RECEIVED 12/14/04

Jonathan Redgrave
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12/14/2004 11:07 AM

To Peter_McCabe@ao.uscourts.gov

cc

Subject Request to Testify Regarding Possible Amendments to Federal Rules of Civil Procedure to Address Electronic Discovery Issues

04-CV-048
Request to Testify
2/11 DC

Dear Mr. McCabe:

I write to request the opportunity to testify at the February 11, 2005 public hearing in Washington, D.C. on the proposed amendments to the Federal Rules of Civil Procedure addressing electronic discovery issues.

I also plan to submit written comments to the Committee on or before the February 15, 2005 deadline.

Please provide me with the details regarding the time and place for this hearing at your convenience, and also please let me know if I need to do anything further with respect to this request.

Thank you for your assistance with this matter.

Very truly yours,

Jonathan Redgrave

RECEIVED 2/10/05

04-CV-048
Testimony 2/11 DC

Jonathan Redgrave
<jredgrave@JonesDay.com>
02/09/2005 11:31 PM

To peter_mccabe@ao.uscourts.gov

cc judy_krivit@ao.uscourts.gov, dlevi@caed.uscourts.gov, lee_rosenthal@txs.uscourts.gov

bcc

Subject Submission of Written Comments Regarding Potential Amendments to the Federal Rules of Civil Procedure to Address Electronic Discovery Issue (04-CV-48)

Dear Mr. McCabe:

I write to submit my personal comments regarding potential amendments to the Federal Rules of Civil Procedure to address electronic discovery issues. I will be prepared to address these materials in addition to any questions the Committee may have during my appearance at the hearings scheduled for Friday, February 11, 2005 in Washington, D.C.

Please contact me if you have any difficulty opening the attachments.

Thank you for your attention to this matter.

Very truly yours,

Jonathan Redgrave

(See attached file: Redgrave Comments (02-09-05).pdf)(See attached file: Redgrave Comments - Attachment A (02-09-05).pdf)

Redgrave Comments (02-09-05).pdf

Redgrave Comments - Attachment A (02-09-05).pdf

MEMORANDUM

TO: Committee on Rules of Practice and Procedure, c/o Peter G. McCabe, Secretary

FROM: Jonathan M. Redgrave

DATE: February 9, 2005

RE: Submission of Comments to the Committee on Rules of Practice and Procedure Concerning Potential Amendments to the Federal Rules of Civil Procedure to Address Electronic Discovery Issues

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I write to submit my personal comments regarding the proposed amendments to the Federal Rules of Civil Procedure addressing "electronic discovery" that were published for public comment in August of 2004. The views expressed in this submission are mine alone; they do not represent the views of the law firm where I practice or any of its clients, nor do these comments represent the views of The Sedona Conference, its Working Group on Best Practices for Electronic Document Retention and Production, or any of its participants, members or observers.

I. Observations Regarding Rules Amendment Process for Proposed Rules Changes to Address Electronic Discovery

First, I want to commend the Advisory Committee for the extensive efforts that have been undertaken to study this issue and obtain views from all interested persons. The issues confronted by the Committee include very difficult and complex topics, and different constituencies have presented competing viewpoints as to the proper scope of amendments, if any. The process, in my view, has been fair to all participants, and I submit that the proposals published by the Standing Committee reflect a concerted effort to balance these differing views and propose targeted changes that can improve the procedures governing civil actions.

Second, in many instances I support the proposed rules amendments and accompanying Committee Notes as drafted. In certain circumstances, I disagree with the wording of the rule and/or proposed Committee Note. Some of these disagreements are minor, and others are more substantial. In the section below, I indicate these areas of disagreement and provide an explanation for my suggested revisions that are contained in the attached document.

Third, I have reviewed the submissions to date of a number of individuals that take issue with any rules changes that address electronic discovery issues. One set of commentators argue that any changes simply will make discovery more difficult, will encourage institutional defendants to obstruct discovery and/or will increase motions practice before courts. As detailed

in the section below, I respectfully disagree. Narrowly tailored rules changes and accompanying Committee Notes can provide substantial guidance to parties — both those seeking and those responding to discovery — as well as courts, that can help reduce the number of disputes and the existing uncertainty as to discovery obligations.[1] I also do not believe that any of the proposed rules will encourage, much less endorse, subversion of the discovery process.

Other submissions argue that there are no sufficient distinguishing aspects of electronic discovery to warrant consideration of rule amendments. I also disagree with these submissions. The nature of electronic documents is so different from paper that analogies are often imperfect, and as a result, application of rules devised principally for a paper-dominated discovery world, cannot fully or even adequately accommodate disputes regarding electronic discovery.[2] Likewise, the potential volume of electronic data can pose vexing problems in a wide variety of cases. Without specific and effective limits on the presumptive scope of electronic discovery, there is a substantial risk that litigation will become too burdensome and expensive for all but a handful of litigants. In my view, the proposed amendments provide a reasonable framework to ameliorate this risk.

Yet other submissions appear to take issue with the language that was drafted, arguing that the proposals draw the wrong distinctions, or that they do not provide the best description of the technology. I submit that the Standing Committee cannot wait for perfect language to develop because it never will. There is some element of uncertainty with respect to technological advances to come, yet targeted rules changes that focus on concepts — such as availability — rather than particular technologies or media (such as back-up tapes) provide the necessary flexibility that has been the hallmark of the rules of civil procedure since their genesis. In large part, I believe the proposed rules meet this test.

Finally, a number of submissions seem to approach the issue from both sides of a polemic "individual plaintiff" versus "corporate defendant" view of the issues. With all due respect to those submissions, I think this view of proposed rules changes is inaccurate. In my practice, it is often corporate litigants that are seeking electronic discovery from another company. *See, e.g., Mosaid Technologies Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d. 332, (D.N.J. 2004). In addition, the preservation and production of electronic data, and the consequences of the failure to do so, inescapably affect all sides, regardless of the nature of the controversy or identification of the party. For example, the majority of Americans now own or regularly access a personal

[1] In my practice and in my work with The Sedona Conference's Working Group on Best Practices for Electronic Document Retention and Production, parties, whether they be plaintiff or defendant, institutions or individuals, are encountering issues as to which there is little guidance in the developed law. And, though efforts such as The Sedona Working Group or the ABA's amended Civil Discovery Standards can assist courts and litigants in navigating the current paradigm, those efforts cannot provide the same direction and consistency that can be provided by the rules of civil procedure. This problem is being exacerbated by the proliferation of local rules and standing orders in various federal jurisdictions that can create substantial problems for litigants involved in cases in multiple jurisdictions. Similarly, while many judges are well equipped to employ the existing rules (such as the proportionality test of Rule 26(b)(2)), the lack of extant rule guidance on electronic discovery issues and the likelihood of differing results in various jurisdictions makes reliance on an eventual accretion of *stare decisis* impracticable. The proposed amendments provide a critical bridge between theory and reality in litigation.

[2] Other pertinent distinguishing characteristics of electronic data are set forth in *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004).

computer, and many have a cellular telephone or a personal digital assistant, and/or use one or more third parties (such as Yahoo! or AOL) to manage and host personal data, such as e-mails, instant messages and financial information. It is not difficult to imagine situations where the discovery of information from all of these sources for individuals who are plaintiffs in an employment or tort context may be relevant, but that does not mean it should be routine or that these parties must freeze and preserve it all indefinitely. Instead, this reality highlights a fact that the Advisory Committee has recognized and sought to address — the digital revolution has dramatically altered the way in which information is generated, shared and stored for everyone, and the rules that govern civil actions need to be adjusted to account for some of the more significant aspects of this change.

In short, I submit that rules amendments in this area can provide presumptive guidance for the vast majority of civil cases, with adequate provisions for extraordinary circumstances, that are fully consistent with the ideals of Rule 1 (rules should be administered to "secure the just, speedy, and inexpensive determination of every action"). Moreover, the proposed inclusion of procedures that more specifically address the scope and availability of electronic document discovery, including presumptive limitations on such discovery, is not radical as some suggest but rather entirely consistent with the current construct of the federal rules.[3] Accordingly, subject to the proposed revisions and comments sets forth below, I endorse the draft rules and Committee Notes published by the Standing Committee.

II. Proposed Rule Changes and Comments

In the attached document, I set forth the text of the proposed amended rules and the proposed Committee Notes. I have annotated the text to include proposed additions (in **bold** text) and deletions (in ~~double strikethrough~~ text) that I suggest the Committee consider in its deliberations.

