

**COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE**

**Boston, MA
June 15-16, 2005
Volume II**

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 15-16, 2005

Volume II

9. Report of the Civil Rules Committee
 - A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 5
 - B. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rule 50
 - C. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 16, 26, 33, 34, 37, 45, and Form 45
 - i. Early attention to electronic discovery issues: discussion and text of proposed amendments to Rules 16, 26(a), 26(f), and Form 35
 - ii. Discovery into electronically stored information that is not reasonably accessible: discussion and text of proposed amendments to Rule 26(b)(2)
 - iii. Procedure for asserting claims of privileges and work product protection after production: discussion and text of proposed amendments to Rule 26(b)(5)
 - iv. Interrogatories and requests for production involving electronically stored information: discussion and text of proposed amendments to Rules 33 and 34(a) and (b)
 - v. Sanctions for a certain type of loss of electronically stored information: discussion and text of proposed amendments to Rule 37(f)
 - vi. Discussion and text of proposed amendments to Rule 45
 - vii. Summary of public comments
 - D. **ACTION** — Approving and transmitting to the Judicial Conference proposed new Supplemental Rule G and conforming amendments to Supplemental Rules A, C, E, and Civil Rules 9, 14, and 26(a)(1)(E)
 - E. **ACTION** — Approving publishing for public comment proposed new Rule 5.2
 - F. “Clean-text version” of all proposed rules amendments
 - G. Minutes and other informational items

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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**To: Honorable David F. Levi, Chair, Standing
Committee on Rules of Practice and Procedure**

**From: Honorable Lee H. Rosenthal, Chair, Advisory Committee on the
Federal Rules of Civil Procedure**

Date: May 27, 2005

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee held three hearings in 2005 on proposed rules amendments published for comment in August 2004. The hearings were held on January 12 in San Francisco, January 28 in Dallas, and February 11 and 12 in Washington, D.C. The Committee met at the Administrative Office of the United States Courts on April 14-15, 2005. Draft minutes of the April 2005 meeting are attached. Summaries of the written comments and testimony presented at the hearings are also provided with the several recommendations of proposed rule amendments for adoption.

Parts I and II present action items. Part I recommends transmission for approval of amendments to several rules. Rules 5(e) and 50(b) come first. The next set of rule amendments is a comprehensive package addressing discovery of electronically stored information, including revisions of Rules 16, 26, 33, 34, 37, and 45, as well as Form 35. The last set of rule amendments recommended for approval is a new Supplemental Rule G governing civil forfeiture actions; this package includes conforming changes to other Supplemental Rules, including the title and Rules A, C, and E. Part I includes a conforming amendment to Rule 26(a)(1) that was published with Rule G and conforming amendments to Rules 9(h) and 14 and 26(a)(1)(E) that are recommended for adoption without publication. For each of the four categories of rule amendments recommended for approval, these materials set out a brief introductory discussion, followed by the text of the proposed rule amendment and Committee Note and a summary and explanation of the changes made since publication.

Part II recommends publication for comment of a new Rule 5.2, the Civil Rules version of the E-Government Act rules. The Appellate, Bankruptcy, and Criminal Rules Advisory Committees have made similar recommendations.

Part III presents information items, briefly noting a few of the projects on the agenda for future work.

I. Action Items: Rule Amendments Recommended for Approval**A. Rule 5(e)****1. Discussion**

The Advisory Committee recommends approval for adoption of amended Rule 5(e). The proposed amendment to Rule 5(e) authorizes adoption of local rules that require electronic filing. The proposed amendment was published last November, with parallel changes to the Appellate, Bankruptcy, and Civil Rules. The Criminal Rules incorporate the Civil Rules on filing and will absorb the proposed revision of Rule 5(e).

The published proposal was simple. It added two words to Rule 5(e), saying that a court “may by local rule permit or require” filing by electronic means. The Committee Note included this sentence: “Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general ‘good cause’ exceptions.” Several comments suggested that this Committee Note advice would not sufficiently protect litigants who face serious — perhaps insurmountable — obstacles to electronic filing. Meeting before the Civil Rules Committee, the Bankruptcy Rules Committee recommended that the parallel Bankruptcy Rule text include an express limit directing that a court reasonably accommodate parties who cannot feasibly comply with mandatory electronic filing. Several drafting alternatives were considered by the Civil Rules Committee. The Appellate Rules Committee met last, and also considered several drafting alternatives. Discussions carried on after the committee meetings led to agreement by the Appellate and Civil Rules Committees to recommend the version set out below: “may by local rule permit or — if reasonable exceptions are allowed — require papers to be filed, signed, or verified by electronic means.”¹ The corresponding Committee Note language was also agreed to.

The Appellate Rules Committee proposes to include Committee Note language recognizing that a local rule may direct that a party file a hard copy of a paper that must be filed by electronic means. The Civil Rules Committee concluded that this statement is appropriate for the Appellate Rule Note because of the nearly universal desire to have paper briefs on appeal, a circumstance that

¹ The recommended version adheres to drafting conventions adopted by the Style Project. If it is decided not to use em dashes to insert a limiting provision in mid-sentence, only a few more words would be needed to state the limit as a separate sentence:

A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. * * *

distinguishes appellate practice from civil practice. District courts face a great variety of filings. At times it may be desirable to require the parties to provide hard copies of papers filed electronically, but it seems unwise to attempt advice on this topic until there is more experience with mandatory electronic filing.

Proposed Amended Rule 5(e) and Committee Note

**PROPOSED AMENDMENTS TO THE
FEDERAL RULES CIVIL PROCEDURE***

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

1 **(e) Filing with the Court Defined.** The filing of papers with
 2 the court as required by these rules shall be made by filing
 3 them with the clerk of court, except that the judge may permit
 4 the papers to be filed with the judge, in which event the judge
 5 shall note thereon the filing date and forthwith transmit them
 6 to the office of the clerk. A court may by local rule permit or
 7 — if reasonable exceptions are allowed — require papers to
 8 be filed, signed, or verified by electronic means that are
 9 consistent with technical standards, if any, that the Judicial
 11 Conference of the United States establishes. A paper filed by

*New material is underlined; matter to be omitted is lined through.

12 electronic means in compliance with a local rule constitutes
13 a written paper for the purpose of applying these rules. The
14 clerk shall not refuse to accept for filing any paper presented
15 for that purpose solely because it is not presented in proper
16 form as required by these rules or any local rules or practices.

Committee Note

Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under amended Rule 5(e), a local rule that requires electronic filing must include reasonable exceptions, but Rule 5(e) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 5(e).

3. Changes Made after Publication and Comment

This recommendation is of a modified version of the proposal as published. The changes from the published version limit local rule authority to implement a caution stated in the published Committee Note. A local rule that requires electronic filing must include reasonable exceptions. This change was accomplished by inserting in the rule text “if reasonable exceptions are allowed.” Corresponding changes were made in the Committee Note, in collaboration with the Appellate Rules Committee. The changes from the published proposal are shown below.

Rule 5. Service and Filing of Pleadings and Other Papers*

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(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or — if reasonable exceptions are allowed — require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

Summary of Comments: Civil Rule 5(e)

04-CV-060, Hon. Robert J. Hallisey: This comment addresses a part of present Rule 5(e) that is not affected by the proposed amendment. The rule directs a judge who accepts a paper for filing to “forthwith transmit” the paper to the clerk. The comment suggests that courtesy to the judge would be better served by directing action within a reasonable time. (Style Rule 5(d) directs the judge to “promptly” send the paper to the clerk.)

04-CV-071, Regina Mullen, Director, Prison Services Project: Electronic filing has clear advantages, particularly for lawyers in small firms and organizations. It could be a great advantage for prisoners in jails and mental institutions, but only if they are provided access to computers and to Internet services “without interference or intrusion.” The Rule cannot ensure computers and Internet access. Thus the Rule “must include a provision providing a blanket exception for filings by prisoners who are not represented by counsel.” Otherwise some court will adopt a local rule that does not recognize the prisoner problem. Greater flexibility may be appropriate with respect to other pro se litigants, but they should be required to use electronic filing only if the court provides a computer and scanning facilities for local litigants, and permits non-local litigants to file electronically from their own local federal courthouse.

04-CV-097, Hon. William M. Acker, J., N.D.Ala.: Most district courts already require electronic filing by local rule. “Either we have the authority to do what we have already done, in which event we do not need a rule change, or we do not have that authority and we should be ashamed.”

04-CV-117, Eliot S. Robinson: Writing as one who has experience as a pro se litigant, urges that “pro se parties must be provided with full access to any electronic system for the filing of papers with the court. Full access includes without limitation system access at the Pro Se Office, remote pro se system access, training, filing capability, searching capability, reading capability, bi-directional file transfers and printing capability.” If a pro se litigant elects not to use electronic filing, the pro se office must accept paper and convert it to electronic form. Only non-proprietary file standards should be used, such as PDF, TIFF, and others.

04-CV-139, Joseph R. Compoli, Esq.: “E-filing is atrocious. It is almost impossible to send attachment documents by e-filing as a result of the enormous time to download them.” He and defense counsel both had to manually file attachments — and defense counsel was from a large firm. Remote filing also thwarts face-to-face discussions that occur when judge, counsel, and clients are all together in the same place.

04-CV-168, American Bar Assn.: The Rule text should incorporate the protections for disadvantaged litigants that are described in the Committee Note. It should incorporate the safeguards of Standard 1.65(c)(ii), ABA Standards Relating to Court Organization:

Mandatory Electronic Filing Processes: Court rules may mandate use of an electronic filing process if the court provides a free electronic filing process or a mechanism for waiving electronic filing fees in appropriate circumstances, the court allows for the exceptions needed to ensure access to justice for indigent, disabled or self-represented litigants, the court provides adequate advanced notice of the mandatory participation requirements, and the court (or its representative) provides training for filers in the use of the process.

04-CV-171, Washington State Access to Justice Board, Hon. Donald J. Horowitz: Urges first that it is premature to authorize mandatory electronic filing, and second that if mandatory electronic filing is authorized there must be provisions for alternative filing means that ensure equal treatment of all filers. The Board has devoted much time to developing an electronic filing rule for Washington that does not allow for exclusive mandatory electronic filing; it allows local courts to decide whether to charge extra for electronic filing, but requires application of the same *forma pauperis* standards as apply to waiving regular filing fees.

The central concern is that mandatory e-filing may impede access to justice. Courts cannot decide which segments of the population to serve for greatest profit; “courts must be equally available to all.” Pro se litigants will face the greatest barriers, including access to technology, a particular problem in rural communities and many inner-city areas; inability to use technology, including physical disabilities; and incarceration. Even if a person suffering these disadvantages manages to accomplish electronic filing, there is no ability to receive notices or other electronic transmissions from the court.

It is a mistake to rely on local rules to address these problems. “Without standards [in the national rule] there is no rule of law.” No guidance is provided for local courts adopting local rules. The belief that local rules so far have proved wise is no cure-all: “Why is there a need for any national rule at all if reliance is simply on local practice?” National standards can be drafted so as to accommodate variations in local conditions and needs.

04-CV-172, HALT (Americans for Legal Reform): HALT “works to reduce and eliminate barriers that might prevent consumers from resolving their legal issues through self-help at the lowest possible cost.” The Note comments about the need to make exceptions for pro se litigants should be included in the Rule text, and most especially in the Bankruptcy Rule that applies to people who by definition are least likely to have access to effective legal help. Rule 5(e) would include this new sentence and a fraction: “Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause. In any event, the clerk shall not refuse to accept * * *.” (The comment notes an ABA estimate that 38,000,000 low- and moderate-income Americans are shut out of the legal system each year because they cannot afford to hire lawyers.)

04-CV-173, Northwest Women’s Law Center: They handle 3,000 to 5,000 calls for legal information annually. Mandatory electronic filing will raise yet another hurdle for self-represented individuals. The rule should mandate that all federal courts “ensure access for pro se litigants. We recommend assistance from staff at federal courthouses, including technical assistance using court equipment and conversion of hard copies by court staff. In addition, the rule should include exceptions for those who cannot make use of this type of assistance.” It is not enough to rely on gradual convergence on uniform exceptions.

04-CV-174, Committee on Federal Courts, State Bar of California: The Committee Note recognizes the problems posed by parties “who may have difficulty complying with an electronic filing requirement, including economically disadvantaged and incarcerated parties.” This statement should remain in the Note.

04-CV-175, Standing Committee on the Delivery of Legal Services, State Bar of California: Supports “provided that exceptions are made for file [sic] by traditional means for: 1) pro se litigants who lack resources and/or the ability to comply, such as incarcerated individuals, and 2) attorneys who lack the technological resources to file papers electronically such as some legal aid attorneys and some pro bono attorneys. In addition, any electronic filing program implemented by the courts should offer sufficient technical support with a designated number of people to call to speak with * * * to walk the pro se litigant or attorney through the e-filing process.”

04-CV-184, California Commn. on Access to Justice: Mandatory e-filing may raise the barriers facing pro se litigants, particularly those with limited English proficiency. The Committee Note should be revised, or — better — the proposed Rule should be amended to make it clear “that an exception to electronic filing should be made for unrepresented parties. The rule should make clear that local courts have the option of setting up a system that allows unrepresented parties to use the electronic filing system if they prefer to do so.”

04-CV-217, Executive Committee, State Bar of Michigan: “[O]pposes the proposed rule, to the extent that it permits local courts to require e-filing of persons other than attorneys.” The rule would be supported if it applied only to filings by attorneys and assured that local rules must allow an attorney to show good cause for failing to file electronically. (1) Most attorneys use computers and the Internet. Unrepresented persons should be allowed to use e-filing. But they should not be required to do so. Barriers include limited English proficiency, special obstacles for incarcerated persons, costs, unfamiliarity with the process, lack of appropriate software, and the intimidating nature of the process. (2) Attorneys may have good cause for paper filing — lack of access to adobe acrobat software, cost, or the like. (3) Any system must be “Bobby compliant” — it must comply with the guidelines developed by the Center for Applied Special Technology to ensure access for persons with disabilities. (4) Provision must be made to permit payment of filing fees in person because some legal organizations or litigants may not be able to pay by credit card. (5) Provision

should be made for forma pauperis paper filings, including waiver of any additional fees charged for e-filing and conditional acceptance of paper filings while the petition for leave to proceed i.f.p. is pending. (6) [Anticipating the E-Government Act rules] Provision must be made to shield various data fields, particularly social security numbers and other account numbers. Information about addresses (domestic violence situations are an example) and medical conditions should not be readily available through the Internet. (7) Advisory bodies should be established, including representatives from organizations representing populations with special needs that affect the ability to file electronically.

04-CV-234, John H. Messing, Esq.: (Mr. Messing speaks only for himself, but is chair of the Electronic Filing Committee of the ABA Science and Technology Law Section.) Endorses the ABA comments in 04-CV-168, and suggests further protections. A court that requires electronic filing is obligated to ensure security on an ongoing basis “because security threats evolve and become more sophisticated at an ever-increasing rate. * * * Electronic court orders [] are often subject to tampering in undetectable ways. Without available standard security protections, it is unfair to require the use of court electronic systems by all practitioners, who may not understand what must be done from their side properly to protect their computers and the integrity of the documents being exchanged. We see examples in electronic commerce daily of identity theft and electronic document alterations. * * * Just last week some mainland Chinese cryptographers broke the encryption that is used commonly to protect the integrity of electronic court documents in the courthouses of this country.”

04-CV-251, Richard Zorza, Esq.: The ideal rule would authorize mandatory e-filing for lawyers, but leave it optional for unrepresented parties. Even if a local rule purports to adopt more limited exceptions, they may not be adequate to protect the rights of those who have difficulty using electronic filing. The exceptions may be vague; they may be discouraging; they may provide alternative filing methods that are impracticable or expensive; they may not address cost problems “in dealing with a fee based system,” address the problems of those with physical or other disabilities, recognize religious objections, help the technologically challenged, or recognize the situation of those incarcerated; and include a general “good cause” exception that does not reassure. Finally, consider the present provision in Civil Rule 5(e) that prohibits the clerk from refusing to accept a paper for filing solely because it is not presented in proper form — does that require that a paper be accepted in paper form despite a mandatory e-filing rule?

B. Rule 50(b)**1. Discussion**

The Advisory Committee recommends approval for adoption of amended Rule 50(a) and (b). Proposed amendments of Rule 50(b) were published in August 2004. The first would permit renewal after trial of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion made before the close of the evidence be renewed at the close of all the evidence. Separately, the proposed amendment adds a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. Style revisions of Rule 50(a) were published at the same time.

The few comments made during the public comment period did not raise any new issues. The Committee unanimously recommends that the amendments be recommended to the Judicial Conference for adoption.

The first proposed amendment addresses the problem that arises when a party moved for judgment as a matter of law before the close of all the evidence, failed to renew the motion at the close of all the evidence, then filed a postverdict motion renewing the motion for judgment as a matter of law. The appellate decisions have begun to permit slight relaxations of the requirement that a postverdict motion be supported by — be a renewal of — a motion made at the close of all the evidence. These are departures, however, made to avoid harsh results that seemed required by the current rule language. The departures come at the price of increasingly uncertain doctrine and practice and may invite more frequent appeals. Other courts adhere to the rule's language, holding that a motion at the close of all the evidence was necessary even if the party had made an earlier motion based on the same grounds.

The proposed amendment deletes the requirement of a motion at the close of all the evidence, permitting renewal of any Rule 50(a) motion for judgment as a matter of law made during trial. The proposed amendment reflects the belief that a motion made during trial serves all the functional needs served by a motion at the close of all of the evidence. As now, the posttrial motion renews the trial motion and can be supported only by arguments made to support the trial motion. The opposing party has had clear notice of the asserted deficiencies in the case and a final opportunity to correct them. Satisfying these functional purposes equally satisfies Seventh Amendment concerns.

Separately, the proposed amendment also provides a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after

the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority saying that the motion must be renewed ten days after the jury is discharged. *See C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) “retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment.” Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

2. Proposed Amended Rule 50 and Committee Note

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

1 **(a) Judgment as a Matter of Law.**

2 ~~(1) If during a trial by jury a party has been fully heard on~~
3 ~~an issue and there is no legally sufficient evidentiary basis~~
4 ~~for a reasonable jury to find for that party on that issue;~~
5 ~~the court may determine the issue against that party and~~
6 ~~may grant a motion for judgment as a matter of law~~
7 ~~against that party with respect to a claim or defense that~~
8 ~~cannot under the controlling law be maintained or~~
9 ~~defeated without a favorable finding on that issue.~~

10 ~~(2) Motions for judgment as a matter of law may be made~~
11 ~~at any time before submission of the case to the jury.~~
12 ~~Such a motion shall specify the judgment sought and the~~
13 ~~law and the facts on which the moving party is entitled to~~
14 ~~the judgment.~~

15 (1) In General. If a party has been fully heard on an issue
16 during a jury trial and the court finds that a reasonable
17 jury would not have a legally sufficient evidentiary basis
18 to find for the party on that issue, the court may:

19 (A) resolve the issue against the party; and
20 (B) grant a motion for judgment as a matter of law
21 against the party on a claim or defense that, under the
22 controlling law, can be maintained or defeated only
23 with a favorable finding on that issue.

24 (2) Motion. A motion for judgment as a matter of law
25 may be made at any time before the case is submitted to
26 the jury. The motion must specify the judgment sought
27 and the law and facts that entitle the movant to the
28 judgment.

29 **(b) Renewing the Motion After Trial; Alternative Motion**
 30 **for a New Trial.** ~~If, for any reason,~~ the court does not grant
 31 a motion for judgment as a matter of law made ~~at the close of~~
 32 ~~all the evidence~~ under subdivision (a), the court is considered
 33 to have submitted the action to the jury subject to the court’s
 34 later deciding the legal questions raised by the motion. The
 35 movant may renew its request for judgment as a matter of law
 36 by filing a motion no later than 10 days after the entry of
 37 judgment ~~or—if the motion addresses a jury issue not decided~~
 38 ~~by a verdict—by filing a motion no later than 10 days after the~~
 39 ~~jury was discharged.~~ ~~—and~~ The movant may alternatively
 40 request a new trial or join a motion for a new trial under Rule
 41 59.

42 In ruling on a renewed motion, the court may:

- 43 (1) if a verdict was returned:
 - 44 (A) allow the judgment to stand,
 - 45 (B) order a new trial, or
 - 46 (C) direct entry of judgment as a matter of law; or
- 47 (2) if no verdict was returned:
 - 48 (A) order a new trial, or

49 (B) direct entry of judgment as a matter of law.

50 * * * * *

Committee Note

The language of Rule 50(a) has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50(b) is amended to permit renewal of any Rule 50(a) motion for judgment as a matter of law, deleting the requirement that a motion be made at the close of all the evidence. Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. The earlier motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury. This fulfillment of the functional needs that underlie present Rule 50(b) also satisfies the Seventh Amendment. Automatic reservation of the legal questions raised by the motion conforms to the decision in *Baltimore & Carolina Line v. Redman*, 297 U.S. 654 (1935).

This change responds to many decisions that have begun to move away from requiring a motion for judgment as a matter of law at the literal close of all the evidence. Although the requirement has been clearly established for several decades, lawyers continue to overlook it. The courts are slowly working away from the formal requirement. The amendment establishes the functional approach that courts have been unable to reach under the present rule and makes practice more consistent and predictable.

Many judges expressly invite motions at the close of all the evidence. The amendment is not intended to discourage this useful practice.

8 (A) ~~determine~~ resolve the issue against the party; and

9 * * * * *

10 (b) **Renewing the Motion After Trial; Alternative Motion**

11 **for a New Trial.** If the court does not grant a motion for

12 judgment as a matter of law made under subdivision (a), the

13 court is ~~deemed~~ considered to have submitted the action to the

14 jury subject to the court's later deciding the legal questions

15 raised by the motion.

16 * * * * *

Summary of Comments: Rule 50(b)

04-CV-109, Federal Civil Procedure Committee, American College of Trial Lawyers: There is no Committee consensus. "Some of our members support the notion of removing traps for the unwary; others believe that it is not unreasonable to require that parties be wary of and follow the rules, and the rule as it exists serves a salutary purpose of permitting the trial court the opportunity to correct its own errors."

Federal Magistrate Judges Assn., 04-CV-127: Supports the proposal. "The present Rule is a trap for the unwary." The motion at the close of all the evidence "is usually just a formality, but * * * can result in a harsh result. * * * Since the motion can only be renewed, but not added to, there is no unfairness to the party opposing the motion."

04-CV-128, Gregory B. Breedlove, Esq., for Cuningham, Bounds, Yance, Crowder & Brown, L.L.C.: A motion should be required at the close of all the evidence because "any deficiency in the evidence at an earlier stage of the proceeding may have been cured by the time all the evidence is in. * * * By the close of the evidence, the plaintiff might cure any such deficiency either through cross-examination of a defense witness or through rebuttal testimony." The proposed change is not justified by the argument that parties continue to fail to meet the close-of-all-the-evidence requirement. It is not necessarily a bad thing that courts allow relief from the requirement in some circumstances, but this should not be generalized in the rule.

04-CV-174, Committee on Federal Courts, State Bar of California: Supports both proposed amendments. Allowing renewal after trial of any Rule 50(a) motion made during trial “serves all the functional needs” and “address[es] conflicting views by the courts.” Setting a time limit to renew after the jury fails to return a verdict “would restore the 1991 deletion — and clarity — to the Rule.”

04-CV-203, United States Department of Justice: “[S]upports the proposed amendment. This is a fair and practical solution to an issue that can confuse practitioners.”

04-CV-218, U.S. Courts Committee, State Bar of Michigan: “[E]ndorses the proposed amendments to Rule 50 for the reasons set forth in the report.”

C. Rules 16, 26, 33, 34, 37, 45, and Form 35**1. Introduction**

Over five years ago, the Advisory Committee began examining whether the discovery rules could better accommodate discovery directed at information generated by, stored in, retrieved from, and exchanged through, computers. The proposed amendments published for comment in August 2004 resulted from an extensive and intensive study of such discovery. That study included several mini-conferences and one major conference, bringing together lawyers, academics, judges, and litigants with a variety of experiences and viewpoints. The Committee also sought out experts in information technology and heard from those involved in the rapidly expanding field of providing electronic discovery services to lawyers and litigants.

Through this study, the Committee reached consensus on two points. First, electronically stored information has important differences from information recorded on paper. The most salient of these differences are that electronically stored information is retained in exponentially greater volume than hard-copy documents; electronically stored information is dynamic, rather than static; and electronically stored information may be incomprehensible when separated from the system that created it. Second, these differences are causing problems in discovery that rule amendments can helpfully address.

In August 2004, the Committee published five categories of proposed amendments: amending Rules 16 and 26(f) to provide early attention to electronic discovery issues; amending Rule 26(b)(2) to provide better management of discovery into electronically stored information that is not reasonably accessible; amending Rule 26(b)(5) to add a new provision setting out a procedure for assertions of privilege after production; amending Rules 33 and 34 to clarify their application to electronically stored information; and amending Rule 37 to add a new section to clarify the application of the sanctions rules in a narrow set of circumstances distinctive to the discovery of electronically stored information. In addition, Rule 45 was to be amended to adapt it to the changes made in Rules 26-37.

At the three public hearings held in late 2004 and early 2005, 74 witnesses testified, many of whom also submitted written comments. An additional 180 written comments were submitted. The Committee revised the proposed rules amendments and note language in light of the public comments. The Committee unanimously recommends that the Standing Committee approve the proposed amendments to Rules 16, 26(b)(5)(B), 26(f), 33, 34, 45, and Form 35, as well as a conforming amendment to Rule 26(a). All but two members of the Committee voted in favor of recommending that the Standing Committee approve the proposed amendments to Rules 26(b)(2) and 37(f). This introduction sets out a brief background of the Committee's work and discusses each of the proposed amendments.

When the 2000 amendments were in their early stages of consideration, it was very helpful to step back and consider what brought the Committee to that point. In a 1997 conference held at Boston College Law School – a meeting very similar in purpose to the 2003 conference on electronic discovery held at the Fordham University School of Law – Professors Stephen Subrin and Richard Marcus presented papers on the historical background of the discovery rules. Some highlights of their papers usefully put the present issues into perspective and context.

Before the civil rules became law in 1938, discovery in both law and equity cases in the federal courts had been extremely limited. When the Committee deliberated on the liberal discovery rules that Professor Edson Sunderland drafted, they raised the concern that expanded discovery would force settlements for reasons and on terms that related more to the costs of discovery than to the merits of the case, a concern raised frequently in the context of electronic discovery.¹ But the debates did not focus on discovery. Instead, the focus was on issues of national uniformity and separation of powers.

In 1946 and 1970, amendments to the discovery rules continued to expand the discovery devices. The 1970 amendments were what Professor Marcus has called the high-water mark of “party-controlled discovery.”² Those amendments included the elimination of the requirement for a motion to obtain document production and of the good cause standard for document production. Since the “high-water mark,” the discovery rules have been amended in 1980, 1983, 1993, and 2000, to provide more effective means for controlling the discovery devices. In 1980, the Committee made the first change designed to increase judicial supervision over discovery, adding a provision that allowed counsel to seek a discovery conference with the court. The Committee considered, and rejected, a proposal to narrow the scope of discovery from “relevant to the subject matter” to “relevant to the issues raised by the claims or defenses,” and to limit the number of interrogatories. The public comment that proposal generated was similar in tone and in approach to some of the comments on certain of the electronic discovery proposals published in August 2004. Many protested any narrowing of discovery as inimical to the basic premise of American litigation; others protested that the Committee had not gone far enough in restricting discovery and controlling the costs and delay it caused; yet others worried that the Committee would feel “pressure” to approve rules prematurely.³ In the face of the vigorous debate, the Committee withdrew these proposals and submitted what then-chair Judge Walter Mansfield characterized as “watered down” proposals. The scope change rejected in 1980 did become law, but not until 2000, and then in a modification that emphasized the supervisory responsibility of the court.

¹Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 Boston Coll. L. Rev. 691, 730 (1998).

²Marcus, *Discovery Containment Redux*, 39 Boston Coll. L. Rev. 747, 749 (1998).

³Marcus, 39 Boston Coll. L. Rev. at 770.

Despite an institutional bias against frequent rule changes, the lack of meaningful amendments in 1980 resulted in significant amendments three years later. The 1983 amendments marked a significant shift toward greater judicial involvement in all pretrial preparation, most particularly in the discovery process. The amendments expanded Rule 16 case-management orders; deleted the final sentence of Rule 26(a), which had said that “[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency and use of these methods is not limited”; and added the paragraph to Rule 26(b) directing the court to limit disproportionate discovery. The newly-appointed reporter to the Advisory Committee, Professor Arthur Miller, described these changes as a “180 degree shift in orientation.” Yet, as Professor Miller pointed out in his written submission to the Committee endorsing the proposed electronic discovery amendments, the 1983 amendments turned out not to be effective by themselves to calibrate the amount of discovery to the needs of particular cases.⁴

In 1993, continued unhappiness about discovery costs and related litigation delays led to a package of proposals that included mandatory broad initial disclosures (with a local rule opt-out feature added in response to vigorous criticism) and presumptive limits on the number of interrogatories and depositions. In part, these amendments were “designed to give teeth to the proportionality provisions added in 1983.”⁵ In 2000, the initial disclosure obligations were cut back and made uniform, and Rule 26(b)(1) was changed to limit the scope of party-controlled discovery to matters “relevant to the claim or defense of any party,” allowing discovery into “the subject matter involved in the action” only on court order for good cause.

