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Which Party Pays the Costs of Document Disclosure?

Patrick M. Connors*

Surprisingly, the question posed in the title to this piece is not well settled under New York law. CPLR Article 31, which governs disclosure in New York State courts, is somewhat reticent on the subject.¹ It is a credit to the bench, the bar, and Article 31's flexibility that this issue has not generated more case law and controversy. During the first four decades of the CPLR's reign, most parties to litigation were apparently able to amicably resolve disputes concerning who was to shoulder the costs of document disclosure.² Typically, each party paid their respective costs associated with production and rarely sought judicial intervention to resolve the occasional dispute.³

In the twenty-first century, however, disclosure of electronically stored information has become an integral part of litigation, and the concomitant costs of document production have skyrocketed.⁴ Litigants in cases involving substantial "e-disclosure" now commonly prevail on the New York State courts to resolve the issue of who should pay the costs of this expensive undertaking, and recently there have even been disputes in

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1. See N.Y. C.P.L.R. art. 31.

2. See generally DAVID D. SIEGEL, NEW YORK PRACTICE § 353 (4th ed. 2005).

3. *Id.*

4. See generally AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FINAL REPORT ON THE JOINT PROJECT 2 (2009), available at <http://www.actl.com/AM/Template.cfm?Section=home&template=/CM/ContentDisplay.cfm&ContentID=4053> (noting the difficulties and costs associated with electronic disclosure, and stating that "discovery can cost far too much and can become an end in itself").

cases involving disclosure of paper documents.⁵ This article explores the development of a questionable rule cited by several New York State tribunals in allocating the costs of document disclosure, while suggesting that the courts adhere to CPLR Article 31's more flexible approach.

It is helpful to begin the discussion in an area of clarity. When disclosure is sought from a nonparty witness under CPLR 3120(1), CPLR 3122(d) acknowledges that there may be significant expense involved.⁶ Implicitly recognizing that a nonparty should not be burdened with the costs of another's litigation, this subsection unequivocally requires that the reasonable production expenses of a nonparty witness be defrayed by the party seeking the disclosure.⁷

Unfortunately, in situations where one party seeks production of "documents or any things" from another,⁸ Article 31 is far less clear on the issue of who should bear the initial costs of production. No provision in this expansive article expressly states which party is responsible for the costs of production incurred in response to a demand under CPLR 3120. However,

5. *See infra* notes 54-62 and accompanying text. *See also In re Link*, N.Y. L.J., Apr. 20, 2009, at 28, col. 1 (Sur. Ct.) (denying trustee's motion to compel production of documents in paper form and allowing objectants to produce documents in native electronic format).

6. N.Y. C.P.L.R. 3122(d) (McKinney 2004).

7. *Id.* Prior to the addition of CPLR 3122(d) in 2003,

when a court order was required to obtain documents from a nonparty pursuant to CPLR 3120, the court provided for the payment of production expenses right in the order. This ensured that the nonparty was on notice that the party seeking the documents ultimately had to pay for their production or copying. CPLR 3122(d) does not require the party to inform the nonparty of its obligation to defray the costs of production, which could lead to some mischief. To avoid any accusations in this regard, the party should be certain to notify the nonparty in writing that it has the obligation to pay for the reasonable production costs. The subpoena would be the ideal place to communicate this information. A failure in this regard might tend to make a court hesitant to enforce the subpoena.

PATRICK M. CONNORS, PRACTICE COMMENTARIES, MCKINNEY'S CONS. LAWS OF N.Y., Book 7B, CPLR C3122:4 (2004).

8. N.Y. C.P.L.R. 3120(1)(i) (McKinney 2004). The courts have interpreted the language in this provision, requiring the production of "any designated documents or any things," to include any relevant electronically stored information. *See Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062, at *7 (Sup. Ct. Aug. 18, 2004). *See also Etzion v. Etzion*, 796 N.Y.S.2d 844, 846 (Sup. Ct. 2005) ("Courts have held that the contents of a computer are analogous to the contents of a filing cabinet." (citing *Byrne v. Byrne*, 650 N.Y.S.2d 499, 500 (Sup. Ct. 1996))).

subsection (a) of CPLR 3103, Article 31's protective order provision, provides that a "court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device."⁹ An order issued under CPLR 3103(a) must be "designed to prevent unreasonable annoyance, *expense*, embarrassment, disadvantage, or other prejudice to any person or the courts."¹⁰ This provision begs the question of which party, in the first instance, is obligated to pay the costs associated with a disclosure request.

