04-CV-169

Judge Ronald Hedges/NJD/03/USCOURTS

02/08/2005 11:37 AM

To Lee Rosenthal/TXSD/05/USCOURTS@USCOURTS

cc Peter McCabe/DCA/AO/USCOURTS@USCOURTS, John Rabiej/DCA/AO/USCOURTS@USCOURTS

Subject Fw: Attached: Comments on Proposed Amendments & E-Discovery Keynote Address

Dear Lee:

As promised, I enclose my comments on the proposed rule amendments. these comments are a "capsule summary" of a speech which I gave at LegalTech 2005 in NYC on January 31, and I enclose the "ideal" version of that speech too.

By copy of this email I am asking Pete McCabe and John Rabiej to accept the attached as my comments.

----- Forwarded by Judge Ronald Hedges/NJD/03/USCOURTS on 02/08/2005 11:36 AM -----

Ellenrose Jarmolowich/NJD/03/USCOURTS

02/08/2005 11:07 AM

To Judge Ronald Hedges/NJD/03/USCOURTS@USCOURTS

cc

Subject Attached: Comments on Proposed Amendments & E-Discovery Keynote Address

Comments on Proposed Amendments 2-3-05.wpd

E-DISCOVERY KEYNOTE ADDRESS 2-2-05.wpd

COMMENTS ON PROPOSED AMENDMENTS TO RULES 26 AND 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Submitted By:

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February 8, 2005

INTRODUCTION[1]

Thank you for giving me the opportunity to comment on certain of the proposed amendments to the Federal Rules of Civil Procedure.

I am a United States Magistrate Judge. In the District of New Jersey, where I sit, magistrate judges are responsible for all phases of pretrial management of most civil actions, including discovery.

I have been on the Bench for nineteen years. I am addressing these comments to you as an individual federal judge who has been presented with, and who has adjudicated, many discovery disputes, including those involving electronic discovery ("e-discovery").

Before I begin my comments, I would simply note that the costs of e-discovery (a factor which has been focused on by the Advisory Committee) appear to be driven by interlocking phenomena: (1) The sheer volume of electronic information ("e-information"), which results from the duplication of that information, the "spread" thereof to remote locations, and the essential impossibility of "removing" the information; (2) advances in technology, such that operating systems become legacy systems and stale date becomes difficult to retrieve, assuming the legacy system even remains available; and (3) the rise of vendors and consultants, who review operating or legacy systems and retrieve data in response to e-discovery requests. Of these phenomena, the first and second are extra- legal and are not driven by litigation. No amendment to the federal rules will affect either volume or the pace of technological change.

My second observation pertains to the lack of empirical data on e-discovery costs. I

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[1]This is a much shorter version of a keynote address I delivered on January 31st at LegalTech 2005 and which I hope to publish as an article. The address has been submitted with these comments.

appreciate that anecdotal evidence appears overwhelming, but it might be appropriate to determine what categories of cases account for most costs and what types of e-discovery requests are most costly to respond to. Are the most costly cases those brought by an individual plaintiff or plaintiffs against a corporate entity (business or government), where the plaintiff has little or no e-information and the defendant has substantial e-information in its possession? Are the most costly cases those between corporate entities which may have access to equivalent resources to engage in e-discovery? Might there be a reason to differentiate between categories of cases and to focus any rule amendments on the most "costly" categories rather than across-the-board?

I would also suggest that, whatever is done, the Advisory Committee also address what might be the most venerable legacy system of all, paper. Problems of volume and accessibility exist as to paper records as well as e-information. Any rule amendment should be broad enough to address any type of information retained by a party, electronic or traditional.

SCOPE OF DISCOVERY

My first comment is to the proposed amendment to Rule 26(b)(2), which would address "reasonably accessible" versus inaccessible e-discovery.

Rule 26(b)(1) introduced the concept of bifurcation of discovery in 2000. That rule now allows for discovery of any matter, not privileged, relevant to a claim or defense. The rule also provides for that, for good cause shown, discovery of any matter relevant to the subject matter involved in an action may be allowed.

The Advisory Committee Note to the 2000 amendment stated that the amendment was intended to involve the court "more actively in regulating the breadth of sweeping or contentious discovery." Plainly, as Magistrate Judge Grimm of the District of Maryland has recognized, the intent of the 2000 amendment was that the scope of discovery "be narrower than it is, in some meaningful way."

My experience with Rule 26(b)(1) is that discovery has not been narrowed in any meaningful way. Discovery is not generally limited to that which is relevant to a claim or defense. Attorneys rarely argue for or against the existence of "good cause" for broader discovery. In fact, attorneys appear to assume that the broader discovery contemplated by Rule 26(a)(1) is allowed in the normal course. This brings me to Rule 26(b)(2).

Rule 26(b)(2) introduced the concept of proportionality. The 1983 Advisory Committee Note stated that, "district judges have been reluctant to limit the use of the discovery devices." In 2000, when Rule 26(b)(1) was amended to include a specific incorporation to Rule 26(b)(2), an Advisory Committee Gap Report stated that, "[t]he Committee has been told repeatedly that courts have not implemented these limitations with a vigor that was contemplated."

I have already noted my experience with Rule 26(b)(1). My experience with Rule 26(b)(2) is similar. Attorneys do not cite to the latter in an attempt to limit discovery. Judges rarely exercise the discretion afforded to them to limit discovery. In short, the concerns expressed by the Advisory Committee have not been alleviated.

Despite this, the Advisory Committee proposes to amend Rule 26(b)(2) to introduce the concept of reasonably accessible e-information. As I understand it, if the amendment is adopted, judges would in theory engage in a Rule 26(b)(1) analysis (assuming that a party asked them to do

so), would then address whether e-information is reasonably accessible, and would thereafter address proportionality under Rule 26(b)(2) or an application for a protective order under Rule 26(c). This gives rise to a number of questions:

(1) Rules 26(b)(1) and 26(b)(2) are, as the Advisory Committee has recognized, underutilized. Why introduce another layer of complexity into what is already an underutilized scheme?

(2) When properly utilized, Rule 26s(b)(1) and (b)(2) can serve to limit discovery and allocate costs, as is apparent from the Rowe Entertainment, Zubulake and McPeek decisions. Indeed, Judge Scheindlin has already addressed discovery of accessible versus inaccessible e-information. Given this, why is there a need for a rule amendment?

(3) Assume that a judge has determined that "good cause" exists for broader discovery as contemplated by Rule 26(b)(1). Also assume that the amendment to that rule has been adopted. What additional showing of "good cause" for access to e-information which is not reasonably accessible does the Advisory Committee intend a judge to make? Is there a redundancy here?

(4) Under the amendment, is there not an incentive for a corporate entity, either after the commencement of litigation or after litigation becomes reasonably anticipated, to make relevant data inaccessible? I appreciate the proposed amendment to Rule 37 with regard to a "safe harbor" (which I will address below). Nevertheless, it seems to me that neither the proposed amendments to Rules 26(f) nor 37(f) truly distinguish between information which has been rendered inaccessible as opposed to information which has been destroyed for spoliation purposes.

WAIVER

There has been a great deal of discussion with regard to the use of so-called "claw back" and "quick-peek" agreements to minimize expense and delay in the production of e-information. Although I appreciate that these agreements may have utility to parties, a strong argument can be made by third parties and members of the public that production of e-information gives rise to a waiver of attorney-client privilege and/or work product protection.

The Advisory Committee proposes to amend Rule 26(b)(5) to include a new subsection (B), which would allow a party producing information "without intending to waive a claim of privilege" to notify the receiving party of that claim. The Advisory Committee Note states that the proposed amendment "does not address whether there has been a privilege waiver." However, and by making reference to a proposed amendment to Rule 16(b), the Note goes on to state that a case management order incorporating a nonwaiver agreement may "provide for protection against waiver of privilege." This raises several questions:

(1) Why should a nonparty or member of the public, who has not agreed to a nonwaiver agreement, who likely did not have notice of the agreement, and who have not had opportunity to contest an order incorporating the agreement, be bound by the order?

(2) Is it the intent of the Advisory Committee to modify the federal common law of waiver and require courts to add as a factor to consider in deciding waiver the presence or absence of an order? If so, has not the Advisory Committee crossed the line between "procedure" and "substance" in its rulemaking?

(3) Assuming that an order is to be given some effect by a court, should the Advisory

Committee not specify, at the least, minimal provisions that should be incorporated in an order before it is given some effect as against third-parties or members of the public?

(4) How does the Advisory Committee expect to apply the amendment in diversity cases in which, under Rule 501 of the Federal Rules of Evidence, State law will determine waiver of attorney-client privilege?

With regard to these questions, I would call the attention of the Advisory Committee to Wright, Miller & Kane, which the Advisory Committee cited in its note to the proposed amendment. This treatise states, in part, that the orders in question "are not sufficient to withstand customary waiver analysis; whatever their estoppel effect as to the parties involved they could not bind nonparties." 8 Wright, Miller & Kane, Federal Practice and Procedure, § 2016.2 at 240 (2d ed. 1994). I would also note, from an ethical perspective, the possibility of some "taint" giving rise to a disqualification motion should a privileged document be turned over to an adversary (either voluntarily or inadvertently) and then returned to the producing party. See Maldanado v. State, 2004 WL 2904898, *20 (D.N.J. Dec. 15).

For all these reasons, I submit that parties should be left to their private agreements with regard to voluntary or inadvertent disclosure.

SAFE HARBOR

I now turn to what may be the most controversial of the proposed amendments, the so-called "safe harbor" of proposed Rule 37(f). I will not discuss the existing law of spoliation, except to note

that there is a conflict of authority as to the degree of culpability necessary to impose a particular sanction.

Rule 37 would be amended to add a new subsection (f) that addresses e-information. I appreciate that, according to the Advisory Committee, the intent of the amendment is to address "a distinctive feature of computer operations, the routine deletion of information that attends ordinary use." I would suggest, however, that the proposed amendment is fatally underexclusive for two reasons: First, the safe harbor applies only to the use of e-information "after commencement of the action in which discovery is sought." No guidance is given with regard to records retention policies before the commencement of litigation. Moreover, the proposed rule addresses only sanctions under the federal rules. It does not restrict the inherent power of courts to impose sanctions for spoliation. Will these elements of underexclusiveness lead to varying standards for spoliation purposes? If so, would the development of varying standards be to the benefit or detriment of attorneys and corporate entities?

I would repeat a concern I expressed earlier. That is, that the interplay of proposed Rules 26(b)(2) and 37(f) will enable corporate entities, in the normal course of business, to shift e-information from being "reasonable accessible" to inaccessible, with some additional burden being imposed on the requesting party. How should this be guarded against? How do the proposed amendments build incentives against an entity doing so?

I would also suggest that the proposed amendment to Rule 37 would be of little practical assistance to any corporate entity. Once an attempt is made by an entity to secure the benefit of a "safe harbor" it will be necessary for courts to determine (as these do now) whether the party took reasonable steps to preserve deleted information. If so, we have simply come back whole circle to

an analysis under the existing common law. Moreover, I would expect that parties litigating against entities would seek a preservation order in an attempt to ensure that no adversary could have the benefit of the safe harbor. Motions for preservation orders may well become a routine feature of litigation.

CONCLUSION

Based on my experience with the 2003 amendments to the Local Civil Rules of the District of New Jersey, it appears that the costs of e-discovery might be best addressed by reminding attorneys of their obligations to confer with their clients and with their adversaries with regard to e-information and e-discovery. Several proposed amendments to the Federal Rules of Civil Procedure take tentative steps in this direction.

The proposed amendments to Rules 26(b)(2), 26(b)(5) and 37 will, in my opinion, serve no specific purpose other than to highlight the existence of e-information. Existing Rules 26(b)(1) and 26(b)(2) already provide a scheme for the resolution of e-discovery disputes, as does the federal common law with regard to issues of waiver and spoilation. The proposed amendments, therefore, are unnecessary. Moreover, these will give minimal protection, at best, to attorneys and parties. Indeed, the amendments constitute traps for the unwary.