During the study that led to the 2000 amendments, the Advisory Committee became aware of problems relating to electronic discovery. The Committee was urged by lawyers, litigants, and a number of organized bar groups to examine these problems. In 1999, when the 2000 proposals were recommended for adoption following the public comment period, the Committee fully understood that its work was incomplete. In his 1999 report to the Standing Committee recommending adoption of the 2000 amendments, Judge Niemeyer observed that since the work on the proposals had begun in 1996, “the Committee . . . kept its focus on the long-range discovery issues that will confront it in the emerging information age. The Committee recognized that it will be faced with the task of devising mechanisms for providing full disclosure in a context where potential access to information is virtually unlimited and in which full discovery could involve burdens far beyond anything justified by the interests of the parties to the litigation. While the tasks of designing discovery rules for an information age are formidable and still face the Committee, the mechanisms adopted in the current proposals begin the establishment of a framework in which to work.” The present electronic discovery proposals grow out of the Committee’s work on the 2000 amendments and in many ways continue that work. As noted in the report to the Standing Committee in 1999, the Committee’s efforts leading to the 2000 amendments focused on the

⁴ Prof. Arthur Miller, 04-cv-221.

⁵ Marcus, *Discovery Containment*, 39 Boston Coll. L. Rev. at 766.

“architecture of discovery rules” to determine whether changes can be effected to reduce the costs of discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management. The proposed amendments to make the rules apply better to electronic discovery problems have the same focus.

The historical perspective is a reminder that any proposal to add or strengthen rule provisions for what Professor Marcus calls “discovery containment” produces significant debate. The vigor, volume, and themes of the public comment on the August 2004 electronic discovery proposals are not new to proposed discovery rule amendments. The debates over the amendments that became effective in 1983, 1993, and 2000 were vigorous, with many favoring liberal party-controlled discovery and many advocating more effective tools for discovery management and limits. Such debate is not in itself a sign that the proposals are fundamentally flawed. It is right to be concerned if the proposals are only supported by a narrow slice of the bench or bar. But it is not surprising to find that proposals to increase judicial involvement in discovery or to encourage the application of the existing proportionality factors would be opposed more by one side of the bar than the other.

Without understating the nature or depth of the concerns raised in response to specific proposals, discussed at length below, it is useful to note some points of agreement. There was a high level of support for changes to the federal rules to recognize and accommodate electronic discovery. Although there was certainly disagreement as to the proposed amendments to Rules 26(b)(2) and 37(f), there was also support from broad-based organizations that do not represent a reflexive plaintiff or defense view, such as the American Bar Association Section of Litigation,⁶ the Federal Bar Council,⁷ and the New York State Bar Association Commercial and Federal Litigation Section.⁸ Many of the comments criticized aspects of the published proposals that have now been revised. As noted, after the comment period, all but two members of the Advisory Committee approved these proposed amendments as revised in light of the comments. The proposals calling for early attention to electronic discovery and addressing problems in the form of producing electronically stored information received broad support from the bar and the unanimous approval of the Advisory Committee.

The historical review also provides a useful context for considering the question of timing. The Advisory Committee has a history of carefully considering rule amendments and, when appropriate, withdrawing proposed amendments after public comment. The class action proposals of 1996 are a good example. The history of discovery amendments in particular shows great caution. The most prominent example is the 1978 decision to defer the “scope” proposal because there was vigorous opposition, as

⁶ 04-cv-062.

⁷ 04-cv-191.

⁸ 04-cv-045.

well as vigorous support. That decision to defer was criticized on the ground that it would significantly delay the proposal. A version of the scope limitation did become effective – twenty years later. It is always tempting to defer action because more time brings more information, particularly in an area of ongoing technological change. But deferring has costs. The calendar of the rules enabling process makes any delay a significant one. As long ago as the 1998-99 hearings on what became the discovery amendments of 2000, lawyers were urging the Committee to proceed with alacrity in rulemaking for e-discovery. The need for rulemaking now in this area is reflected in the local rules and state rules that have been enacted and the growing number of such rules that have been proposed. Many of these local rule efforts have been deferred because of the proposals to amend the national rules, but the perceived need for such rules means that they will not remain in check indefinitely. The 1993 amendments led in part to the 2000 amendments, teaching us much about the problems of local rulemaking in areas that the national discovery rules address, problems that we do not want to create in the area of electronic discovery. And the possibility of technological change will always exist; there is no reason to think that stability on that front will arrive any time soon.

The Committee has been studying electronic discovery for the last five years. We have learned a great deal, reflected in the rule proposals and the refinements made since publication. Those proposals and refinements are summarized below.

2. The Specific Proposals

i. Early Attention to Electronic Discovery Issues: Rules 16, 26(a), 26(f), and Form 35

Introduction

The comments consistently applauded the directives in Rule 16(b) and Rule 26(f) for the parties to discuss electronically stored information in cases that involve such discovery and to include these topics in the report to the court, and for the court to include these topics in its scheduling orders. The overall directive is broad, but specific provisions focus on three areas recognized as frequent sources of difficulty in electronic discovery: the form of producing electronically stored information in discovery; preserving information for the litigation; and the assertion of privilege and work-product protection claims.

The proposed amendments that direct early attention to electronic discovery issues, as published, did not include a revision to Rule 26(a)(1), although the amendments to Rule 26(f) referred to disclosures as well as discovery of electronically stored information. The Committee approved a proposed amendment to Rule 26(a) as a conforming amendment, making the Rule 26(a)(1) description of information subject to disclosure requirements consistent with the addition of electronically stored information to the discovery rules. Present Rule 26(a)(1) is redundant in requiring disclosure of both certain “documents” and “data compilations,” because the present version of Rule 34 makes “data compilation” a subset of “documents.” Present Rule 26(a)(1) is potentially inconsistent with the proposed revision of Rule 34, which adds “electronically stored information” as a category separate from “documents.” Amending Rule 26(a)(1) to make it apply to “documents and electronically stored information,” and deleting the words “data compilations,” cures this inconsistency. Because Rule 34(a) is revised to distinguish between “documents” and “electronically stored information,” revising Rule 26(a)(1) to conform to this distinction removes the argument that there is a duty to provide in discovery, but not to disclose, electronically stored information.

One concern initially raised about adding electronically stored information to Rule 26(a)(1) was that it could require parties to locate and review such information too early in the case. Such information, often voluminous and dispersed, can be burdensome to locate and review, and early in the case the parties may not be able to identify with precision the information that will be called for in discovery. The Committee concluded that this concern was not an argument against this conforming amendment. The disclosure obligation has been read as applying to electronically stored information and will continue to apply. The obligation does not force a premature search, but only requires disclosure, either initially or by way of supplementation, of information that the disclosing party has decided it may use to support its case.

The Committee decided against revising Rule 26(a)(3) to include “electronically stored information.” Rule 26(a)(3) applies “in addition to the disclosures required by Rule 26(a)(1)” and is directed to identifying exhibits for trial. Electronically stored information is included in “each document or other exhibit” that the current rule requires to be identified in pretrial disclosures.

Proposed amended Rule 26(f) states that the parties are to discuss “any issues relating to preserving discoverable information.” Some comments urged that this directive should be downgraded to the Note, in part out of concern that calling for discussion of the question will promote early applications for preservation orders. Most comments supported the inclusion of preservation as a topic to be discussed early in the case. The dynamic nature of electronically stored information, and the fact that routine operation of computer systems changes and deletes information, make it important to address preservation issues early in cases involving discovery of such information. The Committee decided not to change the published rule language, which includes not only electronically stored information but all forms of information. In response to the concerns raised in the comment period about preservation orders, the Note has been revised to state that preservation orders entered over objections should be narrowly tailored and that preservation orders should rarely be issued on ex parte applications.

Proposed new Rule 26(f)(3) directs parties to discuss “any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.” Form 35 is amended to provide that in the report to the court of their proposed discovery plan, the parties include their proposals for disclosure or discovery of electronically stored information. Rule 16(b)(5) provides that the scheduling order the court enters may include “provisions for disclosure or discovery of electronically stored information.” The comments emphasized the importance of discussing these topics early in the case, to identify disputes before costly and time-consuming searches and production occur. Only one change is proposed to this part of the published proposals. Many comments noted that more than one form of production might be appropriate in a case, because a party may store different information in different forms. Accordingly, this proposed amendment is revised to state that the parties should discuss “any issues relating to . . . electronically stored information, including the form or forms in which it should be produced.” Consistent changes are made in other proposed amendments addressing the form of production as well.

Proposed new Rule 26(f)(4) adds issues relating to the assertion of privilege and work product protection to the list of topics to be addressed in the parties’ initial conference. For years, the Committee has wrestled with how to address the problem of privilege waivers within the rules. The Committee began this work in response to concerns over the expense and delay attendant to reviewing hard copy documents for privilege and generating a privilege log. During the study of electronic discovery, the Committee learned that reviewing electronically stored information for privilege and work product protection adds to the expense and delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information. Metadata and embedded data are examples of such complexities; they may contain privileged communications, yet

are not visible when the information is displayed on a computer monitor in ordinary use or printed on paper. Parties can ameliorate some of the costs and delays created by the steps necessary to avoid waiving privilege or work product protection during discovery through agreements that allow the assertion of privilege or work product protection after documents or electronically stored information are produced. Including this topic among those to be discussed encourages early attention to the problem and facilitates efforts to reach such agreements. Form 35 is amended to provide that if the parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, they are to include a description of the proposed order provisions in their report to the court. Rule 16(b)(6) is amended to state that if the parties have reached an agreement for "asserting claims of privilege or protection as trial-preparation material after production," the court may include those agreements in the scheduling order.

The proposed rule as published described the topic that the parties should discuss as whether, if the parties agreed, the court should enter an order protecting the right to assert privilege after production. During the comment period, some expressed uneasiness about the language that the court enter a order "protecting" against waiver of privilege because it is not clear that this protection is effective against third parties. The Committee has revised the proposed rule and note language to meet these concerns, without changing the substance of what this aspect of the parties' discovery planning conference is to include.

Many comments urged the Committee to include work-product protection as well as privilege within this rule, as well as proposed Rule 26(b)(5)(B). Although the consequences of waiver are less acute for work product protection than for attorney-client privilege, many documents and electronically stored information involve both and issues of waiver frequently involve both. The Committee decided to amend the published proposed rule to include both privilege and work-product protection, using the label for such protection that appears elsewhere in the discovery rules, "trial-preparation materials."

The Proposed Rules and Committee Notes

The Advisory Committee recommends approval for adoption of amended Rules 16(b), 26(a), 26(f), and Form 35.

Rule 16(b)

The Committee recommends approval of the following amendment:

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

2 (b) **Scheduling and Planning.** Except in categories of actions

3 exempted by district court rule as inappropriate, the district

4 judge, or a magistrate judge when authorized by district court

5 rule, shall, after receiving the report from the parties under Rule

6 26(f) or after consulting with the attorneys for the parties and any

7 unrepresented parties by a scheduling conference, telephone,

8 mail, or other suitable means, enter a scheduling order that limits

9 the time

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

11 (2) to file motions; and

12 (3) to complete discovery.

13 The scheduling order may also include

14 (4) modifications of the times for disclosures under Rules

15 26(a) and 26(e)(1) and of the extent of discovery to be

16 permitted;

17 (5) provisions for disclosure or discovery of electronically

18 stored information.

(6) any agreements the parties reach for asserting claims of

~~privilege or protection as trial-preparation material after~~

~~production.~~

(75) the date or dates for conferences before trial, a final

pretrial conference, and trial; and

(86) 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.

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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.

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 or work product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other 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 or protected information is inadvertently produced, the producing party may timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. An order that includes 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 agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

Changes Made After Publication and Comment

This recommendation is of a modified version of the proposal as published. Subdivision (b)(6) was modified to eliminate the references to "adopting" agreements for "protection against waiving" privilege. It was feared that these words might seem to promise greater protection than can be assured. In keeping with changes to Rule 26(b)(5)(B), subdivision (b)(6) was expanded to include agreements for asserting claims of protection as trial-preparation materials. The Committee Note was revised to reflect the changes in the rule text.

The proposed changes from the published rule are set out below.

Rule 16. Pretrial Conferences; Scheduling; Management*

(b) Scheduling and Planning.

The scheduling order may also include

(6) adoption of the parties' any agreements the parties reach

for protection against waiving asserting claims of privilege

or protection as trial-preparation material after production;

Rule 26(a)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional

Matter.

(1) Initial Disclosures. Except in categories of proceedings

specified in Rule 26(a)(1)(E), or to the extent otherwise

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

5 stipulated or directed by order, a party must, without
6 awaiting a discovery request, provide to other parties:

7 (A) the name and, if known, the address and telephone
8 number of each individual likely to have discoverable
9 information that the disclosing party may use to support
10 its claims or defenses, unless solely for impeachment,
11 identifying the subjects of the information;

12 (B) a copy of, or a description by category and location
13 of, all documents, electronically stored information, data
14 computations, and tangible things that are in the
15 possession, custody, or control of the party and that the
16 disclosing party may use to support its claims or
17 defenses, unless solely for impeachment;

18 * * * * *

Committee Note

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term “electronically stored information” has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The term “data

compilations” is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Changes Made After Publication and Comment

As noted in the introduction, this provision was not included in the published rule. It is included as a conforming amendment, to make Rule 26(a)(1) consistent with the changes that were included in the published proposals.

Rule 26(f)

The Committee recommends approval of the following amendments to Rule 26(f).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(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

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12 discovery plan that indicates the parties' views and proposals
13 concerning:

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

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

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

25 (4) any issues relating to claims of privilege or protection as
26 trial-preparation material, including – if the parties agree on
27 a procedure to assert such claims after production – whether
28 to ask the court to include their agreement in an order;

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

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)(B). Rule

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 the 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.

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating 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, discussion at the outset may avoid later difficulties or ease their resolution.

Committee Note

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- 33 under Rule 26(c) or under Rule 16(b) and (c).
- 32 (64) any other orders that should be entered by the court

26(f)(3) explicitly directs the parties to discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34(b) directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

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. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. 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. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *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.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored.

Ex parte preservation orders should issue only in extraordinary circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. 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 or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often 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 pose 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.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege — sometimes known as a “quick peek.” The requesting party then designates the documents 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 responding 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.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. 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 establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Changes Made After Publication and Comment

The Committee recommends a modified version of what was published. Rule 26(f)(3) was expanded to refer to the form “or forms” of production, in parallel with the like change in Rule 34. Different forms may be suitable for different sources of electronically stored information.

The published Rule 26(f)(4) proposal described the parties’ views and proposals concerning whether, on their agreement, the court should enter an order protecting the right to assert privilege after production. This has been revised to refer to the parties’ views and proposals concerning any issues relating to claims of privilege, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order. As with Rule 16(b)(6), this change was made to avoid any implications as to the scope of the protection that may be afforded by court adoption of the parties’ agreement.

Rule 26(f)(4) also was expanded to include trial-preparation materials.

The Committee Note was revised to reflect the changes in the rule text.

The changes from the published rule are shown below.

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

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* * * * *

(f) Conference of Parties; Planning for Discovery. Except in

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categories of proceedings exempted from initial disclosure under

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Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as

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soon as practicable and in any event at least 21 days before a

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scheduling conference is held or a scheduling order is due under

7

Rule 16(b), confer to consider the nature and basis of their

8

claims and defenses and the possibilities for a prompt settlement

9

or resolution of the case, to make or arrange for the disclosures

10

required by Rule 26(a)(1), to discuss any issues relating to

11

preserving discoverable information, and to develop a proposed

12

discovery plan that indicates the parties' views and proposals

13

concerning:

14

* * * * *

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

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

(4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order, whether, on agreement of the parties, the court should enter an order protecting the right to assert ~~privilege after production of privileged information;~~

Form 35

The Committee recommends conforming changes in Form 35, the parties' report to the court of their discovery plan.

Form 35. Report of Parties' Planning Meeting

1
2 **3. Discovery Plan.** The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

4
3
2
1

5 Discovery will be needed on the following subjects:
6 _____ (brief description of subjects on which
7 discovery will be needed) _____
8 Disclosure or discovery of electronically stored
9 information should be handled as follows: _____ (brief
10 description of parties' proposals) _____
11 The parties have agreed to an order regarding claims of
12 privilege or protection as trial-preparation material
13 asserted after production, as follows: (brief description
14 of provisions of proposed order)
15 All discovery commenced in time to be completed by
16 _____ (date). [Discovery on _____ (issue for
17 early discovery) _____ to be completed by
18 _____ (date).]

Changes Made After Publication and Comment

The Committee recommends approval of Form 35 with modifications made from the published version, consistent with changes made to Rule 26(f). The changes are shown below.

Form 35. Report of Parties' Planning Meeting*

2 **3. Discovery Plan.** The parties jointly propose to the court the

3 following discovery plan: *****

4 Disclosure or discovery of electronically stored

5 information should be handled as follows: _____ (brief

6 description of parties' proposals) _____

7 The parties have agreed to a privilege protection an order

8 regarding claims of privilege or protection as trial-

9 preparation material asserted after production, as

10 follows: (brief description of provisions of proposed

11 order). *****

12 *****

*Changes from the proposal published for public comment shown by double-
underlining new material and striking through omitted matter.

**ii. Discovery Into Electronically Stored Information that is
Not Reasonably Accessible: Rule 26(b)(2)**

Introduction

The Rule 26(b)(2)(B) proposal authorizes a party to respond to a discovery request by identifying sources of electronically stored information that are not reasonably accessible because of undue burden or cost. If the requesting party seeks discovery from such sources, the responding party has the burden to show that the sources are not reasonably accessible. Even if that showing is made, the court may order discovery if — after considering the limitations established by present Rule 26(b)(2) — the requesting party shows good cause. The court may specify conditions for the discovery.

Several changes have been made in the rule text to express more clearly the procedure established by the published proposal. The Committee Note is revised to describe more clearly the problems that the rule addresses. The changes both in rule text and Note draw from a large body of public testimony and comments that suggested better ways to implement the proposed procedure without changing the procedure established by the published language.

The proposed rule has frequently been referred to as a “two-tier” system. It responds to distinctive problems encountered in discovery of electronically stored information that have no close analogue in the more familiar discovery of paper documents. Although computer storage often facilitates discovery, some forms of computer storage can be searched only with considerable effort. The responding party may be able to identify difficult-to-access sources that may contain responsive information, but is not able to retrieve the information — or even to determine whether any responsive information in fact is on the sources — without incurring substantial burden or cost. The difficulties in accessing the information may arise from a number of different reasons primarily related to the technology of information storage, reasons that are likely to change over time. Examples from current technology include back-up tapes intended for disaster recovery purposes that are often not indexed, organized, or susceptible to electronic searching; legacy data that remains from obsolete systems and is unintelligible on the successor systems; data that was “deleted” but remains in fragmented form, requiring a modern version of forensics to restore and retrieve; and databases that were designed to create certain information in certain ways and that cannot readily create very different kinds or forms of information. Such difficulties present particular problems for discovery. A party may have a large amount of information on sources or in forms that may be responsive to discovery requests, but would require recovery, restoration, or translation before it could be located, retrieved, reviewed, or produced. At the same time, more easily accessed sources — whether computer-based, paper, or human — may yield all the information that is reasonably useful for the action. Lawyers sophisticated in these problems are developing a two-tier practice in which they first sort through the information that can be provided from easily accessed sources and then determine whether it is necessary to search the difficult-to-access sources.

In many circumstances, the two-tier approach will be worked out by negotiation. The Rule 26(b)(2)(B) amendment expressly incorporates the better practice as the method for judicial control when the parties cannot resolve the problem on their own. The amendment builds on the two-tier structure of scope of discovery defined in Rule 26(b)(1) and applies this structure to discovery of electronically stored information. The proposed rule recognizes a distinctive, recurring problem that electronically stored information presents for discovery and builds on the existing rules to facilitate judicial supervision when it is necessary to calibrate discovery to a particular case.

Much of the criticism during the public comment period focused on specific drafting problems in the published rule, including a lack of clarity in the term “not reasonably accessible,” how that term and the “good cause” showing related to the existing Rule 26(b)(2) proportionality limits, and how a party designation or a court finding that information is not reasonably accessible related to preservation obligations. The proposed rule and Note have been revised to respond to the concerns identified.

The published rule required a party to identify potentially responsive “information” that is not reasonably accessible. The problem, however, is that a responding party cannot identify information without actually searching and retrieving it. The revised rule directs the party to identify the sources of information that may be responsive but is not reasonably accessible.

The published rule did not provide any guide to the considerations that bear on determining whether electronically stored information is not reasonably accessible. Many comments suggested that the test should be based on the burden and cost of locating, restoring, and retrieving potentially responsive information from the sources in which it is stored. The revised rule incorporates this test, which reflects the common understanding of the published proposal. The responding party may identify sources containing potentially responsive information that is not reasonably accessible “because of undue burden or cost.”

Once the responding party has identified a source of information that is not reasonably accessible, the published rule provided for a motion to compel discovery. The revision recognizes that the responding party may wish to resolve the issue by moving for a protective order. Among the reasons that may lead a responding party to raise the issue is to resolve whether, or the extent to which, it must preserve the information stored on the difficult-to-access sources until discoverability is resolved.

A finding that the responding party has shown that a source of information is not reasonably accessible does not preclude discovery; the court may order discovery for good cause. Many comments suggested that the “good cause” standard seemed to contemplate the limitations identified by parts (i), (ii), and (iii) of present Rule 26(b)(2). The revised text clarifies the “good cause” showing by expressly referring to consideration of these limitations.

The Committee Note is revised extensively to provide a clearer description of the two-tier procedure. It recognizes that in some cases a single proceeding may suffice both to find that a source is not reasonably accessible and also to determine whether good cause nonetheless justifies discovery and to set any conditions that should be imposed. But it also recognizes that proceedings may need to be staged if focused discovery is necessary to determine the costs and burdens in obtaining the information from the sources identified as not reasonably accessible, the likelihood of finding responsive information on such sources, and the value of the information to the litigation. In such circumstances, a finding that a source is not reasonably accessible may lead to further proceedings to determine whether there is good cause to order limited or extensive searches and the production of information stored on such sources.

The proposed amendment is modest. The public comments and testimony confirmed that parties conducting discovery, particularly when it involves large volumes of information, first look in the places that are likely to produce responsive information. Parties sophisticated in electronic discovery first look in the reasonably accessible places that are likely to produce responsive information. On that level, stating in the rule that initial production of information that is not reasonably accessible is not required simply recognizes reality. Under proposed Rule 26(b)(2), this existing practice would continue; parties would search sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for a court order. But in an improvement over the present practice, in which parties simply do not produce inaccessible electronically stored information, the amendment requires the responding party to identify the sources of information that were not searched, clarifying and focusing the issue for the requesting party. In many cases, discovery obtained from accessible sources will be sufficient to meet the needs of the case. If information from such sources does not satisfy the requesting party, the proposed rule allows that party to obtain additional discovery from sources identified as not reasonably accessible, subject to judicial supervision.

One criticism leveled against the proposal is that it allows the responding party to “self-designate” information not produced because it is not reasonably accessible. All party-managed discovery and privilege invocation rests on “self-designation” to some extent. That is happening now, without the insights for the requesting party that the identification requirement provides. The responding party must disclose categories and types of sources of potentially responsive information that are not searched, enabling the requesting party to decide whether to challenge that designation.

Two other areas of concern were expressed during the comment period. One is the relationship to preservation. A second, related concern is that this proposal would lead corporations to make information inaccessible in order to frustrate discovery. As to the first concern, the Note is revised to clarify that the rule does not undermine or reduce common-law or statutory preservation obligations. The Committee Note includes a reminder that a party may be obliged to preserve information stored on sources it has identified as not reasonably accessible, but in keeping with the approach taken in proposed Rule 37(f) does not attempt to state or define a preservation obligation. As to the second concern, many

witnesses and comments rejected the argument that the rule would encourage entities or individuals to “bury” information that is necessary or useful for business purposes or that regulations or statutes require them to retain. Moreover, the rule requires that the information identified as not reasonably accessible must be difficult to access by the producing party for all purposes, not for a particular litigation. A party that makes information “inaccessible” because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed rule changes.

The Proposed Rule and Committee Note

Rule 26(b)(2)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

(A) 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. By order or local rule, the court may also limit the number of requests under Rule 36.

12 (B) A party need not provide discovery of electronically
13 stored information from sources that the party identifies
14 as not reasonably accessible because of undue burden or
15 cost. On motion to compel discovery or for a protective
16 order, the party from whom discovery is sought must
17 show that the information is not reasonably accessible
18 because of undue burden or cost. If that showing is
19 made, the court may nonetheless order discovery from
20 such sources if the requesting party shows good cause,
21 considering the limitations of Rule 26(b)(2)(C). The
22 court may specify conditions for the discovery.

23 (C) The frequency or extent of use of the discovery
24 methods otherwise permitted under these rules and by
25 any local rule shall be limited by the court if it
26 determines that: (i) the discovery sought is unreasonably
27 cumulative or duplicative, or is obtainable from some
28 other source that is more convenient, less burdensome,
29 or less expensive; (ii) the party seeking discovery has
30 had ample opportunity by discovery in the action to
31 obtain the information sought; or (iii) the burden or

32 expense of the proposed discovery outweighs its likely
33 benefit, taking into account the needs of the case, the
34 amount in controversy, the parties' resources, the
35 importance of the issues at stake in the litigation, and the
36 importance of the proposed discovery in resolving the
37 issues. The court may act upon its own initiative after
38 reasonable notice or pursuant to a motion under Rule
39 26(c).

40 * * * * *

Committee Note

Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. Subparagraph (B) is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery. One factor that bears on the preservation obligation is whether the responding party has a reasonable basis for believing that discoverable information is only available from sources that are not reasonably accessible and not on other reasonably accessible sources.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a

motion to compel discovery or by a motion for a protective order. Before bringing a motion, the parties must confer under Rule 37. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or

presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26(b)(2)(C) continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

Changes Made after Publication and Comment

This recommendation modifies the version of the proposed rule amendment as published. Responding to comments that the published proposal seemed to require identification of information that cannot be identified because it is not reasonably accessible, the rule text was clarified by requiring identification of sources that are not reasonably accessible. The test of reasonable accessibility was clarified by adding "because of undue burden or cost."

The published proposal referred only to a motion by the requesting party to compel discovery. The rule text has been changed to

recognize that the responding party may wish to determine its search and potential preservation obligations by moving for a protective order.

The provision that the court may for good cause order discovery from sources that are not reasonably accessible is expanded in two ways. It now states specifically that the requesting party is the one who must show good cause, and it refers to consideration of the limitations on discovery set out in present Rule 26(b)(2)(i), (ii), and (iii).

The published proposal was added at the end of present Rule 26(b)(2). It has been relocated to become a new subparagraph (B), allocating present Rule 26(b)(2) to new subparagraphs (A) and (C). The Committee Note was changed to reflect the rule text revisions. It also was shortened. The shortening was accomplished in part by deleting references to problems that are likely to become antique as technology continues to evolve, and in part by deleting passages that were at a level of detail better suited for a practice manual than a Committee Note.

The changes from the published proposed amendment to Rule 26(b)(2) are set out below.

* * * * *

is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery of the information from such sources for if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C).and The court may specify terms and conditions for the discovery.

~~(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.~~

iii. Procedure For Asserting Claims of Privilege and Work**Product Protection After Production: Rule 26(b)(5)****Introduction**

Ever since the Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review. The Committee has long studied whether it could offer a rule that would helpfully address this problem, within the limitations of the Rules Enabling Act and 28 U.S.C. § 2074(b). The Committee's more recent focus on electronic discovery revealed that the problems of privilege review are often more acute in that setting than with conventional discovery. The volume of electronically stored information responsive to discovery and the varying ways such information is stored and displayed make it more difficult to review for privilege than paper. The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment to Rule 26(b)(5) addresses these problems by setting up a procedure to assert privilege and work product protection after production.

Under the proposed rule, if a party has produced information in discovery that it claims is privileged or protected as trial-preparation material, that party may notify the receiving party of the claim, stating the basis for it. After receiving notification, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. A receiving party that has disclosed or provided the information to a nonparty before getting notice must take reasonable steps to obtain the return of the information or arrange for it to be destroyed. The producing party must preserve the information pending the court's ruling on whether the information is privileged or protected and whether any privilege or work product protection has been waived or forfeited by production.

The proposed amendment does not address the substantive questions whether privilege or work product protection has been waived or forfeited. Instead, the amendment sets up a procedure to allow the responding party to assert a claim of privilege or work product protection after production. This supplements the existing procedure in Rule 26(b)(5) for a party that has withheld information on the ground of privilege to assert the claim, the requesting party to contest the claim, and the court to resolve the dispute. It is a nod to the pressures of litigating with the amount and nature of electronically stored information available in the present age, a procedural device for addressing the increasingly costly and time-consuming efforts to reduce the number of inevitable blunders.

The published rule addressed claims of privilege, but did not specifically include claims of protection as trial-preparation material. During the comment period, many suggested adding work-product protection to the rule. Doing so is consistent with present Rule 26(b)(5)(A) and reflects the reality that privilege and work-product protection often overlap; review is conducted simultaneously; and both have waiver consequences, although the extent may differ. The Committee decided to include both privilege and protection as trial-preparation material in the rule.

The published rule required the producing party to assert the claim of privilege within a “reasonable time.” Several concerns were raised about the “reasonable time” provision that convinced the Committee to delete it from the proposed rule. Under the law of many jurisdictions, whether a party asserted a privilege claim within a reasonable time is important to determining whether there is a waiver; focusing on a reasonable time might carry implications inconsistent with the Committee’s intent to avoid the substantive law of privilege and privilege waiver. In addition, the “reasonable time” formulation was not tied to any particular triggering event, such as the date of production or the date when the responding party learned or should have learned that it had produced information subject to a privilege or protection claim. A “reasonable time” requirement unmoored to a particular triggering event proved confusing. It is deleted from the revised proposal. The deletion does not mean that parties are free to assert a privilege or protection claim at any point in the litigation. Courts will continue to examine whether such a claim was made at a reasonable time, but as part of determining whether a waiver has occurred under the substantive law governing that issue.

