, which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly or monthly basis. What alternative is there? Quill pens?*

*"Furthermore, making the producing party pay for all costs of restoration as a cost of its "choice" to use computers creates a disincentive for the requesting party to demand anything less than all of the tapes. American lawyers engaged in discovery have never been accused of asking for too little. To the contrary, like the Rolling Stones, they hope that if they ask for what they want, they will get what they need.*

They hardly need any more encouragement to demand as much as they can from their opponent.

"The converse solution is to make the party seeking the restoration of the backup tapes pay for them, so that the requesting party literally gets what it pays for. Those who favor a "market" economic approach to the law would argue that charging the requesting party would guarantee that the requesting party would only demand what it needs. Under that rationale, shifting the cost of production solves the problem. Note, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 Cardozo L.Rev. 1379 (2000) .

"But, there are two problems with that analysis. First, a strict cost-based approach ignores the fact that a government agency is not a profit-producing entity and it cannot be said that paying costs in this case would yield the same "profit" that other foregone economic activity would yield. Additionally, the government, which has no fewer rights than anyone else, has to insist that its employees do the restoration lest confidential information be seen by someone not employed by the government who has no right to see it. The reality, therefore, is that a government employee will be diverted from his ordinary duties to search backup tapes. When employees are thus diverted from their ordinary duties, the function of the agency suffers to the detriment of the taxpayers. Moreover, if government agencies are consistently required to pay for the restoration of backup tapes, they may be sorely tempted not to have such systems. There lies disaster; one shudders to think what would happen if the computer system at the Social Security Administration crashed and there was no backup system. While the notion that government agencies and businesses will not have backup systems if they are forced to restore them whenever they are sued may seem fanciful, courts should not lead them into temptation.

"Second, if it is reasonably certain that the backup tapes contain information that is relevant to a claim or defense, shifting all costs to the requesting party means that the requesting party will have to pay for the agency to search the backup tapes even though the requesting party would not have to pay for such a search of a "paper" depository.

*"A fairer approach borrows, by analogy, from the economic principle of "marginal utility." The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the government agency search at its own expense. The less likely it is, the more unjust it would be to make the agency search at its own expense. The difference is 'at the margin.'*

"Finally, economic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent "undue burden or expense". Fed.R.Civ.P. 26(c) . If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single e-mail. That is an awfully expensive needle to justify searching a haystack. It must be recalled that ordering the

producing party to restore backup tapes upon a showing of likelihood that they will contain relevant information in every case gives the plaintiff a gigantic club with which to beat his opponent into settlement. No corporate president in her right mind would fail to settle a lawsuit for \$100,000 if the restoration of backup tapes would cost \$300,000. While that scenario might warm the cockles of certain lawyers' hearts, no one would accuse it of being just.

*"Given the complicated questions presented, the clash of policies and the lack of precedential guidance, I have decided to take small steps and perform, as it were, a test run.* Accordingly, I will order DOJ to perform a backup restoration of the e-mails attributable to Diegelman's computer during the period of July 1, 1998 to July 1, 1999. I have chosen this period because a letter from plaintiff's counsel to DOJ, complaining of retaliation and threatening to file an administrative claim, is dated July 2, 1998, and it seems to me a convenient and rational starting point to search for evidence of retaliation. I have chosen e-mail because of its universal use and because I am hoping that the restoration will yield both the e-mails Diegelman sent and those he received.

"The DOJ will have to carefully document the time and money spent in doing the search. It will then have to search in the restored e-mails for any document responsive to any of plaintiff's requests for production of documents. Upon the completion of this search, the DOJ will then file a comprehensive, sworn certification of the time and money spent and the results of the search. Once it does, I will permit the parties an opportunity to argue why the results and the expense do or do not justify any further search.<sup>113</sup>

The second repudiation of the *In re Brand Name Prescription Drugs* approach in electronic discovery cost-shifting analysis was in the January 16, 2002 Memorandum and Order of the District Court for the Southern District of New York in the case of *Rowe Entertainment v The William Morris Agency*.<sup>114</sup> More importantly perhaps, it sets forth a balancing approach in cost allocation analysis, enumerating and discussing eight factors that should be considered. The relevant excerpts from the said Memorandum and Order are quoted below:

"The more difficult issue is the extent to which each party should pay the costs of production. "Under [the discovery] rules, the presumption is that the responding party must bear the expense of complying with discovery requests [.]" *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) . Nevertheless, a court may protect the responding party from "undue burden or expense" by shifting some or all of the costs of production to the requesting party. *Id.* (citing Fed.R.Civ.P. 26(c) ). Here, the

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<sup>113</sup> *McPeck v. Ashcroft*, 202 F.R.D. 31, 32-35 (D.D.C. 2001).