I provide below my comments explaining my positions and the changes that I am suggesting. My comments follow the same order in which the proposed amendments are reflected in the Committee's August 2004 memorandum and the attached document.

A. Rule 16(f)(b) (Pretrial Conferences; Scheduling; Management)

1. I believe the explicit inclusion of electronic discovery issues in proposed Rule 16(b)(5) is appropriate. *See The Sedona Principles* (2004), Principle No. 3 ("Parties should confer early in discovery regarding the preservation and production of electronic data and documents when these matters are at issue in the litigation, and seek to agree on the scope of each party's rights and responsibilities."); *see also* ABA Section of Litigation, Electronic Discovery Task Force, Amendments to the Civil Discovery Standard § 31 (August 2004) ("Discovery Conferences").

[3] For example, depositions presumptively are limited to one day of seven hours, and interrogatories presumptively are limited to 25 in number. *See* Fed. R. Civ. P. 30(d)(2) and 33(a). And, of course, all discovery is subject to the restrictions of Rule 26, including the proportionality test of burden and need of Rule 26(b)(2). Thus, there should be no question that document discovery (electronic or otherwise) is not boundless, and I submit that the focused rules changes that have been proposed will help restore a proper balance of relevance, need and proportionality in the area of electronic discovery.

2. I also believe the reference to a discussion of privilege issues and agreements in proposed Rule 16(b)(6) is appropriate but respectfully submit that the reference in the rule should be more general and that the commentary should be similarly modified.

3. With respect to the text of proposed Rule 16(b)(6), I submit that it would be better to expand the language to "adoption of the parties' agreements regarding assertions of privilege." Under the current rules, it is possible for parties to reach agreements regarding categories of documents that need not be produced or indexed on a privilege log, and it is also possible for parties to agree on procedures by which groups of documents can be logged by category. *See* Rule 26(b)(5) (1993 Advisory Committee Notes); *see also The Sedona Principles* (2004), cmt. 3.b (parties should discuss privilege logs and any unique needs or concerns regarding privilege claims). The rule should be broad enough to encompass these possibilities.

4. With respect to the text of the accompanying proposed Committee Note, I believe the order of the comments regarding assertions of privilege is incorrect. In particular, the proposed note first makes reference to a description of what has become known as the "quick peek" concept. I believe that it is highly unlikely that this procedure will be used in many cases because of the recognized risks and problems with "quick peek" productions.[4] Accordingly, if a "quick peek" option is mentioned at all, it would be better to have it appear last in a list of possible options. The language I suggest in the attached document lists the inclusion of "inadvertent production" agreements as the first item (reflecting the routine use of these agreements in many cases),[5] with a reference to the use of third party neutrals to review documents prior to privilege determination (a modified "quick peek" that has been employed with some frequency through the use of Special Masters and other court-approved or court-appointed personnel) next, followed by a reference to "quick peek" productions to parties, noting the reality that a true "quick peek" by the parties will only be feasible in certain circumstances.[6]

[4] As I noted in a previous submission to the Advisory Committee, the voluntary production of privileged and confidential materials to one's adversary, even in a restricted setting, is inconsistent with the tenets of privilege law that, while varying among jurisdictions, usually require the producing party to meticulously guard against the loss of secrecy for such materials. In addition, despite the strongest possible language in any "quick peek" rule to protect against waiver, there is no effective way to limit the arguments of non-parties regarding the legal effect of the production in other jurisdictions and forums. Furthermore, counsel has an ethical duty to zealously guard the confidences and secrets of the client, and a "quick peek" production could be seen as antithetical to those duties. Moreover, there is a host of issues regarding the possible rights of employees (privacy) and third parties (privacy and commercial trade secrets) that may be implicated in a "quick peek" production. Finally, the "quick peek" production concept (open review of computer systems and files) is inconsistent with the tenet that discovery under Rule 26 should be focused on the claims and defenses of the parties. *See generally The Sedona Principles* (2004), cmt. 10.d. Given these concerns, it is imperative that any inclusion of the "quick peek" concept in the Committee Note should note its limitations and that it should only be used by express voluntary agreement of the parties. It should also be recognized that there are only a limited number of circumstances where the parties will be willing and able to agree to such procedures.

[5] *See The Sedona Principles* (2004), cmt. 10.a; ABA Section of Litigation, Electronic Discovery Task Force, Amendments to the Civil Discovery Standard § 32(b) (August 2004) (2004 Comment).

[6] In light of concerns that have been raised regarding substantive privilege laws (which cannot be abridged, enlarged or modified by the rules under 28 U.S.C. § 2074(b)), I believe it is appropriate to note this specific limitation in the Committee Note so that practitioners are aware of the fact that the rules changes on this issue are procedural in nature. *See* ¶ B.13, *infra*.

B. Rule 26. General Provisions Governing Discovery; Duty of Disclosure

"Two tier" approach

1. The inclusion of a presumptive distinction between accessible and inaccessible data is appropriate in my view. *See The Sedona Principles*, Principles No. 8 ("The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweighs the cost, burden and disruption of retrieving and processing the data from such sources.") and No. 9 ("Absent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.").

2. The language reflecting this presumption should appear preceding the proportionality test of Rule 26(b)(2)(i), (ii), and (iii) because (1) that is more consistent with the structure of the current rule which begins with limitations on other discovery rules (*i.e.*, Rule 30 and Rule 36), and (2) the proportionality test applies to both accessible and inaccessible data. The attached document reflects the re-ordering I propose.

3. The language proposed by the Advisory Committee in the rule and accompanying Committee Note should be modified to <u>exclude</u> a mandatory identification in all cases of inaccessible data that is not subject to discovery. In many cases, there is no need to discuss, much less discover, electronically stored information that is not reasonably accessible. This is true even though practically any organization (both public and private) of any size will have computers that generate shadowed, deleted (but not destroyed), fragmented and maybe even back-up data. To require every case to go into the particulars of electronically stored information, regardless of the need for such inquiry, would substantially increase the costs of discovery for no reason. It is also likely that it could lead to unnecessary motions practice.

4. In short, the current *status quo* of disclosures, under Rule 26 and the pre-trial and discovery conferences under Rule 16 and the "meet and confer" sessions prior to discovery motions, serve as an adequate platform for the discussion of electronically stored information that is not "reasonably accessible" when that is an issue in the case. However, I specifically suggest that the Committee Note be amended to reflect the fact that if the accessibility of electronically stored information is at issue, then it is important for the matter to be raised and addressed in these conferences. Furthermore, this discussion will require the party with such data to be prepared to discuss its identification of data (by type or category) and why it determined it is not reasonably accessible. Ultimately on a motion to compel, the producing party will need to demonstrate to the court why the data at issue is not reasonably accessible and the party seeking discovery will need to show good cause why further discovery is necessary.

5. I also believe it is advisable to include in the Committee Note a more express reference to cost allocation concerning any required retrieval, processing, review and production of inaccessible data. *See The Sedona Principles* (2004), Principle No. 13 ("Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless

the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party."). The attached document contains text I suggest adding for this purpose. However, because cost-shifting and cost-sharing already emanate from the proportionality test of Rule 26(b)(2) and the protections available under Rule 26(c), I do not believe it is necessary to include another reference in the rule itself.

6. The Committee Note should also refrain from making a blanket conclusion that any past access to data renders the presumptive non-discoverability of the rule inapplicable. Organizations routinely test back-up systems to make sure they work in the event of a disaster, and some organizations may have experienced recent computer failures necessitating partial or full tape restorations. It appears patently unfair that such organizations would be deemed to have "accessed" the information and thus be unable to rely on the proposed rule. Indeed, that result would be an anomaly negating much of what the proposed rule is set to accomplish. Instead, to address the legitimate concern raised by some (*i.e.*, that organizations cannot improperly classify materials as "inaccessible" for discovery when they are in fact accessible as the organization usually stores and retrieves data), I suggest that the Committee Note reflect the importance of actual past access as a factor (albeit not conclusive) to consider.

7. The eighth paragraph of the Committee Note should be clarified as suggested in comments submitted by the Philadelphia Bar Association (04-CV-031). I have included their proposed edits in the attached document.

