



**Research Article**

**WILL AN E- DISCOVERY REQUEST WILL CAUSE AN “UNDUE BURDEN”?**

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**ABSTRACT**

The purpose of this essay is to describe the legal and technological issues surrounding e-discovery. The paper briefly examines *United States ex rel. McBride v. Halliburton*, 272 F.R.D. 235 (D.D.C. 2011), where the case outlines five criteria that can be used in deciding whether an e-discovery effort should be conducted. The document then discusses the implications of the five balancing criteria in some depth, including the Electronic Discovery Reference Method. The paper concludes by suggesting that by adhering to a proven methodology, it is more than likely that e-discovery can become a manageable project, rather than unmanageable wild animal.

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**INTRODUCTION**

When is a lot too much? With the promulgation of massive amounts of electronic data, society in general, and the legal system, in particular, are in a quandary as to how to glean relevant material. With the morass of emails, documents, spreadsheets, presentations, and documentaries, it is difficult to gather the desired information in a format that is both easy to collect and then to digest and assimilate. These days, discovering pertinent information is like finding a small needle in a giant haystack with a weak magnet.

Although not the only occupation facing this predicament, the legal profession is plagued by the issue’s ramifications. The rules of civil and criminal procedure demand that the parties have access to appropriate evidence, thereby ensuring that justice is exacted. Years ago, before the age electronic age and in the infancy of computers, documents were precious things, recorded on paper which had the permanency of years. This was when this author was a young adult in the 1970s. At that time, computer printouts had all of the sophistication of a table, not the kind of table that one eats off of, but a table of data with row after row and column after column.

Times have changed. Today, data has taken on an endless number of forms. In the days of yesteryear, it was seemingly unthinkable to foresee the pervasive manner in which human beings are communicating with each other. Today, we experience our fellow creatures with cell phones and miniature

computers in their hand, holdables that are seemingly essential in navigating in a world gone electronic. Each one of these devices has the capability of storing and accessing gigabytes, if not terabytes and beyond, of data that can be employed for a variety of reasons. One can no longer traverse from the steps of one’s adobe to the edifice where one earns one’s daily bread without being connected to an electronic world known as the Internet. And things are getting faster with each passing day as electronic holdables make way for electronic wearables which in turn will yield in the upcoming years to insertables that will eventually marry the carbon flesh of human beings with the silicon machines of computers.

For the legal profession, all of this data must necessarily be accessible when parties are engaged in litigation. The reasons are that the law is a system whose goal is the ruthless pursuit of truth employing the principles of fairness and relevancy to ensure that proper party hopefully prevails. One such case that addressed the burden of sifting immense quantities of data is *McBride v. Halliburton*, 272 F.R.D. 235 (D.D.C. 2011). In this case, the court opined that under the Federal Rule of Civil Procedure (“FRCP”) 26(b)(2)(C) there was a balance between the utility of fact-based discovery versus costs of obtaining relevant evidence.<sup>1</sup> In *McBride*, the defendant possessed far greater financial resources than the plaintiff, spending over

<sup>1</sup>Ben Kerschberg, *The Five Hottest Topics in E-Discovery Today*, FORBES (May 02, 2011), available at <https://www.forbes.com/sites/benkerschberg/2011/05/02/the-five-hottest-topics-in-e-discovery-today/#1b312d58526e>.

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\$650,000 in legal expenses, excluding attorney fees.<sup>2</sup> In 1995, data collection was located offsite, and overseas employees were used to collecting 15-20 gigabytes of data per custodian with a transmission time averaging between two and ten days.<sup>3</sup> Once the data was available for analysis, de-duplication followed by searches for relevance to decide whether any privileges could be asserted, at the time the task before the defendant was modernly equivalent of the cleaning of the Augean stables in a single day by Hercules. The court observed that demonstrating the significance of unknown emails, let alone finding them, cannot be justified.<sup>4</sup>

If anything can be learned from this case, it is that there the following five questions that courts should necessarily attempt to answer:

1. Why will discovery be expensive?
2. Where is the data?
3. What processes are necessary to review the data?
4. What needs to be done to preserve the data?
5. How many hours will it take to review the produced documents?<sup>5</sup>

The responses to these questions are not an indictment against discovery. There is sufficient legal precedent to ensure parties conduct an unbiased review of the relevant information, even if the review is somewhat burdensome.<sup>6</sup> The fact of the matter is that *McBride* began in 2005 and is 14 years old. In 2005, the Internet was experiencing growing pains, where 15 to 20 gigabytes of data were considered to be a large virtual mountain. Today, 15 to 20 gigabytes of data is more than a manageable amount of data. In 2019, the average clock speed of a computer is approximately 3.6 gigahertz (“GHz”),<sup>7</sup> with 16 gigabytes of random-access memory, and contains hard drives with a storage capacity of one terabyte (i.e., 1,000 gigabytes).<sup>8</sup> In coming to grips with current e-discovery statistics, it has been noted that current average of data available for e-discovery consists of five to 15 custodians per matter with five to 20 gigabytes to be examined by each custodian.<sup>9</sup> In other words, the range of data accessible for e-discovery is at a minimum of 50 gigabytes to over 300 gigabytes of data or between 3.3 million pages to over 20 million pages of Microsoft Word documents.<sup>10</sup> In physical dimensions, this volume of data is equivalent 1,205 feet of sheets of paper to 6,450 feet of pages of paper, or a stack of

paper 1.17 miles high.<sup>11</sup> As one can readily see, 15 to 20 gigabytes of data pales in comparison.

### *United States ex rel. McBride v. Halliburton*

Before responding to the five questions listed above, a brief analysis of *McBride* is in order. This analysis will employ the IRAC methodology, where a summary of the facts of the case will be presented before the analysis is communicated. Thus, without further ado, let us begin. The original case was brought by Julie McBride, a relator, against Halliburton Co. and other corporate defendants, including the company that McBride worked for, Services Employees International, Inc. The defendants provided support services to the military in Iraq, working as a Morale, Welfare, Recreation (“MWR”) direction. McBride claimed among other things that the defendants inflated headcounts or situation reports of individuals using its MWR facilities in Iraq and then billed the government based on these inflated numbers.<sup>12</sup>

From an e-discovery perspective, the point was whether the benefits and utility of discovery were justified when compared to its costs, even when the discovery is likely to yield relevant evidence. FRCP 26(b) (2)(C) states that when required: “[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- i. the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- ii. the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- iii. the proposed discovery is outside the scope permitted by Rule 26(b)(1).<sup>13</sup>

Here, McBride wanted to amend her complaint so that her specific claims as to Camps C2 and C5 and any modification of the period for which she seeks damage.<sup>14</sup> McBride wanted to take the current information obtained in discovery and combine with the sought after details so that she could create a table or a chart with the name of the employee and the Bates number of Amount paid to Line item of invoice relevant invoice employee reflecting the payment.<sup>15</sup> McBride desired to show that each payment was a false claim and that the table would simplify the presentation of the evidence.<sup>16</sup> In highly educational and useful detail, McBride explained how the process of collecting data from a corporation occurs, including ghosted images of hard drives, copies of electronic data at different points in time (e.g., audits, inquiries, and litigation), and employee mailboxes and personal network folders.<sup>17</sup>

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

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

<sup>4</sup>*Id.*

<sup>5</sup>*Id.*

<sup>6</sup>*Id.*

<sup>7</sup>Matt Safford, How to Buy the Right CPU: A Guide for 2019, TOM’S HARDWARE (June 15, 2019), available at <https://www.tomshardware.com/reviews/cpu-buying-guide,5643.html>.

<sup>8</sup>Mark Kyrnin, How Fast Does Your PC Really Need to Be? LIFEWIRE (June 13, 2019), available at <https://www.lifewire.com/how-fast-does-your-pc-need-to-be-832310>.