I respectfully submit that the proposed amendments which I have addressed in these comments should not be adopted.

KEYNOTE ADDRESS
LEGALTECH 2005
NEW YORK HILTON
JANUARY 31, 2005

INTRODUCTION[1]

GOOD MORNING. THANK ALM FOR GIVING ME THE OPPORTUNITY TO SPEAK THIS MORNING.

BEFORE I BEGIN, SOME BUREAUCRATIC MATTERS.

FIRST, IT OCCURS TO ME THAT A KEYNOTE ADDRESS NEEDS A TITLE. SO, I'VE DECIDED THAT THE TITLE OF MY ADDRESS WILL BE "A VIEW FROM THE BENCH AND THE TRENCHES: A CRITICAL APPRAISAL OF SOME PROPOSED AMENDMENTS TO THE FEDERAL RULES." THE REASONS FOR THE TITLE WILL (I HOPE) BECOME OBVIOUS TO YOU AS I PROCEED.

SECOND, ON THE PROGRAM CD AND AS A HANDOUT IS MY OUTLINE ON ELECTRONIC OR DIGITAL DISCOVERY. I USE THIS FOR CLE PROGRAMS. MY ADDRESS THIS MORNING DOES NOT FOLLOW THE OUTLINE.

THIRD, I WILL REFER TO OR QUOTE FROM VARIOUS SOURCES DURING MY ADDRESS. I WILL PROVIDE FULL CITATIONS FOR ANYONE INTERESTED.

LAST, I HOPE THAT THERE WILL BE QUESTIONS. PLEASE HOLD THESE UNTIL THE END OF THE ADDRESS.

LET'S BEGIN.

I AM A USMJ. IN DNJ, MJS RESPONSIBLE FOR ALL PHASES OF PRETRIAL MANAGEMENT OF MOST CIVIL CASES.

I WILL HAVE BEEN ON THE BENCH FOR 19 YEARS AS OF FEBRUARY. I'VE SEEN A LOT OF DISCOVERY DISPUTES, INCLUDE E-DISCOVERY DISPUTES.

I AM SPEAKING TO YOU THIS MORNING AS:

1. INDIVIDUAL FEDERAL JUDGE WHO HAS BEEN PRESENTED WITH -AND ADJUDICATED - MANY DISCOVERY DISPUTES. MY LATEST ENCOUNTER WITH

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[1]This was the planned speech. There were omissions, flubs, and ad-libs. Also, speech was shortened as I went along due to time constraints.

DISCOVERY OF ELECTRONIC INFORMATION IS REFLECTED IN AN OPINION BY JUDGE MARTINI OF THE DISTRICT OF NEW JERSEY ON AN APPEAL FROM A SANCTION ORDER I ISSUED. THE OPINION IS ALSO INCLUDED IN YOUR MATERIALS.

2. SOMEONE WHO TRIES TO ADDRESS DISCOVERY DISPUTES IN A PRAGMATIC AND PRACTICAL MANNER.

3. SOMEONE WHO APPROACHES E-DISCOVERY WITHOUT ANY PARTICULAR IDEOLOGICAL BENT.

AND THERE IS ONE. A RECENT BUSINESS WEEK ART. ON E-DISCOVERY SUGGESTS THAT THE PROPOSED AMENDMENTS TO THE FRCP NEEDED TO PROTECT CORPORATE AMERICA. JAMES ROOKER, JR., IN AN ARTICLE "ABRIDGED TOO FAR," SUGGESTS THAT THE AMENDMENTS REPRESENT THE LATEST EFFORT TO CONSTRICT PLAINTIFFS' RIGHTS TO DISCOVERY. I HOPE TO NAVIGATE THRU THIS DEBATE AND ADDRESS THE RULES AND LAW AS THESE ARE - AND MAY BECOME - IN E-DISCOVERY CONTEXT. IN DOING SO, I WILL SIMPLY NOTE THAT THE FUNCTION OF COURTS, IN MY OPINION, IS TO RESOLVE DISPUTES AND HELP ALL PARTIES.

I WILL ADDRESS THREE ASPECTS OF E-DISCOVERY.

1. SCOPE

2. WAIVER

3. SPOLIATION

BEFORE DOING SO, HOWEVER, SEVERAL OBSERVATIONS ARE IN ORDER:

1. MY FIRST OBSERVATION IS THAT EXPENSE OF E-DISCOVERY DRIVEN BY INTERLOCKING PHENOMENA:

a. SHEER VOLUME OF E-INFORMATION, WHICH RESULTS FROM THE DUPLICATION OF THAT INFORMATION, THE "SPREAD" OF THAT INFORMATION TO REMOTE LOCATIONS, AND THE ESSENTIAL IMPOSSIBILITY OF "REMOVING" THAT INFORMATION.

b. ADVANCES IN TECHNOLOGY, SUCH THAT OPERATING SYSTEMS BECOME LEGACY SYSTEMS AND STALE DATA BECOMES DIFFICULT TO RETRIEVE, ASSUMING THE LEGACY SYSTEM EVEN REMAINS AVAILABLE (IN THIS REGARD, THINK OF PUNCH CARDS).

c. THE RISE OF VENDORS AND CONSULTANTS, THOSE EXPERTS OR SERVICE

PROVIDERS WHO REVIEW OPERATING OR LEGACY SYSTEMS AND RETRIEVE DATA IN RESPONSE TO DISCOVERY REQUESTS. THE BUSINESS WEEK ARTICLE PROJECTS THAT THESE VENDORS AND CONSULTANTS WILL BE PAID SOME 1.1 BILLION IN 2005.

OF THESE PHENOMENA, THE FIRST AND SECOND ARE EXTRALEGAL AND NOT DRIVEN BY LITIGATION. THE AMENDMENTS TO THE FEDERAL RULES WILL AFFECT NEITHER VOLUME NOR PACE OF TECHNOLOGY CHANGE. UNLESS AND UNTIL CORPORATE ENTITIES - AND BY THIS I MEAN BOTH BUSINESS AND GOVERNMENT ENTITIES - ADDRESS THESE, NO SOLUTION IN SIGHT. AND ABSENT DOING SO, CONSULTING COSTS WILL CONTINUE TO RISE. NOTE IN THIS REGARD RECENT ARTICLE IN LAW TECHNOLOGY NEWS, WHICH DISCUSSES BRINGING "E-DISCOVERY PROCESSING" IN-HOUSE TO LAW FIRMS.

2. MY SECOND OBSERVATION IS THIS: WHERE IN THE EMPIRICAL DATA ON E-DISCOVERY COSTS? ANECDOTAL EVIDENCE APPEARS OVERWHELMING BUT

a. WHAT CATEGORIES OF CASES DRIVE UP COSTS?

b. WHAT TYPES OF DISCOVERY REQUESTS ARE MOST COSTLY BE RESPOND TO?

FOR EXAMPLE: MOST HORROR STORIES SEEM TO COME FROM CASES OF INDIVIDUAL PLAINTIFF OR PLAINTIFFS VERSUS A CORPORATE ENTITY, WHERE THE PLAINTIFF HAS LITTLE OR NO E-INFORMATION TO GIVE TO DEFENDANT AND THE DEFENDANT HAS SUBSTANTIAL E-INFORMATION IN ITS POSSESSION. ARE THESE THE COSTLY CASES? PRESUMABLY THIS PLAINTIFF HAS LITTLE INCENTIVE TO CONTROL COSTS IN ASKING FOR E-INFORMATION. HOW DOES THE PLAINTIFF REACT TO HIS OR HER COSTS (THAT CAN BE SUBSTANTIAL), IN REVIEWING E-INFORMATION ONCE PRODUCED? ALSO, WHAT WOULD BE THE IMPACT ON EDUCATING THE PLAINTIFF ON WHAT E-INFORMATION THE DEFENDANT HAS BEFORE THE PLAINTIFF MAKES DISCOVERY REQUESTS, ARE MADE IN AN EFFORT TO MINIMIZE OR LIMIT OTHERWISE OVERBROAD AND COSTLY DISCOVERY REQUESTS?

ANOTHER EXAMPLE: TWO CORPORATE ENTITIES IN LITIGATION. BOTH PARTIES MAY HAVE ACCESS TO EQUIVALENT RESOURCES TO DO E-DISCOVERY. DO THESE PARTIES HAVE SIMILAR MOTIVATION TO CONTROL COSTS? IS THIS WHERE MOST E-DISCOVERY CONSULTING COSTS ARE INCURRED? IF SO, SHOULD STATUTORY CAUSES OF ACTION BY INDIVIDUAL PLAINTIFFS BE TREATED DIFFERENTLY?
SO,

1. IS SOME EMPIRICAL RESEARCH WARRANTED? I WOULD SUGGEST "YES" BEFORE WE EMBARK ON RULE AMENDMENTS.

2. WILL RULE AMENDMENTS REALLY EFFECT A SO-CALLED "SEA CHANGE?" I WOULD SUGGEST AN APPROPRIATE RULE CHANGE WOULD BE TO DIRECT ATTORNEYS TO CONSIDER AND DISCUSS PARAMETERS OF E-DISCOVERY, WHICH LOCAL CIVIL RULES IN THE DNJ HAVE NOW DONE SINCE 2003. A PROPOSED AMENDMENTS TO RULE 26(f) IS A FIRST STEP IN THIS DIRECTION, ALTHOUGH DOES NOT GO AS FAR AS DNJ AND OTHER LOCAL RULES DO.

A LAST COMMENT - I AM CERTAINLY AWARE THAT MOST INFORMATION IS NOW GENERATED ELECTRONICALLY IN THIS NATION. WHEN WE HEAR THAT, WE OFTEN PUT OUT OF MIND THE MOST VENERABLE LEGACY SYSTEM OF ALL, PAPER. HOW MANY CORPORATE ENTITIES HAVE PAPER RECORDS SCATTERED THROUGH VARIOUS LOCATIONS WITH LITTLE OR NO INDEXING AND KEPT OVER SIGNIFICANT TIME PERIODS. PROBLEMS OF VOLUME AND ACCESS EXIST AS TO THESE RECORDS TOO. WHAT ARE THE RULE AMENDMENTS DOING TO ADDRESS THIS? THE ANSWER IS LITTLE OR NOTHING.

A TANGENT

BEFORE I PROCEED I WANT TO TAKE YOU OFF ON A TANGENT.

TODAY, I WILL FOCUS ON FEDERAL COMMON LAW AND THE FEDERAL RULES OF CIVIL PROCEDURE. PLAINLY, THE "HEADLINES" FOR THE LEGAL PROFESSION ARE DOMINATED BY THE PROPOSED AMENDMENTS AND DECISIONS OF THE UNITED STATES DISTRICT COURTS WHICH DEAL WITH E-DISCOVERY. BUT, THOSE OF US SITTING HERE TODAY SHOULD NOT IGNORE – AND DO SO AT OUR PERIL – DEVELOPMENTS IN THE STATES AFFECTING E-DISCOVERY.

AFTER ALL, FEDERAL COURTS ARE COURTS OF LIMITED JURISDICTION. MOST OF THE JUDICIAL BUSINESS OF THIS NATION IS CONDUCTED IN THE COURTS OF THE STATES. MOREOVER, TO PARAPHRASE JUSTICE BRANDEIS, THE STATES CAN EXPERIMENT ON AN INDIVIDUAL BASIS WITH APPROACHES TO E-DISCOVERY.

TO GIVE AN EXAMPLE, A CALIFORNIA APPELLATE COURT IN TOSHIBA AND A NEW YORK STATE TRIAL COURT IN LIPCO ELECTRIC, BOTH DECIDED LAST YEAR, CONSTRUED STATUTES OF THEIR RESPECTIVE STATES AND CONCLUDED THAT COST - SHIFTING IN E-DISCOVERY IS NOT PERMITTED AND THAT REQUESTING PARTIES MUST BEAR SUCH COSTS.