8. Regarding the "two tier" proposal as a whole, a number of submissions argue that the "accessibility" test is too vague, others submit that the test can be too easily abused by recalcitrant parties, and others assert that the proposed amendment is unhelpful. Those concerns cannot be lightly dismissed. The tough question that must be answered is: Will the proposed rule improve practice in civil cases consistent with Rule 1? I believe it will for the following reasons:

a. Because it is literally impossible to preserve and produce all electronically stored information, parties already are making distinctions on an *ad hoc* basis and thus the rule cannot fairly be seen as creating any new dilemmas;

b. In conjunction with the expanded discussion of the preservation and discovery of electronically stored information at the Rule 16 and Rule 26 conferences, the proposal provides a rule-based framework to guide requesting and responding parties and help courts resolve disputes;

c. Technology may well moot many of the aspects of current accessibility difficulties through continued innovations, but I believe there will always be reservoirs of data (such as legacy data, fragmented data, or certain back-up data) that are not reasonably accessible. Thus, the rule will have continued vitality; and

d. It should be plain that organizations in litigation cannot willfully take steps to make relevant accessible data inaccessible for the purpose of frustrating discovery. On this point, I suggest that the Committee Note be amended to specifically include the timing and circumstances of the purported "inaccessibility" as another factor for courts to consider in assessing the discoverability of the information in litigation.

10. This proposed rule is an apt illustration of one of my opening observations: there is no perfect language to address the issues presented.[7] Nevertheless, when viewed in conjunction with the other rules proposals, and with the edits suggested above, I believe the proposed rule and accompanying Committee Note can adequately define what information is "reasonably accessible" so that discovery can proceed more efficiently and courts can effectively police any suspected abuse of this qualification.

Additional Procedures Regarding Privilege Claims

11. With respect to proposed section 26(b)(5)(B) addressing the procedure for claiming privileges, I believe the proposed rule is an appropriate and advisable procedural rule addressing the return of (and adjudication of any challenges regarding) inadvertently produced privileged material. Without rule guidance, a patchwork of negotiated and standing protective orders have sprouted in those cases where counsel and courts have been aware of necessity for such procedural protections. *See The Sedona Principles* (2004), cmt. 10.a. I believe the proposed rule reflects a best practice so that all parties, regardless of the experience of their counsel, can gain the same benefit to protect their rights.

12. Some commentators believe that the proposed rule will lead to additional motions practice. I do not agree. Inadvertent productions are not intended, and there is no reason to believe that a uniform procedural standard and practice will encourage parties to be less careful in guarding privileged information against inadvertent disclosure, especially since the rule does not address the substantive law of privilege that will apply to any "waiver" analysis. *See* ¶ II.B.13, *infra*. Moreover, the proliferation and volume of electronically stored information may well generate more instances of inadvertent productions, which is precisely why a uniform standard is needed to provide predictable and understood procedures to all litigants.

13. Some commentators believe the proposed rule transgresses upon substantive privilege laws. It does not. Indeed, as drafted, the Advisory Committee has made clear that the

[7] The suggestion made by Greg Joseph (04-CV-66) that the "reasonably accessible" qualification should apply to all information, not just that which is electronically stored, is an appealing observation. Expanding the proposed rule in this manner is logical and could help reduce the perception that electronically stored information is being improperly distinguished. That said, such a modification of the proposed rules is not necessary as the unique qualitative and quantitative distinctions of electronically stored information is a real distinction from other forms of information that justify the specific proposed language.

Additionally, the Federal Magistrate Judges Association suggests that the distinction for electronically stored information that is not reasonably accessible could be made through an expansion of Rule 26(b)(2)(iii) and Rule 26(c) (*see* 04-CV-127). That approach has some appeal, although I am not sure it would be substantially different than the current proposed language because: (1) it would still rely on the accessibility determinations, and (2) it effectively creates the same "two tier" distinction. In the end, I still believe that the modified proposal set forth above provides an effective way to integrate the "two tier" approach into the current rules.

proposed rule change is addressing the procedure for asserting claims (and not the substantive law of privilege), which falls within the ambit of 28 U.S.C. § 2074(b). All substantive privilege rights remain within the province of existing law and are not affected by this provision any more than they are by the privilege log requirement already embodied in the rules of civil procedure. To make this point more explicit, however, I suggest the Committee simply add to the Committee Note that "[t]he rule does not abridge, enlarge or modify any substantive rights."

14. Some commentators believe that the rule should not be adopted because the proposal vests discretion with the district court to determine what is "reasonable" in terms of the timing of the notice. That concern is unfounded as the civil rules vest extensive discretion on the district court to determine what is "reasonable" in a number of instances already, and there is no reason to believe that courts cannot fairly apply the standard in this context. In deference to the comments of the Federal Magistrate Judges Association (04-CV-127) regarding appropriate diligence on the part of the producing party, however, I suggest that the Committee Note include the "efforts undertaken to identify and safeguard privileged materials from inadvertent production" as a factor to be considered in deciding whether the notice was provided in a reasonably timely fashion.[8]

15. Other commentators have remarked that the proposal appears to be too restrictive because the receiving party could not provide the claw-backed document and related argument to the court under seal. *See, e.g.*, 04-CV-066. This concern merits attention, and I believe that the Committee Note should be modified to reflect that the receiving party is allowed to provide the sequestered materials to the court under seal in the event of a challenge. Proposed language to accomplish this end is included in the attached document.

16. As stated above in the context of Rule 16, I believe the references to the "claw-back" and "quick peek" concepts in the Committee Note are out of order and should be revised. I have suggested edits to make this change.

17. I do not believe there should be any certification requirement in the rule. In particular, I believe the presumption of good faith should attach to both producing and receiving parties so that the court should assume that the parties are fulfilling their obligations under the rule absent contrary evidence. Of course, courts could require them in particular cases (and in various forms) if the need arises.

18. In addition, because of the unique characteristics inherent in electronically stored information, it may be practically impossible to certify that all electronic copies had been destroyed or sequestered when the receiving party's computer may well have reflected all or part of the document in a file fragment, shadowed data or as part of an omnibus back-up tape. What is important, however, is that the parties understand the obligation that they cannot review, use or transmit the information in any way (other than potentially submitting the material to the court under seal) absent a ruling of the court on a challenge.

[8] I continue to believe that it is unnecessary and unworkable to impose a strict time-limit (*e.g.*, 30 days from production) in light of the extraordinary volumes of electronically stored information that can be produced in a given case.

19. Further, the sequestration requirement should be understood to require efforts by the receiving party to inform any subsequent recipients (such as co-counsel or experts) of the destruction or sequestration requirements pending any challenge or further order of the court.

20. Similar to my concern with proposed Rule 16, I believe the language of proposed Rule 26(f) addressing the privilege topic should be broad enough to encompass the discussion of privilege logs and any unique needs or concerns regarding the assertion and adjudication of privilege claims. *See The Sedona Principles* (2004), cmt. 3.b. I have suggested parallel edits to the attached document for this purpose.

C. Rule 33. Interrogatories to Parties.

1. I endorse the proposed rule and Committee Note with one minor suggestion. In particular, at the end of the Committee Note, the "key question" is stated to be "... whether such support [defined in the preceding sentence] enables the interrogating party to use the electronically stored information as readily as the responding party." I believe this unintentionally overstates the scope of the existing rule, which allows a responding party to point to existing business records, including compilations, abstracts and summaries, in lieu of a written interrogatory response when the answer can be obtained from those records with equal burden on the parties.[9] Thus, I believe it is more accurate to state that "[t]he key question is whether such support enables the interrogating party to use the electronically stored information <u>to derive or ascertain the answer</u> as readily as the responding party." I have included this proposed language in the attached document.

2. Some commentators have noted that the language of Rule 33 may inadvertently invite routine computer system inspections if a party elects to provide electronically stored information as part of its response to an interrogatory. I do not believe that to be the intent or the effect of the proposed rule. If there is ambiguity in the minds of Committee members, however, I believe the Committee may want to consider additional statements in the Committee Note to remove any uncertainty.