<sup>114</sup> 205 F.R.D. 421 (S.D.N.Y. 2002).



expense of locating and extracting responsive e-mails is substantial, \*even if the more modest estimates of the plaintiffs are credited. Therefore, it is appropriate to determine which, if any, of these costs, are "undue," thus justifying allocation of those expenses to the plaintiffs.

"1. *Production*

"One line of argument, adopted by the plaintiffs, holds that the responding party should bear the costs of producing electronic data since "if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk." *In re Brand Name Prescription Drugs Antitrust Litigation*, Nos. 94 C 897, MDL 997, 1995 WL 360526, at \*2 (N.D. Ill. June 15, 1995) ; see also *Daewoo*, 650 F.Supp. at 1006 ("The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship."). But even if this principle is unassailable in the context of paper records, it does not translate well into the realm of electronic data. *The underlying assumption is that the party retaining information does so because that information is useful to it, as demonstrated by the fact that it is willing to bear the costs of retention.* That party may therefore be expected to locate specific data, whether for its own needs or in response to a discovery request. With electronic media, however, the syllogism breaks down because the costs of storage are virtually negligible. *Information is retained not because it is expected to be used, but because there is no compelling reason to discard it. And, even if data is retained for limited purposes, it is not necessarily amenable to discovery.* Back-up tapes, for example, are not archives from which documents may easily be retrieved. The data on a backup tape are not organized for retrieval of individual documents or files, but for wholesale, emergency uploading onto a computer system. Therefore, the organization of the data mirrors the computer's structure, not the human records management structure, if there is one. Kenneth J. Withers, "Computer-Based Discovery in Federal Civil Litigation," SF97 ALI-ABA 1079, 1085 (2001); see also *McPeck v. Ashcroft*, 202 F.R.D. 31, 32 (D.D.C.2001) ("The purpose of having a backup system and retaining the tapes was to permit recovery from a disaster, not archival preservation."). Thus, it is not enough to say that because a party retained electronic information, it should necessarily bear the cost of producing it.

"The contrary argument is that the requesting party should bear the burden since, when the costs of discovery are internalized, that party can perform a cost-benefit analysis and decide whether the effort is justified. See Marnie H. Pulver, "Electronic Media Discovery: The Economic Benefit of Pay-Per-View," 21 Cardozo L.Rev. 1379, 1424 (2000) . Yet, this "market" approach has two shortcomings. First, it flies in the face of the well-established legal principle, cited above, that the responding party will pay the expenses of production. Second, it places a price on justice that will not always be acceptable: it would result in the abandonment of meritorious claims by litigants too poor to pay for necessary discovery.

*"Because of the shortcomings of either bright-line rule, courts have adopted a balancing approach taking into consideration such factors as: (1) the specificity of the discovery requests; (2) the likelihood of discovering critical information; (3) the availability of such information from other sources; (4) the purposes for which the responding party maintains the requested data (5) the relative benefit to the parties of obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party. Each of these factors is relevant in determining whether discovery costs should be shifted in this case.*

*"a. Specificity of Requests*

*"The less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that party. See In re General Instrument Corp. Securities Litigation, No. 96 C 1129, 1999 WL 1072507, at \*6 (N.D.Ill. Nov. 18, 1999) (denying motion to compel production of e-mails where requesting parties "have not identified any specific factual issue for which additional discovery would help them prove their case"). Where a party multiplies litigation costs by seeking expansive rather than targeted discovery, that party should bear the expense.*

*"As noted above, the plaintiffs' demands in this case are extremely broad. They stand in sharp contrast to cases such as Daewoo where the court declined to shift costs. There the plaintiff sought only specific data sets that were utilized in the administrative review that resulted in the challenged governmental order. Daewoo, 650 F.Supp. at 1004-05. Similarly, in McPeck the court did not shift costs but required production of only the e-mails of specific persons who purportedly retaliated against the plaintiff. 202 F.R.D. at 33. Here, the plaintiffs' requests are far more nebulous, a factor that favors shifting the costs of discovery to them.*

*"b. Likelihood of a Successful Search*

*"In McPeck, the court utilized the concept of marginal utility in determining whether to shift costs:*

*"The more likely it is that the backup tape contains information that is relevant to a claim or defense, the fairer it is that the [responding party] search at its own expense. The less likely it is, the more unjust it would be to make [that party] search at its own expense. The difference is "at the margin."*

*202 F.R.D. at 34. Here, there is a high enough probability that a broad search of the defendants' e-mails will elicit some relevant information that the search should not be precluded altogether. However, there has certainly been no showing that the e-mails are likely to be a gold mine. No witness has*

testified, for example, about any e-mail communications that allegedly reflect discriminatory or anti-competitive practices. Thus, the marginal value of searching the e-mails is modest at best, and this factor, too, militates in favor of imposing the costs of discovery on the plaintiffs.