ANOTHER EXAMPLE: IN 1998, TEXAS RULE OF CIVIL PROCEDURE 196.4 WAS ADOPTED. LET ME QUOTE IT:

> "TO OBTAIN DISCOVERY OF DATA OR INFORMATION THAT EXISTS IN ELECTRONIC OR MAGNETIC FORM, THE REQUESTING PARTY MUST SPECIFICALLY REQUEST PRODUCTION OF ELECTRONIC OR MAGNETIC DATA AND SPECIFY THE FORM IN WHICH THE REQUESTING PARTY WANTS IT PRODUCED. THE RESPONDING PARTY MUST PRODUCE THE ELECTRONIC OR MAGNETIC DATA THAT IS RESPONSIVE TO THE REQUEST AND IS REASONABLY AVAILABLE TO THE RESPONDING PARTY IN ITS ORDINARY COURSE OF BUSINESS. IF THE RESPONDING PARTY CANNOT-THROUGH REASONABLE EFFORTS–RETRIEVE THE DATA OR INFORMATION REQUESTED OR PRODUCE IT IN THE FORM REQUESTED, THE RESPONDING PARTY MUST STATE AN OBJECTION COMPLYING WITH THESE RULES. IF THE COURT ORDERS THE RESPONDING PARTY TO COMPLY WITH THE REQUEST, THE COURT MUST ALSO ORDER THAT

THE REQUESTING PARTY PAY THE REASONABLE EXPENSES OF ANY EXTRAORDINARY STEPS REQUIRED TO RETRIEVE AND PRODUCE THE INFORMATION."

WHAT HAS BEEN THE EFFECT OF THE TEXAS RULE? HAS E-DISCOVERY BEEN CURTAILED? IF SO, HAS THERE BEEN AN ADVERSE EFFECT ON CIVIL JUSTICE? HAS THE "PLAYING FIELD" BETWEEN PARTIES BEEN UPSET OR LEVELED?

WHAT WILL BE THE EFFECT OF THE TOSHIBA AND LIPCO ELECTRIC DECISIONS? CHANGES IN STATUTES? IN STATUTORY INTERPRETATION? IN E-DISCOVERY PRACTICES?

WE SHOULD INFORM OURSELVES OF WHAT STATES DO, IF FOR NO OTHER REASON THAN TO RECOGNIZE THAT THE FEDERAL RULES OF CIVIL PROCEDURE ARE OF LIMITED APPLICATION AND SHOULD NOT BE CONSIDERED THE "LAST WORD" IN A NEW, COMPLEX - AND EVOLVING - AREA.

SCOPE

RULE 26 GOVERNS MANY ASPECTS OF DISCOVERY. IN 2000, THE CONCEPT OF THE BIFURCATION OF DISCOVERY WAS INTRODUCED AS RULE 26(b)(1). THAT RULE NOW PROVIDES FOR DISCOVERY OF ANY MATTER, NOT PRIVILEGED, THAT IS RELEVANT TO THE CLAIM OR DEFENSE OF ANY PARTY. 26(b)(1) ALSO PROVIDES THAT, FOR GOOD CAUSE SHOWN, THE COURT MAY ORDER DISCOVERY OF ANY MATTER RELEVANT TO THE S/M INVOLVED IN THE ACTION.

ACCORDING TO THE ADVISORY COMMITTEE NOTE TO THE 2000 AMENDMENT - WHICH IS CLOSEST WE HAVE TO A LEGISLATIVE HISTORY -

> "THE AMENDMENT IS DESIGNED TO INVOLVE THE COURT MORE ACTIVELY IN REGULATING THE BREADTH OF SWEEPING OR CONTENTIOUS DISCOVERY."

THE NOTE ALSO PROVIDES THAT, "THE GOOD-CAUSE STANDARD WARRANTING BROADER DISCOVERY IS MEANT TO BE FLEXIBLE."

LET ME QUOTE THE NOTE IN MORE DETAIL:

> "THE DIVIDING LINE BETWEEN INFORMATION RELEVANT TO THE CLAIMS AND DEFENSES AND THAT RELEVANT ONLY TO THE SUBJECT MATTER OF THE ACTION CANNOT BE DEFINED WITH PRECISION. A VARIETY OR TYPES OF INFORMATION NOT DIRECTLY PERTINENT TO THE INCIDENT IN SUIT COULD BE RELEVANT TO THE CLAIMS OR DEFENSES RAISED IN A GIVEN ACTION. FOR EXAMPLE, OTHER INCIDENTS OF THE SAME TYPE, OR INVOLVING THE SAME PRODUCT, COULD BE PROPERLY DISCOVERABLE UNDER THE REVISED STANDARD. INFORMATION ABOUT ORGANIZATIONAL ARRANGEMENTS OR FILING SYSTEMS OF A PARTY COULD BE DISCOVERABLE IF LIKELY TO YIELD OR LEAD TO THE DISCOVERY OF ADMISSIBLE INFORMATION. SIMILARLY, INFORMATION THAT COULD BE USED TO IMPEACH A LIKELY WITNESS, ALTHOUGH NOT OTHERWISE RELEVANT TO THE CLAIMS OR DEFENSES, MIGHT BE PROPERLY DISCOVERABLE. IN EACH INSTANCE, THE DETERMINATION WHETHER SUCH INFORMATION IS DISCOVERABLE BECAUSE IT IS RELEVANT TO THE CLAIMS

> OR DEFENSE DEPENDS ON THE CIRCUMSTANCES OF THE PENDING MOTION.
> THE RULE CHANGE SIGNALS TO THE COURT THAT IT HAS THE AUTHORITY TO CONFINE DISCOVERY TO THE CLAIMS AND DEFENSES ASSERTED IN THE PLEADINGS AND SIGNALS TO THE PARTIES THAT THEY HAVE NO ENTITLEMENT TO DISCOVERY TO DEVELOP NEW CLAIMS OR DEFENSES THAT ARE NOT ALREADY IDENTIFIED IN THE PLEADINGS."

AS SAID BY MY FELLOW MJ, PAUL GRIMM, OF THE D.MD., "IT IS INTENDED THAT THE SCOPE OF DISCOVERY BE NARROWER THAT IT WAS, IN SOME MEANINGFUL WAY." NOW, WHAT HAS BEEN MY EXPERIENCE WITH THE CONCEPT OF BIFURCATED DISCOVERY UNDER AND THE 2000 AMENDMENTS?

1. ATTORNEYS DO NOT AS A GENERAL RULE ATTEMPT TO LIMIT DISCOVERY TO THAT WHICH IS RELEVANT TO A CLAIM OR DEFENSE.

2. ATTORNEYS DO NOT AS A GENERAL RULE ADDRESS THE EXISTENCE OF GOOD CAUSE, EITHER TO ARGUE FOR BROADER DISCOVERY AS 26(b)(1) CONTEMPLATES OR TO CONTEST SUCH ARGUMENTS.

THIS BRINGS ME TO RULE 26(b)(2). 26(b)(2) INTRODUCED THE CONCEPT OF PROPORTIONABILITY IN 1983. IT ALLOWS A COURT, EITHER SUA SPONTE OR ON A MOTION OF A PARTY, TO LIMIT DISCOVERY IF

> "(I) THE DISCOVERY SOUGHT IS UNREASONABLE CUMULATIVE OR DUPLICATIVE, 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 1983 ADVISORY COMMITTEE NOTE MAKES REFERENCE TO THE CONCEPT OF PROPORTIONALITY:

"THE OBJECTIVE IS TO GUARD AGAINST REDUNDANT OR DISPROPORTIONATE DISCOVERY BY GIVING THE COURT AUTHORITY TO REDUCE THE AMOUNT OF DISCOVERY THAT MAY BE DIRECTED TO MATTERS THAT ARE OTHERWISE PROPER SUBJECTS OF INQUIRY. ***. ON THE WHOLE, HOWEVER, DISTRICT JUDGES HAVE BEEN RELUCTANT TO LIMIT THE USE OF THE DISCOVERY DEVICES." ***

IN 2000, 26(b)(1) WAS AMENDED TO INCLUDE A SPECIFIC INCORPORATION OF 26(b)(2). WHY, AS EXPLAINED IN THE 2000 ADVISORY COMMITTEE GAP REPORT:

"THE COMMITTEE HAS BEEN TOLD REPEATEDLY THAT COURTS HAVE NOT IMPLEMENTED THESE LIMITATIONS WITH THE VIGOR THAT WAS CONTEMPLATED. ***. THIS OTHERWISE REDUNDANT CROSS-REFERENCE HAS BEEN ADDED TO EMPHASIZE THE NEED FOR ACTIVE JUDICIAL USE OF SUBDIVISION (b)(2) TO CONTROL EXCESSIVE DISCOVERY. ***."

TAKEN TOGETHER, THESE PROVISIONS GIVE THE COURT BROAD AUTHORITY TO CONTROL THE COST OF DISCOVERY BY IMPOSING LIMITS AND CONDITIONS. THE JUDGE CAN IMPLEMENT THE COST-BENEFIT RATIONALE BY CONDITIONING PARTICULAR DISCOVERY ON PAYMENT OF ITS COSTS BY THE PARTY SEEKING IT. SHORT OF BARRING A PARTY FROM CONDUCTING CERTAIN COSTLY OR MARGINALLY NECESSARY DISCOVERY , THE JUDGE CAN REQUIRE THE PARTY TO PAY ALL OR PART OF THE COST AS A CONDITION TO PERMITTING IT TO PROCEED. SIMILARLY, WHERE A PARTY INSISTS ON CERTAIN DISCOVERY TO ELICIT INFORMATION THAT MAY BE AVAILABLE THROUGH LESS EXPENSIVE METHODS, THAT DISCOVERY MAY BE CONDITIONED ON THE PAYMENT OF THE COSTS INCURRED BY OTHER PARTIES. SUCH A COST-SHIFTING ORDER MAY REQUIRE PAYMENT AT THE TIME, OR MAY IMPLY DESIGNATE CERTAIN COSTS AS TAXABLE COSTS TO BE AWARDED AFTER FINAL JUDGMENT.

REFERENCE TO THE COURT'S AUTHORITY TO SHIFT COSTS WILL TEND TO GIVE THE PARTIES AN INCENTIVE TO USE COST-EFFECTIVE MEANS OF OBTAINING INFORMATION AND A DISINCENTIVE TO ENGAGE IN WASTEFUL AND

> COSTLY DISCOVERY ACTIVITY. FOR EXAMPLE, WHERE PRODUCTION IS TO BE MADE OF DATA MAINTAINED ON COMPUTERS, AND THE PRODUCING PARTY IS ABLE TO SEARCH FOR AND PRODUCE THE DATA MORE EFFICIENTLY AND ECONOMICALLY THAN THE DISCOVERING PARTY, THEY MAY AGREE TO USE THE FORMER'S CAPABILITIES SUBJECT TO APPROPRIATE REIMBURSEMENT FOR COSTS. WHERE IT IS LESS EXPENSIVE FOR A WITNESS TO TRAVEL TO A DEPOSITION SITE THAN FOR SEVERAL ATTORNEYS TO TRAVEL TO THE WITNESS'S RESIDENCE, THE PARTY SEEKING DISCOVERY MAY AGREE TO PAY THE WITNESS'S TRAVEL EXPENSES."

26(b)(1) AND (b)(2) GIVE FEDERAL JUDGES BROAD POWERS TO REGULATE SCOPE OF DISCOVERY, TO IMPOSE CONDITIONS ON DISCOVERY, INCLUDING COST-SHIFTING, AND COURTS HAVE DONE SO:

FOR EXAMPLE, HERE IN SDNY, MJ FRANCIS ARTICULATED A 7-PART COST-SHIFTING TEST IN ROWE ENTERTAINMENT. DJ SCHEINDLEIN RESTATED AND REVISED THAT TEST IN HER ZUBULAKE DECISIONS. LAST AUGUST, THE ZUBULAKE TEST WAS ITSELF REVISED IN THE WIGENTON DECISION FROM N.D. ILL.