D. Rule 34. Production of Documents, Electronically Stored Information, and Things, and Entry Upon Land for Inspection and Other Purposes

1. I believe there is great merit to the conceptual suggestion submitted by the Federal Civil Procedure Committee of the American College of Trial Lawyers (04-CV-109). In particular, that submission proposed that Rule 34 focus on "tangible information" rather than "electronically stored information" or "documents." I believe that "tangible information" is a

[9] *See* Fed. R. Civ. P. 33(d) ("Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.").

very expansive and versatile term that will survive the test of time, whether storage media of the future are electronic, chemical or biological (or anything else for that matter).[10]

2. That said, I remain firmly convinced that Rule 34 should also specifically recognize electronically stored information as a distinct but "equal" type of tangible information subject to discovery in civil litigation. Significantly, although courts have been able to adapt the term "document" to fit a host of situations in the past 30 years, those uses have strained the term at times, and it is appropriate to have a separate term. More importantly, having a separate term is a critical component in allowing the rules and courts to address the unique burdens and opportunities presented by electronically stored information as opposed to traditional "documents."[11]

3. Accordingly, I have proposed language in Rule 34(a) to address these suggestions in a way that I believe best addresses the forward-looking concerns as well as the immediate needs regarding electronic discovery. In particular, I suggest that the broad term "tangible information" be used but that it specifically reference both "electronically stored information" and "documents" and then expand upon the different forms of information that can exist in either documents or electronically stored information (*e.g.*, writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations).

4. The other proposed edits to Rule 34(a) identified by the Committee are appropriate in my view.

5. A few commentators have noted that it is possible that either lazy practices by requesting parties or sharp practices by responding parties may result in the omission of electronically stored information from discovery responses that would have been covered by a current day request for production of "documents." The draft Committee Note makes clear that this is not intended, but I suggest that this concept can be incorporated into the rule so that there is no ambiguity whatsoever. The attached document includes draft language to this effect.

6. I endorse the presumptions and procedures laid out in proposed Rule 34(b) regarding the form of production with one significant caveat: the responding party should have the option to designate the form of production even in the absence of a requested form by the party seeking discovery. The absence of this ability in the proposed rule is inexplicable and unwise. Many defendants involved in multiple cases across jurisdictions will need to identify a single form (or a limited number of forms) of production to effectively process the documents and information for production in all of the cases. This can also include the establishment of document depositories (either physical or "virtual" on the Internet). While it is expected that the

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[10] Another comment agrees that the term "document" is inadequate but then advocates the substitution of "record" as a broader term. Unfortunately, while a document can become a "record" not all documents are "records" as that term is usually used in the record and information management industry. *See The Sedona Guidelines* (Sept. 2004) (public comment draft) at 3 (explaining how "records" are a subset of "information" within organizations). Substituting "record" for "document" would unintentionally have the unfortunate effect of limiting the universe of discoverable information, broadening the universe of data that would be "records" for public and private organizations, or both.

[11] *See* Section I, *supra*; *see generally The Sedona Principles* (2004).

form of production will be discussed at early conferences, such responding parties nevertheless need to have the ability to set forth the manner of production (which may very well differ from the "default" described in the proposed rule) even if a requesting party does not specify a preferred form in a particular case. I have proposed language for Rule 34(b) to address this concern.[12]

E. Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

1. It is evident that the "safe harbor" proposals for Rule 37 have drawn the most attention from observers. These comments have run the gamut from strong endorsement to utter condemnation of the concept, although some have attempted to address the particular language suggested by the Advisory Committee.

2. As a general proposition, I endorse efforts to establish a "safe harbor" for information that is not disclosed or produced as a result of the routine operation of a party's electronic information system. The way in which information is generated and stored by computers is vastly different from the pen and paper world, and these qualitative and quantitative differences are perhaps most magnified when one understands the ways in which information systems capture, replicate and back-up information for system stability and functionality purposes (as opposed to information archiving purposes) by themselves and the ways in which massive volumes of electronic data require active and even automated solutions to consolidate and reduce data collections.

3. Notwithstanding my support of the concept of a limited "safe harbor" in the rules I have struggled with the current proposed language for Rule 37(f) and do not believe it is adequate:

a. As a matter of drafting and construction, the current language of proposed Rule 37(f) and Committee Note appears somewhat foreign from the remainder of Rule 37. I believe that these differences have led to some of the opposition to the changes, and if the language were re-crafted to align with the existing rule, this may mollify some distracters and will clarify the scope of the rule.

b. Currently, proposed Rule 37(f) refers to potential sanctions "under these rules" but that can be a reference to no more than Rules 37(a)(4), 37(b), 37(c), and 37(d) with respect to electronically stored information. As such, the protections offered by proposed Rule 37(f) should be better explained in terms of the very sanctions that would be precluded.

c. Perhaps most significantly, the rule as drafted does not provide much of a "safe harbor" at all. The underlying dilemma is not the failure of parties to take reasonable steps to preserve discoverable information but rather understanding the scope of that duty in the particular context of information that computer systems routinely save and delete as part of their operation. It is in this very narrow focus where parties of all sizes, but particularly large public

[12] Without this proposed edit, I believe the problems with the "default" form of production that have been noted by others will need to be addressed by the Committee.

and private organizations, encounter a world of enormous uncertainty that is leading to substantial expenses and motions practice that are completely unnecessary.

d. Yet, rather than provide presumptive guidance whereby parties can be assured that they need not preserve and produce such information absent extraordinary circumstances, the proposed rule merely recites the general preservation standard as a threshold bar to the safe harbor without any definitive guidance beyond that.[13] Because there is substantial uncertainty as to the scope of the preservation duty in the uncharted waters of electronic data, the effect of the proposed rule is nothing more than stating what is true today — if a party fails to take reasonable steps to preserve discoverable information bad things can happen.[14]

e. In addition, as drafted, I believe the focus of the current draft rule leaves an impression that all other electronically stored information must be preserved, disclosed and produced in all cases. I realize that the Committee Note addresses this misconception, but nevertheless believe that it is very important that the rule itself should be expanded to explain the relationship with the other sections of Rule 37.

f. I respectfully submit that more can and should be done in this area. Rather than describing a general preservation standard, the rule and Committee Note only need to fairly set forth a presumption that the loss of information due to the routine operation of a party's electronic information system will not subject the party to sanctions under the rules absent actual knowledge of a need to preserve or a particularized court order to do so.

4. In large part, the proposed alternative suggested by the Advisory Committee is a better formulation of a narrow "safe harbor" rule. This proposal does not preclude the evaluation of reasonable and good faith preservation efforts under established law (including the established consequences for failures), but it does provide a presumptive level of protection for parties that are not subject to a specific court order or have actual knowledge of a reason why the presumption should not apply to their data. Accordingly, I endorse the alternative formulation, subject to certain important edits and additions detailed below.

5. Specifically, I respectfully submit that my proposed modified alternative (which is based in large part on the Advisory Committee's alternate proposal and the existing proposed Committee Note) in the attached document accomplishes the goals of the Committee, better conforms the proposed rule and Committee Note to the existing structure of Rule 37, and addresses a number of concerns that have been raised to date by a number of commentators. In particular:

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[13] Parties are already required to take reasonable steps to preserve the evidence they believed in good faith to be subject to preservation. *See The Sedona Principles* (2004), Principle No. 5 ("The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.").

[14] Many of the problems with the current proposed language for Rule 37(f) are identified by the submission of the Federal Magistrate Judges Association (04-CV-127).

a. I believe the text of the Rule should address the failure to "disclose or provide" and not just the failure to "provide." This conforms to the other provisions of Rule 37 and makes clear the need to consider electronically stored information regarding all discovery obligations.

b. I submit that the Committee should substitute "willfully" for "intentionally or recklessly" in the text of the proposed rule. Existing case law addressing the term "willful" in the context of existing Rule 37 will provide immediate guidance. I also believe that while "willfulness" incorporates an element of conscious conduct on the part of the producing party, the level of culpability required for different sanctions can vary somewhat depending upon the circumstances.[15]

c. I believe the proposed Rule 37(f) should require that any order requiring the preservation of this specific type of information be particularized. Importantly, blanket protective orders to "save all relevant information" are inefficient and fail to give fair notice as to the proper and reasonable scope of the preservation obligation. Including a requirement of specificity in proposed Rule 37(f), in conjunction with the other rules proposals, will guide courts and parties to the entry of specific preservation orders in appropriate cases.

d. I recommend that the Committee Note include a specific reference to the fact that the failure to produce or disclose other electronically stored information (*i.e.*, electronically stored information that is not deleted or lost as a result of the routine operation of the party's electronic information system) is subject to the other provisions of Rule 37. Importantly, this clarifies that Rule 37(f) does not supplant the other provisions of Rule 37, including consideration of "substantial justification" and "harmless failure" as those terms already exist and have been interpreted by the courts.

e. In this context, it is entirely appropriate (and indeed very helpful) to describe the general considerations of legal holds. The valuable discussion included in the draft Committee Note can be incorporated virtually verbatim in the new structure and will serve as important guidepost for courts, litigants and counsel examining these issues.

f. I further submit that the Committee Note expressly refer to Rule 37(b)(2) as the operative provision to address violations of court orders. Again, this is parallel to other

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[15] Instructively, the Supreme Court has noted that the general due process restriction upon a court's discretion to order sanctions under Rule 37(b)(2) requires that "any sanction [imposed pursuant to it] must be 'just.'" *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982); *see also Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 209 (1958) (power of the Court to apply sanctions under Rule 37 must be "read in light of the provisions of the Fifth Amendment that no person shall be deprived of property without due process of law ..."). For example, numerous courts have held that fairness demands that the severe sanction of default may not be imposed under Rule 37(b)(2) for violation of a court order in the absence of willfulness, bad faith, or fault. *See, e.g., Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003).