The proposed rule is also revised to include what many comments recommended: a provision authorizing the receiving party to submit the information asserted to be privileged or protected under seal to the court. As a related change, the rule language is revised to require the party asserting the claim to set out the basis for it when giving notice; the Committee Note states that the receiving party should submit that statement to the court, along with the information itself, if the receiving party chooses to contest the claim. The notice informs the court of the basis for the claim and allows the receiving party to use the submission to seek a ruling as to waiver, privilege or protection, or both. Additional rule and Note language are provided to clarify this point.

As published, the Note stated that after receiving notice that information is claimed to be privileged, the party that received the information may not disseminate or use the information until the claim is resolved. Many comments urged that this directive be elevated to the rule. The Committee decided to add the directive to the rule text itself, adding clarity and emphasizing the purpose of providing a consistent and predictable procedure and preserving the status quo pending resolution.

The published rule did not specifically address an obligation by the receiving party to retrieve information it disclosed to third parties before the responding party asserted a privilege claim. Although the Committee Note stated that a receiving party should attempt to obtain return of the information if it had been disclosed to a nonparty, the absence of such language emerged as a concern during the comment

period. The Committee decided to address this issue in the rule text, but to limit any such obligation to “reasonable steps” to retrieve such information. Such a formulation provides appropriate protection for the party asserting the claim pending its resolution, but also limits the burden on the receiving party.

The Committee specifically sought reaction during the comment period on whether to require the party that received the notice to certify compliance with the rule. There was little support for this addition during the comment period. One concern was that by requiring the creation of a new, separate document, such a provision would go beyond the certification that Rule 26(g) reads into the signature on a discovery document. Imposing an added requirement on a party that did not make the mistake precipitating the problem in the first place also raised concerns. The Committee decided not to include a certification requirement in the rule.

The Proposed Rule and Committee Note

Rule 26(b)(5)(B)

The Committee recommends approval of the following proposed amendment.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 * * * * *

2 **(b) Discovery Scope and Limits.** Unless otherwise limited by
3 order of the court in accordance with these rules, the scope of
4 discovery is as follows:

5 * * * * *

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

8 **(A) Information Withheld.** When a party withholds
9 information otherwise discoverable under these rules by
10 claiming that it is privileged or subject to protection as

11 trial-preparation material, the party shall make the claim
12 expressly and shall describe the nature of the
13 documents, communications, or things not produced or
14 disclosed in a manner that, without revealing
15 information itself privileged or protected, will enable
16 other parties to assess the applicability of the privilege or
17 protection.

18 **(B) Information Produced.** If information is produced
19 in discovery that is subject to a claim of privilege or
20 protection as trial-preparation material, the party making
21 the claim may notify any party that received the
22 information of the claim and the basis for it. After being
23 notified, a party must promptly return, sequester, or
24 destroy the specified information and any copies it has
25 and may not use or disclose the information until the
26 claim is resolved. A receiving party may promptly
27 present the information to the court under seal for a
28 determination of the claim. If the receiving party
29 disclosed the information before being notified, it must

30 take reasonable steps to retrieve it. The producing party

31 must preserve the information until the claim is resolved.

32 * * * * *

Committee Note

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

Rule 26(b)(5)(B) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. *See 8 Federal Practice & Procedure* § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16(b), allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26(f)(4) and orders including such agreements entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and determine whether waiver has occurred.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to obtain the return of the information or arrange for its destruction or sequestration until the claim is resolved.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or protection is properly asserted and whether it was waived. As with claims made under Rule 26(b)(5)(A), there may be no ruling if the other parties do not contest the claim.

Changes Made After Publication and Comment

The rule recommended for approval is modified from the published proposal. The rule is expanded to include trial-preparation protection claims in addition to privilege claims.

The published proposal referred to production “without intending to waive a claim of privilege.” This reference to intent was deleted because many courts include intent in the factors that determine whether production waives privilege.

The published proposal required that the producing party give notice “within a reasonable time.” The time requirement was deleted because it seemed to implicate the question whether production effected a waiver, a question not addressed by the rule, and also because a receiving party cannot practicably ignore a notice that it believes was unreasonably delayed. The notice procedure was further changed to require that the producing party state the basis for the claim.

Two statements in the published Note have been brought into the rule text. The first provides that the receiving party may not use or disclose the information until the claim is resolved. The second provides that if the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.

The rule text was expanded by adding a provision that the receiving party may promptly present the information to the court under seal for a determination of the claim.

The published proposal provided that the producing party must comply with Rule 26(b)(5)(A) after making the claim. This provision was deleted as unnecessary.

Changes are made in the Committee Note to reflect the changes in the rule text.

The changes from the published rule are shown below.

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

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

(A) *Privileged-iInformation 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-iInformation Produced.* If ~~When a~~ party produces information is produced in discovery that

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

16 is subject to a claim of privilege or protection as trial-
17 preparation material, without intending to waive a claim
18 of privilege, the party making the claim it may, within
19 a reasonable time, notify any party that received the
20 information of the claim and the basis for its claim of
21 privilege. After being notified, a party must promptly
22 return, sequester, or destroy the specified information
23 and any copies it has and may not use or disclose the
24 information until the claim is resolved. A receiving
25 party may promptly present the information to the court
26 under seal for a determination of the claim. If the
27 receiving party disclosed the information before being
28 notified, it must take reasonable steps to retrieve it. The
29 producing party must ~~comply with Rule 26(b)(5)(A)~~
30 ~~with regard to the information and preserve it~~ the
31 information until the ~~privilege~~ claim is resolved pending
32 a ruling by the court.

**iv. Interrogatories and Requests for Production Involving
Electronically Stored Information: Rules 33 and 34(a) and (b)**

Introduction

(a). Rule 33

The proposed amendment to Rule 33 clarifies how the option to produce business records to respond to an interrogatory operates in the information age. The rule is amended to make clear that the option to produce business records or make them available for examination, audit, or inspection, includes electronically stored information. The Note language clarifies how the limitation in Rule 33(d), permitting the production of records to respond to an interrogatory when “the burden of deriving or ascertaining the answer” is substantially the same for either party, applies to electronically stored information. The Note explains that depending on the circumstances, “the responding party may be required to provide some combination of technical support, information on application software, or other assistance” to enable the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. In response to comments, the Note has been revised from the published version to clarify when such support might include direct access to a party’s electronic information system. Because such access may raise sensitive problems of confidentiality or privacy, the Note states that the responding party may choose to derive or ascertain the answer itself.

(b). Rule 34

The proposed amendment to Rule 34(a) adds “electronically stored information” as a category subject to production, in addition to “documents.” Rule 34(b) is amended to add procedures for requesting and objecting to the form for producing such information and to provide “default” forms of production. Such requests and objections did not arise with paper discovery, because paper can generally be produced in only one form. By contrast, electronically stored information may exist in a number of different forms, some of which may be inappropriate for the litigation or costly or burdensome for the requesting or responding party.

Rule 34(a)

Adding “electronically stored information” to Rule 34(a)’s list of what is subject to production is an obvious change. In 1970, this list was revised to add “data or data compilations.” This discovery rule revision was made to accommodate changes in technology; it is safe to say that the technological developments that prompted the 1970 amendment have been dwarfed by the revolution in information technology in the intervening decades, which we are grappling with today. The gap between the rule’s present terminology and existing technology is exacerbated by the inclusion of “phonorecords” in the items subject to discovery and the reference to having to use “detection devices” to translate data or

compilations into a usable form. Proposed revisions made since publication delete the archaic and redundant words “through detection devices,” from the rule text. The term “electronically stored information” was further focused by addition of the word “stored” to Rule 34(a)(1), so that it speaks of information “stored” in any medium.

The public comments focused on whether “electronically stored information” should be included within the term “documents,” or whether it should be a third category with “documents” and “things.” The Committee heard that good arguments support both choices and that few negative consequences flow from either choice. The Committee decided to recommend making “electronically stored information” separate from “documents.” Although courts and litigants have included such information in the word “documents” to make it discoverable under the present rule language, there are significant and growing differences that the distinction acknowledges. During the hearings, many technically sophisticated witnesses confirmed that significant types of electronically stored information — most notably dynamic databases — are extremely difficult to characterize as “documents.” When the Advisory Committee decided in 1970 to include “data or data compilations” as a subset of “documents,” the Committee expected that the rule would require a producing party to provide a “print-out of computer data.” By contrast, while electronically stored information often can be produced in the form of a document, it also exists, and will more often be produced, in forms other than a document. Rather than continue to try to stretch the word “document” to make it fit this new category of stored information, the published proposed amendment to Rule 34 explicitly recognized electronically stored information as a separate category.

Some comments expressed concern that parties seeking production of “documents” under Rule 34 might not receive electronically stored information and would have to ask for it specifically. Note language responds to this concern. Even if a request refers only to documents — or to electronically stored information — the responding party must produce responsive information no matter what the storage form may be. In addition, the rules provide other steps that should alert a party to request electronically stored information if it is involved in a case. The parties are directed by Rule 26(f) to discuss discovery of electronically stored information if such discovery will occur in the case, and Rule 34(b) permits the requesting party to specify the form or forms for production of electronically stored information.

One other drafting matter with respect to Rule 34(a) deserves mention: the significance of the listed items in the parenthetical following the word “documents” in the current rule and the published draft. During the public comment period, some asked whether the listed items in that parenthetical refer only to “documents,” and not “electronically stored information.” The items listed refer, as applicable, to either or both electronically stored information and documents. For example, “data compilations” could be produced as paper, in a print-out of electronically stored information, or in electronic form; an “image” could be in a document or in an electronic form. The items listed reflect the breadth of both the terms “documents” and “electronically stored information.” To clarify this point, redrafting after the public comment period reversed the order of “documents” and “electronically stored information” and changed the punctuation to replace the parentheses with a dash.

Rule 34(b)

Proposed amended Rule 34(b) provides a procedure for an issue that generally does not arise with paper discovery – electronically stored information exists and can be produced in a number of forms. The form or forms in which it is kept may not be a form that the requesting party can use or use efficiently or that the responding party wants to use for production. The form of producing electronically stored information is increasingly a source of dispute in discovery. The proposed amendment provides a structure and procedure for the parties to identify the form or forms of production that are most useful or appropriate for the litigation and provides guidance to the responding party if no request, order, or agreement specifies the form or forms of production and to guide the court if there is a dispute.

Proposed amended Rule 34(b) allows, but does not require, a requesting party to specify a form or forms for producing electronically stored information, clarifies that a responding party's objection to a request may include an objection to the specified form, requires a responding party to state the form or forms it intends to use for production in the written response it must file to the production request, and provides "default" forms of production to apply if the requesting party did not specify a form and there is no agreement or order requiring a particular form.

During the public comment period, concern was expressed as to the published language that described the so-called default forms of production. Rule 34(b), as published, stated that if the parties did not agree on forms of producing electronically stored information, and the court did not order specific forms of production, the responding party could produce in a "form in which it is ordinarily maintained, or in an electronically searchable form." These alternatives were intended to provide functional analogues to the existing rule language that provides choices for producing hard-copy documents: the form in which they are kept in the usual course of business or organized and labeled to correspond to the categories in the request. A number of commentators expressed concern that "a form ordinarily maintained" required "native format" production, which can have disadvantages ranging from an inability to redact, leading to privilege problems; an inability to bates-stamp the "document" for purposes of litigation management and control, which is not an insignificant consideration, particularly in complex multi-party cases; and the receiving party's ability to create "documents" from the produced native-format data and present them back to the producing party as deposition or proposed trial exhibits that, while based on the native format data produced, are totally unfamiliar to the producing party. The commentators expressed concern that the alternative provided, an "electronically searchable form," might exert pressure for "native format" production due to the difficulties that attend providing an electronically searchable form. Other comments challenged this alternative default as a standard that should not be applied for all cases. A form that is readily searchable on one party's system may not be easily searched, or searched at all, on another party's system. And there is a converse concern that the requesting party might insist on production in a form searchable in its own unique system, imposing undue conversion costs on the producing party. Other information may exist in an electronic form that is not searchable in any meaningful sense. Requiring electronic searchability, moreover, may be unnecessary or even unwanted in some cases. Many parties

continue to seek and provide information in paper form by printing out electronic files. On the other hand, commentators noted that it is important to frame the rule to provide the same kind of protection against discovery abuse that is provided for paper discovery by the present choice between producing documents as they are kept in the usual course of business or organized and labelled to correspond with the categories in the request. Producing electronically stored information with the ability to search by electronic means removed or degraded is the electronic discovery version of the “document dump,” the production of large amounts of paper with no organization or order.

In response to these and other concerns, rule and Note language have been revised. The existing language of Rule 34(a) provided the starting point, by requiring a responding party to “translate” electronic information, if necessary, “into reasonably usable form.” The Committee was concerned in its discussion that the Rule 34(b) “default” forms of production should be consistent with this Rule 34(a) requirement. After discussion, the Committee decided to retain the published rule language that one default form of production be the form or forms in which the responding party ordinarily maintains the information, but to make the alternative “a form or forms that are reasonably usable.” Under Rule 34(a) and (b), the form or forms in which the responding party ordinarily maintains its information can be the default choice of the responding party, but if necessary that party might have to translate the information to make it “reasonably usable.” Or the responding party can choose a form that it does not ordinarily use, as long as it is reasonably usable. This is consistent with Rule 34(a) as it has stood since 1970.

If the information is maintained in a way that is not usable by anyone – for example, it may be stored on obsolete sources or require equipment that is unavailable – the problem is properly addressed under Rule 26(b)(2), which covers electronically stored information that is not reasonably accessible. If the requesting party has esoteric or idiosyncratic features on its information system that would be unduly burdensome or costly for the responding party to accommodate, producing the information in a form that can be used with software that is in general commercial use should be “reasonably usable.”

During the comment period, as noted, concerns were raised about whether the “default forms” of production would permit responding parties to produce electronically stored information in ways that remove or degrade functions that are useful to the requesting party, such as features that make it electronically searchable. Committee Note language responds to this concern, stating that the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Rule 34(b) was changed from the published version to permit the parties to specify the form “or forms” for production of electronically stored information. This change recognizes the fact that different

types of information may best be produced in different forms. In addition, the provision stating that a producing party need produce the same electronically stored information in only one form was relocated to make it clear that this limitation applies when the requesting party specifies the desired form or forms in the request.

The Proposed Rules and Committee Notes

Rule 33

The Committee recommends approval of the following amendment:

Rule 33. Interrogatories to Parties

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(d) Option to Produce Business Records. Where the answer

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to an interrogatory may be derived or ascertained from the

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business records, including electronically stored information, of

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the party upon whom the interrogatory has been served or from

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an examination, audit or inspection of such business records,

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including a compilation, abstract or summary thereof, and the

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burden of deriving or ascertaining the answer is substantially the

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same for the party serving the interrogatory as for the party

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served, it is a sufficient answer to such interrogatory to specify

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the records from which the answer may be derived or ascertained

12

and to afford to the party serving the interrogatory reasonable

13

opportunity to examine, audit or inspect such records and to

14

make copies, compilations, abstracts, or summaries. A

15 specification shall be in sufficient detail to permit the
16 interrogating party to locate and to identify, as readily as can the
17 party served, the records from which the answer may be
18 ascertained.

19 * * * * *

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 form 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) states 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 that the responding party must give the interrogating party a “reasonable opportunity to examine, audit, or inspect” the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the

responding party’s need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33(d).

Changes Made after Publication and Comment

No changes are made to the rule text. The Committee Note is changed to reflect the sensitivities that limit direct access by a requesting party to a responding party’s information system. If direct access to the responding party’s system is the only way to enable a requesting party to locate and identify the records from which the answer may be ascertained, the responding party may choose to derive or ascertain the answer itself.

Rule 34

The Committee recommends the following rule amendment and accompanying Committee Note:

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

- 1 **(a) Scope.** Any party may serve on any other party a request
- 2 (1) to produce and permit the party making the request, or
- 3 someone acting on the requestor’s behalf, to inspect, ~~and~~ copy,
- 4 test, or sample any designated documents or electronically stored
- 5 information = (including writings, drawings, graphs, charts,
- 6 photographs, sound recordings, images ~~phonorecords~~, and other
- 7 data or data compilations stored in any medium from which
- 8 information can be obtained; = translated, if necessary, by the

9 respondent ~~through detection devices~~ into reasonably usable
10 form), or to inspect, and copy, test, or sample any designated
11 tangible things which constitute or contain matters within the
12 scope of Rule 26(b) and which are in the possession, custody or
13 control of the party upon whom the request is served; or (2) to
14 permit entry upon designated land or other property in the
15 possession or control of the party upon whom the request is
16 served for the purpose of inspection and measuring, surveying,
17 photographing, testing, or sampling the property or any
18 designated object or operation thereon, within the scope of Rule
19 26(b).

20 **(b) Procedure.** The request shall set forth, either by individual
21 item or by category, the items to be inspected, and describe each
22 with reasonable particularity. The request shall specify a
23 reasonable time, place, and manner of making the inspection and
24 performing the related acts. The request may specify the form or
25 forms in which electronically stored information is to be
26 produced. Without leave of court or written stipulation, a
27 request may not be served before the time specified in Rule
28 26(d).

29 The party upon whom the request is served shall serve a
30 written response within 30 days after the service of the request.
31 A shorter or longer time may be directed by the court or, in the
32 absence of such an order, agreed to in writing by the parties,
33 subject to Rule 29. The response shall state, with respect to each
34 item or category, that inspection and related activities will be
35 permitted as requested, unless the request is objected to,
36 including an objection to the requested form or forms for
37 producing electronically stored information, in which event
38 stating the reasons for the objection shall be stated. If objection
39 is made to part of an item or category, the part shall be specified
40 and inspection permitted of the remaining parts. If objection is
41 made to the requested form or forms for producing electronically
42 stored information – or if no form was specified in the request –
43 the responding party must state the form or forms it intends to
44 use. The party submitting the request may move for an order
45 under Rule 37(a) with respect to any objection to or other failure
46 to respond to the request or any part thereof, or any failure to
47 permit inspection as requested.

48 Unless the parties otherwise agree, or the court otherwise
49 orders:

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

54 (ii) if a request does not specify the form or forms for
55 producing electronically stored information, a responding
56 party must produce the information in a form or forms in
57 which it is ordinarily maintained or in a form or forms that
58 are reasonably usable; and

59 (iii) a party need not produce the same electronically stored
60 information in more than 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 include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not pace with changes in information technology. But it has become increasingly

difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a “document.” Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

Discoverable information often exists in both paper and electronic form, and the same or very similar information might exist in both. The items listed in Rule 34(a) show the different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. 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. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers – either as documents or as electronically stored information – 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 approach. 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 term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 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). References to “documents” appear in discovery

rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term “electronically stored information” is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 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 permits it. 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). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

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

Subdivision (b). Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34(b) permits the requesting party to designate the form or forms 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 a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26(f)(3) is amended to call for discussion of the form of production in the parties' pre-discovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34(b), runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to

permit a responding party to assess the appropriate form or forms of production.

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party must “translate” information it produces into a “reasonably usable” form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature. (The Rule 34(a) requirement that if necessary a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).)

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One

example is “legacy” data that can be used only by superseded systems. The questions whether a producing party should be required to convert such data to a more usable form, or should be required to produce it at all, should be addressed under Rule 26(b)(2)(B).

Whether or not the requesting party specified the form of production, Rule 34(b) provides that the same electronically stored information ordinarily need be produced in only one form.

Changes Made after Publication and Comment

The proposed amendment recommended for approval has been modified from the published version. The sequence of “documents or electronically stored information” is changed to emphasize that the parenthetical exemplifications apply equally to illustrate “documents” and “electronically stored information.” The reference to “detection devices” is deleted as redundant with “translated” and as archaic.

The references to the form of production are changed in the rule and Committee Note to refer also to “forms.” Different forms may be appropriate or necessary for different sources of information.

The published proposal allowed the requesting party to specify a form for production and recognized that the responding party could object to the requested form. This procedure is now amplified by directing that the responding party state the form or forms it intends to use for production if the request does not specify a form or if the responding party objects to the requested form.

The default forms of production to be used when the parties do not agree on a form and there is no court order are changed in part. As in the published proposal, one default form is “a form or forms in which [electronically stored information] is ordinarily maintained.” The alternative default form, however, is changed from “an electronically searchable form” to “a form or forms that are reasonably usable.” “[A]n electronically searchable form” proved to have several defects. Some electronically stored information cannot be searched electronically. In addition, there often are many different levels of electronic searchability — the published default would authorize production in a minimally

searchable form even though more easily searched forms might be available at equal or less cost to the responding party.

The provision that absent court order a party need not produce the same electronically stored information in more than one form was moved to become a separate item for the sake of emphasis.

The Committee Note was changed to reflect these changes in rule text, and also to clarify many aspects of the published Note. In addition, the Note was expanded to add a caveat to the published amendment that establishes the rule that documents — and now electronically stored information — may be tested and sampled as well as inspected and copied. Fears were expressed that testing and sampling might imply routine direct access to a party's information system. The Note states that direct access is not a routine right, "although such access might be justified in some circumstances."

The changes in the rule text since publication are set out below.

80 FEDERAL RULES OF CIVIL PROCEDURE

16 performing the related acts. The request may specify the form or
17 forms in which electronically stored information is to be
18 produced.

19 * * * * *

20 The response shall state, with respect to each item or category,
21 that inspection and related activities will be permitted as
22 requested, unless the request is objected to, including an
23 objection to the requested form or forms for producing
24 electronically stored information, stating the reasons for the
25 objection. If objection is made to part of an item or category, the
26 part shall be specified and inspection permitted of the remaining
27 parts. If objection is made to the requested form or forms for
28 producing electronically stored information — or if no form was
29 specified in the request — the responding party must state the
30 form or forms it intends to use. The party submitting the request
31 may move for an order under Rule 37(a) with respect to any
32 objection to or other failure to respond to the request or any part
33 thereof, or any failure to permit inspection as requested.

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

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(ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in an ~~electronically searchable form~~ a form or forms that are reasonably usable; ~~The party need only produce such information in one form.~~ and
(iii) a party need not produce the same electronically stored information in more than one form.

v. Sanctions for a Certain Type of Loss of Electronically**Stored Information: Rule 37(f)****Introduction**

Proposed Rule 37(f) responds to a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use. The proposed rule provides limited protection against sanctions for a party's inability to provide electronically stored information in discovery when that information has been lost as a result of the routine operation of an electronic information system, as long as that operation is in good faith.

Examples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been "deleted"; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. Similarly, many database programs automatically create, discard, or update information without specific direction from, or awareness of, users. By protecting against sanctions for loss of information as a result of the routine operation of a computer system, the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems. The proposed rule also recognizes that suspending or interrupting these features can be prohibitively expensive and burdensome, again in ways that have no counterpart to managing hard-copy information. One reason is that hard-copy document retention and destruction programs are not intertwined with, nor an inextricable part of, ongoing business processes. A data producer can warehouse large volumes of papers without affecting ongoing activities and can maintain and manage hard-copy records separately from the creation of products or services. By contrast, electronic information is usually part of the data producer's activities, whether it be the manufacture of products or the provision of services. It can be difficult to interrupt the routine operation of computer systems to isolate and preserve discrete parts of the information they overwrite, delete, or update on an ongoing basis, without creating problems for the larger system. It is unrealistic to expect parties to stop such routine operation of their computer systems as soon as they anticipate litigation. It is also undesirable; the result would be even greater accumulation of duplicative and irrelevant data that must be reviewed, making discovery more expensive and time-consuming. There is considerable uncertainty as to whether a party – particularly a party that produces large amounts of information – nonetheless has to interrupt the operation of the electronic information systems it is using to avoid any loss of information because of the possibility that it might be sought in discovery, or risk severe sanctions.

Proposed Rule 37(f) is not intended to provide a shield for parties that intentionally destroy information because of its relationship to litigation by, for example, exploiting the routine operation of an information system to target specific electronically stored information for destruction in order to avoid producing that information in discovery. Defining the culpability standard that would make a party ineligible for protection under Rule 37(f) presented a challenge. Rule 37(f) was therefore published in two versions and the Committee particularly invited commentary on the appropriate culpability standard. The text version adopted essentially a negligence test, requiring that the party seeking protection under the proposed rule have taken reasonable steps to preserve information after it knew the information was discoverable in the action. A footnote offered an alternative version setting a higher culpability threshold – that sanctions could not be imposed unless the party intentionally or recklessly failed to preserve the information. Both versions of the published Rule 37(f) draft also precluded protection when the loss of the information violated a court order.

Much public commentary focused on Rule 37(f). A number of comments urged that the text version – precluding any protection under the rule even for negligent loss of information – provided no meaningful protection, but rather protected against conduct unlikely to be sanctioned in the first place. Any mistake in interrupting the routine operation of a computer system might be found not reasonable, defeating application of the rule. Others urged that the footnote version was too restrictive. Proving that a litigant acted intentionally or recklessly in permitting the regular operation of an information system to continue might prove quite difficult and require discovery and fact-finding that could involve inquiry into difficult subjective issues. Adopting the footnote version could insulate conduct that should be subject to sanctions.

Public commentary also focused on the court-order provision included in both published drafts. Many argued that this provision would promote applications for preservation orders as a way to defeat application of the proposed rule. Others urged that the court-order provision be narrowed to orders that “specifically” called for preservation of certain electronically stored information, for fear that broad preservation orders would nullify the Rule 37(f) protection altogether.

Public commentary also emphasized the possible relationship between Rule 37(f) and the proposed amendment to Rule 26(b)(2) that – unless the court orders discovery – excuses a responding party from providing discovery of electronically stored information that is not reasonably accessible. Many commentators expressed a concern or expectation that the interaction of Rules 26(b)(2) and 37(f) meant that absent a preservation order, there would be no obligation to preserve information a party contended was not reasonably accessible because such information was not “discoverable” under Rule 26(b)(2).

The Advisory Committee carefully considered the comments and made adjustments in the rule and the Note to respond to them. It retained the fundamental focus on the routine operation of an electronic information system. But it revised Rule 37(f) to adopt a culpability standard intermediate

between the two published versions. The proposed rule provides protection from sanctions only for the “good faith” routine operation of an electronic information system.

As the Note explains, good faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a “litigation hold.” The rule itself does not purport to create or affect such preservation obligations, but recognizes that they may arise from many sources, including common law, statutes, and regulations. The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation. Such party agreements may emerge from the early discovery-planning conference, which the proposed amendments to Rule 26(f) provide should include discussion of preserving discoverable information.

The revised rule also includes a provision that permits sanctions in “exceptional circumstances” even when information is lost because of a party’s good-faith routine operation of a computer system. As the Note explains, an important consideration in determining whether exceptional circumstances are present is whether the party seeking sanctions can demonstrate that the loss of the information is highly prejudicial to it. In such circumstances, a court has the discretion to require steps that will remedy such prejudice. The exceptional circumstances provision adds flexibility not included in the published drafts. The Note is revised, also in response to public commentary, to provide further guidance by stating that severe sanctions are ordinarily appropriate only when the party has acted intentionally or recklessly.

The Advisory Committee also decided that the court-order provision should be removed from the rule. Many comments noted that the provision would create an incentive to obtain a preservation order to make the rule’s protection unavailable. As stated in the Note to Rule 26(f) (regarding the discussion of preservation during the discovery-planning conference), preservation orders should not be routinely entered. The existence of a court order remains important, however; as the Rule 37(f) Note recognizes, steps taken to comply with orders calling for preservation of information bear on the good faith of a party that has lost information due to the routine operation of a computer system.

To respond to concerns that the proposed rule would insulate routine destruction of information on sources a party identifies as not reasonably accessible, the Notes to both Rules 37(f) and 26(b)(2) have been revised to make clear that there is no necessary linkage between these rules. Thus, the Rule 37(f) Note says that good faith may require preservation of information on sources a party believes are not reasonably accessible under Rule 26(b)(2).

In addition, the Advisory Committee changed the reference to routine operation from “a party’s” information system to “an” information system. This change recognizes that in many cases, a party’s electronically stored information is actually stored on a system owned by another, such as a vendor in a contractual relationship with the party. Absent this change, the rule could result in holding a party subject

to sanctions for the loss of information resulting from the routine, good-faith operation of a computer system because the information was on a system operated by a vendor or other entity. The rule continues to focus on the party's good faith in the operation of a system containing the party's information. For example, if a party stored certain electronically stored information on a vendor's computer system and that information became subject to a preservation obligation, the party's good faith would be measured by its efforts to arrange for the preservation of the information on that system.

The Proposed Rule and Committee Note

Rule 37(f)

The Committee recommends approval of the following proposed amendment:

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

* * * * *

- 1 **(f) Electronically stored information.** Absent exceptional
- 2 circumstances, a court may not impose sanctions under these
- 3 rules on a party for failing to provide electronically stored
- 4 information lost as a result of the routine, good-faith operation of
- 5 an electronic information system.

Committee Note

Subdivision (f). Subdivision (f) is new. It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37(f), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information

resulting from the routine operation of the party's electronic information system, if that operation was in good faith.

Rule 37(f) applies only to information lost due to the “routine operation of an electronic information system” – the ways in which such systems are generally designed and programmed to meet the party's technical and business needs. The “routine operation” of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such automatic features are essential to the operation of electronic information systems.