*"c. Availability From Other Sources*

"Some cases that have denied discovery of electronic evidence or have shifted costs to the requesting party have done so because equivalent information either has already been made available or is accessible in a different format at less expense. In Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ. 2120, 1996 WL 22976, at \*1 (S.D.N.Y. Jan. 23, 1996), the defendant had already produced the requested data in hard copy. However, the plaintiff sought the same information in electronic form, presumably to facilitate computerized analysis. While recognizing that prior production in one form did not foreclose the plaintiff's demand, the court held that "[i]f plaintiff wants the computerized information, it will have to pay defendants' reasonable costs of creating computer programs to extract the requested data from defendants' computers." *Id.* Similarly, in Williams v. E.I. du Pont de Nemours & Co., 119 F.R.D. 648, 649-50 (W.D.Ky.1987), the defendant had originally supplied data to the EEOC, a plaintiff in the action, in hard copy form, and then demanded disclosure of the computer files created by the agency from that data. The court granted the discovery, but required the defendant to pay a reasonable share of the costs that the EEOC had incurred in formulating the database. *Id.* at 651.

"In the instant case there has been no showing that the defendants' e-mails are generally available other than by a search of the defendants' hard drives or back-up tapes. The representations that "important" e-mails were probably printed out are entirely speculative. Accordingly, this consideration favors requiring the defendants to produce the e-mails at their own expense.

*"d. Purposes of Retention*

"If a party maintains electronic data for the purpose of utilizing it in connection with current activities, it may be expected to respond to discovery requests at its own expense. Under such circumstances, the guiding principle is that "information which is stored, used, or transmitted in new forms should be available through discovery with the same openness as traditional forms." Daewoo, 650 F.Supp. at 1006. A party that expects to be able to access information for business purposes will be obligated to produce that same information in discovery.

"Conversely, however, a party that happens to retain vestigial data for no current business purposes, but only in case of an emergency or simply because it has neglected to discard it, should not be put to the expense of producing it. In this case, the back-up tapes clearly fall into this category. There is no evidence that the defendants themselves ever search these tapes for information or even have a means for doing so. Cost-shifting is therefore

warranted with respect to the back-up tapes. *See Withers, supra*, at 1085 ("retrieving documents from backup tapes may be conditioned on the requesting party paying some or all of the costs").

"The same is true of e-mails which, although deleted from the user's active files, remain on the hard drive. "Aside from the occasional practice of 'dumpster diving,' the discovery of deleted computer documents does not have a close analogue in conventional, paper-based discovery." *Id.* Just as a party would not be required to sort through its trash to resurrect discarded paper documents, so it should not be obligated to pay the cost of retrieving deleted e-mails. Thus, since there has been no showing that the defendants access either their back-up tapes or their deleted e-mails in the normal course of business, this factors tips in favor of shifting the costs of discovery to the plaintiffs.

"To be sure, some users may store recent e-mails in electronic files for ease of access. Such files would presumptively be discoverable at the expense of the producing party. But in this case, it is likely that those costs would be swamped by the expense of obtaining deleted or backed up data.

*"e. Benefit to the Parties*

"Where the responding party itself benefits from the production, there is less rationale for shifting costs to the requesting party. *See Bills, 108 F.R.D. at 464.* Such a benefit could come in one of two forms. First, the process of production could have collateral benefits for the responding party's business. For example, a computer program created to conduct a search for purposes of discovery could also be useful in the regular activities of the business. Second, the responding party may benefit in litigation from the review of its own records.

"Neither circumstance is present here. Since the computer data at issue is not regularly used by the defendants, cataloguing or searching it would have little business value to them. Similarly, recovery of e-mail will not benefit the defendants in this litigation since the e-mails are not relevant to any issue on which the defendants bear the burden of proof. The situation might be different if there were a universe of data that either party might be able to use to support its position: for example, hiring or promotion statistics in an employment discrimination case. But that is not the case here, and the absence of any benefit to the defendants makes cost-shifting more appropriate.