In the current context, the proposed alternative Rule 37(f) does nothing more than set a presumption that, in light of the unique aspects of electronic information, fairness demands that no sanction be imposed for the loss of information from the ordinary operation of computer systems when there is no evidence of willfulness, bad faith or fault, as that standard has been developed by the courts to assess certain alleged violations of other portions of Rule 37.

subsections of Rule 37 and provides a direct link to the established precedents exploring the circumstances of sanctionable conduct and available remedies.

6. Some commentators have railed against the current draft language and would likely decry my proposed alternative (set forth above). Respectfully, I submit that many of the arguments made against any "safe harbor" simply misunderstand the scope of that harbor and the intent of its proponents.

7. Both proposed alternatives set forth by the Advisory Committee (and my suggested amendments to the second alternative) are geared towards the unique aspects of computer systems by which they routinely capture replicant and duplicated data generated for purposes of disaster recovery and system functionality, as well as other systems that classify, categorize and discard information on a scheduled basis. Examples include disaster back-up tapes, deleted (but not completely erased) data on hard drives, data contained in buffered memory devices (such as printers), data randomly captured by the computer (such as in so-called "slack space"), and dynamic databases. Routine operations can include the back-up/recycling procedures, the automatic deletion of old weblogs, temporary files and histories, as well as files removed during simple disk maintenance such as defragmentation. Can there be cases where the data subject to these processes needs to be captured if available? Absolutely. But those are the exceptions that are based on actual knowledge that unique discoverable information is contained on the device or media at issue and that steps should be taken to preserve the evidence. *See Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (organizations need not preserve "every shred of paper, every e-mail or electronic document, and every back-up tape"); *McPeek v. Ashcroft*, 202 F.R.D. 31, 33 (D.D.C. 2001) ("There is certainly no controlling authority for the proposition that restoring all backup tapes is necessary in every case."); *see generally The Sedona Principles* (2004), cmt. 5.g ("All Data Does Not Need to be 'Frozen'").

8. The biggest concern voiced by opponents of any "safe harbor" proposal is that "large corporations" will use it as a guise to institute policies and programs to routinely purge data to "hide the truth." Abuses of the discovery process cannot and should not be taken lightly. But that does not mean that we should assume that parties involved in the rules debate are looking for ways to subvert the judicial process.[16] Nor can we assume that the courts will be oblivious to abusive conduct. More importantly, a view of the proposed amendments as a whole should give greater comfort to those who oppose the "safe harbor" than the *status quo*.

9. In particular, the added requirements in Rule 16 and Rule 26 to discuss the preservation and production of electronically stored information will join the issues covered by the safe harbor at the outset of civil cases when it matters. For example, in the employment context (where many commentators have expressed concern about any "safe harbor") issues as to whether snapshots of e-mail boxes, or hard drives of employees, or even certain existing back-up

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[16] This posture is also contrary to the presumption of regularity in discovery, namely that the responding party undertook reasonable steps to preserve the evidence it believed in good faith to be subject to preservation. *See The Sedona Principles* (2004), Principle No. 5 ("The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.").

tapes need to be preserved can be addressed at the outset of the case, with the court ruling on any disagreements and providing definitive guidance.

10. On the flip-side of these disclosure and discussion requirements, there must be some assurance that, absent a specific court order requiring preservation, the failure to preserve and produce this specific subset of data (*i.e.*, information lost as a result of the routine operation of the party's electronic information systems) is not sanctionable conduct. An exception to this should be if the party acts willfully to destroy evidence it knows to be relevant and not otherwise available. Working together, these rules will help both sides (requesting and producing parties), facilitate agreements, provide certainty and reduce motions practice, including claims for sanctions due to alleged spoliation.

11. Furthermore, there is no need for corporations and governments to save everything forever, even if the price of storage media continues to decline. There are no statutory requirements that mandate such omnibus retention across organizations, and the common law duty of preservation does not expect or demand perfection. In fact, sound record-keeping guidance developed both in the government and the private sector stress the fact that keeping everything forever is an inefficient and unwise approach to record-keeping practices.

12. Moreover, the standard for preservation is commonly thought of as a duty to act reasonably and in good faith to preserve information that the party knows or should know may be discoverable in a pending or reasonably anticipated lawsuit, and not a strict liability standard. Absent a statutory duty, an examination of whether a party has carried out its obligations ordinarily requires (1) understanding the scope of the duty, (2) whether there was a breach of the duty, and (3) whether the breach of the duty was the proximate cause of the loss. Importantly, as with any negligence context, there can be a loss of information without any breach of the duty (*e.g.*, a fire or other natural disaster or even a man-made disruption such as a computer virus).

13. It is also inappropriate to predict that corporations will change their behaviors to quickly discard information on a wholesale basis because of the "safe harbor." Corporations act on the presumption of regularity of the actions of their employees — that the information and data generated in the ordinary course of business will help the organization prosecute or defend claims. Because the loss of data can impair that prosecution or defense, far apart from any spoliation sanction, there is an incentive for organizations to better understand and preserve their business records in the electronic world. *See The Sedona Guidelines* (Sept. 2004) (public comment draft) at 5-7 (explaining potential benefits from effective information and records management, as well the potential consequences of inadequately managing information and records in the electronic age). Moreover, destruction and deletion is an acceptable stage in the information life cycle, and organizations should be allowed to destroy or delete electronic information when there is no continuing value or need (including any legal duty) to retain it. *See, e.g., The Sedona Guidelines* (Sept. 2004) (public comment draft), cmt. 3.a.

14. Significantly, any organization that seeks to hide or obfuscate evidence in judicial proceedings will find no peace or solace in any safe harbor proposal.[17] It is virtually impossible to remove all traces of electronically stored information — especially in large institutions — and any scheme to systematically destroy evidence for the purpose of making it unavailable in judicial proceedings is much more likely to be uncovered today than in the past. And the penalties for doing so include substantial civil and criminal repercussions which greatly undercut the suggestion that the limited "safe harbor" of Rule 37(f) will result in rampant abuse and destruction of relevant evidence.

15. In short, the confluence of the enhanced guidance of the Rule 37(f) as described above, as well as technology enhancements regarding search, retrieval and reviewing tools, will hopefully make the process of dealing with substantial volumes of data more efficient and effective in the future and reduce uncertainty for parties and motion practice before the courts.

F. Rule 45. Subpoena

1. I respectfully submit that the "form of production" language in the proposed Rule 45 should be amended to allow the responding party to identify a particular form (or forms) of production even if the requesting party does not specify a particular form. This modification is parallel to the change I recommended for Rule 34(b) above, and I have included such language in the attached document.

2. I also suggest that the language of proposed Rule 45 be modified to match the same changes I suggested for Rule 26(b)(5) above. I have included such edits in the attached document.

3. Rule 45(a)(1)(C) and Rule 45(c) need to be modified to reflect the term "tangible information" if that term is used in Rule 34(a). I have included such language in the attached document.

4. Rule 45(1)(C) should be amended to reflect that the court may order discovery of information that is not reasonably accessible for good cause and may also "specify terms and conditions for such discovery." The additional terms conform the rule to the language used in Rule 26(b).