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith may require that a party intervene to modify or suspend certain features of the routine operation of a computer system to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, and regulations. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, such intervention in the routine operation of an information system is one aspect of what is often called a “litigation hold.” A party cannot exploit the routine operation of an information system to evade discovery obligations by failing to prevent destruction of stored information that it is required to preserve.

The steps the party takes to design and implement an effective and appropriate litigation hold are important to determining whether the routine operation of the information system was in good faith. Similarly, agreements the parties reached, or orders the court entered, calling for preservation of specific electronically stored information bear on whether the routine operation of the electronic information system continued in good faith.

Good faith steps to preserve electronically stored information through a litigation hold may need to include information from sources that the party believes would not be reasonably accessible under Rule 26(b)(2). Whether preservation obligations apply to such sources depends on the circumstances of each case, particularly whether the party

reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct, may be appropriate.

If Rule 37(f) does not apply, the question whether sanctions should be imposed on a party, and the nature of any sanction to be imposed, are for the court. The fact that information is lost in circumstances that do not fall within the protection of Rule 37(f) does not imply that a court should impose sanctions. The severity of any sanction should correspond to the culpability of the party's conduct as well as the resulting prejudice. Ordinarily, severe sanctions would not be appropriate unless the party acted intentionally or recklessly.

Changes Made after Publication and Comment

The published rule barred sanctions only if the party who lost electronically stored information took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action. A footnote invited comment on an alternative standard that barred sanctions unless the party recklessly or intentionally failed to preserve the information. The present proposal establishes an intermediate standard, protecting against sanctions if the information was lost in the “good faith” operation of an electronic information system. The present proposal carries forward a related element that was a central part of the published proposal — the information must have been lost in the system’s “routine operation.” (The change to a good-faith test made it possible to eliminate the reference to information “discoverable in the action,” removing a potential source of confusion as to the duty to preserve information on sources that are identified as not reasonably accessible under Rule 26(b)(2)(B).)

The change to a good-faith standard is accompanied by addition of a provision that permits sanctions for loss of information in good-faith

4 ~~requiring it to preserve electronically stored information, a court~~
5 ~~may not impose sanctions under these rules on a the party for~~
6 ~~failing to provide such electronically stored information lost as~~
7 ~~a result of the routine, good-faith operation of an electronic~~
8 ~~information system. if:~~

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

12 ~~— (2) the failure resulted from loss of the information because~~
13 ~~of the routine operation of the party's electronic information~~
14 ~~system.~~

15 * * * * *

vi. Rule 45**Introduction**

Rule 45 provisions for subpoenas to produce documents apply to electronically stored information as well as traditional paper documents. The published amendments proposed revisions designed to keep Rule 45 in line with the other amendments addressing electronically stored information. Virtually all of the public comment and testimony focused on the other amendments. It was assumed that Rule 45 would conform, where appropriate, to any changes proposed for the other amendments. A description of the changes made since publication serves also to describe the Rule 45 amendments in general.

A simple change was to expand the Rule 45(a)(1) provision that a subpoena may specify the form for producing electronically stored information to include the “forms.” This change parallels changes made in Rules 26(f) and 34. The same change is made in the Rule 45(c)(2)(B) provision for objecting to the form or forms requested in the subpoena and in the Rule 45(d)(1)(B) provision for the default form or forms of production.

The default form of production was changed to accord with revised Rule 34(b), dropping the alternative for “an electronically searchable form” and substituting a form or forms that are “reasonably usable.”

The Rule 45(d)(1)(E) provision protecting against production of electronically stored information that is not reasonably accessible was revised to mirror the changes made in Rule 26(b)(2)(B). The producing person must identify the sources, not the information; “undue burden or cost” is added to provide a test of reasonable accessibility; motions both to compel discovery and to quash are expressly recognized; discovery of information not reasonably accessible is allowed on court order after finding good cause, considering the limitations of Rule 26(b)(2)(C). The court’s authority to specify conditions for discovery is expressly stated.

Several changes were made in the Rule 45(d)(2)(B) provision that tracks the Rule 26(b)(5)(B) provision for asserting a claim of privilege after information is produced. Trial-preparation material is added to this procedure. The person making the claim must state the basis for the claim. The party receiving the information may not use or disclose it until the claim is resolved, but may present it to the court under seal for a determination of the claim. The receiving party also must take reasonable steps to retrieve the information if it was disclosed to others.

FEDERAL RULES OF CIVIL PROCEDURE
The Proposed Rule and Committee Note

91

Rule 45

The Committee recommends approval of amendments to Rule 45 that incorporate the corresponding changes made to the discovery rules.

1 **Rule 45. Subpoena**

2 **(a) Form; Issuance.**

3 **(1)** Every subpoena shall

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

5 and

6 **(B)** state the title of the action, the name of the court in

7 which it is pending, and its civil action number; and

8 **(C)** command each person to whom it is directed to

9 attend and give testimony or to produce and permit

10 inspection, ~~and copying, testing, or sampling~~ of

11 designated books, documents, electronically stored

12 information, or tangible things in the possession, custody

13 or control of that person, or to permit inspection of

14 premises, at a time and place therein specified; and

15 **(D)** set forth the text of subdivisions (c) and (d) of this

16 rule.

92 FEDERAL RULES OF CIVIL PROCEDURE

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

22 (2) A subpoena commanding attendance at a trial or hearing
23 shall issue from the court for the district in which the hearing
24 or trial is to be held. A subpoena for attendance at a
25 deposition shall issue from the court for the district
26 designated by the notice of deposition as the district in which
27 the deposition is to be taken. If separate from a subpoena
28 commanding the attendance of a person, a subpoena for
29 production, or inspection, copying, testing, or sampling shall
30 issue from the court for the district in which the production
31 or inspection is to be made.

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

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

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

42 **(b) Service.**

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

55 (2) Subject to the provisions of clause (ii) of subparagraph
56 (c)(3)(A) of this rule, a subpoena may be served at any place
57 within the district of the court by which it is issued, or at any
58 place without the district that is within 100 miles of the place
59 of the deposition, hearing, trial, production, ~~or inspection,~~
60 copying, testing, or sampling specified in the subpoena or at
61 any place within the state where a state statute or rule of
62 court permits service of a subpoena issued by a state court of
63 general jurisdiction sitting in the place of the deposition,
64 hearing, trial, production, ~~or inspection,~~ copying, testing, or
65 sampling specified in the subpoena. When a statute of the
66 United States provides therefor, the court upon proper
67 application and cause shown may authorize the service of a
68 subpoena at any other place. A subpoena directed to a
69 witness in a foreign country who is a national or resident of
70 the United States shall issue under the circumstances and in
71 the manner and be served as provided in Title 28, U.S.C.
72 § 1783.

73 (3) Proof of service when necessary shall be made by filing
74 with the clerk of the court by which the subpoena is issued

75 a statement of the date and manner of service and of the
76 names of the persons served, certified by the person who
77 made the service.

78 **(c) Protection of Persons Subject to Subpoenas.**

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

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

94 **(B)** Subject to paragraph (d)(2) of this rule, a person
95 commanded to produce and permit inspection, ~~and~~
96 ~~copying, testing, or sampling~~ may, within 14 days after
97 service of the subpoena or before the time specified for
98 compliance if such time is less than 14 days after service,
99 serve upon the party or attorney designated in the
100 subpoena written objection to providing inspection or
101 copying of any or all of the designated materials or
102 inspection of the premises—or to providing
103 electronically stored information in the form or forms
104 requested. If objection is made, the party serving the
105 subpoena shall not be entitled to inspect, ~~and copy, test,~~
106 ~~or sample~~ the materials or inspect the premises except
107 pursuant to an order of the court by which the subpoena
108 was issued. If objection has been made, the party
109 serving the subpoena may, upon notice to the person
110 commanded to produce, move at any time for an order
111 to compel the production, ~~inspection, copying, testing, or~~
112 ~~sampling~~. Such an order to compel ~~production~~ shall
113 protect any person who is not a party or an officer of a

114 party from significant expense resulting from the
115 inspection and copying commanded.

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

118 **(i)** fails to allow reasonable time for compliance;

119 **(ii)** requires a person who is not a party or an officer
120 of a party to travel to a place more than 100 miles

121 from the place where that person resides, is
122 employed or regularly transacts business in person,

123 except that, subject to the provisions of clause
124 (c)(3)(B)(iii) of this rule, such a person may in order

125 to attend trial be commanded to travel from any such
126 place within the state in which the trial is held; or

127 **(iii)** requires disclosure of privileged or other
128 protected matter and no exception or waiver applies;

129 or

130 **(iv)** subjects a person to undue burden.

131 **(B)** If a subpoena

132 **(i)** requires disclosure of a trade secret or other
133 confidential research, development, or commercial
134 information, or
135 **(ii)** requires disclosure of an unretained expert's
136 opinion or information not describing specific events
137 or occurrences in dispute and resulting from the
138 expert's study made not at the request of any party,
139 or
140 **(iii)** requires a person who is not a party or an officer
141 of a party to incur substantial expense to travel more
142 than 100 miles to attend trial, the court may, to
143 protect a person subject to or affected by the
144 subpoena, quash or modify the subpoena or, if the
145 party in whose behalf the subpoena is issued shows
146 a substantial need for the testimony or material that
147 cannot be otherwise met without undue hardship and
148 assures that the person to whom the subpoena is
149 addressed will be reasonably compensated, the court
150 may order appearance or production only upon
151 specified conditions.

152 (d) **Duties in Responding to Subpoena.**

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

157 **(B)** If a subpoena does not specify the form or forms for
158 producing electronically stored information, a person
159 responding to a subpoena must produce the information
160 in a form or forms in which the person ordinarily
161 maintains it or in a form or forms that are reasonably
162 usable.

163 **(C)** A person producing electronically stored
164 information need only produce the same information in
165 one form.

166 **(D)** A person responding to a subpoena need not
167 provide discovery of electronically stored information
168 from sources that the person identifies as not reasonably
169 accessible because of undue burden or cost. On motion
170 to compel discovery or to quash, the person from whom
171 discovery is sought must show that the information

172 sought is not reasonably accessible because of undue
173 burden or cost. If that showing is made, the court may
174 nonetheless order discovery from such sources if the
175 requesting party shows good cause, considering the
176 limitations of Rule 26(b)(2)(C). The court may specify
177 conditions for such discovery.

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

186 **(B)** If information is produced in response to a
187 subpoena that is subject to a claim of privilege or of
188 protection as trial-preparation material, the person
189 making the claim may notify any party that received
190 the information of the claim and the basis for it.
191 After being notified, a party must promptly return,

192 sequester, or destroy the specified information and
193 any copies it has and may not use or disclose the
194 information until the claim is resolved. A receiving
195 party may promptly present the information to the
196 court under seal for a determination of the claim. If
197 the receiving party disclosed the information before
198 being notified, it must take reasonable steps to
199 retrieve it. The person who produced the
200 information must preserve the information until the
201 claim is resolved.

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

209

* * * * *

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 Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 34(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same information 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 person. Rule 45(c) provides protection 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)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

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. Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45(d)(2) is amended, as is Rule 26(b)(5), to add a procedure for assertion of privilege or protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26(b)(5)(B).

Other minor amendments are made to conform the rule to the changes described above.

Changes Made After Publication and Comment

The Committee recommends a modified version of the proposal as published. The changes were made to maintain the parallels between Rule 45 and the other rules that address discovery of electronically stored information. These changes are fully described in the introduction to Rule 45 and in the discussions of the other rules.

The changes from the published proposed amendment are shown below.

Rule 45. Subpoena*

1 **(a) Form; Issuance.**

2 * * * * *

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

8 * * * * *

9 **(c) Protection of Persons Subject to Subpoenas.**

10 * * * * *

11 **(2) (B)** Subject to paragraph (d)(2) of this rule, a person
12 commanded to produce and permit inspection, copying,
13 testing, or sampling may, within 14 days after service of
14 the subpoena or before the time specified for compliance
15 if such time is less than 14 days after service, serve upon

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

16 the party or attorney designated in the subpoena written objection
17 to providing any or all of the designated materials or inspection
18 of the premises—or to providing electronically stored
19 information in the form or forms requested. . . .

20 * * * * *

21 **(d) Duties in Responding to Subpoena.**

22 * * * * *

23 **(B)** If a subpoena does not specify the form or forms for
24 producing electronically stored information, a person
25 responding to a subpoena must produce the information
26 in a form or forms in which the person ordinarily
27 maintains it or in a form or forms that are reasonably
28 usable ~~an electronically searchable form.~~

29 **(C)** The person producing electronically stored
30 information need only produce the same information it
31 in one form.

32 **(DE)** A person responding to a subpoena need not
33 provide discovery of electronically stored information
34 from sources that the person identifies as not reasonably
35 accessible because of undue burden or cost. On motion

36 to compel discovery or to quash by the requesting party,
37 the ~~responding party~~ person from whom discovery is
38 sought must show that the information sought is not
39 reasonably accessible because of undue burden or cost.
40 If that showing is made, the court may nonetheless order
41 discovery from such sources of the information for if the
42 requesting party shows good cause, considering the
43 limitations of Rule 26(b)(2)(C). The court may specify
44 conditions for such discovery.

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

53 **(B)** If ~~When a person produces information is~~
54 produced in response to a subpoena that is subject
55 without intending to waive a claim of privilege or of

56 protection as trial-preparation material, the person
 57 making the claim it may ~~within a reasonable time~~
 58 notify any party that received the information of ~~its~~
 59 the claim of privilege ~~and the basis for it.~~ After
 60 being notified, a any party must promptly return,
 61 sequester, or destroy the specified information and
 62 ~~all~~ any copies it has and may not disclose the
 63 information until the claim is resolved. A receiving
 64 party may promptly present the information to the
 65 court under seal for a determination of the claim. If
 66 the receiving party disclosed the information before
 67 being notified, it must take reasonable steps to
 68 retrieve it. The person who produced the
 69 information must ~~comply with Rule 45(d)(2)(A)~~
 70 ~~with regard to the information and~~ preserve the
 71 information until the claim is resolved pending a
 72 ruling by the court.

73 * * * * *

c. Conclusion

When the electronic discovery proposals were published in August 2004, the Committee hoped for vigorous and broad comment from a variety of experiences and perspectives. The hearings and written comment provided many thoughtful and helpful criticisms, for which the Committee is grateful. The process has worked precisely as it should, aided by the very electronic communication capability that inspired the work in the first place.

The proposed rule amendments reflect and accommodate changes in discovery practice that have been in the making for years, brought about by profound changes in information technology. The proposed amendments work in tandem. Early attention to the issues is required. The requesting party is authorized to specify the forms in which electronically stored information should be produced and a framework is established to resolve disputes over the forms of producing such information. A party need not review or provide discovery of electronically stored information that is not reasonably accessible unless the court orders such discovery, for good cause. A procedure for asserting claims of privilege or work-product protection after production is established. Absent exceptional circumstances, a party that is unable to provide discovery of electronically stored information lost as a result of the routine operation of an electronic information system cannot be sanctioned, if that operation was in good faith.

Electronically stored information has the potential to make discovery more efficient, less time-consuming, and less costly, if it is properly managed and effectively supervised. The volume, the dynamic character, and the numerous forms of electronically stored information, among other qualities, also have the potential to increase discovery costs and delays, further burdening the litigation process and exacerbating problems the Advisory and Standing Committees have been grappling with for years. The proposed rules provide support for early party management and, where necessary, effective judicial supervision. Keeping discovery manageable, affordable, and fair is a problem that litigants and judges in all courts share. The Committee looks forward to continuing to work to solve it fairly and well.

**Summary of Testimony and Comments
on E-discovery Amendments, 2004-05**

Topics covered

This memo divides the summary into separate topics, in hopes that will prove a helpful device. The topics included are as follows:

Overall

Rule 16(b)

Rule 26(b)(2) -- generally

Rule 26(b)(2) -- identification requirement

Rule 26(b)(2) -- "reasonably accessible"

Rule 26(b)(2) -- costs

Rule 26(b)(5)(B)

Rule 26(f) -- preservation

Rule 26(f) -- discovery of electronically stored information

Rule 26(f) -- agreement regarding privileged information

Rule 33(d)

Rule 34(a)

Rule 34(b)

Rule 37(f) -- overall

Rule 37(f) -- routine operation

Rule 37(f) -- steps to preserve

Rule 37(f) -- standard of culpability

Rule 37(f) -- effect of preservation order

Rule 45

Overall

San Francisco

Greg McCurdy, Esq. (Microsoft): Although the resolutions of e-discovery issues are usually just, they are not speedy or inexpensive as directed by Rule 1. Instead, parties use "weapons of mass discovery" to burden other parties and force settlements. And the quantities

of information have grown by leaps and bounds. In the last five years, Microsoft's discovery costs have tripled. Comparing 1998 with 2003, he found that there is seven times as much information involved in discovery in litigations he examined as examples, but that the amount of responsive information went way down as a proportion -- from 15% in the earlier period to under 4% in 2003. Although search mechanisms have improved matters, certain activities such as privilege review require human page-by-page examination. In one case, Microsoft settled a case involving a small startup company it had acquired because the company had 115 backup tapes and the judge said they should all be restored. The cost of restoring would be \$250,000 and another \$1 million would be spent on reviewing the results. The company settled due to the economics of discovery.

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: One can't fairly say there is no problem. Discovery often exceeds the actual litigation stakes. Indeed, there are a number of companies today that make no products but prey on other companies via discovery. Electronic discovery is rapidly becoming the number one issue to discuss in relation to possible settlements. Intel enthusiastically supports the reform movement. And discovery of electronically stored information is very different from discovery of hard-copy information.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): Electronically stored information is critical to employment discrimination litigation for plaintiffs. It can level the playing field for plaintiffs. Except for the smallest and most unsophisticated of employers, almost every company keeps some of its most important records and communications in electronic form. Where a decade ago plaintiff's counsel would have reviewed hard-copy materials to obtain information about hiring practices, treatment of plaintiff and other similarly-situated employees, etc., now counsel needs to obtain e-mail and computerized data. Defendant's information is critical to build plaintiff's case, and the only source of what plaintiff needs is nowadays electronically stored information.

Thomas Allman (testimony and 04-CV-007): Electronically stored information is infinitely more ubiquitous in its ease of reproduction, distribution, and misuse, and it presents new challenges when one is asked to produce "all" copies of specific information in discovery. The theoretical underpinning of the current discovery provisions -- that discovery involves discrete things which can be easily assembled -- has been undermined by technological advances. The time for action to address these issues in the rules is now. Efforts by individual judges to solve these problems using the current rules have produced many thoughtful responses, but uniform national standards are needed.

Gerson Smoger (testimony and 04-CV-046): In dealing with E-discovery, we are really dealing with all discovery. Already we scan hard copies so that we can search them electronically. Discovery of this material is essential to plaintiffs, and the proposals raise concerns about making that discovery more difficult. The arguments made in support of the most important changes in this package are the same as the arguments in favor of the narrowing of the scope of discovery in Rule 26(b)(1) in 1998.

Jocelyn Larkin (The Impact Fund): For employment discrimination plaintiff lawyers, electronic discovery is nothing new. Statistics often lie at the heart of such cases, and counsel must therefore seek electronic personnel and payroll databases from employers. The availability of such data has made such discovery much easier and less expensive, as well as permitting more accurate analysis. At the same time, such data often contain a great deal of irrelevant information that implicate personal privacy. In an electronic format (as opposed to paper) that sensitive information can be separated from the relevant information. We find that this discovery is cheaper and is getting cheaper yet. Often we use "tech-to-tech" conversations to

facilitate the exchange of this information. It is important to recognize that E-discovery is functioning smoothly in many fields, and that changes in the rules might actually disturb that smooth functioning. I am concerned that some of the impetus behind these proposals is the angst that many of us have about the mysteries of technology rather than genuinely distinctive problems posed by discovery of electronically stored information.

Frank Hunger: Overall I think the proposals will be fair to the litigants, well balanced in accounting for the competing interests, and accommodating to the changes inherent in developing technology. You have gone a long way in meeting the directive or Rule 1. This is most clearly demonstrated by the fact that neither side seems to be totally satisfied with what has been proposed to date.

David Dukes (testimony and 04-CV-034): There exists a clear need for more guidance to litigants, and they deserve discovery rules that lead to predictable and consistent results regardless of the districts in which their cases are pending. The volume of information can be very large. For example, one client searched 400 to 600 million documents and came up with 8 million seemingly pertinent documents. That is lot of data, and was only the "active" data. My clients are prepared for these rules; they are an improvement over the existing regime.

Jean Lawler (Pres. of Fed. of Defense & Corp. Counsel): There is a need for these rules. Only in 1994 did we start using e-mail. The change has been very large, and small businesses in particular are being affected by this form of discovery. They definitely need clear rules.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): There are six asserted distinctions between electronically stored information and hard copy that are invoked as warranting different treatment of electronically stored information in the rules: (1) legacy data does not exist with hard copy materials; (2) there is an increased likelihood of disclosure of privileged materials; (3) onsite inspection of the opponent's computer system is often necessary; (4) spoliation is a distinctive problem; (5) form of production must be determined; and (6) the volume and cost rise very substantially. Actually, only (1), (3), (4) and (5) are truly distinctive. The others are just specialized issues of burden and cost.

Charles Ragan: Electronic discovery does exhibit several distinctive features that warrant treatment in the rules. Both the exponentially greater volume and the dynamic nature of many systems critical for modern enterprises create distinctive problems that deserve treatment in the rules. I don't think that the current rules are up to the task. We simply can't afford the cost that trial-and-error incremental caselaw development of rules would entail. The Committee has the benefit of some local rule experimentation, but clients cannot afford the costs of experimentation with even modestly different regimes in the multiple federal districts in which they may have cases. We should not go through the hit and miss experience of proliferating local rules. Moreover, a change in the "big Rules" should advance the goal of ensuring that more practitioners are aware sooner of the important e-discovery issues. That may actually limit satellite litigation. In short, this is a quintessential example of where guidance and leadership must come from the top.

Dallas

Peter Sloan: We need these changes. They address critical issues.

Charles Beach (Exxon Corp.): Exxon has a huge volume of electronically stored information. In particular, the volume of e-mail traffic within Exxon is enormous. The backup activities of the company are similarly huge. It has 800 terabytes of total storage, and uses

121,000 backup tapes per month. Stopping recycling would cost it almost \$2 million per month. These rules are important to deal with such realities.

Anne Kershaw (testimony and supplemental submission 04-CV-036): She has a firm that provides consulting on information management to corporations. The gamesmanship of E-discovery is so intense that in-house counsel won't even discuss it. To deal with this she created a survey of 40 corporations that is designed to gather information about the consequences of such discovery for companies. She will submit the information to the Committee. Based on her experience she supports the amendments. The big issue is cost; companies have settled cases to put an end to the cost drains. The survey results she compiled in Feb. report a noticeable and critical increase in E-discovery and litigation costs. For one company, the increase was 300% in five years. Electronic discovery is increasingly the most expensive aspect of corporate litigation, and virtually all cases now include some element of electronic discovery.

Paul Bland (TLPJ) (testimony and prepared statement): Access to electronically stored information is extraordinarily important for plaintiffs, and narrowing that access will harm victims and encourage corporate wrongdoing. Nearly all information is kept in electronic form in the modern corporation, and it electronically stored information has proven crucial in a series of important suits. Stonewalling is the greatest problem with discovery, and is a particular problem with electronic evidence. The current rules provide plenty of discretion for courts to fashion reasonable solutions to discovery issues. The proposed rules will quickly become obsolete due to technological change.

Stephen Gardner (National Assoc. of Consumer Advocates) (testimony and 04-CV-069): Treating e-discovery differently from other discovery is not necessary and will encourage collateral litigation. These proposals will probably restrict plaintiffs' access to the courts further, and encourage dilatory defense tactics and collateral litigation regarding discovery. There does not appear to be any empirical or principled basis to show that there is a pressing need to treat electronically stored information differently.

Gregory Lederer: I don't have monster cases, but I can tell you that E-discovery is a big burden for small companies. They are not staffed to handle it. I favor these rules as providing some guidance for that sort of litigant.

Darren Sumerville (testimony and 04-CV-089): The open availability of electronically stored information is crucial in many types of cases, some of which involve plaintiffs who lack the financial resources to wage protracted discovery battles. The candor and informality typifying most electronic communications often creates a treasure trove of candid admissions, evidence of intent, or demonstrations of awareness of a situation. It is a critical method of proof in today's litigation. In this setting, limiting discoverability of electronically stored information is not necessary or sound. If adopted, this will be a watershed in the discovery rules.

David Fish (testimony and 04-CV-021): The proposed amendments are impracticable, unworkable, and will tolerate the destruction of critical evidence needed for a fair day in court. The primary victims of these rules will be small businesses and individuals who rely on the judicial system as the only place where they can get protection for their rights. They also tie the hands of judges who are better able to handle discovery disputes on a case-by-case basis. The rules should be left alone. The current rules adequately address these issues.

Stephen Morrison: I support the amendments. There is a compelling need for change, and these rules are good changes. Electronically stored information is different. It moves faster and increases in volume exponentially. It is dynamic. It is incomprehensible without the right

system. There is great and understandable uncertainty about what to preserve and where to search.

John Martin (DRI) (testimony and 04-CV-055): The rule proposals are outstanding. Our Texas rule has been very effective. I've heard no complaint from any plaintiff attorney about. If you adopt a different rule, however, we should think about changing to that.

Dan Regard (testimony and supplemental submission 04-CV-044): I want to state up front that I am in favor of the proposed amendments. Although there's always room for improvement, I believe they will benefit litigants on both sides of the courtroom. Presently, the tail of electronic discovery is wagging the dog of litigation. These amendments should restore reasonableness. The volumes of data will grow enormously, and we cannot expect technology to save us, all by itself.

Michael Pope (testimony and 04-CV-065): These amendments help to clarify the rules on an important subject. There is a need for clarity. Confusion and concern is widespread. The current situation is a "trap for the wary."

Laura Lewis Owens: I favor the amendments. Judges are doing different things. This creates issues of predictability. Some courts have developed their own local rules, and those may be harder to apply in complex cases.

Alfred Cortese: This is a good package to deal with an area that needs improvement. There ought to be protection against having to save everything for fear of sanctions. These rules will make the process more efficient.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): In ATLA's view the greatest current problems of discovery practice are obdurate recalcitrance of defendants in tort litigation. There is a "culture of discovery abuse" that has vexed plaintiff attorneys for decades. Allowing those who embrace this culture to avoid discovery by arranging frequent erasure of electronically stored information will make things worse. Arguments before the Committee are coming from companies that have been sanctioned by federal judges. We see nothing in these proposals to change the rules to deter this sort of misconduct, and some that may assist it. Moreover, there will be considerable satellite litigation about the meaning of the rules. And proposed Rule 26(b)(5)(B) reaches beyond the rulesmakers' proper authority. Going forward with these proposals will mean taking one side in a fierce partisan debate. The demarcation lines are obvious, and should not be disregarded.

Kelly Kuchta (testimony and 04-CV-081): I have worked on the legal, business, and technical issues of E-discovery for six years and have come to realize that there are no silver bullets to solve the complex challenges presented. The legal aspects are the most rigid, but the old rules have a certain amount of flexibility that has made decisions pliable. My primary concern is that the rules remain flexible enough to accommodate the advances we will see in information technology. Because storage capacity has grown enormously, the amount of information has also grown enormously. Any rule changes should be done with an eye to the data retention practices that our society utilizes. It is an easy business decision simply to buy more storage space and keep everything forever. New technology is being introduced on a daily basis, and much of it should facilitate E-discovery and bring the costs down.

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): We need rules even though there have been a number of court decisions in the area over the last two or three years. These rules begin to provide large data producers like my company with the guidance they need. The absence of such guidance heretofore has imposed tremendous costs. PM USA has a particular interest because it (like some other companies) is a subject of repeated suits on similar grounds, involving discovery of much the same information from the company. It is currently a party to over 2,000 suits and over 40 separate class actions. We now offer online access to approximately 3.4 million documents to certain litigants. The company now has a group with 58 staff members to deal with discovery. It is concerned that the amendments to Rules 26(f), 26(b)(2), and 37(f) may prompt the entry of more overbroad preservation orders. PM USA has had to suspend its automated e-mail maintenance programs, which has caused costs of \$5.6 million just for the cost of managing the growth of its e-mail system, which accumulates 6 gigabytes each business day. The company is approaching the technological limit of adding server capacity.

Jonathan Redgrave (04-CV-048): Narrowly tailored rules will be beneficial and important. This form of discovery is distinctive in ways that require such rules. Some object that the language can be improved. Although that's a desirable goal, it does not make sense to wait until perfect language is devised before proceeding with rules. And corporate parties are not all on one side of these issues. They frequently seek discovery of this information. The proliferation of computerized devices means that a growing segment of the population possesses such data, and the same issues can arise if these citizens are litigants.

Anthony Tarricone (testimony and 04-CV-091): I've participated in prior conferences put on by the Committee, and am concerned that the corporate bar is over-represented in this amendment effort, and that there is insufficient representation of lawyers who represent individual people, particularly plaintiffs. These changes are unnecessary and will create an uneven playing field.

Jeffrey Greenbaum (ABA Section of Litigation): I believe there is a need to act now, and that it is important to develop uniform national standards.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): Some 70% of respondents disagreed with the suggestion that they settled their most recent case to avoid the financial cost of electronic discovery.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): We support rulemaking to provide us with standards. I do discovery for State Farm, which is involved in suits across the country. We want to know what we have to do.

Pamela Coukos (testimony and 04-CV 020): Technology can improve efficiency and reduce cost in discovery, but the key to realizing those benefits is cooperation. In employment discrimination cases, for example, computerization of records permits rapid analysis of a large number of hiring and promotion decisions.