Professor Siegel has observed that a CPLR 3103(a) protective order can be issued to "balance the situation in which a disparity in the economic resources of the parties is disabling one from participating in the disclosure process or empowering another to take undue advantage of it."¹¹ While the court has the power under this statute to order one party to shoulder any expenses associated with an adversary's disclosure,¹² Professor Siegel notes that "this is not a favored step . . ."¹³ The "judicial preference" is to require the parties to individually pay their own costs associated with the disclosure process and to ultimately allow the party prevailing on the merits to tax such expenses as disbursements and recover them from the losing side.¹⁴

In *Lipco Elec. Corp. v. ASG Consulting Corp.*,¹⁵ the first detailed opinion in the New York State court system addressing electronic disclosure, the court observed that "[e]lectronic discovery raises a series of issues that were never envisioned by

9. N.Y. C.P.L.R. 3103(a) (McKinney 2004).

10. *Id.* (emphasis added).

11. SIEGEL, *supra* note 2, § 353, at 578.

12. *See* N.Y. C.P.L.R. 3103(a).

13. SIEGEL, *supra* note 2, § 353, at 578.

14. *Id.* *See also* N.Y. C.P.L.R. 8301(a) (McKinney 1981) ("A party to whom costs are awarded in an action or on appeal is entitled to tax his necessary disbursements for . . . such other reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court."). CPLR Article 31 provides an express rule for the costs incurred in connection with a deposition, noting that "[u]nless the court orders otherwise, the party taking the deposition shall bear the expense thereof." N.Y. C.P.L.R. 3116(d). However, there is no parallel rule addressing the expenses incurred in connection with disclosure of "documents and things" under CPLR 3120.

15. No. 8775/01, 2004 WL 1949062 (Sup. Ct. Aug. 18, 2004).

the drafters of the CPLR.”¹⁶ Noting that “[t]he cost of providing computer records can be rather substantial,” in part because they are normally maintained for far longer periods than paper records,¹⁷ the court concluded that, under the CPLR, “the party seeking discovery should incur the costs incurred in the production of discovery material.”¹⁸ Unfortunately, the two decisions relied upon by the *Lipco* court to support this proposition are far from definitive on such a monumental point.

The *Lipco* court cited *Schroeder v. Centro Pariso Tropical*,¹⁹ a short memorandum opinion from the Second Department, which briefly noted in a one-sentence paragraph that a defendant in the litigation was not required “to help [a third party defendant] defray the costs of its own discovery.”²⁰ In the second case relied upon in *Lipco*, *Rubin v. Alamo Rent-a-Car*,²¹ one of only two cases cited in that portion of *Schroeder* addressing disclosure expenses,²² the trial court directed the plaintiffs to bear the costs of redaction and reproduction of documents sought by a defendant.²³ Implementing the procedure most commonly followed under the CPLR up until that time, the trial court in *Rubin* noted that it would tax any costs in connection with the reproduction should the plaintiff ultimately prevail.²⁴ The Appellate Division in *Rubin*, however, reversed this aspect of the trial court’s order, holding that “‘each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their reproduction.’”²⁵

16. *Id.* at *6.

17. *Id.* at *8.

18. *Id.* at *9.

19. 649 N.Y.S.2d 820 (App. Div. 1996).

20. *Id.* at 821.

21. 593 N.Y.S.2d 284 (App. Div. 1993).

22. See 649 N.Y.S.2d at 821 (citing *Rubin*, 593 N.Y.S.2d at 284-86; *Rosado v. Mercedes-Benz of N. Am.*, 480 N.Y.S.2d 124, 125-27 (Sup. Ct. 1984)).

23. 593 N.Y.S.2d at 285.