5. Similar to my comments regarding Rule 26(b), I believe the Committee Note for Rule 45 should be amended to specifically reference cost-shifting and cost-sharing considerations for electronically stored information that is not reasonably accessible, although I think the reference here can be more emphatic to require consideration of the issue in light of the specific context of rule's protection of non-parties from undue burden. *See* Fed. R. Civ. P. 45(1)(c)(1) ("A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to

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[17] *See, e.g., Rambus, Inc. v. Infineon Techs. AG*, 220 F.R.D. 264, 286 (E.D. Va. 2004) ("[R]ecord in this case shows that Rambus implemented a 'document retention policy,' in part, for the purpose of getting rid of documents that might be harmful in litigation."); *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76-77 (D. Mass. 1976) (a party cannot adopt a records management system designed to obstruct discovery).

that subpoena...."); Fed. R. Civ. P. 45(1)(c)(2)(B) ("... Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.").

6. I believe the remainder of the proposed rule amendment and Committee Note should be adopted as proposed.

G. Form 35. Report of Parties' Planning Meeting

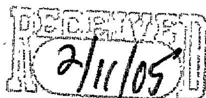
1. I endorse the proposed rule and Committee Note.

III. Conclusion

I again thank the Committee for its attention to these matters over the past several years, including the substantial work that went into the publication of the current proposed rules and Committee Notes. I also appreciate the opportunity to submit these remarks to the Committee and will be prepared to address them during the hearings scheduled for February 11, 2005.

Attachment

WAI-2150205v1



04-CV-048

Attachment to Testimony 2/11 DC

ATTACHMENT A

Annotated Proposed Rule Amendments and Committee Notes

Below I set forth the text of the proposed amended rules and the proposed committee note. I have annotated the text to include proposed additions (in **bold** text) and deletions (in ~~double strikethrough~~ text) that I suggest the committee consider in its deliberations. Following the text, I provide my comments explaining my position and proposed changes. My comments follow the same order in which the proposed amendments are reflected in the memorandum published by the Standing Committee on August 4, 2004.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) adoption of the parties' agreements **regarding assertions of** ~~for protection against waiving~~ privilege;

(7~~5~~) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8~~6~~) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise later.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management order adopting such an agreement. The parties may agree to various arrangements. For example, ~~they may agree to initial provision of requested materials without waiver of privilege to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege.~~ **they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege. Alternatively, they may agree to initial provision of requested materials to a neutral third party (or even to another party in certain circumstances) without waiver of privilege to enable the designation of a subset of materials for actual production, with the privilege review of only those materials to follow.** Other arrangements are possible. A case-management order to effectuate the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. See Manual for Complex Litigation (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and adds protection against nonparty assertions that privilege has been waived**, although the rule does not abridge, enlarge or modify any substantive rights**. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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(b) Discovery Scope and Limits.

* * * * *

(2) Limitations. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. **A party need not provide discovery under Rules 34 and 45 of electronically-stored information that the party**

determines is not reasonably accessible. By order, the court for good cause may allow discovery of any electronically stored information that is not reasonably accessible and may specify terms and conditions for such discovery. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under rule 26(c). ~~A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.~~

* * * * *

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) ***Privileged information withheld.*** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) ***Privileged information produced.*** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

* * * * *

(f) Conference of Parties; Planning for Discovery. Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to

preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced;

(4) whether, on agreement of the parties, the court should enter an order **addressing additional procedures governing assertions of privilege**~~protecting the right to assert privilege after production of privileged information~~;

(5~~3~~) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6~~4~~) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. A court may order that the parties or attorneys attend the conference in person. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule (i) require that the conference between the parties occur fewer than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b), and (ii) require that the written report outlining the discovery plan be filed fewer than 14 days after the conference between the parties, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address some of the distinctive features of electronically stored information, including the volume of that information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information. Many parties have significant quantities of electronically stored information that can be located, retrieved, or reviewed only with very substantial effort or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be "legacy" data retained in obsolete systems; such data is no longer used and

may be costly and burdensome to restore and retrieve. Other information may have been **created, stored or** deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible.

In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to **identify, obtain, retain, review and produce** ~~obtain~~ additional information may be substantial. **Although the provisions of Rule 26(b)(2)(i), (ii) and (iii) apply to all discovery of electronically stored information, t**~~T~~he rule addresses this **particular** concern by providing **a presumptive limitation** that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. **This presumptive limitation on discovery can be modified by order of the court. Moreover, i**~~I~~f the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information **sought** is not reasonably accessible. Even if the information is not reasonably accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(2)(i), (ii), and (iii).

The Manual for Complex Litigation (4th) § 11.446 illustrates that problems of volume that can arise with electronically stored information:

The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

With volumes of these dimensions, it is sensible to limit discovery to that which is within Rule 26(b)(1) and reasonably accessible, unless a court orders broader discovery based on a showing of good cause.

Whether given information is "reasonably accessible" may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party routinely uses the information -- sometimes called "active data" -- the information would ordinarily be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that access requires substantial effort or cost.

Technological developments may change what is "reasonably accessible" by removing obstacles to using some electronically stored information. But technological change can also impede access by, for example, changing the systems necessary to retrieve and produce the information.

The amendment to Rule 26(b)(2) **limits discovery under Rules 34 and 45 by excusing** ~~excuses~~ a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must **be prepared at the Rule 16 or 26 conference and any required "meet and confer" sessions concerning pertinent discovery motions to discuss** ~~identify~~ the information it is neither reviewing nor

producing on this ground. The specificity the responding party must use **to describe** ~~in identifying~~ such electronically stored information will vary with the circumstances of the case. For example, the responding party may describe a certain type of information, such as information stored solely for disaster recovery purposes. In other cases, the difficulty of accessing the information -- as with "legacy" data stored on obsolete systems -- can be described. The goal is to inform the requesting party that some requested information has not been reviewed or provided on the ground that it is not reasonably accessible, the nature of this information, and the basis for the responding party's contention that it is not reasonably accessible. ~~But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information.~~ **The history of the party's prior access and use of the information is a factor in assessing whether the information is accessible in discovery. Another factor would be the timing and circumstances by which the data is or became inaccessible.**

If the requesting party moves to compel discovery, the responding party must show that the information sought is not reasonably accessible to ~~invoke this~~ **justify application of the** rule. Such a motion would provide the occasion for the court to determine whether the information is reasonably accessible; if it is, this rule does not limit discovery **of that information**, although other limitations -- such as those in Rule 26(b)(2)(i), (ii), and (iii) -- may apply **to limit or even preclude the discovery.** Similarly, if the responding party sought to be relieved from providing such information, as on a motion under Rule 26(c), it would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.

The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include: **(a)** sampling electronically stored information to gauge the likelihood that relevant information will be obtained~~,~~**;** **(b)** the importance of that information, and the burdens and costs of production; limits on the amount of information to be produced; and **(c)** provisions regarding the **allocation between the parties of the** cost of production**, including cost-sharing and cost-shifting.**

When the responding party demonstrates that the information is not reasonably accessible, the court may nevertheless order discovery if the requesting party shows good cause. The good-cause analysis would balance the requesting party's need for the information and the burden on the responding party. Courts addressing such concerns have properly referred to the limitations in Rule 26(b)(2)(i), (ii), and (iii) for guidance in deciding when and whether the effort involved in obtaining such information is warranted. Thus Manual for Complex Litigation (4th) § 11.446 invokes Rule 26(b)(2), stating that "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." It adds: "More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in specified nonstandard format, should be conditioned upon a showing of need or sharing expenses."

The proper application of those principles can be developed through judicial decisions in specific situations. Caselaw has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeek v.*

Ashcroft, 202 F.R.D. 31 (D.D.C. 2000). Courts will adapt the principles of Rule 26(b)(2) to the specific circumstances of each case.

Subdivision (b)(5). The Committee has repeatedly been advised that privilege waiver, and the review required to avoid it, add to the costs and delay of discovery. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on grounds of privilege to make a privilege claim so that the requesting party can contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has produced privileged information without intending to waive the privilege to assert that claim and permit the matter to be presented to the court for its determination. **The rule does not abridge, enlarge or modify any substantive rights.**

Rule 26(b)(5)(B) does not address whether there has been a privilege waiver. Rule 26(f) is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b) is amended to alert the court to consider a case-management order to provide for protection against waiver of privilege. Orders entered under Rule 16(b)(6) may bear on whether a waiver has occurred. In addition, the courts have developed principles for determining whether waiver results from inadvertent production of privileged information. *See* 8 Fed. Prac. & Pro. § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a "reasonable time." Many factors bear on whether the party gave notice within a reasonable time in a given case, including the date when the producing party learned of the production, **the efforts undertaken to identify and safeguard privileged materials from inadvertent production,** the extent to which other parties had made use of the information in connection with the litigation, the difficulty of discerning that the material was privileged, and the magnitude of production.