*"f. Total Costs*

"If the total cost of the requested discovery is not substantial, then there is no cause to deviate from the presumption that the responding party will bear the expense. *See Oppenheimer Fund, 437 U.S. at 361-62, 98 S.Ct. 2380; Anti-Monopoly, 1996 WL 22976, at \*2 ; Bills, 108 F.R.D. at 464.* In *Oppenheimer Fund*, the Supreme Court found that "a threshold expense of \$16,000 ...

hardly can be viewed as an insubstantial burden," even for a defendant with assets exceeding one-half billion dollars. 437 U.S. at 361- 62, 98 S.Ct. 2380. In Anti-Monopoly, the court considered costs of \$1,680 to one defendant and \$5,000-6,000 to another to be sufficiently significant to warrant cost-shifting. 1996 WL 22976, at \*2. Here, the costs of the proposed discovery would be substantial by any definition. Even the plaintiffs project that the costs for WMA would be between \$24,000 and \$87,000, for Monterey between \$10,000 and \$15,000, for CAA between \$60,000 and \$70,000, and for SFX and QBQ approximately \$64,000. The magnitude of these expenses favors cost-shifting.

*"g. Ability to Control Costs*

"The plaintiffs have professed an ability to limit the costs of discovery of e-mails to a much greater extent than defendants. Of course, this factor alone does not dictate cost-shifting; the defendants could be required to pay the bill for the less expensive methodologies proposed by the plaintiffs. However, where the discovery process is going to be incremental, it is more efficient to place the burden on the party that will decide how expansive the discovery will be. *Cf. Bills*, 108 F.R.D. at 464 (declining to shift costs where "[t]he relative expense and burden in obtaining the data would be substantially greater to the requesting party as compared with the responding party"). The plaintiffs here will be able to calibrate their discovery based on the information obtained from initial sampling. They are in the best position to decide whether further searches would be justified. *See McPeck*, 202 F.R.D. at 33-34 (requiring producing party to pay all costs is disincentive to requesting party to narrow its demands). This consideration, then, also militates in favor of cost-shifting.

*"h. The Parties' Resources*

"Finally, the ability of each party to bear the costs of discovery may be an appropriate consideration. *See Oppenheimer Fund*, 437 U.S. at 361-62, 98 S.Ct. 2380; *Bills*, 108 F.R.D. at 464. In some cases, the cost, even if modest in absolute terms, might outstrip the resources of one of the parties, justifying an allocation of those expenses to the other. But in this case, all parties have sufficient resources to conduct this litigation. Although the plaintiffs argue that the defendants are some of the most powerful players in the concert promotion business, the plaintiffs purport to be able to compete with them in the marketplace. The relative financial strength of the parties, then, is at most a neutral factor.

"The relevant factors thus tip heavily in favor of shifting to the plaintiffs the costs of obtaining discovery of e-mails in this case. The protocol to be followed will be addressed below.<sup>115</sup>

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<sup>115</sup> *Id.* at 428-32.

This discussion of discovery cost allocation began with some of Judge Francis' thoughts on the matter. The discussion also draws to an end with a more vivid view of the issue courtesy of Judge Francis who wrote the order in the *Rowe, Inc. v. William Morris Agency, Inc.* case discussed above with its eight-point balancing test for electronic discovery cost allocation questions. In the event that Philippine courts encounter such issues, it has been demonstrated that a number of relevant American court rulings may serve to guide our courts. In resolving such questions, a court's discretion should be guided by the cost allocation factors identified and considered in these rulings in order to arrive at a just and equitable allocation of the expenses of electronic discovery.

Cost allocation in electronic discovery cases will be an important area of concern because, as mentioned earlier, the willingness of parties and lawyers to avail of and comply with discovery will depend in a significant way on the costs it will entail. A reasonable allocation of discovery costs will go a long way in sustaining interest in electronic discovery once it takes root in this country.

### III. SOME PARTING WORDS

The rough map of the realm of electronic discovery provides possible solutions for various problems. While it cannot answer all questions, the student and practitioner of the law can be encouraged by the thought that they can learn from those who have ventured ahead into the realm of electronic discovery. Such encouragement, perhaps, has been the underlying goal of this work.

The "old stories," so to speak, of those that have ventured ahead have been told, and like all old stories, lessons can be learned from them. With these lessons hopefully taken to heart, it is hoped that for each step taken, a continuing and better understanding of the realm of electronic discovery is attained.