24. *Id.*

25. *Id.* at 286 (alteration omitted) (quoting *Rosado*, 480 N.Y.S.2d at 126). While *Rubin* can be read to support the proposition that the party seeking disclosure has an obligation to pay for both the cost of reproduction of documents and redaction of privileged information from those documents, the decision has been appropriately interpreted to be limited to the former obligation. See *Fletcher v. Atex, Inc.*, 156 F.R.D. 45, 50 n.4 (S.D.N.Y. 1994) (“As for expenses of redaction, it is not at all clear that *Rubin* stands for the proposition that the cost of redaction—

In so holding, the *Rubin* court relied upon and quoted *Rosado v. Mercedes-Benz of North America*,²⁶ a 1984 Second Department case in which the plaintiff sought an English translation of a German brochure produced by the defendant during disclosure but published by a nonparty to the action.²⁷ In *Rosado*, the Second Department concluded that CPLR 2101(b), which requires that papers “served and filed be in the English language,”²⁸ does not require a party to translate foreign language documents it produces in disclosure.²⁹ The court also held that CPLR 3120, which generally provides for disclosure of relevant “documents and things,”³⁰ cannot be construed to compel a party “to create new documents or other tangible items in order to comply with particular discovery applications.”³¹

In determining which party should bear the costs of translation, the *Rosado* court relied upon “the general assumption enunciated by our brethren in the First Circuit, namely, that each party should shoulder the initial burden of financing his own suit, and based upon such a principle, it is the party seeking discovery of documents who should pay the cost of their translation.”³² The *Rosado* court also based its holding on

rather than of copying—may be imposed on the discovering party.”); *Waltzer v. Tradescape & Co.*, 819 N.Y.S.2d 38, 40 (App. Div. 2006) (“The cost of an examination by defendants’ agents to see if [documents sought by plaintiff in disclosure] should not be produced due to privilege or on relevancy grounds should be borne by defendants.”).

26. 480 N.Y.S.2d 124.

27. *Id.* at 125. *Rosado* is the second and only other decision, aside from *Rubin*, cited in that portion of *Schroeder* addressing expenses of disclosure. See *Schroeder*, 649 N.Y.S.2d at 821 (citing *Rubin*, 593 N.Y.S.2d at 284-86; *Rosado*, 480 N.Y.S.2d at 125-27).

28. N.Y. C.P.L.R. 2101(b) (McKinney 1997).

29. 480 N.Y.S.2d at 125-26.

30. N.Y. C.P.L.R. 3120(1)(i) (McKinney 2004).

31. *Rosado*, 480 N.Y.S.2d at 126. The *Rosado* court explained that “only presently existing items within a party’s possession, custody or control are susceptible to an application for production.” *Id.*

32. *Id.* at 126 (citing *In re P.R. Elec. Power Auth.*, 687 F.2d 501, 507-09 (1st Cir. 1982)). On closer inspection, it does not appear that *In re Puerto Rico Electric Power Authority* actually supports the proposition that *Rosado* cites to it for authority. In *In re Puerto Rico Electric Power Authority*, the First Circuit actually stated that

[t]o be sure, the respondent is expected to accept the initial expense of producing its own documents, answering interrogatories, and submitting to depositions. But if the discovery requests threaten to impose “undue burden or expense” upon a respondent, the district courts are specifically empow-

CPLR 3114,³³ which requires the party seeking a deposition of one who does not understand the English language to bear the cost of the translation of all questions and answers and to pay the cost of any experts necessary to assist the court in the settlement of questions in a foreign language.³⁴

In addition to citing *Rosado*, the *Rubin* court also included *Wiseman v. American Motors Sales Corp.*³⁵ as a “see also” authority to support the proposition that a party seeking disclosure of documents should pay the costs of reproduction.³⁶ Upon close examination, however, *Wiseman* does not support such a blanket rule. In *Wiseman*, the defendant moved under CPLR 3108 for a commission to take the deposition in Missouri of a deputy sheriff who had authored an accident report relevant to the plaintiff’s claim.³⁷ Recognizing that “oral interrogation is a more effective method for eliciting information at an examination before trial,”³⁸ the Second Department concluded that the defendant could proceed by “open commission” to seek an oral examination of the witness in Missouri.³⁹ On the issue of expense, the *Wiseman* court observed that the record was “devoid of any proof that plaintiff would not have an equal opportunity to examine and cross-examine the witness in Missouri” if his disclosure expenses were not defrayed by the defendant.⁴⁰ Therefore, the court concluded that the expenses incurred in connection with the oral deposition in Missouri were to be borne

ered to enter protective orders conditioning the request or requiring the requesting party to pay the expenses of production.