The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. In many cases informal but very rapid and effective means of asserting a privilege claim as to produced information, followed by more formal notice, would be reasonable. Whatever the method, the notice should be as specific as possible about the information claimed to be privileged, and about the producing party's desire that the information be promptly returned, sequestered, or destroyed.

Each party that received the information must promptly return, sequester, or destroy it on being notified. The option of sequestering or destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. After receiving notice, a party must not use, disclose, or disseminate the information pending resolution of the privilege claim. A party that has disclosed or provided the information to a nonparty before receiving notice should attempt to obtain the return of the information or arrange for it to be destroyed.

Whether the information is returned or not, the producing party must assert its privilege in compliance with Rule 26(b)(5)(A) and preserve the information pending the court's ruling on whether the privilege is properly asserted and whether it was waived. As with claims of

privilege made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information. **That party may submit the sequestered information to the court under seal for *in camera* review in connection with such a motion.**

Subdivision (f). Early attention to managing discovery of electronically stored information can be important. Rule 26(f) is amended to direct the parties to discuss these subjects during their discovery-planning conference. *See* Manual for Complex Litigation (4th) § 11.446 ("The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case"). The rule focuses on "issues related to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, addressing the issues at the outset should often avoid problems that might otherwise arise later in the litigation, when they are more difficult to resolve.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. See Manual for Complex Litigation (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. See Rule 26(b)(2). The form or format in which a party keeps such information may be considered, as well as the form in which it might be produced. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." Manual for Complex Litigation (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b) is amended to permit a party to specify the form in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the

court. Any aspects of disclosing or discovering electronically stored information discussed under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included. The court may then address the topic in its Rule 16(b) order.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Complete cessation of that activity could paralyze a party's operations. Cf. Manual for Complex Litigation (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party's electronic information system. The parties' discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and other tangible evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.

Rule 26(f) is also amended to provide that the discovery plan may include any agreement that the court enter a case-management order facilitating discovery by protecting against privilege waiver. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information poses particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic document file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic document (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a

screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

The Manual for Complex Litigation notes these difficulties:

A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Manual for Complex Litigation (4th) § 11.446.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. **Parties often enter agreements -- sometimes called "clawback agreements" -- that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. In addition,** t~~T~~hey may agree that the responding party will provide requested materials for initial examination **by a neutral third party** without waiving any privilege. **In some circumstances, the parties may agree that the responding party will provide requested materials for initial examination by opposing counsel without waiving any privileged. Both of these types of arrangements are variations of a concept** -- sometimes known as a "quick peek." **The neutral third party or** ~~The~~ **the** requesting party ~~then~~ designates the documents to be produced. ~~it wishes to have actually produced.~~ This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). ~~On other occasions, parties enter agreements -- sometimes called "clawback agreements" -- that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances.~~ Other ~~voluntary~~ arrangements may be appropriate depending on the circumstances of each litigation. **Importantly, however, entry into such agreements must be voluntary because of the uncertain application of substantive privilege law in different jurisdictions and the fact that these rules cannot abridge, enlarge or modify any substantive rights.**

As noted in the Manual for Complex Litigation, these agreements can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. As the Manual also notes, a case-management order implementing such agreements can further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement

regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to emphasize the court's entry of an order recognizing and implementing such an agreement as a case-management order. The amendment to Rule 26(f) is modest; the entry of such a case-management order merely implements the parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to provide an additional protection against privilege waiver by establishing a procedure for assertion of privilege after production, leaving the question of waiver to later determination by the court if production is still sought.

Rule 33. Interrogatories to Parties.

* * * * *

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

COMMITTEE NOTE

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and also provides that the responding party must give the interrogating party a "reasonable opportunity to examine audit, or inspect" the information. Depending on the circumstances of the case, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technological support, information on application software, access to the pertinent computer system, or other assistance. The key question is whether such support enables the interrogating party to use the

electronically stored information **to derive or ascertain the answer** as readily as the responding party.

Rule 34. Production of *Tangible Information* ~~Documents, Electronically Stored Information,~~ and Things, and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated ~~electronically stored information or any designated documents (~~ **information which exists in tangible form or is stored in some medium capable of retrieval in tangible form no matter how maintained, including documents and electronically stored information such as** ~~including~~ writings, drawings, graphs, charts, photographs, sound recordings, images ~~phonorecords~~, and other data or data compilations ~~in any medium — from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form)~~, or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b). **Any request that seeks the production of tangible information regarding a designated subject matter shall be deemed to seek production of the subject matter contained in both documents and electronically stored information unless the request specifically excludes one type of information.**

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form for producing electronically stored information, stating ~~in which event~~ the reasons for the objection ~~shall be stated~~ **and the form in which that party intends to produce electronically stored information.** If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any party thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(i) aA party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request; and

(ii) if a request for electronically stored information does not specify the form of production **and the responding party has not identified a specific production format in its response,** a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable form. The party need only produce such information in one form.

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to authorize discovery of data compilations in anticipation that the use of computerized information would grow in importance. Since that time, the growth in electronically stored information and in the variety of systems for creating and storing such information have been dramatic. It is difficult to say that all forms of electronically stored information fit within the traditional concept of a "document." Accordingly, Rule 34(a) is amended to **reflect that the rule addresses the discovery of tangible information, no matter how created and stored. Within this definition, the terms "document" and "electronically stored information" are used together to** acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery~~. The title of Rule 34 is modified to acknowledge~~ **and** that discovery of electronically stored information stands on equal footing with discovery of documents. Although discovery of electronically stored information has been handled under the term "document," thisese changes avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of **"tangible information"** ~~"documents"~~ should be understood to include electronically stored information **and documents** unless discovery in the action has clearly distinguished between "electronically stored information" and "documents."

The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. The definition in Rule 34(a)(1) is expansive, including any type of information that can be stored electronically. A common example that is sought through discovery is electronic communications, such as e-mail. A reference to "images" is added to clarify their inclusion in the listing already provided. The reference to "data or data compilations" includes any databases currently in use or developed in the future. The rule covers information stored "in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive definition. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the definition in Rule 34(a)(1) is invoked in a number of other amendments, such as those to

Rules 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).

The definition of electronically stored information is broad, but whether material within this definition should be produced, and in what form, are separate questions that must be addressed under Rule 26(b)(2), Rule 26(c), and Rule 34(b).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c).

Rule 34(a)(1) is further amended to make clear that tangible things must -- like documents and land sought through discovery -- be designated in the request.

Subdivision (b). The amendment to Rule 34(b) permits the requesting party to designate the form in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The parties should exchange information about the form of production well before production actually occurs, such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f) now calls for discussion of form of production during that conference.

The rule does not require the requesting party to choose a form of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form of production for electronically stored information, Rule 34(b) provides that the responding party must -- unless **it specifically designates a form of production in its response,** the court orders otherwise or the parties otherwise agree -- choose between options analogous to those provided for hard-copy materials. The responding party may produce the information in a form in which it ordinarily maintains the information. If it ordinarily maintains the information in more than one form, it may select any such form. But the responding party is not required to produce the information in a form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production, providing the form is electronically searchable. Although this option is not precisely the same as the option to produce hard copy materials organized and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form of production, Rule 34(b) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an objection is made, Rule 37(a)(2)(B) requires the parties to confer about the subject in an effort to resolve the matter before a motion to compel is filed. If they cannot agree, the court will have

to resolve the issue. The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.

Rule 34(b) also provides that electronically stored information ordinarily need be produced in only one form, but production in an additional form may be ordered for good cause. One such ground might be that the party seeking production cannot use the information in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * *

~~**(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:~~

~~(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and~~

~~(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.[1]~~

(f) Failure to Disclose or Produce Electronically Stored Information; Violation of Court Order

A court may not impose sanctions under these rules on a party for failing to disclose or provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information systems unless: (1) the party willfully failed to preserve the information or (2) the party violated an order issued in the action specifically requiring the preservation of such information.