<sup>9</sup>Kristin Kolasinski, E-Discovery Fact Week Day Four: Examining E-Discovery Data Volumes, EXTERRO (July 26, 2018), available at <https://www.exterro.com/blog/e-discovery-fact-week-day-four-examining-e-discovery-data-volumes/>

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*

<sup>12</sup>*United States ex rel. McBride v. Halliburton Co.*, No. 05-CV-828, 2007 WL 1954441, at \*1-2 (D.D.C. July 5, 2007).

<sup>13</sup> Legal Information Institute Staff, *Rule 26. Duty to Disclose; General Provisions Governing Discover*, LEGAL INFORMATION INSTITUTE (n.d.), available at [https://www.law.cornell.edu/rules/frcp/rule\\_26](https://www.law.cornell.edu/rules/frcp/rule_26).

<sup>14</sup>*United States ex rel. McBride v. Halliburton*, 272 F.R.D. 235 (D.D.C. 2011)

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

The court observed that all discovery is “subject to the court's obligation to balance its utility against its cost.” See FRCP 26(b) (2) (C).<sup>18</sup> In particular, the court considered whether: “(1) the discovery sought is unreasonably cumulative or duplicative, or obtainable from a cheaper and more convenient source; (2) the party seeking the discovery has had ample opportunity to obtain the sought information by earlier discovery; or (3) the burden of the discovery outweighs its utility.”<sup>19</sup>

**Thus, the court decided that it should ruminates about the**

1. Needs of the case;
2. Amount in controversy;
3. Parties' resources;
4. Importance of the issues at stake in the action; and
5. Significance of the discovery in resolving the problems.<sup>20</sup>

Given these criteria, the court initially indicated that the balance favored McBride because what she was asserting was that the defendant committed fraud against the United States government.<sup>21</sup> However, when the court balanced the financial burden that had already been levied against Halliburton (i.e., \$650,000 not including attorney fees), the court opined that the balance favored the defendant. In conclusion, McBride's motion for additional discovery was denied.

### **The Meaning of the Five Criteria**

In the introduction of this essay, five questions were listed, with the understanding that *McBride* provided a balancing test that can be effectively employed in future cases where e-discovery and FRCP 26(b)(2)(C) is at issue. In this section of this paper, each one of the questions will be discussed in turn in some detail.

#### ***Why will discovery be expensive?***

According to the American College of Trial Lawyers and the University of Denver's Institute for the Advancement of the American Legal System (“IAALS”), the civil justice system in America is significantly hindered by a morass that is overly expensive for parties to take their cases to trial.<sup>22</sup> The IAALS surveyed over 3,800 members, concluding that:

1. Court pleading and the Federal Rules of Civil Procedure are commonly used as leverage to force a settlement, rather than move a case to trial;
2. Judges do not do enough to limit discovery, particularly e-discovery which can be quite expensive; and
3. The current works well for individual tort claims but is cumbersome for mass tort claims, ERISA cases, administrative law actions, etc.<sup>23</sup>

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Martha Neil, *Litigation Too Costly, E-Discovery a 'Morass,' Trial Lawyers Say*, ABA JOURNAL (September 09, 2008), available at [http://www.abajournal.com/news/article/litigation\\_too\\_costly\\_e\\_discovery\\_a\\_morass\\_trial\\_lawyers\\_say](http://www.abajournal.com/news/article/litigation_too_costly_e_discovery_a_morass_trial_lawyers_say).

<sup>23</sup> *Id.*

According to the IAALS survey, if the FRCP were changed so that the costs of discovery were proportionate to the dispute (i.e., attorney's fees, expert costs, document costs, etc.), judges would then be willing to control a case from the beginning to the end more closely.<sup>24</sup> However, the survey lamented that to do so would require a significant increase in judicial resources.<sup>25</sup>

According to the IAALS, the issue is a benefit-cost problem, where the focus is getting the biggest e-discovery bang per buck. The question from the plaintiff's perspective is that he or she does not know what information is essential unless the defendant discloses it. Plaintiffs are by no means omniscient. Also, defendants, particularly corporations, loathe engaging in transparency unless forced to do so by a court. It is the nature of the capitalist system in which we live that companies hide information. It should be remembered that the purpose of a corporation is to maximize shareholder value,<sup>26</sup> not to be fair or honest, both of which are obligations of the legal system. In the United States, corporations are run in an amoral manner whose sole purpose is to maximize profits, or equivalently, minimize costs.<sup>27</sup> The Hegelian conflict between the judicial system that seeks fairness and hopefully justice and the capitalist economic market system that promotes shareholder value über alles has yet to demonstrate the dialectics of synthesis.