687 F.2d at 507.

33. 480 N.Y.S.2d at 126 (citing N.Y. C.P.L.R. 3114 (McKinney 2004)).

34. N.Y. C.P.L.R. 3114.

35. 479 N.Y.S.2d 528 (App. Div. 1984).

36. See *Rubin v. Alamo Rent-A-Car*, 593 N.Y.S.2d 284, 286 (App. Div. 1993) (citing *Wiseman*, 479 N.Y.S.2d at 536).

37. 479 N.Y.S.2d at 530.

38. *Id.* at 536.

39. *Id.* CPLR 3108 authorizes a commission to examine a witness out of the State through oral questions (open commission) or written questions (sealed commission). See CONNORS, *supra* note 7, § C3108:5 (“[W]hile for reasons of economy the written questions are preferred for out-of-state questioning, the questioning can be oral if the court so directs.”).

40. 479 N.Y.S.2d at 536. In reaching this conclusion, the court was implicitly referring to its authority under CPLR 3103(a) to shift costs in disclosure and actually cited to the Practice Commentaries to this provision. *Id.*

“by the respective parties and said expenses may be taxed as disbursements by the prevailing litigant.”⁴¹

Based on the above history, it is apparent that the rule enunciated in *Lipco*—that “the party seeking discovery should incur the costs incurred in the production of discovery material”⁴²—traces back to the 1984 opinions in *Rosado* and *Wiseman*. Neither of these decisions, however, actually support such a blanket proposition. The *Rosado* court reached the eminently sensible conclusion that a party seeking disclosure of foreign language documents must shoulder the cost of their translation,⁴³ but it did not specifically address who should pay the costs of production.⁴⁴ In *Wiseman*, the Second Department required both parties to pay their own travel costs in connection with the deposition of a nonparty outside the state,⁴⁵ while noting that these expenses could be recouped by the prevailing party as a disbursement.⁴⁶ That result, while certainly reasonable under the facts of *Wiseman*, provides scant authority for the proposition delineated in *Lipco*.

Although the New York courts never clearly established the uniform rule stated in *Lipco*, and the text of the CPLR does not support it,⁴⁷ several recent decisions have stated the proposition in the context of requests for disclosure of paper documents and electronically stored information. For example, in *Waltzer v. Tradescape & Co.*,⁴⁸ the First Department observed that “as a general rule, under the CPLR, the party seeking discovery should bear the cost incurred in the production of discovery ma-

41. *Id.* See also *Bottalico v. Seaboard Coast Line R.R.*, 305 N.Y.S.2d 1021, 1021 (App. Div. 1969) (“If plaintiffs elect to examine by open commission, the parties shall pay their respective expenses, which shall be taxed as costs by the prevailing party.”); *CONNORS*, supra note 7, § C3108:5 (noting that when the court orders an open commission, “[t]he expenses are usually borne by the respective parties . . . , but the court under CPLR 3103(a) can direct the party who wishes the oral examination outside the state to pay the expenses of the other side in order that the latter have an equal opportunity to examine and cross-examine the witness.”).

42. No. 8775/01, 2004 WL 1949062, at *9 (Sup. Ct. Aug. 18, 2004).

43. *Rosado v. Mercedes-Benz of N. Am.*, 480 N.Y.S.2d 124, 126 (App. Div. 1984).

44. See *id.* at 125-27.

45. 479 N.Y.S.2d at 536.

46. *Id.*

47. See supra notes 6-14 and accompanying text.

48. 819 N.Y.S.2d 38 (App. Div. 2006).

terial”⁴⁹ In affirming the order striking the defendants’ answer pursuant to CPLR 3126(3), based, in part, on their failure to produce electronically stored documents,⁵⁰ the court noted that the defendants could not excuse their “willful and contumacious” failure merely because the plaintiff did not agree to pay the costs of providing the documents.⁵¹ Rather, “when the parties disagreed as to the form of discovery of the two CDs containing the 160,000 pages, defendants could and should have asked the court to resolve the issue.”⁵² While the *Waltzer* court states the same blanket rule enunciated in *Lipco*, it declines to actually apply it and opts for a more flexible approach that essentially requires the parties to seek judicial intervention in the event of a disagreement on the issue of which party should pay the upfront costs of disclosure.⁵³