~~[1] The Committee is continuing to examine the degree of culpability that will preclude eligibility for a safe harbor from sanctions in this narrow area, where electronically stored information is lost or destroyed as a result of the routine operation of a party's computer system. Some have voiced concerns that the formulation set out above is inadequate to address the uncertainties created by the dynamic nature of computer systems and the information they generate and store. Comments from the bench and bar on whether the culpability or fault that takes a party outside any safe harbor should be something higher than negligence are important to a full understanding of the issues.~~

~~An example of a version of Rule 37(f) framed in terms of intentional or reckless failure to preserve information lost as a result of the ordinary operation of a party's computer system is set out below, as a way to focus comment and suggestions:~~

~~(f) Electronically stored information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless:~~

~~(1) the party intentionally or recklessly failed to preserve the information; or~~

~~(2) the party violated an order issued in the action requiring the preservation of the information.~~

Committee Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine deletion of information that attends ordinary use. Rule 26(f) is amended to direct the parties to address issues of preserving discoverable information in cases in which they are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving electronically stored information and management of the routine operation of a party's information system to avoid loss of such information. Rule 37(f) provides ~~that, unless a court order requiring preservation of electronically stored information is violated,~~ the court may not impose sanctions under these rules on a party when such information is lost because of the routine operation of its electronic information system ~~if~~ **unless** the party ~~took reasonable steps to preserve discoverable information.~~ **willfully failed to preserve information relevant to claims or defenses and not otherwise available. Of course, if a specific court order has been entered regarding the preservation and production of the electronically stored information, then any violation of the court order will be addressed under Rule 37(b)(2).**

Rule 37(f) applies only with regard to information lost due to the "routine operation of the party's electronic information system." The reference to the routine operation of the party's electronic information system is an open-ended attempt to describe the ways in which a specific piece of electronically stored information disappears without a conscious human direction to destroy that specific information. No attempt is made to catalogue the system features that, now or in the future, may cause such loss of information. Familiar examples from present systems include programs that recycle storage media, automatic overwriting of information that has been "deleted," and programs that automatically discard information that has not been accessed within a defined period. The purpose is to recognize that it is proper to design efficient electronic information storage systems that serve the user's needs. Different considerations would apply if a system were deliberately designed to destroy litigation-related material.

Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. It does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced. ~~Rule 37(f) does not, however, require that there be an actual discovery request. It requires that a party take~~

In addition, the failure to disclose or produce electronically stored information under Rules 37(a), 37(c) or 37(d) is subject to the same consideration of substantial justification and harmless failure as provided in those rules for all tangible information. Whether the failure to disclose or produce electronically stored information is substantially justified will turn largely on whether the party undertook reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action **(whether or not an actual discovery request was pending)**. Such steps are often called a litigation hold.

The reasonableness of the steps taken to preserve electronically stored information must be measured in at least three dimensions. The outer limit is set by the Rule 26(b)(1) scope of discovery. A second limit is set by the new Rule 26(b)(2) provision that electronically stored

information not reasonably accessible must be provided only on court order for good cause. In most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order. In some instances, reasonable care may require preservation of electronically stored information that is not reasonably accessible if the party knew or should have known that it was discoverable in the action and could not be obtained elsewhere. Preservation may be less burdensome than access, and is necessary to support discovery under Rule 26(b)(2) if good cause is shown. The third limit depends on what the party knows about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information. Once the subjects and information systems are identified, e-mail records and electronic "files" of key individuals and departments will be the most obvious candidates for preservation. Other candidates for preservation will be more specific to the litigation and information system. Preservation steps should include consideration of system design features that may lead to automatic loss of discoverable information, a problem further addressed in Rule 37(f). In assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party's electronic information system and the nature of the litigation.

One consideration that may sometimes be important in evaluating the reasonableness of steps taken is the existence of a statutory or regulatory provision for preserving information, if it required retention of the information sought through discovery. See, e.g., 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Although violation of such a provision does not automatically preclude the protections of Rule 37(f), the court may take account of the statutory or regulatory violation in determining whether the party took reasonable steps to preserve the information for litigation. Whether or not Rule 37(f) is satisfied, violation of such a statutory or regulatory requirement for preservation may subject the violator to sanctions in another proceeding -- either administrative or judicial -- but the court may not impose sanctions in the action if it concludes that the party's steps satisfy Rule 37(f)(1).

Rule 37(f) does not apply if the party's failure to provide information resulted from its violation of an order in the action requiring preservation of the information. An order that directs preservation of information on identified topics ordinarily should be understood to include **"reasonably accessible"** electronically stored information, **inaccessible electronically stored information that the party knows is unique and relevant to the claims and defenses, or if otherwise specified in the order**. Should such information be lost even though a party took "reasonable steps" to comply with the order, the court may impose sanctions **consistent with the considerations for imposing sanctions under Rule 37(b) including considerations of culpability.**. If such an order was violated in ways that are unrelated to the party's current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The determination whether to impose a sanction, and the choice of sanction, will be affected by the party's reasonable attempts to comply.

If **the exclusion within** Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, is for the court

depending upon the rule violated and its provisions. The court has broad discretion to determine whether sanctions are appropriate and to select a proper sanction. See, e.g., Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is not reasonably accessible because a party has failed to take reasonable steps to preserve the information, it may be appropriate to direct the party to take steps to restore or retrieve information that the court might otherwise not direct.

Rule 45. Subpoena

(a) Form; Issuance

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated books, documents, electronically stored information, **tangible information** or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form in which electronically stored information is to be produced.

(2) A subpoena commanding attendance at a trial or hearing shall issue from the court for the district in which the hearing or trial is to be held. A subpoena for attendance at a deposition shall issue from the court for the district designated by the notice of deposition as the district in which the deposition is to be taken. If separate from a subpoena commanding the attendance of a person, a subpoena for production, ~~or~~ inspection, copying, testing, or sampling shall issue from the court for the district in which the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed in Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, ~~or~~ inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the depositions, hearing, trial, production, ~~or~~ inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and the manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling of designated electronically stored information, books, papers, documents, **tangible information** or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to providing ~~inspection or copying~~ any or all of the designated materials or of the premises -- or to providing information in the form requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, ~~and~~ copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within a state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form for producing electronically stored information, a person responding to a subpoena must **either (1) identify the form(s) in which the electronically-stored information will be produced, or (2)** produce the information in a form in which the person ordinarily maintains it or in an electronically searchable form. The person producing electronically stored information need only produce it in one form.

(C) A person responding to a subpoena need not provide discovery of electronically stored information that the person identifies as not reasonably accessible. ~~On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, t~~The court may order discovery of the information for good cause **and may specify terms and conditions for such discovery.**

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) When a person produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, any party must promptly return, sequester, or destroy the specified information and all copies. The person who produced the information must comply with Rule 45(d)(2)(A) with regard to the information and preserve it pending a ruling by the court.

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by claims (ii) of subparagraph (c)(3)(A).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. As under Rule 34(b), Rule 45(a)(1)(D) is amended to provide that the subpoena can designate a form for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the party served with a subpoena to object to the requested form. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that the party served with the subpoena must produce electronically stored information either **in a form which it specifies in its response or** in a form in which it is usually maintained or in an electronically searchable

form, and that the party producing electronically stored information should not have to produce it in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding party. The Rule 45(c) protections should guard against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Rule 45(d)(1)(C) is added to provide that the responding party need only provide reasonably accessible electronically stored information, unless the court orders additional discovery for good cause. A parallel provision is added to Rule 26(b)(2). In many cases, advance discussion about the extent, manner, and form of producing electronically stored information should alleviate such concerns. **The court must consider the shifting or sharing of costs for any production that may be ordered regarding electronically stored information that is not reasonably accessible.**

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena, however, the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege after inadvertent production of privileged information.

Throughout Rule 45, further amendments have been made to conform the rule to the changes described above.

Form 35. Report of Parties' Planning Meeting

* * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _______ (brief description of subjects on which discovery will be needed)_______

<u>Disclosure or discovery of electronically stored information should be handled as follows: _______ (brief description of parties' proposals) _______</u>

<u>The parties have agreed to a privilege protection order, as follows: (brief description of provisions of proposed order)</u>

All discovery commenced in time to be competed by _______(date)_______. [Discovery on _____(issue for early discovery)_______to be completed by _______(date)_______.]

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