MJ FACCIOLA OF D.DC., IN HIS McPEEK DECISIONS, ADOPTED THE ECONOMICS CONCERT OF "MARGINAL UTILITY" AND USED IT TO REQUIRE SAMPLING OF E-INFORMATION IN THE FIRST INSTANCE.

SO, WHERE ARE WE NOW IN THE REGULATION OF E-DISCOVERY?

1. WE HAVE THE BIFURCATION OF DISCOVERY UNDER 26(a)(1), WHICH, BASED ON MY KNOWLEDGE AND EXPERIENCE, IS NOT OFTEN ADDRESSED BY ATTORNEYS.

2. WE HAVE THE PROPORTIONALITY PRINCIPLE OF 26(b)(2), WHICH IS NOT BEING UTILIZED BY JUDGES.

3. BUT, WHEN (b)(1) AND (b)(2) ARE UTILIZED BY JUDGES, SCOPE CAN BE LIMITED.

WHAT WOULD THE PROPOSED AMENDMENT DO? 26(b)(2) WOULD HAVE THIS TEXT ADDED:

> "A PARTY NEED NOT PROVIDE DISCOVERY OF ELECTRONICALLY STORED INFORMATION THAT THE PARTY IDENTIFIED 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."

WHY THIS AMENDMENT? ADVISORY COMMITTEE NOTE QUOTES THE FOURTH EDITION OF THE MANUAL FOR COMPLEX LITIGATION ABOUT VOLUME OF E-INFORMATION AND CONCLUDES:

> "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."

THE ADVISORY COMMITTEE NOTE ALSO SPEAKS OF WHAT "REASONABLY ACCESSIBLE" MEANS:

> "WHETHER GIVEN INFORMATION IS 'REASONABLY ACCESSIBLE' MAY DEPEND ON A VARIETY OF CIRCUMSTANCES. ONE REFERENT WOULD BE WHETHER THE PARTY ITSELF ROUTINELY ACCESS OR USES THE INFORMATION. IF THE PARTY ROUTINELY USES THE INFORMATION - SOMETIMES CALLED 'ACTIVE DATA' - THE INFORMATION WOULD ORDINARILY BE CONSIDERED REASONABLE ACCESSIBLE. THE FACT THAT THE PARTY DOES NOT ROUTINELY ACCESS THE INFORMATION DOES NOT NECESSARILY MEAN THAT ACCESS REQUIRES SUBSTANTIAL EFFORT OR COST."

THE ADVISORY COMMITTEE NOTE GOES ON TO DISCUSS INTERPLAY WITH OTHER RULES:

> "IF THE REQUESTING PARTY MOVES TO COMPEL DISCOVERY, THE RESPONDING PARTY MUST KNOW THAT THE INFORMATION SOUGHT IS NOT REASONABLE ACCESSIBLE TO INVOKE THIS 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, ALTHOUGH OTHER LIMITATIONS -

SUCH AS THOSE IN RULE 26(b)(2)(I), (ii), AND (iii) - MAY APPLY. 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."

SO, WHERE WILL WE BE UNDER THE AMENDMENT IF ADOPTED:

1. DO 26(b)(1) ANALYSIS, THEN ADDRESS ACCESSIBILITY, THEN (POSSIBLY) GO TO 26(b)(2) OR 26(c).

2. NOTE THAT DISCOVERY CAN STILL BE ALLOWED UNDER AMENDMENT, BUT ON A SHOWING OF GOOD CAUSE - BUT HASN'T A GOOD CAUSE DETERMINATION PRESUMABLY BEEN MADE UNDER 26(b)(1) IF "BROADER" DISCOVERY ALLOWED? WHAT OTHER SHOWING O9F GOOD CAUSE IS CONTEMPLATED?

3. I AM NOT A DOOMSAYER - AND I DO NOT INTEND TO ARGUE THAT THIS AMENDMENT WILL OPEN A FLOODGATE OF DISCOVERY DISPUTES, BUT WHY ARE WE INTRODUCING YET ANOTHER BIFURCATION OF DISCOVERY - NOW BETWEEN ACCESSIBLE AND INACCESSIBLE E-INFORMATION? ISN'T THE FIGHT REALLY ABOUT THE DIFFICULTY AND COST IN RETRIEVING DATA, ACCESSIBLE OR NOT - AND DOESN'T (b)(2) ALLOW THAT QUESTION TO BE DECIDED NOW? - AND YET, RULE PROPOSAL WOULD ENGRAFT AN ACCESSIBLE/INACCESSIBLE TEST ON TOP OF EXISTING DISCOVERY MANAGEMENT TOOLS OF (b)(1) AND (b)(2), WHICH ARE UNDERUTILIZED NOW.

HOW MEANINGFUL IS THE DISTINCTION BETWEEN ACCESSIBLE AND INACCESSIBLE DATA ANYWAY? ASSUME THAT A CORPORATE ENTITY HAS A LARGE DATA BASE THAT IS USED DAILY. ONE COULD ARGUE THAT, UNDER THE AMENDMENT TO 26(b)(2), THE INFORMATION CONTAINED IN THIS DATA BASE WOULD BE REASONABLY ACCESSIBLE. ALSO ASSUME THAT A REQUEST WILL BE MADE FOR CERTAIN INFORMATION FROM WILL REQUIRE SUBSTANTIAL TIME AND MONEY TO CREATE A NEW REPORT THAT WILL PROVIDE THE INFORMATION. ALSO ASSUME THAT A REQUEST WILL BE MADE FOR CERTAIN INFORMATION. THE DATA BASE, HOWEVER, IS NOT PROGRAMMED TO RETRIEVE THE INFORMATION SOUGHT. IT WILL TAKE SUBSTANTIAL TIME AND MONEY TO CREATE A NEW REPORT THAT WILL PROVIDE THE INFORMATION.

TO RESPOND TO THE REQUEST, A MIRROR IMAGE OF THE DATA BASE MUST BE MADE (REMEMBER, IT IS DYNAMIC IN NATURE). WHEN THE NEW REPORT IS

CREATED, THE MIRROR IMAGE MUST BE RESTORED TO AN OPERATING SYSTEM TO RUN THE REPORT.

WHO PAYS FOR THIS EFFORT? THE DISTINCTION BETWEEN REASONABLY ACCESSIBLE AND INACCESSIBLE E-INFORMATION MAY NOT BE RELEVANT. AT ISSUE HERE IS THE REQUIREMENT THAT THE INFORMATION ON THE DATA BASE BE REFORMATTED. WE MUST, I ASSUME, GO BACK TO THE "TRADITIONAL" TESTS UNDER 26(b)(1) AND 26(b)(2). SHOULD THE FOCUS ON E-DISCOVERY BE "RETRIEVABILTY" RATHER THAN ACCESSIBILITY? SHOULD WE NOT FOCUS ON WHETHER E-INFORMATION IS RETRIEVABLE RATHER THAN ON BACK-UP TAPES OR LEGACY SYSTEMS?

A RULE AMENDMENT SHOULD NOT BE A SUBSTITUTE FOR EFFECTIVE CASE-MANAGEMENT. JUDGES ALREADY HAVE TOOLS AVAILABLE - AS DO LAWYERS. MAKES NO SENSE.

I DO FORESEE ONE POSSIBLE PROBLEM: WHAT WILL STOP A CORPORATE ENTITY, AFTER COMMENCEMENT OF LITIGATION, FROM MAKING RELEVANT DATA INACCESSIBLE? WHY REWARD SUCH A UNILATERAL DECISION - WHETHER MADE FOR VALID BUSINESS OR LITIGATION STRATEGY REASONS - TO DO THIS? (AND, AS SAID BEFORE, WHY NOT ADDRESS PAPER?).

RATHER THAN AMEND:

1. ATTORNEYS SHOULD REACH AGREEMENT UNDER (b)(1) AS TO PARAMETERS OF DISCOVERY AND JUDGES SHOULD RELUCTANTLY MADE GOOD CAUSE DETERMINATION.

2. JUDGES SHOULD USE (b)(2)

3. AN INCREMENTAL APPROACH WITH SAMPLING SHOULD BE FOLLOWED. A PROPOSED AMENDMENT TO RULE 34(a)(1) WOULD ADDRESS THIS, MAKING CLEAR THAT PARTIES MAY "REQUEST AN OPPORTUNITY TO TEST AND SAMPLE MATERIALS."

4. ANALYZE COSTS IN THE FIRST INSTANCE.

PERHAPS WE SHOULD CONSIDER A NEW PARADIGM FOR COSTS. IF DISCOVERY SOUGHT THAT IS RELEVANT TO A CLAIM OR DEFENSE, THE RESPONDING PARTY MIGHT BEAR THE COST. IF THE REQUESTING PARTY CAN SHOW GOOD CAUSE FOR "EXPANDED" DISCOVERY UNDER 26(b)(1), THIS WOULD AT LEAST IMPOSE A MEASURE OF PREDICTABILITY AND ENABLE PARTIES TO CONSIDER THE COSTS OF E-DISCOVERY BEFORE DISCOVERY REQUESTS MUST BE RESPONDED

TO.

ALSO, NOTE THAT JUDGES SUCH AS JUDGE FACCIOLA IN D.DC AND, AGAIN HERE IN SDNY, JUDGE SWEET HAVE RECOGNIZED THAT, WHEN THE "NORMAL COURSE OF BUSINESS" IS FOR ENTITIES TO MAINTAIN RECORDS IN E- FORMAT, WHAT IS IMPORTANT FOR DISCOVERY PURPOSES IS NOT WHETHER THE RECORDS ARE INDEXED BUT WHETHER THE RECORDS ARE (OR CAN REASONABLY BE MADE) READABLE AND SEARCHABLE.

IS THIS A KEY TO COST REDUCTION? THINK ABOUT THE POSSIBILITIES ARISING FROM CONTEXT-BASED SEARCHES OF E-DATA IN NATIVE FORMAT, A SUBJECT WHICH MJ FRANCIS WILL ADDRESS THIS AFTERNOON

SEVERAL PROPOSED AMENDMENTS TO THE FEDERAL RULES MAY BE OF ASSISTANCE HERE. PROPOSED RULE 34 (b)
WOULD ALLOW A REQUESTING PARTY TO "SPECIFY THE FORM IN WHICH ELECTRONICALLY STORED INFORMATION IS TO BE PRODUCED." IT WOULD ALSO PROVIDE FOR "AN OBJECTION FOR THE REQUESTED FORM FOR PRODUCING ELECTRONICALLY STORED INFORMATION." RULE 34(b) WOULD ALSO BE AMENDED TO PROVIDE THAT:

> "IF A REQUEST FOR ELECTRONICALLY STORED INFORMATION DOES NOT SPECIFY THE FORM OF PRODUCTION, 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."

THE ADVISORY COMMITTEE NOTE STATES, IN PERTINENT PART, AS FOLLOWS:

> "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. ***."

LET'S TALK ABOUT "WAIVER."

WAIVER

AT ISSUE HERE IS WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT PROTECTION BY DISCLOSURE OF INFORMATION TO AN ADVERSARY IN LITIGATION. SPECIFICALLY, I AM SPEAKING OF THE "CLAWBACK" AGREEMENT AND THE "QUICK PEEK" AGREEMENT, WHICH HAVE BEEN UTILIZED BY PARTIES IN THE CONTEXT OF E-DISCOVERY AND TRADITIONAL PAPER DISCOVERY TO ADDRESS, ONCE AGAIN, THE VOLUME OF PRODUCTION.