In *Vinings Spinal Diagnostic v. Progressive Casualty Insurance Co.*,⁵⁴ the plaintiff sought a copy of an assignor’s no-fault file that was in the defendant’s possession.⁵⁵ The defendant did not dispute that the documents were relevant but refused to provide them unless the plaintiff paid the cost of reproducing

49. *Id.* at 40. The court indicated that this “general rule” might not be applicable in *Waltzer* because the disclosure request did not require “the retrieval of deleted electronically stored material, the data sought was on two CDs and readily available. The cost of copying and giving them to plaintiff would have been inconsequential.” *Id.* See also *In re Maura*, 842 N.Y.S.2d 851, 859 (Sur. Ct. 2007) (“The CPLR provides that the party seeking discovery should incur the costs incurred in the production of discovery material.” (citing *Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062, at *9 (Sup. Ct. Aug. 18, 2004))); *Etzion v. Etzion*, 796 N.Y.S.2d 844, 847 (Sup. Ct. 2005) (“Under the CPLR, the party seeking discovery should incur the costs in the production of discovery material.”).

50. 819 N.Y.S.2d at 40.

51. *Id.* at 39.

52. *Id.* at 40.

53. See *id.* at 39-40. Any motion relating to disclosure must be accompanied by “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a) (2009). “The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.” *Id.* § 202.7(c).

54. 829 N.Y.S.2d 871 (Dist. Ct. 2006), *appeal dismissed*, No. 2007-582NC, 2008 WL 2814831 (App. Term July 10, 2008).

55. *Id.* at 871.

them.⁵⁶ The plaintiff contended that if the court ordered it to pay the reproduction costs, the ruling would “set a precedent on both the plaintiff’s and defendant’s bar to charge each other for the cost of reproduction of documents.”⁵⁷ The District Court cited CPLR 3103(a) and acknowledged it had broad discretion “to set the terms and conditions of discovery,”⁵⁸ but ultimately invoked “the rule in the Second Department,” as stated in *Rubin, Schroeder, and Lipco*, and required the plaintiff to pay the reproduction costs.⁵⁹ Declaring that it could exercise its “protective powers under CPLR 3103(a) in cases where there is a disparity in the parties’ economic resources, or where the expense of the disclosure greatly exceeds the small monetary recovery sought by the party,”⁶⁰ the court concluded that there was no basis in the case for departing from “the precedent and general rule in th[e] [Second] Department.”⁶¹ The court also confirmed, as noted above, that “the legislature contemplated that the party who ultimately prevails on the merits is permitted at that later time to tax as disbursements the expenses incurred in connection with disclosure and recover them from the losing side.”⁶²

56. *Id.* The court acknowledged the surprising lack of clarity in this area, stating that

the parties could not resolve their dispute over a narrow question which is discussed daily between practitioners in this field but apparently has not been officially reported upon in New York: does the plaintiff have to pay the defendant for the cost incurred by the defendant in copying its no-fault file?

Id. at 871-72.

57. *Id.* at 872.

58. *Id.* (citing N.Y. C.P.L.R. 3103(a) (McKinney 2004)). CPLR 3103 applies in the District Court. N.Y. UNIFORM DIST. CT. ACT § 1101(c) (McKinney 1989).

59. *Vinings*, 829 N.Y.S.2d at 872 (citing *Schroeder v. Centro Pariso Tropical*, 649 N.Y.S.2d 820, 821 (App. Div. 1996); *Rubin v. Alamo Rent-a-Car*, 593 N.Y.S.2d 284, 285-86 (App. Div. 1993); *Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062, at *9 (Sup. Ct. Aug. 18, 2004)).

60. *Id.* at 873.

61. *Id.* *But see* *Town of Eastchester v. Shawn’s Lawns, Inc.*, 858 N.Y.S.2d 358, 359 (App. Div. 2008) (“The [Supreme Court] also providently exercised its discretion in directing [the plaintiffs] to pay the cost of [defendant’s disclosure request]. While the general rule is that a party should shoulder the initial burden of financing his or her own lawsuit, here, based upon the circumstances surrounding discovery, the [plaintiff] should have sought a protective order pursuant to CPLR 3103(a).” (citation omitted)).

62. 829 N.Y.S.2d at 873 (citing N.Y. C.P.L.R. 8301(a) (McKinney 1981)).