With the advent of massive flash drives (e.g., 128 to 256 - gigabyte of storage) and portable hard disks over one terabyte (i.e., 1,000 gigabytes or one million megabytes) there is little or no reason why the storage medium should be an issue. One possible way to resolve this apparent contradiction is for a plaintiff to request from a defendant using search criteria that have been successful in the past. Another suggestion with long-term ramifications is that judges and attorney should spend time learning the nuances of information technology. Understandably, the legal profession may believe that such efforts are best left to technical experts, but in the opinion of this author, the long-term benefits will exceed the costs. Finally, as e-discovery tools become more sophisticated and wide-spread, the costs of e-discovery should decline. It is a matter of economies of scale; as technical knowledge diffuses into the legal profession, the costs will drop for the simple reason that more effective mechanisms will be used to the advantage of all parties.

#### ***Where is the data?***

Several years ago, there was a commercial on television where the punch line was: “Where's the beef?” Years ago, companies would purchase or lease a computer and the associated storage mediums, typically either an International Business Machines (“IBM”) mainframe for most significant corporations or a Digital Equipment Corp. (“DEC”) VAX minicomputer for more modest-sized organizations. The firm's data processing department exclusively controlled a company's data. The computers stored data employing an Indexed Sequential Access Method (“ISAM”) program purchased by the hardware

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Dodge v. Ford Motor Company*, 204 Mich. 459, (Mich. 1919).

<sup>27</sup> PAUL KRUGMAN AND ROBIN WELLS, *ECONOMICS* 4th ed., (Worth Publishers 2015).

manufacturer or a network or relational database system also leased by the hardware manufacturer or by a third-party vendor. The data structures varied widely, depending on the software application and the data that the company desired to store. There was rarely any data-structure overlap from company to company. Each organization usually developed its software with the idea that an application would address the unique needs of the firm. From an e-discovery perspective, where one of the goals is to reduce costs, this was an impossible situation. Every time a new case was litigated, a unique analysis of a company's data structures had to be done. There was no such thing as taking advantage of a learning curve or returns to scale.

However, with the advent of the cloud, the archaic data storage methods of the past are quickly dying an ignominious death. To reduce costs, currently, over one exabyte of data are stored on the cloud, where one exabyte equals 1,024 petabytes equals 1,073,741,824 gigabytes.<sup>28</sup> Čandrić observed that by 2016, more than 50 percent of all data created by individuals and corporations would be stored on the cloud.<sup>29</sup> As of 2019, even more, data will reside in the cloud.

The advantage of cloud storage is that data from different individuals and different organizations will be stored in databases employing common data structures. With this commonality becoming the data storage solution of choice, any distinctions that would necessarily increase e-discovery costs will disappear over time. Another advantage of cloud computing from an e-discovery perspective is that cloud companies will tend to merge taking advantage of economies of scale. Although the price of data storage will increase as the cloud computing market evolves into an oligopoly,<sup>30</sup> the benefit to this evolution is that e-discovery will become less expensive because litigants overcoming nuanced data structures will spend less money. As corporations employ similar data structures to minimize their costs when communicating with vendors and customers in a business-to-business ("B2B"), the value of accessing data for litigation purposes will decline.