THESE AGREEMENTS DIFFER. AS EXPLAINED BY K. WITHERS OF FJC IN HIS RECENT ARTICLE, "TWO TIERS AND A SAFE HARBOR: FEDERAL RULEMAKERS GRAPPLE WITH E-DISCOVERY." UNDER A CLAWBACK AGREEMENT "THE PARTIES AGREE TO A PROCEDURE FOR THE RETURN OF APPARENTLY PRIVILEGED INFORMATION WITHIN A REASONABLE TIME OF ITS DISCOVERY." THE QUICK PEEK AGREEMENT "DOES NOT INVOLVE 'INADVERTENT' PRODUCTION OF PRIVILEGED INFORMATION BUT THE PURPOSEFUL DISCLOSURE OF INFORMATION, 'WITHOUT INTENDING TO WAIVE A CLAIM OF PRIVILEGE,' PRIOR TO PRODUCTION WITH AN EXPRESS RESERVATION OF THE RIGHT TO ASSERT PRIVILEGE AT A LATER POINT IN THE DISCOVERY PROCESS."

HOW MIGHT THE LAW OF WAIVER DEAL WITH THESE AGREEMENTS? BY WAY OF INTRODUCTION, IT IS IMPORTANT TO DISTINGUISH BETWEEN THE VOLUNTARY (OR INTENTIONAL) PRODUCTION OF WHAT MIGHT BE PRIVILEGED INFORMATION AND THE UNINTENTIONAL PRODUCTION OF WHAT MIGHT BE PRIVILEGED INFORMATION. NOTE IN THIS REGARD THAT, AS THEN - MAGISTRATE JUDGE WOLFSON OF THE DISTRICT OF NEW JERSEY STATED IN CIBY-GEIGY, "AN INADVERTENT DISCLOSURE IS, BY DEFINITION, AN UNINTENTIONAL ACT."

LET US BEGIN WITH VOLUNTARY PRODUCTION. THE BLACKLETTER LAW IS THAT, AS THE THIRD CIRCUIT OF APPEALS RECOGNIZED IN WESTINGHOUSE, "VOLUNTARY DISCLOSURE TO A THIRD PARTY OF PURPORTEDLY PRIVILEGED COMMUNICATIONS HAS LONG BEEN CONSIDERED INCONSISTENT WITH AN ASSERTION OF THE [ATTORNEY-CLIENT] PRIVILEGE." WAIVER OCCURS EVEN IF A "THIRD PARTY AGREES NOT TO DISCLOSE THE COMMUNICATIONS TO ANYONE ELSE."

TURNING TO WORK PRODUCT, WESTINGHOUSE HOLDS THAT A VOLUNTARY DISCLOSURE TO AN ADVERSARY GIVES RISE TO A WAIVER.

LET'S TURN TO THE INADVERTENT PRODUCTION OF PRIVILEGED MATERIALS. AS JUDGE WOLFSON RECOGNIZED IN CIBY-GEIGY, AND JUDGE SAND OF THE SOUTHERN DISTRICT OF NEW YORK RECOGNIZED MORE RECENTLY IN RIGAS,

THERE ARE "THREE DISTINCT SCHOOLS OF THOUGHT."

> "ONE LINE OF CASES HOLDS THAT THE INADVERTENT DISCLOSURE OF A PRIVILEGED DOCUMENT VITIATES THE PRIVILEGE AND CONSTITUTES A WAIVER. ***. AT THE OTHER END OF THE SPECTRUM LIES A LINE OF CASES WHICH ESPOUSE THE 'NO WAIVER' RULE. ***. THIS RULE PROVIDES THAT AN ATTORNEY'S NEGLIGENCE CANNOT WAIVE THE PRIVILEGE BECAUSE THE CLIENT, AND NOT THE ATTORNEY, IS THE HOLDER OF THE PRIVILEGE. ***.
>
> THE THIRD APPROACH TAKES THE MIDDLE OF THE ROAD, AND FOCUSES UPON THE REASONABLENESS OF THE STEPS TAKEN TO PRESERVE THE CONFIDENTIALITY OF PRIVILEGED DOCUMENTS. THIS APPROACH CONSIDERS INADVERTENT DISCLOSURE TO BE A FORM OF WAIVER. ***. IN GENERAL, A WAIVER MUST BE A KNOWING AND INTENTIONAL ACT TO BE EFFECTIVE. ***.

HOW DO CLAWBACK AND QUICK PEEK AGREEMENTS MEASURE UP AGAINST THESE BLACKLETTER LAW PRINCIPLES? PRESUMABLY, GIVEN THE DECISION OF THE PARTIES TO ENTER INTO SUCH AGREEMENTS, ONE CANNOT ASSERT A WAIVER AGAINST THE OTHER. HOWEVER, TO THE "OUTSIDE WORLD LOOKING IN," THE VOLUNTARY ACT OF A PARTY IN TURNING OVER PRIVILEGED MATERIALS TO AN ADVERSARY WOULD APPEAR TO CONSTITUTE A WAIVER OF BOTH THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT. SIMILARLY, UNDER AT LEAST ONE IF NOT TWO OF THE APPROACHES DESCRIBED ABOVE, THE INADVERTENT DISCLOSURE OF ALLEGEDLY PRIVILEGED MATERIALS UNDER A CLAWBACK AGREEMENT WOULD ALSO APPEAR TO GIVE RISE TO A WAIVER.

THE PRINCIPLES WHICH I HAVE JUST DISCUSSED ARISE FROM FEDERAL COMMON LAW. NO FEDERAL RULE OF CIVIL PROCEDURE ADDRESSES WAIVER, NOR DOES ANY RULE ADDRESS QUICK PEEK OR CLAWBACK AGREEMENTS. AT BEST, EXISTING RULE 26(b)(5) DESCRIBES A PROCEDURE BY WHICH A PARTY CAN ASSERT PRIVILEGE OR WORK PRODUCT AND BY WHICH AN ADVERSARY CAN CONTEST ANY SUCH ASSERTION. THIS "SILENCE" WOULD CHANGE UNDER A PROPOSED AMENDMENT TO THE FEDERAL RULES.

RULE 26(b)(5),WHICH I JUST DESCRIBED, WOULD BECOME 26(b)(5)(A). A NEW RULE 26(b)(5)(B) WOULD PROVIDE AS FOLLOWS:

> "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."

THE ADVISORY COMMITTEE NOTE PROVIDES, IN PART, AS FOLLOWS:

> "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)(B) IS ADDED TO PROVIDE A PROCEDURE FOR A PARTY WHAT 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.
>
> 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. ***. RULE 26(b)(5)(B) PROVIDES A PROCEDURE FOR ADDRESSING THESE ISSUES."

THE ADVISORY COMMITTEE NOTE REFERS TO A PROPOSED AMENDMENT TO RULE 16(b) TH AT WOULD ADD A SUBSECTION (6)

> ALLOWING SCHEDULING ORDERS TO INCLUDE THE "ADOPTION OF THE PARTIES' AGREEMENT FOR PROTECTION AGAINST WAIVING PRIVILEGE." THE ADVISORY COMMITTEE NOTE TO THIS PROPOSED AMENDMENT STATES, AMONG OTHER THINGS, THAT "[A] CASE-MANAGEMENT ORDER TO EFFECTUATE THE PARTIES' AGREEMENT MAY BE HELPFUL IN AVOIDING DELAY AND EXCESSIVE COSTS IN DISCOVERY." IT GOES ON, HOWEVER, TO STATE THAT THE PROPOSED AMENDMENT "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."

AS I STATED, WE CAN ASSUME THAT NEITHER PARTY CAN ASSERT WAIVER AGAINST ANOTHER UNDER A CLAWBACK OR QUICK PEEK AGREEMENT. WHAT HAPPENS, HOWEVER, WHEN A THIRD-PARTY, SUCH AS A COLLATERAL LITIGANT OR A MEMBER OF THE PUBLIC, SEEKS ACCESS TO PRIVILEGED MATERIALS PRODUCED UNDER ONE OF THESE AGREEMENTS? AT FEDERAL COMMON LAW, A WAIVER LIKELY OCCURRED. WHAT MIGHT BE THE AFFECT OF THE PROPOSED RULE?

RECALL THAT THE ADVISORY COMMITTEE NOTE STATES THAT THE PROPOSAL "DOES NOT ADDRESS WHETHER THERE HAS BEEN A PRIVILEGE WAIVER." IN THE NEXT SENTENCE, HOWEVER, THE NOTE STATES THAT A COURT SHOULD CONSIDER WHETHER A CASE-MANAGEMENT ORDER PROVIDES FOR PROTECTION AGAINST A WAIVER OF PRIVILEGE, AS DOES THE ACCOMPANYING NOTE TO RULE 16(b)(6). WHY? HOW?

LET'S BEGIN WITH THE WORDS OF MY COLLEAGUE AND FRIEND, MAGISTRATE JUDGE ROSEN OF THE DISTRICT OF NEW JERSEY, WHO STATED IN KOCH MATERIALS:

> "COURTS GENERALLY FROWN UPON 'BLANKET' DISCLOSURE PROVISIONS AS CONTRARY TO RELEVANT JURISPRUDENCE. ***. IN PARTICULAR, THE COURT

OBSERVES THAT SUCH BLANKET PROVISION, ESSENTIALLY IMMUNIZING ATTORNEYS FROM NEGLIGENT HANDLING OF DOCUMENTS, COULD LEAD TO SLOPPY ATTORNEY REVIEW AND IMPROPER DISCLOSURE WHICH COULD JEOPARDIZE CLIENTS' CASES. MOREOVER, WHERE THE INTERPRETATION OF THE PROVISION REMAINS HOTLY DISPUTED, AS IT IS IN THIS CASE, BROAD CONSTRUCTION IS ILL ADVISED. CONSEQUENTLY, THE COURT SHALL NOT APPLY THE PLAINTIFF'S PROFFERED BLANKET PROVISION IN THE LITIGATION. INSTEAD, THE COURT SHALL REVIEW THE PARTIES' SUBSTANTIVE WAIVER ARGUMENTS."

THE ADVISORY COMMITTEE NOTE CITES TO WRIGHT, MILLER & KANE. HERE IS WHAT THE TREATISE SAY IN VOLUME 8, PAGES 239-40:

"THESE DIFFICULTIES [ARISING FROM A FINDING OF WAIVER] ARE MOST PRONOUNCED IN CASES INVOLVING SUBSTANTIAL DOCUMENT DISCOVERY IN WHICH DISCLOSURE MAY OCCUR UNEXPECTEDLY. AS ONE DISTRICT COURT PUT IT, '[T]HE INADVERTENT PRODUCTION OF A PRIVILEGED DOCUMENT IS A SPECTER THAT HAUNTS EVERY DOCUMENT INTENSIVE CASE.' INDEED, SUCH DISCLOSURES HAVE OCCURRED EVEN INCASES IN WHICH THE ITEMS IN QUESTION WERE LISTED ON A PRIVILEGE LOG.' ONE REACTION TO THIS PROBLEM IS TO ENTER A PREDISCOVERY ORDER THAT UNINTENDED DISCLOSURE OF PRIVILEGED MATERIALS WILL NOT OPERATE AS A WAIVER AND IN THIS WAY TO REDUCE THE BURDEN OF SCREENING MATERIAL AND STREAMLINE THE DISCOVERY PROCESS. THE NINTH CIRCUIT CONCLUDED THAT IT WAS 'OBVIOUS' THAT NO WAIVER OCCURRED IN A CASE AFTER A COURT ENTERED SUCH AN ORDER. ***. BUT SUCH ORDERS OR AGREEMENTS ARE NOT SUFFICIENT TO WITHSTAND CUSTOMARY WAIVER ANALYSIS; WHATEVER THEIR ESTOPPEL EFFECT AS TO THE PARTIES INVOLVED THEY COULD NOT BIND NONPARTIES. PERHAPS THE SOLUTION SHOULD BE TO RECOGNIZE THAT SUCH ORDERS FALL WITHIN A COURT'S GENERAL POWER TO MANAGE LITIGATION BY FACILITATING AND CONTROLLING THE COST OF DISCOVERY, BUT THIS APPROACH HAS YET TO BE ADOPTED DESPITE THE POTENTIAL FOR ADVANCING THE