Michael Nelson (testimony and 04-CV-005): The current rules are simply insufficient to address the obligations of litigants to preserve and produce electronically stored information. These proposals go a long way toward remedying that problem.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): There is a genuine need to amend the rules to establish clear and consistent guidelines and to balance the benefits and

burdens of preserving and producing electronically stored information. Currently there is uncertainty due to the variations in approach in different courts. Clients are stunned that the tail can wag the dog in this manner. In one case, we were forbidden by a federal judge from doing anything that would change any information possibly relevant to the topic of the suit. During the several days it took to get on the court's schedule to be heard, we had the choice between shutting down and being held in contempt. It used to be that the nuisance value of a suit was \$20,000, but now it's \$500,000 because of electronic discovery.

David McDermott (ARMA Int'l) (testimony and 04-CV-041): As the Committee develops rules for this topic, it should strive to avoid doing anything that might deter litigants from using good information management practices. Organizations should make decisions regarding records management that are appropriate to their business imperatives and legal and regulatory requirements. Rules of discovery should not inadvertently discourage the adoption of appropriate best practices. A single set of rules nationwide will be desirable. Accepted records management policies do not vary on a local basis.

Dabney Carr (testimony and 04-CV-003): Although requests for discovery of electronically stored information are becoming more frequent, they are still uncommon in my practice. The smaller companies I represent find production of this information disruptive.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): Our members strongly support measured reforms needed to address the undue burdens of electronic discovery. These members seek discovery of this information as well as providing it through discovery. But they agree that the current system is not functioning well, and that court opinions are rendering piecemeal precedents often attached to bad fact patterns. The result is inconsistent and unreliable guidance to records managers rather than good or predictable rules.

William Butterfield (testimony and 04-CV-075): The proposed amendments inadequately incorporate the current standards under the rule and result in increased ambiguity and complexity. The new rules would foster a "hide and destroy" mentality.

David Romine (testimony and 04-CV-080): In my experience, electronic discovery is not more expensive for defendants. It's cheaper. We have to remember how much effort producing parties had to invest in hard copy production. I responded to a discovery request for a company that had such experiences, and the client was delighted at how easy electronic production was.

M. James Daley (testimony and 04-CV-053): The advent of the personal computer worked a revolution, making each person an electronic records custodian. Electronic information was no longer the domain of a centralized and technically trained elite. Today that process has reached a pitch in which individuals have in their possession more data than large organizations possessed two decades ago. There has also been a packrat mentality about discarding this information, particularly since storage was very cheap. These rules are not a "silver bullet" for these problems, but they create a context for addressing them in a way that offers predictability. Unless they are adopted, the problems of cost of e-discovery will only get worse.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We overwhelmingly support the need to update the civil rules to account for the changes wrought by the increase in the creation and storage of electronically stored information. For us, managing information is a major concern. We have many complex information systems.

Alfred Cortese (testimony and 04-CV-54): This is a well-integrated package, including rules that are needed now. This is like the 2000 package in that it is needed but it is not earth-shattering.

Ariana Tadler (testimony and 04-CV-076): We applaud the proposed amendments to the extent they identify electronically stored information as properly considered in discovery, and call for early consideration of this form of discovery. Thus, we favor the changes to Rules 16, 26(f), and 33. But we strongly oppose any proposal that will erect hurdles to fact-gathering or create a further imbalance in the litigation playing field in favor of the responding party. Thus, we oppose Rules 26(b)(2) and 37(f). On the other proposals, we urge caution given the newness of the subject. Many lawyers and judges are uninformed about these issues, and many do not work for large firms.

Ted Kurt (testimony and 04-CV-018): There is a huge array of sources of electronically stored information. In my car as I drove here, my son and I counted up at least eleven sources of information, including palm pilot PDAs, a laptop, two jump drives, two cell phones, a global positioning system, two digital cameras, and my blood sugar monitor. In some circumstances any one of these might contain discoverable information. This is a major developing area. The term electronically stored information may be unduly limiting. Perhaps the term "digitally stored information" or "digitized information," or "optically stored information." Would electronically stored information include my blood sugar monitor?

Craig Ball (testimony and 04-CV-112): We need to be careful about whether there is really a need for rule changes. There is little evidence of uncorrected abuses of discretion by federal judges. The cases in which judges really have imposed sanctions involve bad behavior that explains why there were sanctions. The proposed amendments to Rules 26(b)(2) and 37(f) are premature and will likely prove unnecessary and possibly harmful. Judges can become techno-savvy.

Michael Ryan (testimony and 04-CV-083): Some of the proposals seem to result from a sense of overwhelming cost and a "sky is falling" attitude. I don't think this attitude is justified. With hard copy discovery, there was often a great deal of work involved in preparing to produce documents and in reviewing the documents. The costs of E-discovery are by no means universally more. Computer searches can mean that the costs of reviewing material are less. Before adopting these proposals, the Committee should make a comparison of the cost and effort involved in producing electronically stored information and a large hard-copy production. Caselaw has adequately addressed these issues under the current rules. We are now on the cusp of a big change in this sort of discovery. Until now, a majority of ATLA lawyers probably have not done this sort of discovery. But very soon it is likely to be much more common.

Steven Shepard (testimony and 04-CV-058): A provision should be added to Rule 26(a)(1) requiring disclosure of electronically stored information. If that is not done, litigants may argue that the Committee intentionally left such material out of the initial disclosure obligation.

Rudy Kleysteuber (testimony and 04-CV-049): The costs associated with the kinds of things that motivate these rule proposals are likely to change a great deal in the future. Therefore, adopting rules is not a good idea. For example, the "reasonably accessible" standard is based on assumptions about cost. But today's technological capabilities are bad predictors of what the costs of further activities will be. And the costs of accessing or retrieving information are not monolithic. They consist of components that vary with the problem. The troubling scenarios on cost that have been presented, however, do not break out the components of those

costs. For example, if privilege review is the largest cost, the rules should promote efficient handling of that problem. Storage, for example, has plummeted in cost.

David Tannenbaum (testimony and 04-CV-047): Rules 37(f) and 26(b)(2) could provide disincentives to use technology that facilitates broad discovery and should be rewritten to maintain neutrality. And the Committee should solicit information from a broad range of technology specialists to avoid adverse effects. But the cast of the introduction to the proposed amendments is that somehow the advent of electronically stored information has impeded access to information for litigation purposes. That is not what has really happened in most areas of human activity, and it is not obvious why it should happen with litigation. The volume of information, for instance, should not have this effect. But it does make sense to prompt parties to go first for the "low hanging fruit" that can most easily be obtained. At the same time, the rules should encourage parties to adopt technology that will ensure there is more such fruit. On the other hands, the rules should avoid anything that might encourage parties to make their information more costly to access. At some point, these rules might even inhibit the market for tools to make discovery faster and less costly.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft applauds the Committee's efforts to update the rules to address the problems of discovery of electronically stored information. Changes to the rules are necessary to provide guidance to litigants and courts. Advances in technology have produced an exponential growth of information that may be relevant to litigation. "It is high time for the Federal Rules to catch up with this reality and adapt to the very different nature and quantity of electronically stored information that is the focus of so much expensive litigation and discovery." Two examples are the volume of e-mail and the existence of backup tapes. In addition, the operation of Microsoft-enabled systems shows that the automatic functioning of such systems creates risks of serious disruption of their working, and also shows why there is a great deal of inaccessible information as well as very large quantities of accessible information.

Allen Black (04-CV-011): My overall reaction to these proposals is quite positive. They do a very good job of addressing the issues that arise out of our economy's ever-accelerating change from paper to electronic record-keeping. All in all, a very good job.

Clifford Rieders (04-CV-017): The changes place a clear advantage on a large entity with electronic means of storage as opposed to a less sophisticated litigant who will be required to have a great deal of information concerning electronic storage capabilities of its opponent to address the new issues raised.

James Rooks (04-CV-019) (attaching article from Trial Magazine): There are squads of lawyers whose main occupation is ensuring that plaintiff lawyers in products liability cases have nothing in the way of proof. Lately they've been getting too good at it for comfort, and the ever-increasing contraction of discovery "rights" through court rule amendments helps them to keep secret information that will prove the products liability case. For at least 15 years, the right to obtain information has been steadily curtailed. The public comments that accompanied the 2000 amendments to the rules showed clearly the interests that promote this kind of rule-making -- business and defense bar organizations. The latest phase of the campaign to curtail discovery rights began officially with the publication of the E-discovery proposals in August 2004. For example, it was urged that e-mail messages should be treated like telephone calls. But companies regularly use e-mail as a method of communication and record-making for millions of workers. To treat e-mail messages like telephone calls would create a loophole in the

accountability of wrongdoers that would be greater than any immunity in the substantive law. The arguments for the amendments are short on evidence supporting the changes, but they are a high priority among corporate counsel, defense attorneys, and the burgeoning industry of electronic discovery consultants and contractors. If this campaign to alter the rules succeeds, it will provide producing parties with extra opportunities not to produce. "[T]he involvement of the business and tort 'reform' lobbies from one end of the rule-making assembly line (the Judicial Conference's committees) to the other (Congress) suggests strongly that this contest is not about electronic discovery alone. In its most unvarnished nature, it is a raw struggle to roll back the U.S. civil justice system to an era when corporate interests had even more leverage in court than they do now."

John Yanchunis (04-CV-22): I read with dismay an article which discussed the proposed change to the Federal Rules which would impact and severely hamper the ability of lawyers to obtain key discovery during the litigation process. Having found a considerable amount of very valuable information in the past which was stored or created electronically such as emails, I can see no justification for changing the rules to limit this discovery.

Steven Flexman (04-CV-035): The rule changes will destroy the use of electronic discovery and actually encourage attempts to conceal and destroy electronically stored information.

ABA Section of Litigation (04-CV-062): We applaud the Advisory Committee for addressing the unique issues of E-discovery. We agree that a consistent set of national standards should be adopted. Ironically, although the intent of the 2000 discovery rule changes was to refocus the scope of discovery so that litigation could be more affordable, the unique problems of electronic discovery have resulted in making discovery more costly. We note also that new technology permits quick and reliable searches and can make some such discovery less costly.

Peter Riley (04-CV-064): I have found no difficulties with the rules as currently written, and believe that these proposals should not be adopted.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): The Committee should propose new rules only when existing rules have created genuine hardships and there is a widespread consensus that new rules are needed. From our perspective as plaintiffs' lawyers, several of the proposed rules are not needed, and some may do harm to existing, well-functioning discovery procedures. We believe that the asserted clamor from "bar groups" for change is actually a concerted lobbying effort by corporate defense lawyers and their clients -- not plaintiffs -- to gain litigation advantages. But the rules should be party-neutral and changed only when existing rules are not working for both sides.

Duncan Lott (04-CV-085): I object to the proposed new restrictive rules on discovery of information from databases, email, and other electronic sources. Corporate America and this economy are now run through the computer, and curtailing discovery of computerized information would completely destroy consumers in their battles with Corporate America. "I understand that we are in a time when corporate America runs the Federal government with their lobbyists and special interest legislation, i.e. tort reform, however such lobbying and corporate influence should have no influence with the court system and/or its rule makers."

Patrick Barry (04-CV-087): The rule changes would make it easy to hide evidence simply by keeping it in electronic form. It would also be more difficult, without any good reason, to obtain legitimate electronic evidence that would otherwise be available. It is an unfair burden to plaintiffs to allow corporate defendants to so easily protect discoverable information.

Anthony Sabino (04-CV-088): The proposed changes no doubt represent the necessary initial steps to bring the evolving sphere of electronic data within the universe of discovery. The changes are good because they comprehensively open up the Civil Rules to provide for electronic discovery, to preserve evidence, and clarify the equally important point that the hallowed attorney-client privilege will not be compromised by accidental disclosure buried within masses of electronic bits and bytes.

Gary Berne (04-CV-101): Electronic discovery has become a crucial means of proving or disproving a case. In several securities fraud cases I have handled, the fraud would probably not have been proved without such discovery. Any rules that are specifically directed at this sort of discovery will serve only as a mechanism that will set up roadblocks to obtaining complete discovery. E-mail is the primary form of business correspondence; making these communications harder to get disregards their nature and their importance. The provision that a party can assert that information is not reasonably accessible will be raised in every case. The current rules provide all the mechanisms that are needed.

Hon. Michael Baylson (04-CV-106): Lawyers' appetite for discovery seems to be even greater with electronically stored information, but sometimes producing this information is less burdensome than hard copy information because it can be electronically searched. Perhaps what we need in civil cases is some sort of Brady rule requiring a party to certify that it has appropriately searched for and produced the documents requested. Such a certification could be followed as a matter of right by a 30(b)(6) deposition of an appropriate representative of the party. The Committee's proposals offer laudable and practical standards for the conduct of electronic discovery. I do think that some comments might be included to give pro se and civil rights litigants and courts some guidance on the need for regulation of discovery in cases where the expense of undertaking it tremendously outweighs the likelihood of production of valuable material.

S. Micah Salb (04-CV-108): The proposed changes will give an unfair litigation advantage to large organizations. For example, a party's ability to decline to produce electronic discovery based on a claim that the information is not reasonably accessible would be a departure from the current rules, which require production even of documents that are not easily obtained. I am particularly concerned with this provision as well as the provision permitting organizations to apply a privilege to previously-produced documents and proposed Rule 37(f) regarding spoliation.

Edward Bassett (04-CV-110): The proposed amendments are likely to promote discovery gamesmanship and discovery abuse.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): Electronic evidence provides an unprecedented opportunity to achieve justice because it offers the fullest possible knowledge about what happened. In most cases today, it is not possible to determine the truth without e-mail and other electronic documents. In our practice, e-mails are a constant source of important evidence. Electronically stored information is cheaper and easier to store, search, and exchange, so this circumstance offers the promise of a win/win situation for the rulesmakers.

Hon. Benson Legg (D.Md.) (04-CV-114) (speaking for the whole court): The proposed amendments provide helpful and much needed guidance for the proper conduct of discovery relating to electronically stored information. Overall, we believe that the proposed amendments strike the proper balance between promoting fair discovery while at the same time guarding against excessive cost and burden to the producing party. But we recommend reconsideration of Rule 26(b)(2).

Thomas O'Brien (04-CV-115): I oppose the rule changes. Regular document destruction goes on all the time, and these amendments simply facilitate the ease and lack of remedy for this destruction. If these rules are adopted, the Committee will be seen as approving of this practice.

Lee Mosher (04-CV-116): E-discovery, which should make discovery more efficient, is being subverted by the proposed amendments. I am not aware of any need to restrict this discovery to the extent proposed.

Walter Floyd (04-CV-118): These amendments would hurt the plaintiff bar. The rules don't need to be changed, and making these changes will change the traditional way of pleading in the U.S. courts. I am having problems with defendants producing information as they are claiming that the information is not reasonably accessible. This is problem of stonewalling.

Prof. Bruce French (04-CV-119): As a plaintiff's lawyer, I have found that discovery abuse is generally not from my side, but from the other side. I oppose allowing defendants to avoid discovery of material they claim is not reasonably accessible; that will make the exception become the rule, and discovery will be frustrated. In addition, 26(b)(5) is ill-advised to the extent that it is a reprieve for mistaken production of a document.

Michael Archuleta (04-CV-120): These proposals would delay and complicate discovery, give corporate litigants additional procedural advantages, and continue the erosion of the right to discovery, and, ultimately, of the distinct American system of notice pleading itself. They may also exceed the federal courts' rulemaking authority. The current rules are more than adequate to handle the issues addressed in the amendments. Allowing parties to refuse to produce information on the ground that it is not reasonably accessible will produce more stonewalling. The "claw-back" provision would create a new substantive right, and would set a high standard for the requesting party to meet. Giving defendants a safe harbor for destroyed information will invite them to destroy more information.

Carla Oglesbee (04-CV-122): These changes would simply invite discrimination by employers. In employment cases, the information is in the employer's possession. It is imperative that plaintiffs obtain all relevant discovery, whether electronic or otherwise. But under these rules, employers could simply routinely delete files before the statute of limitations expired.

Carl Varady (04-CV-124): I strongly oppose the proposed changes to the rules, which are supported by corporate manufacturers, insurance companies, and HMOs. They would significantly limit the ability of individuals to obtain information through discovery.

Stanley Helinski (04-CV-125): Although I believe that specific rules are necessary to foster the disclosure of electronically stored information, the present proposals will serve only to discourage that. The proposals place too much control in the hands of parties who may want to frustrate discovery.

Gregory Gellner (04-CV-126): These rules would permit corporate giants to destroy valuable evidence, without any recourse. Companies that don't now have a policy of destroying evidence would develop one.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA agrees that amendments to the rules regarding E-discovery are necessary because the present discovery rules do not adequately address issues arising from the increasingly frequent use of this sort of discovery. It supports the proposed amendments to Rules 26(f) and 16(b), and the changes to Rules 33 and 34. But it

recommends that further consideration be given to Rules 26(b)(5)(B), 26(b)(2) and 37(f), and to the parts of Rule 45 that relate to the same topics.

Kelly Kruse (04-CV-129): These changes create grave dangers for the civil justice system. They would give litigants an easy way to avoid producing information. It is ironic to create such privileged status for electronically stored information, which should be easiest to accumulate and produce.

Robert Meier (04-CV-132): I see nothing in the proposals regarding encrypted information. This is important, but it has been overlooked. There should be a provision to deal with the problem of electronically stored information that cannot be accessed without a code or password.

Daniel Faber (04-CV-133): The present rules work well for all kinds of discovery and need little change, if any.

Sheri Ann Pochat (04-CV-134): These changes will lead to drastic, irreparable harm to the person requesting discovery, and more motion practice. The amendment that is needed is to specify that, on service with a complaint, a party must preserve all relevant information.

Michael Ganson (04-CV-135): The rules are working just fine, and the proposed changes would do harm. They create an unprecedented exemption from discovery for hard-to-access information. Consumer-side lawyers believe that this change will lead to more stonewalling. The claw-back proposal would create a new substantive right and would preempt state law in a way that is not authorized. And defendants will get a free pass through the spoliation gate. They will therefore have an incentive to destroy relevant information.

Theodore Koban (04-CV-138): I oppose the proposed rules because they allow destruction of electronic records and frustrate discovery attempts to obtain copies of this information. I suggest that most entities maintaining electronic filing systems utilize some sort of backup procedure that would allow records to be retrieved. There accordingly seems to be no earthly reason for this data to be destroyed.

William Solms (04-CV-140): There should be no safe haven for a party when it comes to destruction of information. But I would agree that accidental production of privileged information should not violate the status of that information, providing that the error is corrected in a prompt manner. No other changes should be made. They appear to favor corporate defendants who do not have the burden of proof. The present rules provide the fairest method.

Scott Blumenshine (04-CV-141): The proposed rules are unfair to individual litigants who don't have the money to combat discovery abuse by corporate or other monied litigants. They represent a further threat to individual rights and vindication of those rights in court.

Genevieve Frazier (04-CV-142): Before I became a plaintiff's personal injury lawyer, I practiced for 17 years as an insurance defense attorney. In that capacity, I was often asked to object to E-discovery on the ground that the information was not reasonably accessible when all that was needed was a couple of strokes of a key to reformat and print everything requested. E-discovery was purged in many cases within a very short time frame (four to six months) because of fear of litigation. Now, I have to fight long hard battles to get this sort of information. Changes in the rules that will only assist wealthy corporate defendants to obstruct discovery should not be adopted.

John Aylward (04-CV-147): I oppose the changes because they will enable businesses to hide potentially relevant information that should be available through discovery.

Stephen Justino (04-CV-148): I understand that the Judicial Conference is considering rules that would prevent discovery of documents stored on a party's computers. That would be a terrible idea. Under the proposed rules, parties could insulate themselves from discovery simply by digitalizing.

Richard Waterhouse (04-CV-149): I oppose the proposals. All of them seem simply to add another layer of difficulty in trying to obtain discoverable information. We should be making it easier, not harder, to get information. Companies will develop policies not to retain documents to avoid future discovery. There are already too many objections, and this will create more.

Patrick McGraw (04-CV-150): I oppose these rules. I had a case in which electronically stored information was essential, but defendants vigorously resisted production of it. Only when the judge ordered production did the case settle for a large figure. Had these rules been in place, we would have lost the case because these rule changes would be stifling to small businesses. They would tilt the playing field in favor of the largest corporate and business interests, and completely eviscerate any semblance of a level playing field.

Altom Amglio (04-CV-152): These proposals will further institutionalize obstruction of discovery and increase the need for court intervention. All clients think that their requested records are not reasonably accessible. You have to twist their arms to get the stuff. This will make it harder. The claw back is a huge change in existing law, and it will lead to a multitude of hearings. The safe harbor makes the electronic version of Arthur Andersen shredding o.k.

Michael Cafferty (04-CV-153): These changes will allow defendants to stonewall even more than they do now. As an attorney representing discrimination victims, I have to struggle to get needed discovery under the current rules. The new rules will provide even more cover for refusals to provide discovery.

Mark Burton (04-CV-155): The proposed rules should be entitled "Rules for the Protection of Corporate America." These changes are proposed at the behest of those corporations that are disturbed that their "profit over people" agenda is partly uncovered during discovery. They already make discovery unduly expensive with their privilege reviews and disputes over what is privileged. These rules will magnify the disputes about such matters.

Robert Katz (04-CV-156): The changes will have a significant negative impact on individuals engaged in litigation with large corporations. They will prompt corporations to change the manner in which they hold data to keep it beyond discovery. Instead, the rules should state affirmatively that they presume that all electronically stored information is held in a reasonably accessible manner due to the nature of modern technology. A defendant who claims that some of its information is not accessible should have to file a motion to seek relief from its discovery obligations. Defendants should be forbidden to store information in a manner that is not reasonably accessible.

Fred Pritzker (04-CV-157): The proposed rules would make access to electronically stored information more difficult. The term "not reasonably accessible" will introduce a huge amount of subjectivity into the process. Court decisions will vary widely. It is inconceivable that anyone other than corporations and their counsel derive any benefit from these proposed changes.

Randi Saul-Olson (04-CV-158): These proposals should be abandoned. They will prompt more stonewalling via the "not reasonably accessible" provision, and the claw back will make it a lot more difficult to use materials that prove liability. The result will be that more unreasonably dangerous products injure or kill more people.

Joseph Neal (04-CV-159): These changes will impede discovery for my clients and force me to file more motions. The "privilege" rule will enable corporations to retrieve information they've already produced. Companies will also expedite their purging of their records.

Ian Robinson (04-CV-160): The current rules adequately address the issues involved in E-discovery. There is no particular burden in retrieving this sort of information. To the contrary, it is considerably easier to obtain than other types of information. The motive behind these changes is to suppress access to readily available information and protect corporations from having their skeletons exposed.

Whitman Robinson (04-CV-161): These problems are already adequately handled under the current rules. It is already hard enough for individual plaintiffs to litigate against corporations. These changes will give additional advantages to corporations. The civil rules were not created to allow biased favoritism for one party against the other, but to provide justice.

Mary Fleck (04-CV-162): I urge you to reject the proposed amendments. All corporations keep important records electronically. E-discovery can be easy and inexpensive.

William Frates (04-CV-163): I have just learned of the proposed amendments. I strongly urge that they not be adopted. The biggest problem with discovery is corporate stonewalling and destruction of evidence. These amendments would magnify those problems, and add to the cost of litigation and burdens on courts in handling discovery disputes.

Gregory Cusimano (04-CV-164): I believe that these changes would invite additional discovery abuse and give corporations additional procedural and substantive advantages.

Bruce Truesdale (04-CV-165): In this age of electronic documentation, discovery should be expanded to accommodate new technologies, not contracted to help unethical wrongdoers destroy evidence with impunity. Why go about this piecemeal? Why not just eliminate all discovery of electronically stored information? That will be the practical effect of these amendments.

Chicago Bar Ass'n (04-CV-167): The CBA favors adoption of uniform national standards to deal with these matters. The current proposals seem a good first effort, but that they seem to be based on outmoded concepts about information systems.

Hon. Ronald Hedges (D.N.J.) (04-CV-169): The costs of E-discovery appear to be driven by three things: (1) the sheer volume of data; (2) advances in technology that leave some systems behind; and (3) the rise of vendors and consultants who review operating or legacy systems in response to discovery requests. The first and second of these phenomena are not driven by litigation, and no rule amendment can affect them. Moreover, there seems to be almost no empirical data to support these change proposals. It might be appropriate, for example, to determine what sorts of cases account for the most costs and what types of E-discovery requests are the most costly to respond to. Perhaps there is reason to differentiate between categories of cases and to focus any rule changes on the most "costly" categories rather than all cases.

Bradley Gate (04-CV-170): Do not enact these changes. They will create additional discovery abuse and erode the right to a fair trial.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP supports amending the rules to provide more specific guidance on discovery of electronically stored information. The burdens and costs of preserving and reviewing electronic data can be severe. Large companies such as BP also face very substantial burdens in E-discovery due to the size, variety and complexity of their operations. They must be able to continue their business operations even though they are often the objects of suits.

Gary Epperley (American Airlines) (04-CV-177): Most bookings and many check-ins on American are done online. When it is sued, it is frequently required to retrieve electronic information. In some cases, it may spend upwards of \$1-2 million to identify, review, and produce millions of pages of records. It strongly supports the efforts to develop a uniform set of rules for the federal courts.

American Petroleum Institute (04-CV-178): API's members have far-flung operations, and are concerned about the excessive cost of electronic discovery in the U.S. It therefore applauds the Committee's efforts in the area. It will limit its comments to the two-tier proposal and the related safe harbor proposal.

Assoc. of the Bar of N.Y. (04-CV-179): The ABCNY is concerned that the proposed amendments will be prove to be counterproductive, and urges the Committee to withdraw this proposal in favor of further study of the issues. We have two broad concerns. First, the rules continue to migrate from a set of relatively simple rules that give courts wide latitude to apply broad principles justly and fairly to a regulatory regime that requires a detailed understanding of the interrelationships among not only the text of multiple rules, but also a system of "sub-textual" requirements buried in the Notes. Particularly in light of the likelihood of technological changes, this set of proposals sets certain procedures and standards at a finer level of detail than exists elsewhere in the rules. Second, the proposals raise a host of specific issues that need further study. We agree that these problems justify efforts to streamline discovery in this area, but believe that these proposals don't achieve that goal and will create problems. An example is proposed 37(f), which appears to impose a standard different from the one that courts have used for spoliation. Another is the proposal in 26(b)(5) and 16(b) that encourages practices that disregard the fact that under current rules of privilege the parties face a risk of waiver to third parties without regard to such orders. Both of these proposals may serve as traps for the unwary, producing collateral litigation about privileges, preservation and other obligations of counsel.

Steve Berman (04-CV-183): The assumption that E-discovery is more burdensome, costly, and time-consuming is wrong. The Notes therefore should not operate on this premise, and the rules should not be amended to address these mistaken assumptions. Rather than making discovery more difficult, the advent of electronically stored information has made discovery easier and more effective. Further technological change will make it better yet. It is not true that being sued requires a company to suspend all back-up operations or stop recycling backup tapes. Only certain backup tapes must be retained. And backup tapes are not too difficult to search. Because most companies have shifted to Windows NT platforms, the amount of legacy data is steadily diminishing. Producing data in native format is not difficult. It may be viewed and marked for reference without modifying the files, and Concordance and Summation permit parties to search and sort native format data. Finally, restoring deleted data is not prohibitively expensive. To the contrary, it costs about \$2,000 per computer, and is appropriate only where a few computers are to be examined. In sum, in a variety of ways the assumptions of this set of proposals are wrong. Adopting them would restrict access to the most important source of

information in litigation today. Many examples (see commentary at pp. 5-7) show how crucial this evidence routinely proves to be.

B.C. Cornish (04-CV-185): The proposed rules will obviously work to the detriment of individuals and will favor corporations. For example, in a case in which I represented that victim the truck driver who caused the accident and corporate representatives lied under oath. The truth was buried in one of the computer files. The company destroyed that file, but did not realize that another file existed. Because we were able to get that file, we were ultimately able to resolve the case on the basis of the truth.

Randall Burt (04-CV-186): I've been a programmer for 33 years. I believe that backup tapes are not a problem for discovery, and that if the company wants to produce the information it will prove easy. It's only hard when the other side wants the information.

Hon. John Carroll (04-CV-187): Most of the proposed changes are excellent and provide important additions to the rules for dealing with electronically stored information. They will assist judges in handling this discovery. Particularly noteworthy in this regard are the changes to 26(f) and 16(b) that focus attention on these matters early in the case. But I fear that the interaction of proposed 26(b)(2) and 37(f) will raise a risk of failure to preserve what may prove to be important evidence.

Federal Bar Council (04-CV-191): As a general matter, the Council supports the implementation of rules governing electronic discovery. We believe that the guidance provided in these rules is essential for this rapidly expanding area of federal civil practice. One topic strikes us by its omission -- voicemails. Existing caselaw supports the view that they are "sound recordings" or otherwise discoverable under current law. We see no reason why they should not continue to be subject to discovery.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): ILR and LCJ strongly support rule amendments in each of the areas addressed by the proposals, because each will help solve a problem unique to E-discovery.

Henry Courtney (04-CV-193): The present system of discovery has worked very well for injured clients to obtain information about defective products.

J. Wylie Donald (04-CV-194): The proposed rules go too far in some ways and not far enough in other ways. They go too far because they assume that accessible electronically stored information should be searched regardless of how much difficulty that would cause. But attorney review of the resulting material may be burdensome and costly. Expanding the universe of discoverable documents simply because they can be searched is not sensible. The amendments do not go far enough because they ignore issues of privacy that discovery threatens directly. Information that is searchable electronically can be mined much more easily for personal data. Yet the proposals do not mention of this problem or suggest ways to deal with it.