#### **What processes are necessary to review the data?**

In 2008, the Great Recession (a.k.a., Great Depression II) occurred. Law firms were forced to find ways to save money to survive. A 2012 study by Rand Corporation, *Where the Money Goes*, discovered that outside counsel usually expended approximately 70 percent of total e-discovery expenditures, while vendors and service providers accounted for another 26 percent.<sup>31</sup> Although there is probably no correct way to engage in e-discovery, some of the factors that influence e-discovery include:

1. Size and nature of the company;
2. Industry; and

#### 3. Data infrastructure.<sup>32</sup>

When discussing e-discovery, no explanation would be complete without talking about the Electronic Discovery Reference Model ("EDRM") created in 2005 e-discovery experts and consultants, George Socha and Tom Gelbman.<sup>33</sup> The purpose of EDRM was to provide a visual process for e-discovery activities.<sup>34</sup> The EDRM has the following nine distinct stages that indicate the sequential and iterative features of e-discovery:

**Information Governance** – Organizing electronic information to mitigate risks and expenses associated with e-discovery from the initial creation of electronically stored information ("ESI") through its final disposition;

**Identification** – Locating sources of ESI and determining its scope, breadth, and depth;

**Preservation** – Ensuring that ESI is protected against inappropriate alteration or destruction;

**Collection** – Gathering ESI to be used in further ESI processing;

**Processing** – Reducing the volume of ESI by converting it, to forms more suitable for review and analysis;

**Review** – Evaluating ESI for relevance and privilege.

**Analysis** – Evaluating ESI for content and context, such as patterns, topics, people and discussion;

**Production** – Delivering ESI to other individuals in the appropriate form and delivery method; and

**Presentation** – Displaying ESI at depositions, hearings, trials, "etc". especially in native & near-native forms, to obtain additional information.<sup>35</sup>

#### **Contrary to the zealot in us all. EDRM has several limitations, including**

1. The EDRM is a framework for implementing an e-discovery process;
2. As technology advances, some parts of EDRM may become obsolete; and
3. There are essential e-discovery processes that have been left out of the EDRM.

Finally, it should be remembered that e-discovery is a business process.<sup>36</sup> It is a project and should be managed like any other project, using the project management methodologies espoused by the Project Management Institute.<sup>37</sup>

<sup>32</sup> *Id.*

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

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* and Duke Law Staff, *EDRM Model*, DUKE LAW (n.d.), <http://www.edrm.net/frameworks-and-standards/edrm-model/>.

<sup>36</sup> *exterro Staff, supra* note 31.

<sup>37</sup> *Id.* and A GUIDE TO THE PROJECT MANAGEMENT BODY OF KNOWLEDGE (PMBOK GUIDE) 4th ed., PROJECT MANAGEMENT INSTITUTE (2008). The nine project management knowledge areas include (1) Project Integration Management, (2) Project Scope Management; (3) Project Time Management, (4) Project Cost Management, (5) Project Quality Management, (6) Project Human Resource Management, (7) Project Communications Management, (8)

<sup>28</sup> Goran Čandrić, *How Much Is Stored in the Cloud?*, GLOBAL DOTS (April 03, 2013), *available* at <https://www.globaldots.com/how-much-is-stored-in-the-cloud/>.

<sup>29</sup> *Id.*

<sup>30</sup> PAUL KRUGMAN AND ROBIN WELLS, *supra* note 28.

<sup>31</sup> *exterro Staff*, Chapter 1: The Basics of E-Discovery, EXTERRO (n.d.), *available* at <https://www.exterro.com/basics-of-e-discovery/e-discovery-process/>

The FRCP contains several rules that are relevant to the e-discovery process, including:

• **FRCP 16** – Requires that attorneys enter pretrial conferences informed and prepared to discuss their client's IT and data environment, thereby properly scope e-discovery processes;

**FRCP 26** – Requires parties ensure that their discovery requests reasonable and proportional to the issues at hand;

**FRCP 34** – Establishes a structured way to prevent and resolve e-discovery disputes; and

**FRCP 37** – Gives judges the power to sanction parties for failing to produce relevant documents, while describing situations where parties cannot be punished for failing to produce ESI.<sup>38</sup>

#### ***What needs to be done to preserve the data?***

According to WhatIs.com, data preservation is the “active safekeeping of digitally stored information.”<sup>39</sup> Data preservation consists of a formalized effort using the library and archival sciences to ensure that information is “safe from medium failures as well as software and hardware obsolescence.”<sup>40</sup>