DISCOVERY PROCESS IN CASES WHERE THE DEVICE IS EMPLOYED." [FOOTNOTES OMITTED]

CONSISTENT BOTH WITH JUDGE ROSEN'S COMMENTS AND THOSE OF THE TREATISE, THE FOURTH EDITION OF THE MANUAL FOR COMPLEX LITIGATION PROVIDES AT § 11.431:

> "CERTAIN MATERIALS MAY QUALIFY FOR FULL PROTECTION AGAINST DISCLOSURE OR DISCOVERY AS PRIVILEGED, AS TRIAL PREPARATION MATERIAL, OR AS INCRIMINATING UNDER THE FIFTH AMENDMENT. IT HELPS TO MINIMIZE THEIR POTENTIALLY DISRUPTIVE EFFECTS ON DISCOVERY, BY ADDRESSING THE POSSIBILITY OF SUCH CLAIMS AT AN EARLY CONFERENCE AND ESTABLISHING A PROCEDURE FOR THEIR RESOLUTION OR FOR AVOIDANCE THROUGH APPROPRIATE SEQUENCING OF DISCOVERY. PARTIES SOMETIMES TRY TO FACILITATE DISCOVERY BY AGREEING THAT THE DISCLOSURE OF A PRIVILEGED DOCUMENT WILL NOT BE DEEMED A WAIVER WITH RESPECT TO THAT DOCUMENT OR OTHER DOCUMENTS INVOLVING THE SAME SUBJECT MATTER. SOME COURTS, HOWEVER, HAVE REFUSED TO ENFORCE SUCH AGREEMENTS." [FOOTNOTE OMITTED].

I SHOULD MENTION HERE THE NINTH CIRCUIT DECISION CITED BY WRIGHT, MILLER & KANE, TRANSAMERICA COMPUTER COMPANY v. IBM CORP. AN ANTITRUST ACTION HAD BEEN COMMENCED AGAINST IBM IN THE NORTHERN DISTRICT OF CALIFORNIA. A DOCUMENT REQUEST HAD BEEN SERVED ON IBM. IBM REFUSED TO PRODUCE THE DOCUMENTS, ASSERTING ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT. PLAINTIFF ARGUED THAT ANY PRIVILEGE OR PROTECTION HAD BEEN WAIVED BY IBM'S PRODUCTION OF THE DOCUMENTS TO AN ADVERSARY IN A CASE IN THE DISTRICT OF MINNESOTA. AS EXPLAINED BY THE NINTH CIRCUIT OF APPEALS, THE EFFECT OF A CASE-MANAGEMENT ORDER IN THE MINNESOTA ACTION "WAS TO REQUIRE IBM TO PRODUCE WITHIN A THREE-MONTH PERIOD FOR INSPECTION AND FOR ADVERSARY COPYING APPROXIMATELY 17 MILLION PAGES OF DOCUMENTS." WITHIN THE SHORT TIME AVAILABLE TO IT, IBM ATTEMPTED TO DEVELOP "EFFECTIVE SCREENING PROCEDURES." THE DISTRICT JUDGE IN THE MINNESOTA ACTION RULED THAT "HENCEFORTH THE INADVERTENT PRODUCTION OF ALLEGEDLY MATERIAL BY EITHER PARTY WOULD NOT CONSTITUTE A WAIVER OF THAT PARTY'S RIGHT TO CLAIM THE ATTORNEY-CLIENT PRIVILEGE, PROVIDED ONLY THAT THE PARTY DISCLAIMING WAIVER HAD CONTINUED TO EMPLOY PROCEDURES REASONABLY DESIGNED TO SCREEN OUT PRIVILEGED MATERIAL."

THE NINTH CIRCUIT CONCLUDED THAT WHAT HAPPENED TO IBM IN MINNESOTA WAS "PROBABLY A TRULY EXCEPTIONAL AND A UNIQUE SITUATION" AND THAT IBM HAD BEEN "COMPELLED" TO PRODUCE PRIVILEGED DOCUMENTS. THESE FACTS, NOT ANY ORDER BY THE MINNESOTA JUDGE, LED THE NINTH CIRCUIT TO CONCLUDE THAT THERE HAD NOT BEEN A WAIVER. THE NINTH CIRCUIT DID NOT IN ANY WAY FOCUS ON THE EFFECT OF THE MINNESOTA JUDGE'S RULING.

TWO OBSERVATIONS ARE APPROPRIATE HERE:

(1)THE FEDERAL RULES OF CIVIL PROCEDURE, AS THE TITLE IMPLIES, ARE INTENDED TO ADDRESS PROCEDURAL AND NOT SUBSTANTIVE MATTERS. BY ADVISING COURTS THAT THE EFFECT OF CASE-MANAGEMENT ORDERS SHOULD BE TAKEN INTO CONSIDERATION WHEN QUESTIONS OF WAIVER ARISE, HAS NOT THE ADVISORY COMMITTEE "CROSSED THE LINE" BETWEEN PROCEDURE AND SUBSTANCE AND ADDED A SUBSTANTIVE FACTOR TO BE CONSIDERED IN RULING ON WAIVER? MOREOVER, WHAT EFFECT SHOULD BE GIVEN TO THIS DIRECTION IN DIVERSITY CASES, WHEN STATE PRIVILEGE LAW PROVIDES THE RULE OF DECISION?

WHAT PROTECTION SHOULD AN ORDER GIVE TO PARTIES VIS-A-VIS THIRD-PARTIES AS OPPOSED TO BETWEEN THEMSELVES? PRESUMABLY, THE ONLY REASON FOR PARTIES TO SECURE A CASE-MANAGEMENT ORDER WHICH INCORPORATES A QUICK PEEK OR CLAWBACK AGREEMENT IS TO SECURE A JUDICIAL IMPRIMATUR TO THAT AGREEMENT. DOES A "SO ORDERED" TO AN OTHERWISE PRIVATE AGREEMENT INSULATE PARTIES FROM CLAIMS OF WAIVER BY THIRD-PARTIES WHO NEVER CONSENTED TO THAT AGREEMENT, MOST LIKELY NEVER KNEW OF THE AGREEMENT BEFOREHAND, AND DID NOT HAVE AN OPPORTUNITY TO CHALLENGE THE ENTRY OF THE ORDER?

CLAWBACK AND QUICK PEEK AGREEMENTS HAVE ANOTHER POSSIBLE VICE WHICH, I SUBMIT, NEITHER THE FEDERAL COMMON LAW OF WAIVER NOR THE PROPOSED RULE ADDRESS.

ASSUME THAT, EITHER UNDER A QUICK PEEK OR CLAWBACK AGREEMENT, A PARTY PRODUCED, VOLUNTARILY OR INADVERTENTLY, A DOCUMENT WHICH IS SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE OR WORK PRODUCT PROTECTION. ASSUME ALSO THAT THE RECEIVING ATTORNEY, AFTER HAVING READ AT LEAST PART OF THE DOCUMENT, REALIZED THAT IT WAS PRIVILEGED AND, CONSISTENT WITH THE PROPOSED RULE, RETURNED THE DOCUMENT TO THE PRODUCING PARTY. FURTHER ASSUME THAT THE DOCUMENT WAS CENTRAL TO THE PRODUCING PARTY'S PROSECUTION OR DEFENSE OF THE CASE.

UNDER THOSE CIRCUMSTANCES, WOULD IT BE REASONABLE FOR THE PRODUCING PARTY OR THE PUBLIC TO "SHARE *** THE NAGGING SUSPICION THAT

[THE OPPOSITION'S] TRIAL PREPARATION AND PRESENTATION OF THEIR CASE HAD BENEFITTED FROM CONFIDENTIAL INFORMATION OBTAINED FROM [THE DOCUMENT]?"

IN OTHER WORDS, DOES POSSESSION OF THAT IMPORTANT DOCUMENT, EVEN FOR A LIMITED TIME, CREATE A SUBSTANTIAL TAINT ON ANY FUTURE PROCEEDINGS? AFTER ALL, CAN INFORMATION - OR MEMORY - BE REMOVED FROM ONE'S MIND? THIS IS A QUESTION WHICH JUDGE RODRIGUEZ OF THE DISTRICT OF NEW JERSEY GRAPPLED WITH RECENTLY IN THE MALDANADO CASE AND IN WHICH HE, FOR A NUMBER OF REASONS INCLUDING SUCH A "TAINT," DISQUALIFIED LOCAL AND PRO HAC COUNSEL FOR A PLAINTIFF.

QUICK PEEK AND CLAW BAC K AGREEMENTS DO ENABLE THE PARTIES TO CONSERVE RESOURCES THAT WOULD OTHERWISE BE EXPENDED IN PRE-PRODUCTION REVIEW OF E- OR OTHER INFORMATION. UNDER FEDERAL COMMON LAW, WHETHER THESE AGREEMENTS WOULD SURVIVE WAIVER CHALLENGES BY THIRD-PARTIES IS QUESTIONABLE. THE PROPOSED AMENDMENT DOES NOT ALLEVIATE THIS CONCERN. INDEED, BY POSSIBLY VENTURING INTO THE WORLD OF "SUBSTANCE," IT PERMITS A CHALLENGE TO THE RULE ITSELF AS WELL AS THE INTRODUCTION OF A NEW FACTOR IN WAIVER ANALYSIS ARISING OUT OF THE IMPRIMATUR OF A COURT ORDER. REMEMBER ALSO THAT WRIGHT, MILLER & KANE, RELIED ON BY THE ADVISORY COMMITTEE, CONCLUDES THAN AN ORDER CANNOT BIND THIRD PARTIES. SIMILARLY, NEITHER THE FEDERAL COMMON LAW NOR THE PROPOSED RULE INFORM ON THE QUESTION OF DISQUALIFICATION WHICH I HAVE RAISED.

THERE IS YET ANOTHER PROBLEM WITH THE PROPOSED AMENDMENT. IT INFORMS NO ONE ON WHAT STANDARDS A CLAWBACK OR QUICK PEEK AGREEMENT SHOULD INCLUDE. ARE THERE -- SHOULD THERE BE – MINIMUM STANDARDS THAT AN AGREEMENT SHOULD INCLUDE BEFORE IT IS "SO ORDERED" BY A COURT? OR IS A COURT TO SIMPLY "RUBBER STAMP" AN AGREEMENT REGARDLESS OF ITS CONTENTS AND THEREBY GIVE THE AGREEMENT SOME LEVEL OF PROTECTION?

FOR ALL THESE REASONS, PARTIES SHOULD BE LEFT TO THEIR PRIVATE AGREEMENTS WITH REGARD TO VOLUNTARILY OR INADVERTENT DISCLOSURE. A RULE AMENDMENT IS NEITHER NECESSARY NOR, AS PROPOSED, APPROPRIATE.

I WOULD ALSO NOTE IN THIS REGARD THAT, IRRESPECTIVE OF THE PROPOSED RULE, ETHICAL CODES MAY REQUIRE ATTORNEYS TO TAKE CERTAIN ACTIONS AS TO ARGUABLY PRIVILEGED MATERIALS PRODUCED IN DISCOVERY. IS THE PROPOSED RULE INTENDED TO SUPPLEMENT THESE INDEPENDENT ETHICAL OBLIGATIONS? IS THE PROPOSED RULE IN CONFLICT WITH THESE ETHICAL OBLIGATIONS? THE BEST THAT CAN BE SAID ABOUT THE PROPOSED RULE IS THAT, UNLIKE THE EARLIER PROPOSED AMENDMENT WHICH I HAVE ADDRESSED, IT IS NOT CONFINED TO E-DISCOVERY BUT, ON ITS FACE, ALSO APPLIES TO "TRADITIONAL" PAPER DISCOVERY.