The pronouncement in *Lipco* that “the party seeking discovery should incur the costs incurred in the production of discovery material,”⁶³ which has now been subscribed to by several courts,⁶⁴ should be reexamined for several reasons. As noted above, the text of the CPLR does not support it,⁶⁵ and the case law cited in *Lipco* does not establish such a blanket proposition.⁶⁶ Furthermore, the rule detracts from the unique flexibility of Article 31, which is eminently desirable in this context.⁶⁷

At first blush, a rule requiring the party seeking disclosure to pay the costs associated with it appears to best promote efficiency. If a party knows it will be required to defray any costs attributable to its own disclosure request, it will have a strong incentive to limit the scope of its demands and thereby avoid unnecessary expense. While this is generally true, it places only a minimal stimulus on the party producing the material to maintain the documents in a manner that simplifies their retrieval and production. Furthermore, the producing party has little incentive to minimize the cost of retrieval and reproduction. This can be particularly important in a case requiring disclosure of significant amounts of electronically stored information where a third party is often required to assist with the production.

The system is better served if each party operates under the assumption that it will be required to pay any costs associated with the production of documents. While a party seeking disclosure could always make a motion under CPLR 3103(a) to request that the court depart from any governing rule,⁶⁸ these motions will become far more common if New York State courts are governed by the rule espoused in *Lipco*. Under *Lipco*'s rule, only minimal inducement exists for the producing party to

63. *Lipco*, 2004 WL 1949062, at *9.

64. See *supra* notes 48-61 and accompanying text. See also *T.A. Ahern Contractors Corp. v. Dormitory Auth.*, 875 N.Y.S.2d 862, 869 (Sup. Ct. Mar. 19, 2009) (applying the *Lipco* rule and refusing to order the production of relevant e-mails and/or electronic documents in the Outlook mailboxes of twenty-seven of the defendant's employees “until such time as [the plaintiff] communicates that it is willing to bear the costs incurred for their production subject to any possible reallocation of costs at trial” (citation omitted)).

65. See *supra* notes 8-14 and accompanying text.

66. See *supra* notes 19-46 and accompanying text.

67. See *supra* notes 8-14 and accompanying text.

68. See N.Y. C.P.L.R. 3103(a) (McKinney 2004).

share in the costs of production prior to a court application. The producing party can simply rely on the rule, refuse to pay any of the costs associated with production, and require the party seeking the disclosure to make an application to the court to deviate from the rule. If the court grants the motion, the producing party will likely be in no worse position than it would have occupied if it originally agreed to pay a portion of the production costs. In sum, if the blanket rule stated in *Lipco* is not hovering over all disclosure disputes, the parties will have greater incentive to resolve disputes without court intervention.

The *Lipco* rule will also generate debate on several collateral issues. In a case in which there is a request for a limited number of hard-copy or electronic documents that are readily identifiable and available, the application of the rule is relatively straightforward.⁶⁹ If, more typically, the documents sought in disclosure are voluminous and contain information protected by a privilege⁷⁰ or by the work-product doctrine,⁷¹ there will be costs associated with interposing appropriate objections, redacting the information, and assembling a privilege log.⁷² There may also be significant costs associated with or-

69. Under the rule stated in *Lipco*, the party seeking the documents merely pays the costs of reproduction. See *Lipco Electrical Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062, at *6 (Sup. Ct. Aug. 18, 2004). The *Lipco* court noted, however, that

[c]ustomarily, [with traditional paper discovery] if the volume of documents demanded is small, the party upon whom the demand is made copies the documents and serves them upon the party demanding discovery. If the demanded documents are voluminous, the party responding to the demand advises the party demanding the documents that the documents are available for review, identification and copying at the demander's expense.

Id.

70. See N.Y. C.P.L.R. 3101(b) (McKinney 2004) ("Upon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable.").

71. See N.Y. C.P.L.R. 3101(d)(2) (granting a qualified immunity for material "prepared in anticipation of litigation or for trial").