William Herr (Dow) (04-CV-195): The time for additional clarity and guidance is at hand, not only for the parties but also for the courts. Getting to where we need to be can only come from amendments to the discovery rules. I was initially skeptical of the need for amendments, but have come to support the need for them.

David Frydman (04-CV-196): I agree with the comments of Ariana Tadler (Washington witness; see also 04-CV-076).

Edward Wolfe (General Motors) (04-CV-197): Adoption of a framework of national standards is desirable. We have found that disparate local rulings and practices, along with limited developing case law, create a clear lack of clarity on a litigant's obligations.

Guidance Software (04-CV-198): We question some assumptions underlying the proposed amendments. For example, we doubt that E-discovery is usually more burdensome and costly than paper discovery. Lawyers who have spent countless hours combing through boxes of documents might reach a different conclusion. Similarly, the conclusion that deleted information is hard to access is based on technological capacities that are changing.

David Johnson (04-CV-201): The proposals rely on a flawed assumption. Advanced text-search capabilities mean that searching electronically stored information containing the equivalent of 500,000 pages of hard copy is hard. It is not. Comparing gigabytes of information to paper relies on a false analogy. Volume and search time are now the least important metrics for discovery of electronically stored information.

Jannette Johnson (04-CV-202): In many employment discrimination cases, plaintiffs must have access to the e-mail that relates to them. Any rule that impedes that access -- including cost shifting -- will undercut the enforcement of the civil rights laws. It is fundamentally unfair to allow searches of electronic databases to be controlled by the company and then have the expense shifted to the requesting party. Rather than accommodating companies for their poor handling of their electronically stored information, the rules should require them to maintain better control of it.

Joel Strauss (04-CV-204): In recent years, technology has had an increasing impact on the discovery process. Against that background, I oppose any rule change that would erect unfair hurdles in the way of discovery of electronically stored information. I agree with my colleague Ariana Tadler (04-CV-076) on these subjects.

Partrick Keegan (04-CV-205): I believe that the proposed amendments result in increased complexity and ambiguity in the rules and reduce equity among the parties. Rule 26(b)(2) already authorizes the court to limit discovery that is disproportionate, and 26(c) authorizes protective orders. These rules go too far to shifting that control to the responding party.

Clinton Krislov (04-CV-206): The Committee should promulgate national rules for discovery of electronically stored information and deter local rules on this topic. But these proposals are based on outmoded assumptions about technology, and they need more work as a result. Actually, discovery has become easier due to the advent of computers, and there is no reason to worry about the alleged burdens of this type of discovery. Providing excuses from production just feeds into the spin of those who want to thwart rather than facilitate justice.

Michael London (04-CV-212): The changes would serve only to frustrate a plaintiff's right to discovery and lead to potential discovery abuses by defendants. The notion that electronically stored information is less accessible than paper is wrong. The claw back provision will grant defendants a second claim of privilege. The Rule 37 change will invite a party to eliminate damaging evidence.

Michael Rabinowitz (04-CV-213): The current rules are sufficient, and these changes would shift things in favor of defendants. Electronic information is more accessible than paper, and the claw back will frustrate discovery. Finally, Rule 37(f) would prompt routine discarding of damaging information.

Wachovia Corp. (04-CV-214): The current rules don't take account of the huge costs and burdens of discovery of electronically stored information. Amendments are needed to put things right.

John Marshall (04-CV-215): I represent employment discrimination plaintiffs, and defendants in those cases resist discovery. These changes will facilitate that sort of behavior. Rule 26(b)(2), for example, begs for abuse, and it does not even say that improper refusal to produce leads to sanctions against the defendant. In the cases I handle, unlike personal injury and medical malpractice lawyers, employment discrimination lawyers can't afford to finance expensive discovery disputes, so making them pay will not work but will only prevent plaintiffs from proceeding.

Prof. Arthur Miller (04-CV-219): The rules should be amended to establish national standards on certain matters and thereby supply needed guidance for courts and litigants.

New York City Transit (04-CV-221): The proposed amendments, in our view, fail to address the variety of matters in federal court adequately. A "one size fits all" solution should not be imposed lightly. In the vast majority of cases, there is no need to incur the considerable expense and burden of attempting to locate electronic records. The cost of searching of inaccessible records would easily surpass the ultimate value of most personal injury or employment law cases. Rarely would the cost of engaging in electronic discovery be warranted except in multi-million dollar disputes. Electronic discovery would not be needed in the usual employment case.

J.W. Phebus (04-CV-224): These amendments raise a risk of tilting the field to favor defendants. I think that the current rules are better than these rules.

Dahlia Rudavsky (04-CV-227): For employment discrimination lawyers like me these proposals present a real danger that critical sources of information will be lost. It is essential to us to get the employer's electronically stored information. The safe harbor and the exclusion of inaccessible information from discovery are the provisions that worry us the most. 26(b)(2) is a drastic change that will have a devastating impact on our ability to find and obtain information and evidence. This rule would prompt companies to claim that much is not accessible, and the safe harbor would prompt them to discard more information, and sooner.

Brian Sanford (04-CV-229): Email discovery is much less cumbersome than paper discovery. These changes will impede the search for truth.

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): The rules should articulate that different standards apply to hard copy discovery and discovery of electronically stored information. Even using keywords that would be likely to uncover information on a given topic, an attorney will often not uncover that are pertinent because they did not happen to use any of the keywords.

Donald Slavik (04-CV-235): I object to the proposed changes. I have extensive experience in product liability litigation that shows that discovery of electronically stored information is critical to many cases. Because of the extensive experience in E-discovery our firm has developed, we are now able to work with defense counsel to formulate discovery requests to minimize both cost and time incurred by both sides. I am now able to list specific databases for the defendant to search, and give them queries that match fields in particular databases that really exist. The proposed changes, including cost-shifting, clawback and other provisions, would significantly affect a claimant's ability to discovery key evidence.

Texas Employment Lawyers Ass'n (04-CV-238): The assumption underlying these proposals -- that discovery of electronically stored information is distinctive -- is wrong. The only way it is distinctive is that it is easier, faster, and less costly. The amendments are prompted by the exceptional rather than the usual case. In the usual case, the Committee's assumptions don't apply. The tools currently available under the rules sufficiently deal with the needs of the extraordinary case. Electronic information is fast becoming an ingredient in most litigation; it is a rare case that does not involve some of it.

Prof. Ettie Ward (04-CV-240): I generally endorse the comments of the Federal Bar Council (04-CV-191) and the Assoc. of the Bar of the City of New York (04-CV-179) on privilege waiver and 37(f). Overall, I think that the proposed changes are unnecessary and premature. Existing technology is likely to change, rendering these rules irrelevant, and possible harmful. Moreover, the proposals are replete with directives that should be in the rules but are instead buried in the Note. This use of the Note creates a trap for the unwary.

Steven Sindell (04-CV-242): I oppose the changes to 26(b)(2) and 37(f). I represent plaintiffs in employment discrimination litigation. I have found the federal courts to be unjustifiably hostile to employment claims by employees. I usually turn down cases if I cannot avoid federal jurisdiction. The federal courts are inundated with ultra-conservative/pro-corporate judges who reflect the rightwing views of the various Presidents who nominated them. Defense counsel usually behave in an outrageously reprehensible manner, and treat discovery as a game of hide and seek. These rule changes reflect sympathy with the "grievances" of the corporate world; the hearts of the drafters go out to these supposedly overburdened corporations. Nobody seems to have much concern, in drafting these rules, for the employees who are victimized by discriminatory and retaliatory corporate malfeasance. I do not find it helpful or appropriate to extend my comments with politely reasoned examples and contentions. I do not believe they will make the slightest difference to the true believers attempting though these proposed rules to further diminish the discovery rights employees ought to have.

Dan Furlotte (04-CV-244): More input should come from the technology community regarding the design and implementation of electronic document storage and retrieval systems.

Paul Miniclier (04-CV-245): Why do electronic "papers" need more protection than real papers? Whoever says it is more difficult to search for and/or review electronically stored information is either a computer illiterate or has never done such discovery. There is a computer program for everything. There is no such thing as electronically stored information that is not reasonably accessible. I find all the proposed changes to be offensive to the well-established general principle of allowing discovery of all information.

Zwerling, Schachter & Zwerling (04-CV-247): Overall, electronic discovery is no more difficult than traditional paper discovery. Indeed, it is often far easier. The emergence of E-discovery businesses, which profit from the lack of knowledge lawyers have to devote to understanding electronic media, does not automatically translate into increased cost of discovery. The proposals seem designed to allow large parties to limit discovery unilaterally. What is needed is an addition to initial disclosure that requires also that parties provide information. We propose adding a requirement to disclose the following to 26(a):

- (a) the number, types and locations of computers (including desktops, laptops, PDAs, cell phones, etc. currently in use and no longer in use;
- (b) past and present operating systems and application software, including dates of use and number of users;

- (c) name and version of network operating system currently in use and no longer in use but relevant to the subject matter of the action;
- (d) backup and archival disk or tape inventories, schedules, or logs;
- (e) backup rotation schedules and archiving procedures, including any automatic data recycling programs in use at any relevant time;
- (f) electronic records management policies and procedures; and
- (g) most likely locations of electronic records relevant to the subject matter of the action.

Mike Overbo (04-CV-249): These changes will promote short retention periods to "scrub" harmful information from systems. Microsoft is already building that sort of provision into its programs.

Jeffrey Krinsk (04-CV-252): Routine document destruction goes on all the time. Changing the rules will be seen as approving the practice of hiding information from those outside the company. These rule changes will impede access to information.

Rule 16(b)

San Francisco

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): CELA supports the proposed rule change in 16(b). This has the benefit of alerting the court at an early stage that electronic discovery will be occurring in the case, and may prompt helpful judicial guidance.

Washington

Jonathan Redgrave (04-CV-048): The explicit inclusion of electronic discovery in Rule 16 is appropriate. See Sedona Principle No. 3. Discussion of privilege issues at this point is also appropriate. I suggest expanding the rule 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. But the Note should be revised so it does not begin with the "quick peek" agreement, for that will be very rare. I think that the first item should be "inadvertent production" agreements, and that reference to use of third party neutrals would be desirable.

M. James Daley (testimony and 04-CV-053): I endorse adding electronic discovery issues to Rule 16(b). It's vital that they be raised at the earliest possible moment. But the "quick peek" reference in the Note should be expressly limited to show that this is a very seldom-used option, unless mutually agreed upon by the parties. I cannot think of a single case in the last 25 years where I would have endorsed this approach.

Michael Ryan (testimony and 04-CV-083): Having the court involved is a valuable way to make the conference effective, and to resolve potential problems before they become problems. That is the time to resolve the accessibility issue, even if it requires a motion. I think that most plaintiff lawyers would be content knowing that the information is there if needed to go forward without asking that it be provided at an early point.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The proposed amendment to Rule 16(b)(5) alerts the parties and the court to the possible need to address the handling of discovery of electronically stored information early in the litigation. This generalized approach is preferable to the one adopted in some jurisdictions that describes specific actions to be taken by the parties. Requiring a company to "investigate and disclose" specific information regarding its entire computer system will often be unnecessary and burdensome. Large organizations usually do not have any one person or department that is responsible for or has an overview of the organization's entire IT system. Even though much litigation in the 21st century will involve discovery of electronically stored information, this will not be true of all cases, and the rules should acknowledge that. We therefore see as critical the Note's recognition that if the parties do not anticipate electronic discovery there is no need to address it. Regarding privilege waiver, we oppose any addition to the rules that would influence parties to adopt agreements regarding privilege waiver, particularly if these agreements might propel parties into premature production of possibly privileged material. There seems to be a subtle endorsement of agreements regarding waiver that may have the unacceptable effect of influencing courts regarding whether there has

been a waiver if there is no such agreement. In addition, the provision might prompt a court to pressure a litigant to agree, which would be undesirable.

Philadelphia Bar Association (04-CV-031): We endorse the proposed amendments to Rule 16. (Note that the Association opposes the addition of Rule 26(f)(4).)

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We oppose the proposal to promote agreements to preserve privilege because we believe that the question of waiver is governed by state law.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We applaud the Committee's proposal that the original case scheduling order contain provisions regarding the discovery of electronically stored information. We would also provide that the original case scheduling order specify the reasonable steps to be taken to preserve this information relevant to the subject matter of the lawsuit. We would also permit judicial officers to issue rulings regarding privilege even if the parties do not reach agreement.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports the proposed amendments of Rule 16, viewing them as noncontroversial.

Chavez & Gertler (04-CV-222): We support this proposal. We think that two other additions would be valuable. First, the scheduling order should also specify the reasonable steps that the parties will take to preserve electronically stored information. Second, the order should provide that, if the parties fail to reach agreement on a protocol for avoiding privilege waiver, the judge may issue a ruling regarding privilege.

Rule 26(b)(2) -- generally

San Francisco

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: Intel strongly supports the two-tier approach to discovery. The two-tiered approach should make clear that a party need not alter or suspend or the routine operation of its disaster recovery system. To understand this point, it is important to understand the way in which a disaster recovery system works. The information on the system is very difficult to search, and it is demonstrably not "reasonably accessible." On an Intel system, the information is not word-searchable. Backup tapes should be recognized as generally not reasonably accessible. Intel uses 22,000 backup tapes every week, and each of them holds millions of pages of information. Stopping the reuse of these tapes would cause a major expense. With hard copy discovery, the costs are about one dollar per page. With electronic discovery, the costs are about ten times as much. And routinely production runs to three to seven million pages of material. Very rarely does important information exist only on backup tapes, but the costs of searching those tapes is very large.

Thomas Allman (testimony and 04-CV-007, as supplemented Jan. 19): I strongly support the two-tiered limitation, which mirrors commonly accepted practice in hard-copy discovery where the ability to retrieve discarded information has long been recognized as a touchstone. Adoption of the rule would materially aid parties in planning for preservation since, by and large, reasonably accessible information generally satisfies production requirements in the great majority of cases. Allowing self-management to determine accessibility in the first instance is fair and consistent with current discovery practice. As several witnesses said, producing parties are not rationally motivated to make the information inaccessible in a business context, and any parties who deliberately seek to do so in particular cases will quickly find that effective remedies apply to them, including criminal penalties.

Jeffrey Judd: I applaud the attempt to add clarity to the determination as to what electronically stored information must be produced and preserved.

Gerson Smoger (testimony and 04-CV-046): This change is not necessary. The reality currently is that defendants don't produce materials that are not reasonably accessible and that plaintiffs seeking these materials must demonstrate a justification for production. This rule is therefore not needed, and it will work mischief by putting additional materials off the table.

Jocelyn Larkin (The Impact Fund): We believe that this proposal will, if adopted, create a dangerous loophole in the existing discovery regime and greatly increase the likelihood of litigated discovery disputes. Rather than enhancing the discoverability of electronic data, in keeping with its ubiquity, the rules will be moving backwards, insulating such data from discovery.

Frank Hunger: I heartily endorse the two-tiered approach.

David Dukes (testimony and 04-CV-034): The proposal strikes the appropriate balance between the benefits of potentially discoverable information and the costs and burden of production. the proposal contemplates that there will be situations where the benefit does outweigh the costs and burden and under these situations the court may order discovery even though the information is not reasonably accessible.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): This is a good change, but it should be in Rule 26(b)(1) instead. There is no reason to

limit this provision regarding accessibility to electronically stored information, however. It should apply equally to hard copies, which can be very inaccessible with some frequency. For example, in one case all claims that the client had were filed without an index.

Dallas

James Wren (testimony and written statement): This provision shifts the presumption about discoverability based on the unilateral determination by the responding party that information is "not reasonably accessible." This protects a company that goes to lengths to encrypt or bury data without regard to whether there is a true business need for that action. He recognizes that Texas has a more vigorous rule in some respects, but has not seen problems as a result of that rule. That might be because companies don't change their national operations just because Texas has changed its rules. A national rule, however, would produce results that a Texas rule would not; companies then might shift to systems that permit them to avoid discovery. The issue regarding access to data should be a cost issue, not an issue of discoverability. There should not be a good cause requirement to obtain this information.

Paul Bland (TLPJ) (testimony and prepared statement): This rule would encourage corporations to make most electronically stored information "inaccessible."

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): This proposal is unnecessary and reverses the concept of full discovery, meanwhile giving inadequate clarity to the standard. Dilatory tactics during discovery are a major problem, and sanctions are rarely granted to deal with this problem. These changes will make these problems worse, because the defendant need not seek protection from the court but only take the position that electronically stored information is not reasonably accessible. Plaintiff then has the burden to move for production. It is probable that it is easier and cheaper to retrieve electronically stored information than hard copies. Many of the companies I deal with contend that nothing they have is reasonably accessible unless it is already in the public domain.

Darren Sumerville (testimony and 04-CV-089): The proposal stands the usual approach to discovery and burden on its head. Usually, the responding party can escape the obligation to provide discovery only by persuading the court that it would be unduly burdensome. Under this rule, the responding party could simply claim "inaccessibility," with little or no showing. Moreover, most plaintiffs would not have the necessary information at the outset of litigation to make a good cause showing, so that important information would effectively be out of bounds. A party could even design an electronic information system to fit the rule and make the information created inaccessible. For example, as a matter of routine, a prospective litigant could easily shift "active" data to archival form on a frequent basis, thereby creating a shield against discovery. Altogether, this change will increase the frequency of discovery motion practice. Particularly in cases involving a party's knowledge or intent, the change could undermine the ability of plaintiffs to prove their charges. Putting the burden on plaintiffs to go forward with motions is unwise.

Stephen Morrison: The two-tier structure focuses wisely on the proportionality issue that should be at the heart of handling of discovery issues. It is silly to say that companies will shift all their information to "inaccessible" locations. That's no way to run a business. It may be that there will be some effort to police what's in the files, but that's like cleaning the closets. Lawyers will urge closet cleaning.

John Martin (DRI) (testimony and 04-CV-055): In Texas, the adoption of the Texas rule on extraordinary steps to obtain information not normally used in the business has not led to a change in companies' records retention policies.

Dan Regard (testimony and supplemental submission 04-CV-044): I definitely support the two-tiered system, even though I first said that the Note needed to be improved on the definition of the dividing line. The use of "reasonably accessible" as distinguishing online from off-line data may become passe soon. Storing data off-line is rapidly becoming a disappearing concept. Instead, corporations are considering "hot sites" that rely on duplicate live systems rather than backup systems. Backup tapes are being used for less than one week on these systems. The new Google online email system may be a harbinger of a larger shift away from the entire concept of deleting data. The goal of a two-tier system should be to permit parties to deal with the first tier without needing an expert. Thus, information that is beyond the reach of the average user such as metadata, deleted files or fragmented files, etc. should be in the second tier. Sedona Principle 8 cuts to the heart of this concept.

Michael Pope (testimony and 04-CV-065): This proposal is a realistic recognition of how most businesses conduct themselves. The first focus of discovery ought to be on the information that is available. 99% of the information needed to prepare for trial is, in fact, readily accessible.

James Michalowicz (testimony and 04-CV-072): I believe a primary goal of this amendment is to minimize the "fishing expeditions" that can occur with overly broad discovery requests. Confining the scope of a request to the area where responsive materials reside makes sense and facilitates the reasonable, efficient and timely exchange of evidentiary materials.

Jeffrey Cody: The two tier approach is sound, and the Texas experience shows that it is. There is only one reported case since the Texas rule went into effect, which proves that it works. The mandatory cost-shifting did this. It is important that the Note also point out that the proportionality rules of 26(b)(2) apply to accessible information.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): We oppose this rule. I believe that our members frequently seek discovery of information that the other side deems inaccessible. That is not frequently a problem, however.

Kelly Kuchta (testimony and 04-CV-081): Based on my experiences with E-discovery, I strongly recommend that you reconsider the attempt to distinguish between accessible and inaccessible data. Technology has improved data access a great deal in a few years, and should continue to do so. Moreover, if the data are important enough to save, aren't they important enough for discovery?

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): The "burden" analysis under current Rule 26(b)(2) is not a substitute for adoption of a rule containing the amendments proposed. Emerging case law does not provide litigants with clear and consistent guidance. In the absence of a national standard, large companies are faced with a Hobson's choice because they don't know which line of cases a given judge will follow. And districts are beginning to develop their own local rules. Costs of review have mushroomed; in one case the responding party estimated that its costs of review were between \$16.5 and \$70 million. New rules are needed to address unique new issues of cost and burden. We have to know what to do

about backup tapes and other recurrent issues of accessibility. The more the rule or Note can specify what is and is not accessible, the more helpful that will be.

Sanford Svetcov & Henry Rosen: Under this rule, if the other side says that it has not produced inaccessible information, it's up to me to file a motion. What am I going to say in this motion? Now the producing party can file a motion for a protective order, but under the proposal that's flipped and the requesting party has to go forward.

Darnley Stewart: In almost every one of our securities cases, we are seeking and getting what some might call inaccessible data. A lot of these companies have gone out of business, so most data is "inactive." But speaking as an employment discrimination lawyer, I guess that most such lawyers do not get this sort of information. It's clear that all that's involved here is cost and burden. What is the value of adding a new term that can be used to avoid discovery? I've found repeatedly that, after they say they can't provide crucial information, the defendants ultimately do provide it. We even had to restore some ten-year-old tapes, and found it was fairly easy to do. So it would be very bad to have this rule look to ordinary course of business because often there are readily accessible things that are not usually accessed by the business in its current operations but critical to litigation about past events and easy to get at. And this motion is a meaningless motion since I can't make a showing, knowing nothing about their data. I'd have to take discovery to do that.

Jonathan Redgrave (04-CV-048): I think this distinction is appropriate for the rules. See Sedona Principles No. 8, but the language should be moved up before the proportionality test because that's more consistent with the current rule.

Anthony Tarricone (testimony and 04-CV-091): This rule will frustrate the right of individual litigants to have a fair day in court by creating hurdles to obtaining electronically stored information. It will also unnecessarily complicate the judicial process and necessitate court involvement in discovery more often. There will be a unilateral claim of inaccessibility by the defendant, and the plaintiff will be poorly positioned to challenge it. And technological change is going at such a pace that the concept of inaccessibility is slightly quaint. We should not freeze the rules based on today's technology. And we would be prompting parties to put information into an "inaccessible" format. I've seen situations in which a claim of inaccessibility is made but proved entirely insubstantial.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): State Farm supports the two-tiered approach. Accessible and inaccessible information should be treated differently. This will force requesting parties to tailor requests with appropriate specificity and ensure that the responding parties know what electronically stored information to produce.

Pamela Coukos (testimony and 04-CV-020): I don't usually have to go after legacy documents in my employment discrimination practice. But this rule will generate disputes and invite abuse. We often need information that is not deemed "active." It is unwise to allow the defendant to designate information inaccessible and not to require that counsel investigate that claim and certify that it is well-founded before making the objection. If there must be a rule on accessibility, I propose the following revision:

A party need not provide discovery of electronically stored information that ~~the party identifies as not reasonably~~ is inaccessible without undue burden or expense. ~~On motion by the requesting party,~~ The burden is on the responding party to must show that the information is ~~no reasonably~~ inaccessible without undue burden or expense. 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.

This would remove the "designation" approach in the proposed rule, which invites abuse and is inconsistent with the thrust of Rule 26. Parties can't simply "designate" information cumulative or expensive now and refuse to provide it. Leaving it to the requesting party to move to compel is not fair to that party. The burden should remain on the producing party to justify the failure to produce.

Michael Nelson (testimony and 04-CV-005): The Note should clarify that inaccessible electronically stored information need not be preserved absent an agreement between the parties or a court order. This would be consistent with the provision to be added to Rule 26(f) regarding discussion of preservation.

George Socha (testimony and 04-CV-094): This approach appears to be consistent with existing practices for discovery of information stored on paper as well as electronically stored information. I suggest some changes to the Note. First, the following should be softened somewhat as suggested: "For example, some information may be stored primarily ~~solely~~ for disaster-recovery purposes and be expensive and difficult to use for other purposes." This change would show that a single use of a disaster-recovery system for reasons other than recovering from a disaster should not mean that all information stored on that system is reasonably accessible. In addition, it would be helpful to mention the range of disasters for which electronically stored information might be recovered. Although some may assume that these are only catastrophic events, that need not be true. Backup systems are also used for smaller but equally valid disasters, such as the corruption of a file so that it no longer can be accessed, damage to the hard drive of a backed-up computer, or problems caused by viruses. I also suggest that the last full paragraph on the second page of the Note (regarding whether a party itself routinely accesses the information) should be modified. Even if a party routinely uses the information, it may not be "reasonably accessible" for discovery purposes. Most organizations rely on databases for a variety of purposes. Even though the databases are used routinely, the organization has limited actual ability to make use of the full body of information on the database or to report it in ways other than that provided by the software that the end users employ. At least, the term "active data" should be removed. The distinction between "active data" and "inactive data" is a murky one at best, and not mentioned elsewhere in the rule changes. Yet another consideration that should be mentioned is capacity. Handling some volumes of information -- from many backup tapes, for example -- may itself be beyond the capacity of many entities. Although some assert that backup tapes will soon pass from the scene, I don't think that will happen any time soon. Finally, the sentence at the end of the first full paragraph on the third page of the Note about situations in which a party has actually accessed the information should be revised. The mere fact that a party has accessed the information in some fashion does not mean that it has a ready or even actual way to access the information in the way sought by the requesting party.

Damon Hacker & Donald Wochna (Vestige, Ltd.) (04-CV-093): A basic starting point is to appreciate that all data is the same -- magnetized metallic particles whose polarity can be read and interpreted by operating systems -- but that some of it is usually invisible while other data are visible during ordinary operations. As a physical matter, the invisible data are just as accessible as the visible data. Visible data can be rendered invisible by "deleting" it. Our company is in the business of retrieving such data. Using forensic methods, a party is no longer limited to viewing only the data in the allocated areas of the media.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): As worded, the amendment may bog down the courts in motion practice on whether the information is accessible and may impose on the responding party burdensome production or preservation duties that don't exist in other rules. It should be made clear also that the primary source of discoverable information is the active data of the party.

Dabney Carr (testimony and 04-CV-003): I support the idea of two-tiered discovery. It gives protection to parties whose systems have changed substantially over time. And it allows production of the information most likely to be of greatest relevance and provides a mechanism for determining whether more discovery is warranted. To better accomplish these goals, I suggest rewording the amendment as follows:

A party shall provide discovery of any reasonably accessible electronically stored information without a court order. On motion by a requesting party, the court may order discovery of other electronically stored information for good cause.

This eliminates the identification requirement, which is unnecessary and difficult to apply.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): We support proposals to presumptively limit the need to preserve and produce information that is otherwise inaccessible. This allows clients to establish and follow reasonable and predictable records retention and disaster recovery policies.

William Butterfield (testimony and 04-CV-075): This rule improperly places discretion in the producing party rather than the court to decide issues of discovery scope and undue burden. This creates a "hide" incentive for responding parties. Under the current rules, only the court is authorized to limit the scope of discovery. Moreover, this rule would upset business protocols for document organization with a protocol keyed to litigation. It will also create disincentives for companies to adopt new technology that would reduce costs and enhance retrieval, and furthermore technical advances already have undermined the rationale behind the rule. It will also result in a dramatic increase in motion practice. Under current rules, informal negotiations are the focal point, but formal motions would supplant those under this rule. On that motion, the burden will unfairly rest on the moving party, the one less able to address the issues raised on accessibility. In my practice, however, I recognize that there will be a big fight to get information from backup tapes, so I only ask for it if I have a very good reason. (Indeed, it is not clear that the witness has ever asked for restoration of information because the amount of information received from accessible sources was inadequate. See pp. 391-92.)

David Romine (testimony and 04-CV-080): Permitting a party to withhold electronically stored information that it identifies as not reasonably accessible will encourage hiding of information. The current rule allowing for objecting to discovery that is unduly burdensome is sufficient. He has once asked for access to inaccessible information in his 11 years of practice. We tried to restore a computer that had crashed, and we couldn't, as producing party, so that information was truly inaccessible.

M. James Daley (testimony and 04-CV-053): The argument that companies will start making information inaccessible is not a serious argument.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): He cannot think of an occasion on which J & J has had to restore backup tapes, or of a litigated dispute about restoring backup tapes. He does not regard inaccessibility as an invitation to discard information that would be discoverable if accessed. "[I]f it's material that you consider in the first instance to

be discoverable, I think you're taking your life in your hands not preserving it." (p. 20) There will be some risk balancing regarding how important the information seems to be. There is a problem of comfort level there. And there is no basis to think that his company would move information into "inaccessible" places. Information is a fundamental business tool, "kind of the lifeblood of the way the business is transacted." (p. 23)

Ariana Tadler (testimony and 04-CV-076): This amendment is a bad idea. It would give the responding party an incentive to stall, and would impose on the requesting party the burden of pursuing a motion to obtain access to the information. It would also tempt companies to routinely transfer information to media which appear to be inaccessible for purposes of litigation but remain (or with the rapid evolution of technology may become) readily accessible for business purposes. Our firm (Milberg Weiss) sporadically obtains access to backup media or fragmented data. We don't do that in the majority of our cases. We had to do that due to 9/11 loss of information in one case. We have found that sometimes the backup information for specific people is not concentrated in one repository. In class actions, it is necessary sometimes to access the backup information because the class period was long enough ago that the information about who was in the class, etc., is not n active data. We would not go after backup information until we reviewed all the active data. Our concern early in the case is preservation, not access. And the PSLRA impedes our efforts because it puts a hold on some activities. An example of efforts to deal with that is in the attachments to my statement -- the order and protocols from the IPO litigation. This regime supplanted the 30(b)(6) deposition approach, and included a questionnaire about preservation of various materials.