SPOILATION

I NOW WANT TO TURN TO MY FINAL TOPIC, SPOILATION. THIS TOPIC LEADS TO WHAT MAY BE THE MOST CONTROVERSIAL OF THE PROPOSED AMENDMENTS, THE SO-CALLED "SAFE HARBOR." I THINK IT FAIR TO SAY THAT ATTORNEYS ARE PARTICULARLY CONCERNED ABOUT SPOILATION IN THE E-INFORMATION CONTEXT. CERTAINLY, THERE IS A DEVELOPING AND EXPANDING BODY OF CASE LAW ON THIS ISSUE.

SPOILATION MUST, OF COURSE, BE DISCUSSED IN THE CONTENT OF DOCUMENT RETENTION. MICHAEL KOON AND M. JAMES DALEY OF SHOOK, HARDY & BACON IDENTIFY THREE PRIMARY REASONS FOR CORPORATE RETENTION OF RECORDS:

(1) "FOR INTERNAL USE, REVIEW AND ANALYSIS TO CARRY OUT *** BUSINESS OPERATIONS."

(2) "FOR DEFENDING ITSELF IN RESPONSE TO CLAIMS THIRD PARTIES."

(3) "IN RESPONSE TO GOVERNMENTAL OR REGULATORY REQUIREMENTS."

THEY CONTEND THAT DOCUMENT RETENTION POLICIES BALANCE

> "TWO COMPETING COSTS INTERESTS: THE COST ASSOCIATED WITH RETAINING DOCUMENTS ON THE ONE HAND AND THE ANTICIPATED COSTS ASSOCIATED WITH BEING UNABLE TO ACCESS THEM, INCLUDING POTENTIAL LOSSES WHICH COULD RESULT FROM THE CORPORATION'S DIMINISHED ABILITY TO DEFEND ITSELF DUE TO THE UNAVAILABILITY OF SUPPORTING EVIDENCE."

THEN,

> "TO AVOID EXORBITANT STORAGE AND ACCESS COSTS AND TO ADDRESS POTENTIALLY SUBSTANTIAL SEARCH EXPENSES SHOULD COMPANY-WIDE DOCUMENT REVIEW BE REQUESTED, MANY ORGANIZATIONS ESTABLISH SOME TYPE OF DOCUMENT RETENTION POLICY THAT SETS OUT WHICH RECORDS ARE TO BE DESTROYED AFTER SPECIFIED PERIODS OF TIME."

WHAT IS SPOLIATION? AS DEFINED IN THE SILVESTRI DECISION, "SPOILATION REFERS TO THE DESTRUCTION OR MATERIAL ALTERATION OF EVIDENCE OR TO THE FAILURE TO PRESERVE PROPERTY FOR ANOTHER'S USE AS EVIDENCE INTENDING OR REASONABLY FORESEEABLE LITIGATION." JUDGE SCHLEINDLIN, IN HER FIFTH ZUBULAKE DECISION, DESCRIBES STEPS THAT COUNSEL SHOULD TAKE WHEN LITIGATION IS REASONABLY FORESEEABLE.

> "ISSUE A 'LITIGATION HOLD' AT THE OUTSET OF LITIGATION OR WHENEVER LITIGATION IS REASONABLY ANTICIPATED. THE LITIGATION HOLD SHOULD BE PERIODICALLY RE-ISSUED SO THAT NEW EMPLOYEES ARE AWARE OF IT, AND IT REMAINS FRESH IN THE MINDS OF ALL EMPLOYEES.
>
> COMMUNICATE DIRECTLY WITH THE 'KEY PLAYERS' IN THE LITIGATION, I.E., THE PEOPLE IDENTIFIED IN A PARTY'S INITIAL DISCLOSURE AND ANY SUPPLEMENTATION HERETO. ***. AS WITH THE 'LITIGATION HOLD,' THE KEY PLAYERS SHOULD BE PERIODICALLY REMINDED THAT THE PRESERVATION DUTY IS STILL IN PLACE.
>
> INSTRUCT ALL EMPLOYEES TO PRODUCE ELECTRONIC COPIES OF THEIR RELEVANT ACTIVE FILES. COUNSEL MUST ALSO ENSURE THAT ALL BACKUP MEDIA WHICH THE PARTY IS REQUIRED TO RETAIN ARE IDENTIFIED AND STORED IN A SAFE PLACE. ***.

I DO NOT INTEND TO GO INTO ANY EXTENDED DISCUSSION OF SPOILATION. FOR THOSE OF YOU INTERESTED IN A MORE DETAILED ANALYSIS, I COMMEND TO YOU THE 2004 DECISIONS OF THE EIGHTH CIRCUIT COURT OF APPEALS IN THE STEVENSON AND MORRIS CASES.

SPOLIATION IN THE CONTEXT E-INFORMATION IS, AS I ALREADY NOTED, A SERIOUS CONCERN. THE PROBLEM LIES, AS I SUGGESTED BEFORE, WITH SHEER VOLUME. THE PROBLEM ALSO LIES, HOWEVER, WITH THE DYNAMIC OR CHANGING NATURE OF E-INFORMATION.

CASE LAW NECESSARILY DEVELOPS ON AN AD HOC BASIS, APPLYING BLACKLETTER PRINCIPLES OF LAW TO SPECIFIC FACTS. IT APPEARS TO ME THAT THE UNCERTAINTIES THAT EVERY CORPORATE ENTITY MUST ADDRESS FOCUS ON (1) WHEN DOES A DUTY TO PRESERVE ARISE, (2) WHAT RECORDS MUST BE PRESERVED AND (3) WHAT STEPS MUST BE TAKEN INTERNALLY TO REASONABLY

ASSURE THAT PRESERVATION IN FACT TAKES PLACE. THE WATCHWORD HERE – AND IN THE DEVELOPMENT OF ANY RECORD RETENTION POLICY – IS REASONABLENESS.

THERE IS ONE OTHER AREA OF UNCERTAINTY THAT IS A MAJOR ONE, AND THAT IS THE QUESTION OF THE DEGREE OF CULPABILITY NECESSARY TO SUPPORT A FINDING OF SPOLIATION AND AN APPRECIATE SANCTION.

MUST THERE BE A SHOWING OF INTENT TO DESTROY OR ALTER EVIDENCE OR OF BAD FAITH? IN THE SECOND CIRCUIT DECISION IN RESIDENTIAL FUNDING, THERE WERE TWO DISTINCT "EVENTS" BY THE SANCTIONED PARTY: FAILURE TO MAINTAIN E-MAIL IN AN ACCESSIBLE FORMAT AND "PURPOSEFUL SLUGGISHNESS" IN COMPLYING WITH AN ORDER TO PRODUCE THE E-MAIL. ALTHOUGH THE LATTER LEAD TO A SANCTION, THE COURT OF APPEALS STATED IN DICTA THAT ORDINARY NEGLIGENCE AS A RESULT OF WHICH A PARTY BREACHED ITS OBLIGATION TO PRODUCE E-INFORMATION WAS SANCTIONABLE. RESIDENTIAL FUNDING WAS FOLLOWED IN MASTERCARD, IN WHICH THE DEFENDANTS WERE SANCTIONED FOR "AT LEAST GROSS NEGLIGENCE" IN FAILING TO PRESERVE E-MAIL. IN MOSAID, WHICH I MENTIONED EARLIER AS BEING AN APPEAL FROM A SANCTIONS ORDER I HAD ISSUED, JUDGE MARTINI CONSIDERED TWO APPROACHES TO CULPABILITY IN THE THIRD CIRCUIT. HE CONCLUDED:

> "PRIMARILY, THE SPOLIATION INFERENCE SERVES A REMEDIAL FUNCTION – LEVELING THE PLAYING FIELD AFTER A PARTY HAS DESTROYED OR WITHHELD EVIDENCE. AS LONG AS THERE IS SOME SHOWING THAT THE EVIDENCE IS RELEVANT ***, THE OFFENDING PARTY'S CULPABILITY IS LARGELY IRRELEVANT AS IT CANNOT BE DENIED THAT THE OPPOSING PARTY HAS BEEN PREJUDICED. *** NEGLIGENT DESTRUCTION OF RELEVANT EVIDENCE CAN BE SUFFICIENT TO GIVE RISE TO THE SPOLIATION INFERENCE. IF A PARTY HAS NOTICE THAT EVIDENCE IS RELEVANT TO AN ACTION, AND EITHER PROCEEDS TO DESTROY THAT EVIDENCE OR ALLOWS IT TO BE DESTROYED BY FAILING TO TAKE REASONABLE PRECAUTIONS, COMMON SENSE DICTATES THAT THE PARTY IS MORE LIKELY TO HAVE BEEN THREATENED BY THAT EVIDENCE. *** BY ALLOWING THIS SPOLIATION INFERENCE IN SUCH CIRCUMSTANCES, THE COURT PROTECTS THE INTEGRITY OF ITS PROCEEDINGS AND THE ADMINISTRATION OF JUSTICE."

IT IS PROBABLY FAIR TO STATE, AS THE ADVISORY COMMITTEE NOTE TO THE 1970

AMENDMENT TO RULE 37 RECOGNIZED, THAT WILLFULNESS IS RELEVANT TO THE SELECTION OF AN APPROPRIATE SANCTION TO BE IMPOSED. MY REFERENCE TO RULE 37, HOWEVER, RAISES ANOTHER ISSUE.

RULE 37 AUTHORIZES THE IMPOSITION OF VARIOUS SANCTIONS FOR WHAT I WILL LOOSELY CHARACTERIZE AS DISCOVERY ABUSE. PLAINLY, IT AUTHORIZES THE IMPOSITION OF SANCTIONS ON A PARTY FOR DESTRUCTION OR ALTERATION OF EVIDENCE. THERE IS, HOWEVER, A SEPARATE SOURCE OF AUTHORITY FOR THE IMPOSITION OF SANCTIONS FOR SPOLIATION. AS SILVESTRI HELD: "THE RIGHT TO IMPOSE SANCTIONS FOR SPOLIATION ARISES FROM A COURT'S INHERENT POWER TO CONTROL THE JUDICIAL PROCESS AND LITIGATION ***."

WITH THIS BRIEF SUMMARY IN MIND, I WANT TO TURN TO THE PROPOSED "SAFE HARBOR" AMENDMENT.

RULE 37 WOULD BE AMENDED TO ADD A NEW SUBSECTION (F) THAT ADDRESSES ELECTRONICALLY STORED INFORMATION AND READS AS FOLLOWS:

> "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."

ALL RULE MAKING OBVIOUSLY NECESSITATES COMPROMISE. EVIDENCE OF COMPROMISE WITHIN THE ADVISORY COMMITTEE– AND ALSO OF A DEBATE WITHIN IT -- IS THE FOOTNOTE TO THE PROPOSED RULE.

> "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."

THUS, AS ADOPTED, RULE 37(f) WOULD NOT RESOLVE THE STANDARD FOR CULPABILITY WHICH I JUST OUTLINED.

WHY THIS AMENDMENT? ACCORDING TO THE ADVISORY COMMITTEE NOTE, "IT ADDRESSES A DISTINCTIVE FEATURE OF COMPUTER OPERATIONS, THE ROUTINE DELETION OF INFORMATION THAT ATTENDS ORDINARY USE." THE PROPOSED RULE REFERS TO THE "ROUTINE OPERATION OF THE PARTY'S ELECTRONIC INFORMATION SYSTEM." THE ADVISORY COMMITTEE STATES THAT THIS REFERENCE 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." CONTINUING, "THE PURPOSE IS TO RECOGNIZE THAT IT IS PROPER TO DESIGN EFFICIENT ELECTRONIC STORAGE SYSTEMS TO SERVE THE USER'S NEEDS. DIFFERENT CONSIDERATION WOULD APPLY IF A SYSTEM WERE DELIBERATELY DESIGNED TO DESTROY LITIGATION-RELATED MATERIAL."