72. See N.Y. C.P.L.R. 3122(a) (McKinney 2004) (requiring a party or person objecting to a demand under CPLR 3120 or 3121 to, among other things, "state with reasonable particularity the reasons for each objection"); N.Y. C.P.L.R. 3122(b) ("Whenever a . . . person withholds one or more documents that appear to be within the category of the documents required by [a notice, subpoena, or order] to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld" and provide, among other things, "the legal ground for withholding each such document . . .").

ganizing and labeling documents “to correspond to the categories in the request,” if a party desires to produce them in this fashion.⁷³ Finally, there may be substantial costs and fees incurred in defending a motion to compel production of documents.⁷⁴ Can the party responding to a disclosure request in this scenario attempt to pass off all of these costs to the party seeking the information on the ground that they were “incurred in the production of discovery material”?⁷⁵

It is respectfully submitted that the disclosure process will function more efficiently and fairly without a general rule requiring the party seeking “documents or any things”⁷⁶ to bear the costs of production. The parties should be encouraged to discuss issues concerning the costs of disclosure at the earliest possible opportunity and certainly at the preliminary conference.⁷⁷ If agreement cannot be reached, either party can move

73. N.Y. C.P.L.R. 3122(c) (“Whenever a person is required . . . to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.”). These problems expand in the age of electronic disclosure. The documents may still be on a hard drive or may be on some form of backup that may be difficult to retrieve. Some documents may have been deleted. Furthermore, the software that was used to create and store the documents may no longer be commercially available.

74. N.Y. C.P.L.R. 3122(a) (“The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.”).

75. *Lipco Elec. Corp. v. ASG Consulting Corp.*, No. 8775/01, 2004 WL 1949062, at *9 (Sup. Ct. Aug. 18, 2004).

76. N.Y. C.P.L.R. 3120(1)(i) (McKinney 2004).

77. See N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12 (2009). The 2006 amendments to the Federal Rules of Civil Procedure require the parties to meet and confer prior to a Rule 16 Pretrial Conference to discuss “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” FED. R. CIV. P. 26(f)(3)(C). This new provision was designed to require the parties to attempt to reach agreement on issues regarding electronic disclosure at the earliest possible stages of the litigation. See FED. R. CIV. P. 26, Notes of Advisory Committee on 2006 Amendments. The New York City Bar Association has proposed that Uniform Rule 202.12, entitled “Preliminary Conference,” be amended to include a specific provision requiring the “establishment of the method and scope of any electronic discovery” to be considered at the preliminary conference. See Letter from Andrea Masley, Chair, Comm. on State Courts of Superior Jurisdiction, to Members of the N.Y. State Admin. Bd., N.Y. State Office of Court Admin. (Dec. 28, 2007), *available at* <http://www.nycbar.org/pdf/report/bar%20comm%20ediscovery%20ltr.pdf>. Rule 8 of the Uniform Rules of the Commercial Division contains similar requirements and, according to the

for a protective order under CPLR 3103(a) to request that the court balance any perceived disparity.⁷⁸ In the absence of a general rule similar to the one stated in *Lipco*, there will be more incentive on the parties to reach an agreement without court intervention. Finally, the prevailing party can always attempt to recover any expenses incurred in disclosure by seeking to tax them as costs at the conclusion of the matter.⁷⁹

New York City Bar, “this rule has worked well in the Commercial Division and should be adopted state-wide.” *Id.*

On March 20, 2009, the Chief Administrative Judge amended Uniform Rule 202.12 to, among other things, require courts to consider issues pertaining to electronic disclosure at the Preliminary Conference. N.Y. COMP. CODES R. & REGS. tit. 22, § 202.12(c)(3). Under the revised rule, “[w]here the court deems [it] appropriate,” it may prescribe

the method and scope of any electronic discovery, including but not limited to (a) retention of electronic data and implementation of a data preservation plan, (b) scope of electronic data review, (c) identification of relevant data, (d) identification and redaction of privileged electronic data, (e) the scope, extent and form of production, (f) anticipated cost of data recovery and proposed initial allocation of such cost, (g) disclosure of the programs and manner in which the data is maintained, (h) identification of computer system(s) utilized, and (i) identification of the individual(s) responsible for data preservation.

Id.

78. N.Y. C.P.L.R. 3103(a) (McKinney 2004). Any motion under CPLR 3103 must be accompanied by “an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.” N.Y. COMP. CODES R. & REGS. tit. 22, § 202.7(a). “The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.” *Id.* § 202.7(c). See also CONNORS, *supra* note 7, § C3103:3A.

79. See N.Y. C.P.L.R. 8301(a) (McKinney 1981).