Craig Ball (testimony and 04-CV-112): Considering the dynamic and fragile nature of electronically stored information, the interposition of a new procedural hurdle to production creates greater problems than it solves. That delay is particularly troubling because there is no preservation obligation built into the rules. If this proposed rule is not abandoned, it should be accompanied with an express preservation requirement. We should recall that everything on backup tapes was in active data once, and somebody did something to remove it from active data. The incentives to do something like that would result from this rule are considerable. That point should, at least, cause us to look askance at those who bridle at paying the cost of restoring backup tapes.

Cheri Grosvenor: My concern is that it seems to be assumed that anything that's accessible is easy to obtain. That assumption should be removed; the burden of obtaining accessible information may be very great. Something that would make it clear that the proportionality provisions of 26(b)(2) apply to accessible information should do the job. And my experience as a responding party has been that people don't always look at the accessible material that was produced before pressing to get access to the inaccessible. Some lawyers recognize the lever that discovery can be, and press for the inaccessible early.

Michael Ryan (testimony and 04-CV-083): It is not often that backup tapes are accessed. Before asking for that, I'd want to look over what's available without doing that. Backup tapes come up, if at all, in cases that are quite focused as to time-frame and individual. My big concern is preservation, not production. I don't want to find out a year later that the tapes had been used after we started the case. And on the motion contemplated by the rule, I have a problem in those courts where I don't get a reply. I don't have much to say in my motion, and then the other side comes in with its inaccessibility showing. But then I don't get a chance to file something in response to that. If I could just get reassurance about preservation while these things are worked out, however, that would comfort me a good deal. This proposal would invite unnecessary motion practice and eliminate the gains that would be produced by adopting the changes to Rule 26(f). The reality is that parties are not routinely requesting obsolete data and

backup tapes. Other than to identify the existence of this information, I for one have never requested that it be produced. To my knowledge (he is chair of ATLA's E-Discovery Litigation Group), it would be a rare request in a large document production case as often seen in multidistrict litigation. The evolving caselaw is sufficient to deal with these issues. Moreover, from my reading of the proposal, the amended rule will not excuse the responding party from producing anything. Instead, it invites motion practice on whether certain information must be produced. But the Note seems to create a presumption that producing parties are excused from producing even though this is to be found nowhere in the proposed rule. In addition, nowhere in the proposed rule does the responding party have an obligation to identify the information not provided.

Keith Altman (testimony and 04-CV-079): I think this rule would lead to an increase in motion practice because it seems to presume that if the responding party believes the information is not accessible it doesn't have to produce it. But the collection of electronically stored information is much easier than with hard copy information, and that is not subject to the rule.

Rudy Kleysteuber (testimony and 04-CV-049): Because the costs of access are at the heart of the motivation for this proposal, and they are likely to change in the future, a better way to approach the problem would be to add the following at the end of Rule 26(b)(2);

The court should pay special attention to the unique potential for technological barriers to increase the costs of discovery greatly and should seek specific information about those costs before deciding whether the burden or expense of the discovery outweighs its likely benefit.

Michael Heidler (testimony and 04-CV-057): The fears about adverse incentives from adopting this rule are wrong. Businesses would not intentionally implement inadequate archival systems. They design their systems for business needs, not litigation needs. And they would not replace systems more often than they had to, because of the costs that replacement generates.

Steven Shepard (testimony and 04-CV-058): This provision should not be adopted because the problem should be handled under Rule 26(c) rather than (b)(2). The factors of Rule 26(b)(2) have been used by courts acting under Rule 26(c) in regard to shifting costs, but the provision should not be in (b)(2). This proposal writes an unprecedented protective order provision into Rule 26(b)(2) itself. But the idea of concealing legitimately discoverable information goes against our country's tradition of broad and open discovery, so the burden should be on the responding party to file a Rule 26(c) motion to avoid the obligation to produce this information. Rule 26(b)(2) is not suited to this task. There is, for example, no provision in (b)(2) for meeting and conferring before making a motion. The following could be added as a new Rule 26(c)(9):

(9) that the discovery of electronically stored data be had only under terms and conditions, including the sharing of costs, specified by the court. In making such an order, the court should consider: (i) the extent to which the request is specifically tailored to discover relevant information; (ii) the availability of such information from other sources; (iii) the total cost of production, compared to the amount in controversy; (iv) the total cost of production, compared to the resources available to each party; (v) the relative ability of each party to control costs and its incentive to do so; (vi) the importance of the issues at stake in the litigation; and (vii) the relative benefits to the parties of obtaining the information.

Joseph Masters (testimony and 04-CV-063): The amendment would allow a producing party to make discovery a much more costly process, and might allow it to hide information. The requesting party could only get the information the other side deemed inaccessible by making a motion, and then perhaps only by hiring an expert to support the motion. The actual problems can be handled under the standards in the rule now. Thus, this is a solution to a problem that does not exist because the rules already provide the tools for resolving these issues.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft strongly supports the implementation of a "two-tier" approach to the discovery of electronically stored information. The need for a distinction between accessible and inaccessible documents is clear, and warrants the exclusion of inaccessible electronically stored information from discovery absent a court order.

J. Walter Sinclair (04-CV-004): It is essential that we deal differently than we normally do with electronically stored information that is not reasonably accessible. The primary source of discovery should be active data and information purposefully stored in a manner that anticipates future business use and permits efficient searching and retrieval.

Robert Leake (04-CV-015): I firmly believe that the availability of discovery creates the necessity to conduct discovery, and that the wider the availability the wider the search. The result has been an unconscionable increase in the cost of litigation that has become a real economic burden. I have no solution but there should be some rational threshold to cross before a litigant can compel another to disgorge all electronic stored material.

James Rooks (04-CV-019) (attaching article from Trial Magazine): This provision would establish an unprecedented two-tier system of document production that would invite abuse. An example is a request for five-year-old data from a manufacturer. The data was duly stored but is now on a backup tape held by a commercial data-storage company. Finding it will require a search of many backup tapes, and defendant responds that it is "not reasonably accessible."

Herbert Ogden (04-CV-023): The proposed change is neither necessary nor reasonable. The situation it addresses is already addressed by 26(b)(2)(iii). It is unreasonable because it assumes that computer records are usually hard to search. The opposite is true. It would make much more sense to excuse someone from having to search boxes and boxes of poorly indexed paper records than it would to excuse him from searching computer disks or even backup tapes.

Marilyn Heiken (04-CV-024): The proposed amendment would establish an unprecedented two tier system. Searches of electronic information can be conducted very quickly, unless the company has gone to lengths to encrypt or hide its data. Allowing the party to self-designate material as inaccessible will invite even more stonewalling. Requiring an extra hearing to obtain the information further burdens the courts.

Philadelphia Bar Association (04-CV-031): We endorse the proposed amendment but favor some minor revisions to the Note. We considered whether the phrase "electronically stored information" should be deleted so that the amendment would apply to all discovery of inaccessible information. Such a change would be consistent with the changes regarding Rule 34, but we rejected that approach because electronic information is unique both in its form and in its sheer volume (thereby warranting separate treatment). Remedies for burdensome paper

discovery are adequately addressed in the existing rules. Although we generally believe that electronically stored information should be treated as a type of "document" that is subject to the same rules as other documents, its unique character also requires supplemental rules where appropriate. Rule 26(b)(2) is such a supplemental rule. In the Note, the ninth and tenth paragraphs should be reversed to conform to the sequence in which the topics they address are dealt with in the rule.

Steven Flexman (04-CV-035): The changes will only encourage companies to make their electronic information inaccessible. The technology exists to allow for easy access. The world's knowledge is available at a keystroke on the Internet. Surely a company's computers should be able to make information accessible. This rule encourages a company to take information off its computers, putting it into a warehouse, etc. There is an example of the effects of such rules in Illinois. A state law required that medical records be made available at a reasonable cost. The cost for microfiche was higher than the cost for records kept in other forms, and within a year hospitals started putting information on microfiche.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The Section supports the change.

ABA Section of Litigation (04-CV-062): We strongly support this proposal.

Peter Riley (04-CV-064): I am opposed. In a recent products case, I'm sure that if this rule had been in place we would have suddenly found that virtually all of the documents we wanted were not "reasonably accessible."

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): This proposal is a recipe for mischief because it is easy for parties to assert that information is "not reasonably accessible" when they do not want to disclose it. If this rule is adopted, it will often be used to resist "original format" production. For example, in one recent case defendant insisted on producing information in TIFF form until the magistrate judge ruled that it was insufficient because it was not searchable. The proposal is also inconsistent with Rule 34's directive that a party should produce documents "which are in the possession, custody or control of the party." In effect, it would substantially change the scope of discovery. Existing law says that all documents (electronic and otherwise) should be treated the same. If this provision is nevertheless adopted, at least it should require that the responding party afford the other side and its technical expert access to its systems and database (subject to an appropriate protective order) to permit a determination whether the information is actually inaccessible. The cost of that examination should be on the party resisting discovery of the data.

Duncan Lott (04-CV-085): I object to the initial exemption of inaccessible information because that would invite more stonewalling and the secretion of damaging documents by corporate America.

Scott Lucas (04-CV-098): By allowing the party to designate information covered by this rule, it invites litigants to obstruct legitimate discovery whenever it suits them.

Michelle Smith (04-CV-099): This amendment would invite stonewalling and motions to compel involving the court. Requiring an extra hearing to determine whether the information is not reasonably accessible would further burden the court. The rules should presume that electronically stored information is "reasonably accessible" based on its very nature. As a general rule, a search of electronically stored information may be conducted more quickly than a search of paper data.

Richard Broussard (04-CV-100): This provision would place a burden on the court because each corporation would develop systems to ensure that its electronically stored data for one reason or another is not "reasonably accessible." The assumption that corporations would spend huge amounts of money to create electronic data storage systems so that this data would become less accessible than manually stored data is preposterous. This idea probably results from the creative thinking of those who would benefit by concealing their culpability.

Mica Notz (04-CV-102): In today's business and private sectors, the majority of communications are done by e-mail. The court system must have access to those to impose responsibility for misconduct. If a business chooses to use this form of communication, then it must be responsible for ensuring that all communications utilized by its personnel are stored effectively. that means in an easily accessible and readable manner. If the courts are going to allow employers to access their employees' e-mail, they must also make sure that others can for litigation purposes. Otherwise there is a double standard.

Stephen Herman (04-CV-103): This proposal seems to invite stonewalling. Although such cases as *Zubulake* may clarify the distinction between accessible and inaccessible data, the rule does not seem to require the producing party to adhere to any such definition. Arguably, almost anything could be identified as not reasonably accessible. This gives a party who wants to delay the proceedings very great latitude for doing so. And technology is constantly changing in regard to what is accessible. The rule seems to contemplate that this information is entirely off limits for discovery. Even the caselaw discussing cost-sharing does not go that far. At least the discovering party should be able to insist on discovery if it will pay the resulting costs.

Dwight Davis, Jamseon Carroll & Cheri Grosvenor (04-CV-107): We strongly support this provision. Corporate infrastructure is set up to maintain records needed to support the business, not as a search engine for litigation. Search efforts frequently require converting files and data to formats other than that in which they are maintained in order to generate search capabilities. This process is quite costly, both in terms of labor and financial outlay.

Edward Bassett (04-CV-110): This change would likely spawn a new generation of discovery motions. It does not take into account the importance of the issues, the amount in controversy, or the rest of the factors used under Rule 26(b)(2) now.

Hon. Benson Legg (D.Md.) (04-CV-114) (speaking for the whole court): The court is concerned about the 26(b)(2) proposal and recommends reconsideration. The concern is that, as phrased, the proposal will make it too easy for a party that declines to produce electronically stored information to justify it with a conclusory, boilerplate statement, which can be expected to prompt almost automatic motions to compel. We note that, elsewhere in the rules, when a party objects to producing requested information it must provide a particularized explanation for its position. See Rules 33(b)(4) and 26(b)(5). We believe that requiring a more detailed factual basis for the refusal to produce will guard against reflexive but unjustified refusals to provide electronically stored information. We see no undue hardship for the producing party in providing this information. Once it is provided, the requesting party is in a position to more objectively evaluate the merits of the claim of unavailability. In addition, this particularized explanation will assist the court in resolving disputes the parties cannot work out by making it easier for the court to employ the cost-benefit analysis of Rule 26(b)(2).

Brian Davis (04-CV-121): I strongly oppose the proposed change to Rule 26(b)(2). It would provide attorneys who lack good faith with yet another excuse to block or delay legitimate discovery requests. It would also place a growing volume of relevant evidence beyond discovery.

Brian King (04-CV-123): This rule would provide an incentive for defendants to claim that documents are not accessible. But the ease of recovery of electronically stored information is actually significantly better than with hard copies. I see no reason for limiting discovery of such information. But for defendants who want to delay the case, this amendment provides new ways to throw up additional roadblocks.

Federal Magistrate Judges Ass'n (04-CV-127): The proposed change represents a further narrowing of discovery, and we have many concerns about it. The proposal is potentially redundant, for one thing, since the language seems to replicate what is already in the rule with regard to the proportionality analysis. Moreover, the rule would eliminate the presumption of discoverability that currently is used, and instead impose on the party seeking discovery the burden of justifying production. And it places too much control in the hands of the responding party and may encourage parties to make some electronically stored information inaccessible as rapidly as possible.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): The proposed rule invites abuse. A party can circumvent the policy of full disclosure by declaring material inaccessible. Parties can also render information inaccessible. Moreover, the whole concept that information is not reasonably accessible is outdated and skews the rules in favor of the defense. A party's inadequate storage system is not an excuse for failure to produce.

Donna Bader (04-CV-130): This rule would allow a party to avoid providing discovery by making its own determination that the information is not reasonably accessible. From the time that claim is made, the burden and expense of pressing further rests on the party seeking discovery.

Caryn Groedel (04-CV-131): Currently a party must produce information whether or not it is difficult to access. Electronic information is usually easier to access than hard copies. This would allow employers to claim that important documents are not reasonably accessible, and would thereby give employers who discriminate more protecting against plaintiff lawyers.

Bradley Kirschner (04-CV-137): In debt collection practices litigation, defendants often fail to produce material that they clearly should possess, and those cases are the ones where E-discovery is most important. This rule says that if electronic data can't be printed to paper by the push of a button, they are not available. The ability to obtain electronic data from a hard drive after it has been deleted is a powerful tool. The possibility of doing that is itself a deterrent to delete evidence. Judges now allow the sort of "fishing expedition" needed to troll for such information on a hard drive. This rule would make it harder to get that information.

Brain Huddleston (04-CV-145): Under the current rules, a party has to produce information even if it is hard to access. But electronic information is usually more accessible than paper documents.

R. Deno Cole (04-CV-151): I represent a defendant in a contractual dispute in which access to e-mail is essential. I am concerned that proposed Rule 26(b)(2) would have allowed another party in this case to claim that the relevant e-mails were not easily accessible.

Floyd Ivey (04-CV-154): I oppose the proposed rules. 26(b)(2) is not needed to protect responding parties, who can already resist discovery on the ground it is too burdensome if they can show that on a motion to compel. There is no suggestion of a standard on what is not "reasonably accessible."

Bruce Elfin (04-CV-166): There is no such exemption for discovery of hard copy materials, and electronically stored information often makes or breaks a case. By allowing employers to claim that important documents are not reasonably accessible, this rule would create false or misleading responses on important topics. It would protect discriminating employers. It is no exaggeration to say that many civil rights plaintiffs will lose or find their cases jeopardized as a direct result of this change if it goes into effect.

Hon. Ronald Hedges (D.N.J.): (04-CV-169): Despite the introduction of a two-tier approach to discovery scope in 2000, discovery has not actually been limited since then to what is relevant to a claim or defense. And the proportionality concepts of Rule 26(b)(2) have reportedly not been used much. Despite this history, the Committee now proposes to introduce a two-tier approach to E-discovery. This proposal causes me to ask many questions: Why introduce another layer of complexity into what is already an underutilized scheme? Why is there a need for rule amendment at all, given that case law is developing on these problems using the current rule scheme? Is it not possibly redundant to add the "good cause" standard onto the existing limitations of 26(b)(2)(i), (ii), and (iii)? Is there not an incentive for a corporation that fears litigation to make data inaccessible?

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee is split on the amendment, with a majority in favor. The majority believe that the amendment is an appropriate way to deal with the distinctive features of electronically stored information. It also believes that the Note gives a sufficient explanation of the term "reasonably accessible." A minority opposes the amendment and has serious reservations about the effect it would have on the conduct of discovery. The concern is, in part, that the rule change alters the burden of proof, making the party seeking discovery justify the request. The minority thinks that one possible solution to this problem would be to require automatic exchange of technical information about information systems.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP supports this change, and urges consideration of the balancing approach of the Sedona Principles. But it notes that this new rule will have little meaning if it is not made clear that preservation of inaccessible data is not required without a showing that the need and relevance outweighs the expense. Given the huge amounts of data already available in reasonably accessible form, there is very little realistic risk that relevant information will not be produced in the normal course of discovery.

Gary Epperley (American Airlines) (04-CV-177): American strongly supports the two-tier proposal. Some plaintiff lawyers seem to believe that its disaster-recovery system is the same thing as an electronic data archive, but it was not.

American Petroleum Institute (04-CV-178): API supports the change. It has the potential to reduce the unwarranted costs and burdens required to preserve or disclose information that can be preserved and retrieved only by extraordinary means. In conjunction with proposed 37(f), it would help minimize unwarranted disruption of necessary and routine computer operations involving information that is not reasonably accessible.

Assoc. of the Bar of N.Y. (04-CV-179): The Association believes that the focus on what is "reasonably accessible" is fundamentally flawed (as set forth in detail in that section below). It also feels that the "good cause" determination should incorporate the proportionality factors. The Note should state explicitly that courts should take account of the same factors that are now listed in (i), (ii), and (iii) of the current rule. If the "good cause" standard means something other than those standards, the Note should so state and explain how it relates. The Note should also endorse sampling as part of the good cause showing.

Jeffrey Bannon (04-CV-182): As a lawyer who deals with employment discrimination, I am concerned that this rule will make it more difficult to obtain necessary data from employers. The existing rules already allow courts to balance undue burden and other factors in handling electronic discovery. See *Zubulake*. Because payroll and personnel records were computerized long ago, they have been actively used in employment discrimination litigation for over 30 years. Frequently, the only usable evidence is on backup tapes or in legacy systems, and these seem to be precisely the sorts of sources this rule would deem inaccessible. It appears that much of the concern about discovery burdens relates to unorganized collections of word processing documents and e-mail and not to structured databases. But I think this is an historical anomaly that technological developments are rapidly overcoming. Although storage hardware developed in advance of retrieval software, but in the last year more sophisticated search methods have started to come on line. For example, until recently retrieving e-mail from a backup tape required a complete restoration, but the latest version of the e-mail software now allows searching for content the tape. My concern is that the proposed rule will not adjust for such technological improvements as the current balancing rule does. The "reasonably accessible" concept simply does not improve the situation, and it poses risks of causing harm.

Steve Berman (04-CV-183): The rule would allow the responding party to self-designate information as not reasonably accessible and leave the party seeking the information with little or no information about the nature, subject matter, or relevance of the information that it is not getting. It would thus contradict the existing rule that the responding party must explain why production is too burdensome based on specific objections rooted in the peculiar nature of the information. Now the burden will rest on the party seeking the information to show that there is good cause for production. The courts have ruled that the inaccessibility of information is not a basis for suppressing it.

Hon. John Carroll (04-CV-187): The interaction of this rule and 37(f) would create serious preservation problems. This rule seems to put "inaccessible" information beyond discovery unless and until a court orders discovery, and 37(f) seems to say that it therefore is not foreseeably discoverable. Indeed, the signal may be that there is no restraint on destroying "inaccessible" data. The potential problem is exacerbated by the difficulty in defining the term "reasonably accessible." The lack of an adequate definition for that critical term exacerbates the problem. I think that 26(b)(2) and 37(f) should not go forward because these issues deserve further study.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): The proposal is another narrowing of discovery. We think that it places undue emphasis on electronically stored information. Cases often involve a lot of paper documents that are stored in "Siberia" or commingled with lots of irrelevant documents. The problems resulting from those difficulties are likely to be as great or greater than with "inaccessible" electronically stored information. Nonetheless, the current rules are sufficient to deal with these problems. Even the authors of the Sedona Principles view existing 26(b)(2) as more than sufficient. They say that these principles are "particularly applicable" to discovery of electronically stored information. The proposed rule would create an incentive for potential litigants to make information "inaccessible." The effect of this rule on the law of spoliation is another concern. It appears that electronically stored information that is not accessible is not discoverable and therefore not subject to any duty to preserve. Would that mean that destroying that information after litigation appears on the horizon would not be spoliation? Compare *Zubulake* (220 F.R.D. 212, 220-21).

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): ILR and LCJ strongly support the change to 26(b)(2). But they urge that the Note be clarified to confirm that electronically stored information that is not reasonably accessible need not be preserved

absent a voluntary agreement of the parties or a specific court order. This is the most important clarification to be made based on the public comment process. It is already implicit in the relationship between the two tier and the safe harbor provisions and is fully supported by the comments and testimony.

J. Wylie Donald (04-CV-194): The rule overlooks the burdens of reviewing and producing electronically stored information that is reasonably accessible. It proceeds on the predicate that all such information will be reviewed. But that's not the kind of information gathering that is done with regard to paper discovery; in a patent dispute one doesn't look through personnel records even though it could be that there is something in there about the patent. The Note suggests that all files will be searched, and that is too much material for such a presumption. Such a search will find all the relevant material, but also a very large quantity of irrelevant material that will have to be reviewed by counsel, at great expense.

William Herr (Dow) (04-CV-195): This proposal does not fit with the accepted method of responding to discovery. That method begins with determining what is responsive and then looks to what can be produced without undue burden. After that production occurs, the other side can seek more. But this amendment makes the first step looking at what is accessible, not what is responsive. But accessibility is not a surrogate for responsiveness; the mere existence of accessible information does not make it responsive. Placing accessibility in the fore puts it out of place; burden should be addressed as a whole, not piecemeal. This shift to accessibility will result in increased costs in responding to discovery because a party will have to process large volumes of accessible data without any reason for believing it responsive. And there is no uniform correlation between accessibility of data and the burden associated with collecting and producing the data.

Guidance Software (04-CV-198): Allowing the producing party to identify the information as not reasonably accessible on subjective grounds is not justified. For example, should deleted but potentially relevant data that resides on the unallocated space of a hard drive be considered inaccessible? There are available tools that can easily access this information. It would be better to provide:

A party need not provide discovery of electronically stored information that is not reasonably accessible using commercially available tools.

For example, if in Zubulake the tools to access backup tapes were commercially available, could defendant continue to say that these were not accessible to it? To the extent one raises the cost of these tools, the answer is in the current provisions of 26(b)(2).

C. Richard Reese (04-CV-200): Many enterprises keep disaster recovery tapes for extended periods of time. Some use them as a relatively inexpensive way to archive information. This is likely to be cheaper in the long run than converting the information into another form for archival storage. It is costly to retrieve the information from these tapes, but that is not a frequent need. This is, in other words, a business decision. Should that put the information off limits for discovery? To deal with this possibility, the Note could say that information will be considered to be stored for disaster-recovery purposes only for a short time, but after that it won't be considered to be not reasonably accessible.

David Johnson (04-CV-201): The creation of the category of information that is not reasonably accessible results in nothing less dramatic than a shift in polarity. And it allows the responding party to make the initial decision using a factor that has nothing to do with the importance of the information to the case. But information should be discoverable or not based

on its content, not its manner of storage. Parties seeking to avoid discovery will structure their documents retention policies to sweep information into remote storage media, perhaps labeled "Disaster Recover" or "Legacy Data." The requesting party will have no information with which to make the showing needed to get this information. This will make discovery more contentious and costly.

Peter Keisler (Dep't of Justice) (04-CV-203): Considerations of public policy and the importance of governmental enforcement efforts should be incorporated into the Note's analysis of good cause. Rule 26(b)(2)(iii) already permits the court to take these matters into account. One of the matters to be considered in making the determination is whether the information is sought in an action seeking to enforce a federal statute. The following should be added to the Note:

As provided in Rule 26(b)(2)(iii), a court's analysis of good cause will appropriately consider "the importance of the issues at stake in the litigation." For example, there is a strong public interest in securing documents needed for civil law enforcement proceedings, and a court should give that interest substantial weight.

In addition, a sentence should be added to the Note at either p. 54 or p. 56 that says: "In some cases the court may wish to defer resolution of whether certain inaccessible information must be produced until factual issues from the rest of the case have been developed." We hope that the parties will resolve these issues through discussion, so the Note should emphasize that the rule is not intended to disrupt the parties' informal efforts to address and resolve electronic discovery issues.

Partrick Keegan (04-CV-205): Authorizing the responding party to determine accessibility creates a "hide" incentive. The current rules provide sufficient protection for such a party. But these amendments would delegate to the party the responsibility to determine what is discoverable. Now companies have a business incentive to make their storage and access capabilities more effective. This amendment will produce a reverse incentive for litigation purposes. In particular, it would deter companies from adopting new technology that would facilitate access to records. Moreover, the entire rationale -- that some electronically stored information can't be accessed without great difficulty -- is becoming outdated. By introducing the question whether data are reasonably accessible, this change will promote motions practice.

Peter Kraus (04-CV-207): This change may lead to discovery abuse. Plaintiffs will frequently be forced to call the defendants' bluff by filing motions to compel. The presumption should remain as it is -- that all items requested must be produced unless the responding party affirmatively demonstrates that the material is not reasonably accessible.

Kristin Nimsgger and Michele Lange (Kroll Ontrack) (04-CV-209): We are concerned that this rule may be susceptible to self-serving evaluations of data accessibility. Backup data may be relatively easy to access, but the responding party will have an incentive to assert that it is not reasonably accessible. This problem is exacerbated by the elasticity of the definition of what is reasonably accessible.

William Lazarus (04-CV-210): Computer systems make retrieval of highly relevant data a snap, at least for the party who controls the system. But to an outsider the system is an unknown. The party seeking access is usually at a big disadvantage. This change would make that worse. For example, we tried for a long time to get access to a Ford Motor Co. database, but were told that it could only be accessed through a supercomputer. Then we found a former Ford warranty database analyst, who revealed that the data was regularly supplied to analysts in

database format that could be readily downloaded into an Excel spreadsheet. Ford also claimed that there was confidential information on the database, but our analyst said that he had never seen any. This change would place the burden on the requesting party to penetrate this sort of maze, and that's not the right way to handle the problem.

Eric Somers (Lexington Law Group) (04-CV-211): This would create an additional and cumbersome step in the discovery process even though accessibility issues can be more efficiently addressed during the initial discovery conference. That is the way to go, and the 26(f) amendment provides the vehicle for doing that. This is not a good way to go.

Prof. Arthur Miller (04-CV-219): This rule carries forward into today's electronic world the concepts of proportionality, balance, and common sense embedded in what is now 26(b)(2) in 1983 when I was Reporter to the Committee. At the time, I viewed the amendment as a philosophical adjustment of the uncabined liberality formerly accorded opportunities for discovery. This trend continued in 1993, with amendments to permit the court to place limits on the number of depositions, etc. The same sensible approach lies behind the 2000 introduction of a two-tier approach to the scope of discovery under rule 26(b)(1). Against this background, the Committee is on appropriate ground in offering amendments to address the unique problems of today's e-discovery and honoring the trend toward focused discovery.

City of New York Law Department (04-CV-220): The Law Department supports this amendment, and urges that the Note recognize the continuing applicability of the current limitations in Rule 26(b)(2).

New York City Transit (04-CV-221): The rules should presume that inaccessible electronically stored information should not be discoverable absent (i) substantial need, and (ii) a likelihood that admissible, relevant and unique evidence will be found.

Chavez & Gertler (04-CV-222): This would be a sea change from the current state of the law. We think that, if such a change is adopted, there should be three changes. (1) The Committee should further define "reasonably accessible" as "unduly burdensome and costly." Second, the rule should clarify that the party making the claim that the information is not reasonably accessible must submit declarations under penalty of perjury establishing this fact, and provide sufficient detail for the Court to assess whether the designation is appropriate. Third, the rule should permit a court to consider whether the party seeking discovery may have an opportunity to depose the declarants to test their assertions.

Michael Patrick (04-CV-223): The rule should not single out electronically stored information. The rules provide sufficient tools to deal with burden already. And it should not require a requesting party to file a motion to test the assertion that information is not reasonably accessible. The requesting party lacks sufficient information to make an argument about the accessibility of this information. A better method would be to make the producing party provide detailed information to support its claim that the information is not reasonable accessible.

J.W. Phebus (04-CV-224): This will impose unfair burdens on plaintiffs unless defendants are required to specify where the information not produced is located. That problem is worsened by the fact that "reasonably accessible" is a very elastic term.

Ashish Prasad (04-CV-225): This change provides a much-needed general framework for dealing with discoverability of electronically stored information. But the rule should be revised to clarify that the burden of establishing good cause falls on the requesting party once the responding party shows that the information is not reasonably accessible. The presumptive

limitation should apply unless the requesting party satisfies that burden. In addition, the citation to the current factors in 26(b)(2) suggests that they apply only to whether good cause has been established. It should be made clear that they apply also to whether discovery of accessible electronically stored information is appropriate.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): Ambiguity in the term "reasonably accessible" will lead to discovery disputes; in each case, discovery regarding electronically stored information will include motion practice about this issue. During these disputes, the party seeking access will be severely disadvantaged due to its ignorance of the other side's information systems. Indeed, that party will require access to the other side's systems to test claims about inaccessible information. For this reason, we like the addition to Rule 34(a) to permit testing and sampling. But we think that there is no reason to reverse the presumption that all information should be provided. In a recent case we had, the other side claimed that all electronically stored information was inaccessible because the company was defunct, all "active" data had been lost, and only backup tapes remained. We obtained the indices generated automatically by the backup tapes, and from that were able cheaply and easily to identify file directories, file names, and dates that would yield probating evidence. The caselaw is already sufficient to deal with these issues.