Data is growing at an exponential rate. From a practical perspective, not all data should and ought to be preserved. However, from a legal point of view, the opposite is the order of the day. According to Fran Berman, director of the San Diego Supercomputer Center (SDSC) at the University of California, the following ten tips should be implemented to preserve data:

1. Establish a detailed plan for the preservation of data;
2. data costs including hardware, software, support, and time;
3. Associate metadata with its data;
4. Make multiple copies of valuable data;
5. Plan for digital data being stored on other storage media;
6. Plan for the eventual change in data stewardship;
7. Determine the level of trust required when selecting how to archive data;
8. Tailor preservation and access plans to the specific needs of users;
9. Pay attention to security; and
10. Know the regulations, and in the case of e-discovery, the FRCP, Federal Rules of Criminal Procedure (“FRCrP”) and the appropriate state rules.<sup>41</sup>

#### ***How many hours will it take to review the produced documents?***

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Project Risk Management, and (9) Project Procurement Management.

<sup>38</sup> *exterro Staff, supra* note 32.

<sup>39</sup> *Data Preservation*, WHATIS.COM (n.d.), available at <https://whatis.techtarget.com/definition/digital-preservation>.

<sup>40</sup> *Id.*

<sup>41</sup> Jon Brodtkin, *10 tips to preserve data for the long haul*, NETWORK WORLD (December 18, 2008), available at <https://www.networkworld.com/article/2270968/10-tips-to-preserve-data-for-the-long-haul.html>

This is a hard question to answer. The trite answer to the matter is that the number of hours should be long enough to perform the e-discovery process thoroughly, and short enough to be cost-effective.

In 1988, the author was hired as a consultant team leader of the quality assurance effort for Prime Computer Inc.'s (“Prime”) COBOL85 compiler development project. The individual contributor consultants were having difficulty estimating how long it would take to write a series of COBOL85 test cases and then install the approved test cases into the testbed. The problem that the consultants experienced was that they were being paid on a per milestone basis, where a milestone had previously taken eight weeks or more to complete. Both the client and the consultants were not happy.

When the author arrived at Prime, the author immediately set out to discover the process of creating an average single COBOL85 test case. The average time was eight hours per approved test case. This time had to be reduced by three hours per approved test case. The author received pushback from the consultants and the client because they both believed that calculating an average time was not reasonable due to the number of lines of source code in a COBOL85 test case varied widely. Undaunted, the author took a sample of the test bed and counted the number of lines of source code in each one of the programs. The total number of source code lines were then divided by the number of programs in the sample, providing a representative estimate of the number of lines of source code in the average test bed program.

The next step was to find the individual programs in the sample that contained approximately the same number of lines of source code as the calculated average. Once these programs were identified, a detailed analysis was conducted, where the key statistic was the number of hours that were expended in writing the selected programs. With this information firmly in hand, the author was able to estimate the number programs that should be in a milestone of an approximate length of six weeks, where the expected hours expended was five person-hours per approved test case. As for the accuracy of the estimate, over a none month period, the estimate of the length of time in a milestone was off by at most one day, where a milestone contained approximately 100 test cases.

As for an e-discovery process, it is the author's opinion that a similar technique could be employed in determining the length of time to expend on e-discovery. The author understands and appreciates the skepticism of attorneys and clients. It should be remembered that attorneys and clients are not statisticians. Statistics is a potent tool when used appropriately and not abused. The author is well versed in statistics. The case study above demonstrates the validity of the methodology.

#### **CONCLUSION**

In conclusion, this essay has demonstrated that e-discovery is not necessarily as daunting as it is purported to be. If proper methodologies are employed and proper tools are used, it is the opinion of this author that e-discovery is a manageable endeavor. In the experience of the author, problems arise when individuals deviate from a reliable methodology due to their collective skepticism. This is a mistake, and the consequences in litigation can be severe. In this author's mind, staying on target and holding on to the iron rod of established methodologies is the key to success. Nothing else will suffice.