I WOULD SUGGEST TO YOU THAT THIS PROPOSED AMENDMENT IS UNDEREXCLUSIVE. FIRST, AS THE ADVISORY COMMITTEE NOTE RECOGNIZES, IT "APPLIES ONLY TO THE LOSS OF ELECTRONICALLY STORED INFORMATION AFTER COMMENCEMENT OF THE ACTION IN WHICH DISCOVERY IS SOUGHT." IT GIVES NO GUIDANCE WITH REGARD TO, NOR DOES IT EXTEND TO, RECORDS RETENTION POLICIES OF CORPORATE ENTITIES BEFORE LITIGATION COMMENCES. EVEN IF THE ENTITY "KNEW OR SHOULD HAVE KNOWN" THAT LITIGATION WAS REASONABLY CONTEMPLATED SUCH THAT A "LITIGATION HOLD" MIGHT BE APPROPRIATE.

MOREOVER, THE PROPOSED RULE "ADDRESSES ONLY SANCTIONS UNDER THE CIVIL RULES." IT DOES NOT ATTEMPT TO RESTRICT THE INHERENT POWER OF COURTS TO IMPOSE SANCTIONS FOR SPOLIATION. THE ADVISORY COMMITTEE NOTE STATES:

> "IF 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. THE COURT HAS BROAD DISCRETION TO DETERMINE WHETHER SANCTIONS ARE APPROPRIATE AND TO SELECT A PROPER SANCTION. *** THE FACT THAT INFORMATION IS LOST IN CIRCUMSTANCES THAT DO NOT SATISFY RULE 37(f) DOES NOT IMPLY THAT A COURT SHOULD IMPOSE SANCTIONS."

WILL THE TWO ELEMENTS OF UNDER EXCLUSIVENESS THAT I HAVE DESCRIBED LEAD TO VARYING STANDARDS FOR SPOLIATION PURPOSES? IF SO, WOULD THE DEVELOPMENT OF VARYING STANDARDS BE TO THE BENEFIT OR DETRIMENT OF ATTORNEYS AND CORPORATE ENTITIES?

LET'S TALK A LITTLE ABOUT THE MEANING OF "REASONABLE STEPS TO PRESERVE THE INFORMATION." SHOULD THE STEPS ARTICULATED BY JUDGE SCHLEINDLIN BE DEEMED SUFFICIENT? WHAT GUIDANCE DOES THE ADVISORY COMMITTEE GIVE US? WE ARE TOLD THAT "THE REASONABLENESS OF THE STEPS TAKEN TO PRESERVE ELECTRONICALLY STORED INFORMATION MUST BE MEASURED IN AT LEAST THREE DIMENSIONS." THE FIRST IS RULE 26(b)(1) SCOPE OF DISCOVERY. THE SECOND IS RULE 26(b)(2) AND THE CONCEPT OF ACCESSIBLE E-INFORMATION. DISCOVERABLE INFORMATION IS TO BE IDENTIFIED AND PRESERVED. THAT MAY REQUIRE PRESERVATION OF INACCESSIBLE DATA "IF THE PARTY KNEW OR SHOULD HAVE KNOWN THAT IT WAS DISCOVERABLE IN THE ACTION AND COULD NOT BE OBTAINED ELSEWHERE." THE THIRD DIMENSION IDENTIFIED BY THE ADVISORY COMMITTEE "DEPENDS ON WHAT THE PARTY KNOWS ABOUT THE LITIGATION. THAT KNOWLEDGE SHOULD INFORM ITS JUDGMENT ABOUT WHAT SUBJECTS ARE PERTINENT TO THE ACTION AND WHICH PEOPLE AND SYSTEMS ARE LIKELY TO RELEVANT INFORMATION." ADVISORY COMMITTEE GOES ON IN A SIMILAR VEIN. WHERE ARE WE? WILL WE NOT, UNDER THE PROPOSED RULE, ENGAGE IN THE SAME ANALYSIS AND WEIGHING THAT WE DO NOW WHEN THERE ARE ALLEGATIONS OF SPOLIATION?

I WOULD SUGGEST THAT, AND AS I COMMENTED EARLIER, THE INTERPLAY OF PROPOSED RULE 26(b)(2) AND 37(f) WILL BE TO ENABLE CORPORATE ENTITIES, IN THE NORMAL COURSE OF BUSINESS, TO SHIFT E-INFORMATION FROM BEING "ACCESSIBLE" TO INACCESSIBLE," WITH A SHIFT OF BURDEN OF PROOF TO THE REQUESTING PARTY. THIS IS WHAT KEN WITHERS SUGGESTED IN THE ARTICLE THAT I CITED EARLIER.

I WOULD PREDICT ANOTHER POSSIBLE RESULT. FOR THE REASONS WHICH I HAVE DESCRIBED, I QUESTION WHETHER PROPOSED RULE 37(f) WILL BE PRACTICAL ASSISTANCE TO ANY CORPORATE ENTITY. HOWEVER, I WOULD ASSUME THAT PARTIES WHO WILL BE REQUESTING E-INFORMATION FROM SUCH

CORPORATE ENTITIES WOULD, AS A MATTER OF ROUTINE, SEEK A PRESERVATION ORDER IN AN ATTEMPT TO ENSURE THAT THE CORPORATE ENTITIES COULD NOT HAVE THE BENEFIT OF THE RULE. AGAIN, I DO NOT PRETEND THAT THIS WILL LEAD TO A FLOODGATE OF LITIGATION. I MERELY SUGGEST THAT THIS IS A REASONABLE OUTCOME OF THE RULE WERE TO BE ADOPTED.

ONE FINAL COMMENT ON SPOLIATION IS WARRANTED. WE ALL KNOW OF THE CORPORATE SCANDALS OF THE PAST SEVERAL YEARS THAT HAVE LED TO CLASS ACTIONS AND CRIMINAL PROSECUTIONS. THOSE SCANDALS HAVE ALSO LEAD TO THE SARBANES-OXLEY ACT. SECTION 802 OF THAT ACT, CODIFIED AT 18 U.S.C. §1519, MAKES IT A FELONY TO, AMONG OTHER THINGS, KNOWINGLY ALTER OR DESTROY "ANY RECORD, [OR] DOCUMENT *** WITH THE INTENT TO IMPEDE, OBSTRUCT, OR INFLUENCE THE INVESTIGATION OR PROPER ADMINISTRATION OF ANY MATTER WITHIN THE JURISDICTION OF ANY DEPARTMENT OR AGENCY OF THE UNITED STATES ***." GIVEN LEGISLATION SUCH AS THIS, WHAT IS THE DRIVING FORCE BEHIND PRESERVATION OF E-INFORMATION TODAY? AGAIN, THERE ARE ANECDOTAL HORROR STORIES. BUT, EVEN IF A STRONGER VERSION OF RULE 37(F) WERE TO BE ADOPTED, WHAT RELIEF WOULD CORPORATE ENTITIES HAVE FROM EXPANSIVE PRESERVATION OBLIGATIONS? AND, IN CLOSING ON THIS SUBJECT, I WOULD AGAIN REMIND YOU THAT THIS RULE DOES NOT ADDRESS THE ULTIMATE LEGACY SYSTEM, PAPER.

CONCLUSION

I HAVE TOUCHED ON THREE ASPECTS OF E-DISCOVERY: SCOPE, WAIVER AND SPOLIATION. OF THESE, THE EXISTING FRCP ADDRESS ONLY SCOPE AND DO SO WITHOUT ANY SPECIFIC REFERENCE TO E-DISCOVERY. THE PROPOSED AMENDMENTS WOULD, IN 26 (b)(2), ADDRESS E-DISCOVERY EXPLICITLY BY REFERENCE TO ACCESSIBILITY. PROPOSED RULE 26(b)(5) WOULD ALLOW FOR ORDERS EMBODYING NON-WAIVER AGREEMENTS BETWEEN PARTIES (PARENTHETICALLY, BOTH FOR E-DISCOVERY AND TRADITIONAL DISCOVERY). PROPOSED RULE 37(f) WOULD CREATE A SAFE HARBOR OF SORTS FOR LOSS OF E-INFORMATION.

WILL THESE AMENDMENTS BENEFIT THE BAR AND LITIGANTS? I WOULD SUGGEST NOT. 26(b)(2) WOULD INTRODUCE YET ANOTHER LAYER OF COMPLEXITY OVER AN EXISTING ANALYTICAL SCHEME THAT IS UNDERUSED. WHEN THAT SCHEME IS APPLIED, THE PROBLEMS THAT WILL SUPPOSEDLY BE ADDRESSED BY THE AMENDMENT CAN ALREADY BE RESOLVED.

26(b)(5) AND 37(f) WILL BE TRAPS FOR THE UNWEARY. THE PROTECTIONS THAT WILL BE AFFORDED ARE MINIMAL AT BEST.

RULE AMENDMENTS ARE NOT SUBSTITUTES FOR AFFIRMATIVE ACTS BY ATTORNEYS. ATTORNEYS SHOULD FAMILIARIZE THEMSELVES WITH THEIR CLIENT'S INFORMATION TECHNOLOGY SYSTEMS, LEARNING WHAT E-INFORMATION IS MAINTAINED, HOW IT CAN BE RETRIEVED AND AT WHAT COST, AND ADVISING CLIENTS WHAT TO DO TO COMPLY WITH DEMANDS FOR RETENTION IMPOSED BY LITIGATION AND, JUST AS IMPORTANTLY, REGULATION. CLIENTS SHOULD EXPECT THIS OF THEIR ATTORNEYS, WHETHER IN-HOUSE OR RETAINED. CLIENTS THEMSELVES SHOULD MAINTAIN A CONTINUING WATCH OVER THEIR IT SYSTEMS, ADDRESSING BOTH THE SPRAWL OF DATA AND THE ADVANCE OF TECHNOLOGY. COURTS, AFTER ALL, REACT TO THE MARCH OF TECHNOLOGY, NOT THE OTHER WAY AROUND.

ATTORNEYS MUST ALSO TAKE SERIOUSLY THEIR EXISTING OBLIGATION TO CONFER WITH ADVERSARIES AND TO DEVELOP A DISCOVERY PLAN FOR SUBMISSION TO THE COURT. ANY CONFERENCES AMONG ATTORNEYS AND THE RESULTING DISCOVERY PLAN SHOULD CONSIDER PRESERVATION OF E-INFORMATION, DISCLOSURE AND DISCOVERY OF E-INFORMATION, FORMS OF PRODUCTION, AND, IF APPROPRIATE, NON-WAIVER AGREEMENTS. PROPOSED AMENDMENTS TO RULE 26 WILL REMIND ATTORNEYS TO DO SO, AS DO EXISTING LOCAL RULES.

AS ATTORNEYS AND CLIENTS HAVE OBLIGATIONS, SO DO FEDERAL JUDGES. 26(b)(1) AND (b)(2) VEST SUBSTANTIAL DISCRETION IN JUDGES TO REGULATE DISCOVERY. JUDGES SHOULD NOT HESITATE TO EXERCISE THAT DISCRETION, AND ATTORNEYS SHOULD NOT HESITATE TO ASK THEM TO DO SO.

I DO NOT PRETEND TO HAVE ALL THE ANSWERS. COURTS ARE ENTERING A BRAVE NEW WORLD OF E-TECHNOLOGY. RULES GIVE GUIDELINES FOR WHAT WE SHOULD DO. I AM NOT CERTAIN THAT PROPOSED AMENDMENTS GIVE CORRECT GUIDELINES. YOU STILL HAVE AN OPPORTUNITY TO COMMENT. I ENCOURAGE YOU TO DO SO.