Richard Renner (04-CV-237): I represent whistleblowers in environmental litigation. Every case is a fight over discovery. This rule would be devastating to environmental whistleblowers. It would allow companies to withhold information that they claim is not reasonably accessible. Companies will establish systems that will make it look like one has to jump through hoops to get any information at all.

Texas Employment Lawyers Ass'n (04-CV-238): This would be a sea change in the fundamental policy of liberal disclosure. Virtually every production requests will now be met with the additional objection that the information is not accessible, precipitating a court battle that will prove costly.

Trial Lawyers for Public Justice (04-CV-239): We oppose this change. It would essentially create a presumption that electronically stored information that can be characterized as not reasonably accessible need not be produced absent unusual circumstances. This is an enormous change from the current law, which allows discovery unless the responding party establishes that it would be an undue burden. Companies will have a huge incentive to put as much information as possible into media they can plausibly designate as not reasonably accessible.

Prof. Ettie Ward (04-CV-240): This unnecessarily complicates the discovery process and will inevitably lead to applications to judges to determine whether material is accessible. The concerns identified in the Note have already been addressed by the limitations in 26(b)(2). Routine access to such information is not a sensible criterion for this new rule; it should look to burden and expense of accessing the information.

Heller, White, Ehrman & McAuliffe (04-CV-246): Plaintiffs will routinely file a pro forma motion requesting production of any information the other side designates as not reasonably accessible. The standards for the new rule seem to be the same as existing law on such issues. What does the new rule add? Even data sampling often involves considerable costs, but it may be a boon for defendants because it could allow them to show that there is no significant relevant information in this source.

Rule 26(b)(2) -- identification requirement

San Francisco

Greg McCurdy, Esq. (Microsoft): Microsoft is concerned that the identification requirement would call for review of the inaccessible material and therefore be very burdensome. If the identification requirement were satisfied by a general description of the types of information not searched, it would not be a concern. That should be made clear in the Note. It should be clear that this does not call for creation of a document like a privilege log.

Frank Hunger: To require a more specific initial showing would impose an undue burden on a responding party in providing a catalogue. However, only the responding party has the ability to make this initial designation since it is the entity that created the records and knows them best. While some may suggest that the rule be worded in a way to relieve the responding party of the initial obligation of identifying what is not accessible, this would appear to leave the requesting party in the position of not knowing what to ask for in its motion to compel since there has been no identification of what is being claimed as not reasonably accessible.

David Dukes (testimony and 04-CV-034): I encourage the Committee to eliminate the obligation to identify all information that is inaccessible so that the rule maintains the more traditional method of the requesting party submitting specific discovery requests and the responding party either responding or stating an appropriate objection. If the discovery request seeks information that is not reasonably accessible, then the responding party could state an objection to production of that information and the court could rule on that objection. If the identification provision is considered essential, the Note should be clarified to say that it is satisfied by the identification of a generalized description of broad categories of information such as "disaster recovery back-up tapes," as opposed to the creation of a specific log like a privilege log. Comments during the hearing from Committee members are encouraging, and it would be good to capture those comments in the Note.

Dallas

Charles Beach (Exxon Corp.): It should not be too difficult to designate the inaccessible materials in compliance with the identification requirement of the proposed rule, although there might be some tweaking regarding legacy data. By the time one reaches this point, the other side should be on notice of the basic parameters of the problems due to the Rule 26(f) conference.

Anne Kershaw: Companies do not have records of where all their inaccessible information is located. That's sort of asking about "all the stuff I don't know about." The concern is that if your identification overlooks something and that comes out later the court will sanction you. She thinks that the Note should say that if you don't know about certain data you don't have to list it.

Darren Sumerville (testimony and 04-CV-089): The response one gets about "inaccessible" information is almost always boilerplate.

David Fish (testimony and 04-CV-021): If this rule is adopted, law firms will amend their standard objections so that they always object on this basis. That is what happens already - most law firms object to the vast majority of discovery requests.

Stephen Morrison: I think I understand what this requires, and can live with it. It is important to be careful in the Note to explain that this is not a privilege log.

Washington

Danley Stewart: The identification requirement should be just as demanding as a privilege log under Rule 26(b)(5). At least the Note should make it clear that there must be very specific information about what's being withheld.

Jonathan Redgrave (04-CV-048): The identification requirement should be removed. In many cases, there is no need to discuss, much less restore or discovery, this sort of data. And every organization will have such data. Requiring that a party go into details on this ubiquitous problem is wasteful. The current status quo is adequate to address this issue.

Dennis Kiker (testimony and 04-CV-077): I concur with the comments from Microsoft Corp. that the identification requirement may well prove to be as burdensome as actually accessing the information that is not reasonably accessible. Otherwise this will just result in a form objection expansively identifying all inaccessible data. Rather than requiring the parties to identify the sources of information that were not searched, the rule should affirmatively require the parties, on request, to identify the sources of information that were searched, perhaps as follows:

A party need not provide discovery of electronically stored information that is not reasonably accessible, but shall, upon the demand of the requesting party, identify the sources of electronic information provided. Upon motion by the requesting party, the responding party must show that the sources of information not accessed are, in fact, not reasonably accessible. Even if that showing is made, the court may order discovery of information contained in those sources for good cause and may specify terms and conditions for such discovery.

Pamela Coukos (testimony and 04-CV 020): The identification requirement is critical to keeping the process honest. To ensure that this provision is not abused, a responding party should have to identify anywhere responsive information may be, and a reason why certain sources of that information were not searched.

Michael Nelson (testimony and 04-CV-005): Requiring parties to prepare a log would result in virtually the same burden and expense as production of the documents themselves. One solution to that would be to remove the identification requirement altogether.

Dabney Carr (testimony and 04-CV-003): This requirement is unnecessary and should be removed. It is nearly impossible to identify the universe of data that may exist but which a party is not producing. In order to avoid an inadvertent failure to identify all the information, parties will quickly develop a default response that will include a laundry list of potential data. This will be of little use. If the requirement is retained, the Note should say that it is satisfied with a generalized description.

Alfred Cortese (testimony and 04-CV-054): The proposed amendment should not create a new obligation to identify information that is not reasonably accessible. The rule could be changed as follows:

Electronically stored information that is not reasonably accessible need not be produced except on a showing of good cause.

The addition of a requirement that the information be identified is unnecessary, unhelpful, and in some cases could be very burdensome, depending on the specificity required. The interest in early identification of potentially discoverable information could be accomplished by a Note that suggests early identification of generalized categories of electronically stored information.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should not force parties to identify information that is not reasonably accessible. This is too burdensome and costly. There is too much such information.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): It should be made clear that there is no need in every case for a producing party to identify inaccessible information, create a specific list of all places a party did not look, or specifically identify inaccessible data not produced. This should not require a privilege log.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We are concerned about the lack of clarity of the definition of this duty. If it is only necessary that a party identify those repositories of inaccessible data located after reasonable investigation, then the obligation is manageable. But if it requires a comprehensive inventory of all repositories of inaccessible data which might possibly contain discoverable information, then the rule significantly expands discovery obligations. We would hope that it could be made clear in the rule that it is only necessary to identify general categories of inaccessible data.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The current wording may be interpreted to create a new and potentially a very burdensome obligation on the responding party. As presently drafted, it would produce either a boilerplate generic listing of categories of types of information, but this overbroad listing is not likely to be useful. But to be more specific, the responding party would likely have to undertake a very substantial investigation. There are likely to be few records of what was deleted, for example; it might be necessary to search such things as backup tapes just to provide the needed identification. We recommend deleting the identification requirement from the rule. Alternatively, the rule could require that the identification be in the negative -- by affirmatively describing the sources that were searched and saying nothing else was.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The rule is not clear on what identification is required. Is it sufficient for the party to say "backup tape data" or "data that may reside on hard drives," or does the rule contemplate a more detailed description? Information that is not reasonably accessible may be difficult to identify with specificity precisely because it is inaccessible. The Note should provide further guidance.

ABA Section of Litigation (04-CV-062): Further attention might be given to the term "identify." The issue is what a party must do to identify information that is not reasonably accessible. Our view is that a party should be able to object to the production that is not accessible and specify what is being produced. The requesting party would then determine whether to move to compel production. The word "identify" should not require a party to specify every type of disaster recovery system, legacy data, or deleted information that it believes is not reasonably accessible. To eliminate confusion, the Rule should be revised to remove the word "identify," without changing its substance, to provide that "a party need not provide discovery of electronically stored information that is not reasonably accessible."

Richard Broussard (04-CV-100): If a party withholds data on the basis that it is not reasonably accessible, that party should be required to state specifically the basis on which that claim is made in the initial discovery response and state exactly how and where the data is stored. All that anyone who is not familiar with federal court discovery needs to do is review a few corporate discovery responses to see that the rules are being abused on a routine, continuing basis.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The identification obligation should not become unreasonable. To have to specifically identify all electronically stored information that is not reasonably accessible would impose the very type of burden that this approach is designed to avoid. It should be sufficient to generally identify types of inaccessible information such as disaster recovery systems and legacy data. Addressing this issue in the Note rather than the rule should be sufficient.

Gary Epperley (American Airlines) (04-CV-177): Requiring a party to identify its inaccessible records at the outset of litigation would be unduly burdensome. Moreover, the identification requirement seems unnecessary. If an opponent's discovery requests are reasonably specific, then it should be sufficient for the responding party to object to requests to specific types of records on this ground. The requesting party could then request that they be produced via a motion to compel. There is no need for the identification requirement in this sequence.

American Petroleum Institute (04-CV-178): API urges that the Note confirm that "identification" does not create a new obligation to identify specific information or documents. The Note implies that the party only has to identify general categories or types of information and the nature or difficulty that retrieval would entail. But if the requirement were interpreted to require the specificity needed for a privilege log, that would defeat the value of the rule proposal. The Note should clarify that only general categories have to be identified.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): This is the only part of the proposed rule that we find satisfactory. But neither the rule nor the Note explains how this description of the information is to be provided. It seems that this is like the privilege log called for by 26(b)(5).

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The proposed amendment should not create a new, burdensome obligation to identify information that is not reasonably accessible. The Note should clarify that the obligation is limited to a generalized description of broad categories of information (e.g., "disaster recovery tapes"). It should not require a specific log.

William Herr (Dow) (04-CV-195): By requiring the responding party to identify the electronically stored information it deems not reasonably accessible, the proposed amendment will force the responding party to disclose its information infrastructure, thereby providing a potential roadmap to adverse litigants. The design and structure of information systems is information that a company normally regards as highly confidential. This turns precedent on its head by requiring the responding party to disclose what it is not producing, instead of having the requesting party challenge the adequacy of the response, as is the case for non-electronic discovery.

Edward Wolfe (General Motors) (04-CV-197): This is so expansive and potentially cumbersome that it carries a substantial risk of confusion and may spawn unnecessary disputes. We support the suggestion of the ABA Section of Litigation that the party seeking electronically stored information should spell out what is sought in a specific request and leave to the

producing party the obligation to respond by way of objection so as to facilitate an orderly discussion on whether or not court intervention is needed. We therefore suggest deletion of the identification requirement.

Peter Keisler (Dep't of Justice) (04-CV-203): The Department supports the identification requirement. Requiring such identification will be important for implementation of the rule. But the Note should clarify that a general description of the types of data or databases that are not being reviewed may be sufficient.

Wachovia Corp. (04-CV-214): This requirement creates a trap for producing parties which may allow requesting parties to demand inaccessible data. Unless the party can "identify" the data, it seems it must produce it. This is a Catch 22.

New York City Transit (04-CV-221): A requirement to identify all electronic information and locate it may not even be possible, absent expensive and time-consuming searches. Searches of electronic records not readily available should be a last resort.

Securities Industry Assoc. (04-CV-231): This is an unwarranted burden for the responding party. It cannot know what all the sources of information are since they are not reasonably accessible. This problem would be particularly difficult for broker-dealers, which are subject to an SEC record-storage rule. The format that they are required to use is very inefficient in terms of speed. We think that the better rule would be: "Electronically stored information that is not reasonably accessible need not be produced except on a showing of good cause."

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): If a party refuses to produce on this ground, it should be required to provide detailed reasons why the information is not reasonably accessible.

Prof. Ettie Ward (04-CV-240): The Note should be clearer about what is required to identify inaccessible information. If it is to be like a privilege log, there should be an indication of what should be in the log.

Rule 26(b)(2) -- "reasonably accessible"

San Francisco

Greg McCurdy, Esq. (Microsoft): Search techniques may improve, but the reliance on what is "reasonably accessible" is not as good as a bright-line rule looking to what a party ordinarily accesses.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): There is great merit in making clear that parties should produce "reasonably accessible" data without the typical but expensive motion practice that is currently necessary to obtain such data. For example, most companies keep detailed sales data. But if a fired plaintiff wants to show that her sales were (contrary to the given reason for firing her) equal to those of male sales representatives, defendant will often refuse to produce any data until ordered to do so. The problem with the proposed rule change is that it also permits a party to self-designate relevant electronically stored information as "not reasonably accessible," which requires the party seeking discovery to bring a motion. This is a very disturbing proposition, particularly combined with the lack of a definition of "not reasonably accessible." If the real problem here is cost and expense, the current provisions of Rule 26(b)(2)(iii) are adequate to deal with the problem. Moreover, "accessible" versus "inaccessible" categories are likely to change quite rapidly, and the proposed rule will be focusing on a moving target. CELA urges that the "not reasonably accessible" language be deleted from the proposed amendment.

Michael Brown: The two-tiered proposal is absolutely essential. It would be better to get closer to Sedona Principle 8 -- that only "active data" is initially subject to discovery. It would also be desirable to exclude backup tapes explicitly.

Joan Feldman (testimony and 04-CV-037): The proposed rule could be abused by a party that deliberately changes originally active data to tape or other media deemed "not reasonably accessible." The party should not later be allowed to claim burden for producing or retrieving that data if it was originally available in active format at the time it was identified for discovery. Accessibility often hinges on the choice of a system and operator(s) needed to access the data. Discussion of offline data is outdated already. There is a movement toward moving data to backup storage, and soon that will be relatively easy to search. Therefore, do not say that backup tapes are to be presumed inaccessible. Stick with a functional description.

Thomas Allman (testimony and 04-CV-007): The amendment is a good idea. But it would be better as follows:

A party shall provide discovery of any reasonably accessible electronically stored information sought by a requesting party without a court order. On motion by a requesting party for other electronically stored information, the court may order such discovery for good cause and may specify terms and conditions, including appropriate shifting or sharing of extraordinary costs relating to such production.

This approach would reduce uncertainty about the need to preserve inaccessible information. There is no greater source of angst to producing parties with large volumes of litigation and multiple electronic information systems than issues relating to preservation of inaccessible information. Parties must be free to make their best judgments in good faith without unnecessary risk of second guessing. The approach replaces the affirmative "identification" provision in the published proposal with the traditional approach for handling discovery requests. Requiring parties to affirmatively "identify" such information in each instance,

regardless of the specificity of the request for discovery, creates a trap for the unwary even if restricted to a generalized description. The risk is that a detailed log of omitted information, like a privilege log, would be sought. Parties don't have to provide a listing of what they didn't search when they make production of hard-copy materials under Rule 34. Perhaps the approach might be for the party to describe what it did, not what it didn't do. This could lead to discovery on the subject of what search was made. A standardized response might develop, but that's not necessarily troubling. Finally, the description of "reasonably accessible" could be improved to adding reference to the purpose for storage and ease of access of the information.

Jeffrey Judd: The concept of "reasonably accessible" information is somewhat useful, but the Note raises almost as many questions as it answers. From the Note, one could reasonably conclude that all "active" data is discoverable, even though it may be extremely costly to perform the privilege and responsiveness reviews necessary to determine what information must be produced in response to specific requests. At some point, what is often millions of pages of potentially privileged documents must be reviewed by attorneys to determine whether a material is subject to production. In some instances, it is necessary to note somehow that the material is subject to a protective order. This is costly, and involves creating a .tiff or .jpg image of the document to be "branded." There is, despite the effort involved, no guarantee that such "active" information will be at all relevant to the case. A substantial body of caselaw has in recent years developed fairly sophisticated means of assessing the balance between benefit and burden when E-discovery is involved, and determining how to appropriately allocate the discovery costs among the parties. The proposed amendment should focus on the question of the relative benefit and burden associated with producing electronically stored information, rather than on accessibility.

Gerson Smoger (testimony and 04-CV-046): The addition of the concept of "reasonable accessibility" will not be helpful. There will be 20 definitions of what is accessible, and the concept will become rigidified. It is better to rely on burden, as provided in the current rules. If a number of judges find that some circumstances render information "inaccessible," others will tend to fall in line. Such rigid guidelines will not improve discovery practice, and in effect will shift from the current presumption that relevant material is discoverable to a new paradigm in which much relevant information will be discoverable only if the party seeking it has made a showing of good cause. The current rules fully address these problems on a case-by-case basis. If the amendment is adopted, it may seem to lawyers that they must continually test the waters by contending that their clients' electronically stored information is not accessible.

Jocelyn Larkin (The Impact Fund): Defense claims of burden regarding electronically stored information are pretty similar to those made in the pre-electronic age. In the old days, judges -- who were familiar and quite comfortable with paper documents -- would cut through both sides' hyperbole and apply a dose of common sense to reach a working compromise. Judges may not appreciate that electronically stored information is often far less difficult to manage than hard copies. This rule does not define "not reasonably accessible." Is this to be the rare exception, or to be routinely invoked to limit electronic discovery? The only guidance I see in the Note is the use of disaster recovery and legacy information as examples. The disaster recovery example looks pretty sensible from the perspective of the present, but in five to seven years it may not be in light of existing search capacities. But it will still be in the Note; if that is still taken as the measure of what's not "reasonably accessible" then, a great deal will be taken away from plaintiffs. Ironically, technological change could actually constrict the availability of discovery as a matter of right if the Note seems to say that anything as hard to get as something technology has made easy to get is not reasonably accessible. Frankly, defense counsel are likely to designate most systems not reasonably accessible. The benefit of removing such a swath of information from discovery is a result that would be simply too valuable not to try.

Then plaintiff will have to hire an expensive expert to contest this claim and/or try to put together a good cause showing. Either way, it produces an expensive and time-consuming discovery dispute. Under the current rules, there is a strong incentive to resolve discovery disputes informally. But this change will alter that. Defendant will have every incentive to invoke this loophole without any significant downside. The existing rules adequately and properly guard the responding party against undue expense.

David Dukes (testimony and 04-CV-034): I encourage the Committee to clarify the meaning of "reasonably accessible." One way would be to use language like Sedona Principle 8, which states that the "primary source of electronic data and documents for production should be active data and information purposefully stored in a manner that anticipates future business use and permits efficient searching and retrieval," and that "[r]esort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the costs, burden and disruption of retrieving and processing the data from such sources."

Jean Lawler (Pres. of Fed. of Defense & Corp. Counsel): "Reasonably accessible" should be limited to that which is ordinarily used. I would always make the burden objection to avoid waiving any objection.

Kenneth Conour: I would change the standard to "reasonably available." An example is a request for a database itself. That could be said to be reasonably accessible. The client may often access it. But for purposes of production it can't be provided. Indeed, it is hard to envision as a "document" in any meaningful sense. So it can't be provided in response to a Rule 34 request. The "available" concept is designed to capture that difficulty and excuse the impossible. An example from his practice is the "adverse event" database for pharmaceutical companies. It is hard to generate specialized queries for that.

Charles Ragan: The Note's reference to the situation in which the party "has actually accessed the requested information" is undesirable and seems to conflict with the focus on whether a party "routinely accesses the information" that also appears in the Note. The "actually accessed" articulation seems to impose a requirement to produce from backup tapes if they were ever accessed. But if there had been a system failure requiring access for purposes of system restoration, that would gut the protections of the new rule. That should not occur. The solution would be, on p. 13, to change the Note to say "responding party has routinely accessed the requested information . . ." In addition, it is important to make explicit what seems to be an assumption -- the discovery of inaccessible information will be limited to that which is relevant under rule 26(b)(1). That should be affirmatively stated in the rule and the Note. The way to do that in the rule would be as follows:

A party need not provide discovery of relevant 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 such relevant ~~the~~ information for good cause and may specify terms and conditions for such discovery.

Dallas

Peter Sloan: "Reasonably accessible" is a satisfactory definition. He has heard criticisms of it, but believes that it should work. It is intuitive that active data is accessible and that compressed backup data is not. A reality is that such inaccessible material is sometimes accessed for business purposes. For example, if the CEO says "I lost that e-mail yesterday and I

must have it," the place the IT folks may look is the backup tape. But that should not be a reason to conclude that the backup tapes are reasonably accessible. It is hard to forecast whether technological change will make disaster recovery materials more easily accessed in the future.

Anne Kershaw (testimony and Feb. survey results, 04-CV-036): She asked corporations how "reasonably accessible" should be interpreted and got varying responses. This is not just a technical issue, and depends on the internal culture of the company to some extent. Survey results: There was general agreement that active, unfiltered email is accessible, but beyond that consensus it was clear that opinions varied. Some believed that websites were inaccessible for these purposes, but most said "it depends" when discussing data created with retired programs. Some said that email and backup tapes are accessible, but others disagreed. One respondent told Kershaw that she gave her IT department a list of various kinds of data, and that no one could agree. This leads Kershaw to conclude that the distinction between accessible and inaccessible sources should not be solely based on mere technical concepts or definitions of inaccessibility. "Given that a group of individuals who routinely handle electronic discovery could not agree on what is 'inaccessible,' a broader and more functional definition is warranted." Companies can identify what they use on a daily or regular basis. But they do not maintain lists of backup or unused systems.

David Fish (testimony and 04-CV-021): My experience has been that presently we may get very little that the other side concedes is "accessible." In one case, we did 30(b)(6) depositions and identified specific backup tapes that could be searched. The IT person produced for the deposition said that they could be reviewed by a method like a Google search.

Daniel Regard (testimony and 04-CV-044): There are techniques to search some backup tapes without restoring them. We're making progress in searching them. But technology is not solving the problems as fast as technology is creating problems. It is not true that all backup tapes are searchable. The term "reasonably accessible" may soon be (or already is) outdated. Data stored off-line may be a disappearing concept in practice. Corporations are actively considering or implementing "hot sites" that rely on duplicate live systems rather than backup systems for recovery. Backup tapes are being used in those organizations only for short-term (one week or less) storage. Another example is a Google e-mail system that encourages users not to throw anything away. It could be that, under such a scenario, everything is "accessible." To the extent a rule provision is needed, Rule 26(b)(2)(iii) does the job on burden, which is all that matters. So I think that this provision is not needed and could be counter-productive. At least the Note should be expanded beyond references to backup data to include active data that is not reasonably accessible. Databases produce thousands of tables, and there may be no way to access all these tables. See Sedona Factor 8 on this general subject.

James Michalowicz (testimony and 04-CV-072): The terminology used (accessible and non-accessible) does not necessarily correlate to how the information is maintained and managed in the records and information context. Once the responding party has demonstrated that a reasonable process for the identification, preservation, collection, and production of evidentiary materials in response to the defined request exists, then no further requirement should be imposed on the responding party to justify why certain storage areas were not searched or produced. There is a problem with terminology sometimes used in this area. For example, the term "archival data" may refer to data stored in a way that the company can access and use it, which would mean that it is accessible, or to information that is not really accessible. Therefore, care should be used in employing the term "archival data" in relation to this issue.

Ian Wilson (testimony and 04-CV-104): The current technology and procedures for accessing data were implemented in large measure without regard to the demands of litigation.

The Note suggests that improved technology may render what is now inaccessible accessible tomorrow. The opposite may very well occur. It is difficult to see a market for a method of accessing data that a party does not want to access, particularly if it would make that data available to the party's adversary in litigation. The reverse product might be marketable, however. Thus, if one could develop a method of making what is now accessible inaccessible, one might find a ready market for that product. If this rule produces a bright-line rule on what is accessible, that might create a market for such a product. It is important to avoid placing too much reliance on the storage media used (such as backup tapes). That should not govern the question of accessibility. Data should not be considered inaccessible if the burden of accessing it results, in part, for that party's decision to forgo implementation of technology that would aid in making the data accessible. The rules should encourage parties to utilize available technology to aid in the accessibility of data. A party's implementation of systems that result in the systematic removal of historical data should weigh in favor of finding that there is good cause for access of what might be thought to be "inaccessible" data. The more a party is shown to have relied upon an inaccessible storage technology, the more the court should be inclined to find that good cause has been shown.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We generally support the distinction between accessible and inaccessible information, but it has to be flexible in the rule and Note that this takes into account all the factors. And there needs to be more clarity on what sort of description the producing party has to give on what's not included. It should not focus solely on the nature of the medium in which the information is stored. It should not be that any accessing of the information makes it "accessible" for all purposes. Consider, for example, an effort to access to show the court the extreme burden that entails. That should not make the information accessible. The problem is basically one of cost and burden. What this adds to the current rule is some certainty. In practice, people are not producing this information initially anyhow. People do preserve it, however. The preservation obligation is broader than the production obligation.

Sanford Svetcov & Henry Rosen: The Note suggests that what's accessible is active data. In our cases, that's not what we need. We need the older data about what was happening when the transactions at issue were going on. In accounting fraud cases, the litigation is by nature backward looking. Moreover, there simply is not the difficulty claimed in accessing the information. Backup tapes, for example, are not hard or expensive to restore. There's a wide disparity of bids for doing this work, but if the other side can select the one it wants and charge us, it'll choose the most expensive. We find that we need this sort of inactive data in every case that's got, say, a four year class period. It varies with the subject area; we need the old data in all our accounting fraud cases.

Jonathan Redgrave (04-CV-048): The Note should not make a blanket statement that any access to inaccessible data means, per se, that it is not inaccessible. The access might have been in response to a disaster, which is the purpose of a disaster-recovery system and does not make it any more accessible for discovery purposes. The objections that this test will lead to abuses are overstated. These very distinctions are being made now. Even if technology makes it easier to access some of this data, there will still be reservoirs of inaccessible data. It should be made clear at the same time that organizations in litigation cannot willfully take steps to make relevant accessible data inaccessible in order to frustrate discovery. Although there is no perfect language for the issues presented, what the Committee has proposed will work.

Jeffrey Greenbaum (ABA Section of Litigation): The basic issue is cost and burden, but national guidelines on the accessible/inaccessible division would be very helpful because now there are judges making very different rulings.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3 response rate): Our results showed a lot of confusion about the concept of reasonable accessibility. Almost 60% of the respondents thought that information on backup tapes was reasonably accessible. Maybe this contradicts an urban myth. On legacy systems, only 7% thought it was accessible.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): It would be helpful to define "reasonably accessible" in the Note, perhaps by giving additional examples of what is included. We recognize that the costs of retrieving some of this information may go down, and it would be sensible to take account of that. We have had to restore information from inaccessible sources on very rare occasions.

Pamela Coukos (testimony and 04-CV-020): The term is susceptible on its face to a variety of interpretations. I am concerned that opposing counsel will take that opportunity to define "accessible" very narrowly, particularly with the modifier "reasonably" attached. This will cause particular problems in connection with the personnel databases that are often critical to my employment discrimination cases.

Michael Nelson (testimony and 04-CV-005): I think that the Note should have a clear statement of what is accessible, and that it should be what the Sedona Conference proposed -- "The primary source of electronic data and documents for production should be active data and information purposefully stored in a manner that anticipates future business use."

George Socha (testimony and 04-CV-094): I have a set of five factors to consider in deciding what's reasonably accessible. I would not put these in the rule, but put this into the Note to explain what "reasonably accessible" means. These are: type, form, location, ability, and effort. For type, the question is whether the information is of a type that the producing party routinely and knowingly made and knowingly uses, or that a reasonable organization or entity would routinely use. Metadata would not meet this definition because most computer users don't think about or intend to create this information. The form issue looks to whether the information is routinely and knowingly used by the responding party. A relational database is an example of something that is not in such a form. Most people who use it don't know how it works. Location looks to whether the location is knowingly and routinely used by the party. Online servers most likely would be an example of locations where people routinely go for information. Ability looks to whether the producing party has the hardware, software, and expertise to gain access to this information. Finally, effort calls for consideration of an assessment of how hard it would be to access the information. Effort is like cost and burden. I would expect these five factors to be used together, not independently, in evaluating accessibility. Backup tapes, for example, would not all be treated the same for this determination. Frankly, they vary tremendously, and the people who make them are trying to make them faster, more effective, and more usable.

Damon Hacker & Donald Wochna (Vestige, Ltd.) (04-CV-093): But from a computer forensic point of view, volume is not a factor limiting the identification and extraction of responsive information from large amounts of electronically stored information. We can search several terabytes of data on tens or hundreds of computers or devices. Very large amounts of data can be searched in seven to ten days. The Note also mentions location of data as important. Location need not render data inaccessible either. Indeed, distributed data may make it more accessible than the concentration of data found in servers and backup tapes. WE create

an exact clone of each of the relevant computers or devices. This can be done without disrupting the operation of the enterprise. We have used a six-person team to obtain 20 to 40 clones in less than ten hours. The Note mentions technical difficulty. This is anachronistic in characterizing forensic analysis as "expensive and uncertain" and as "extraordinary." This description might have been accurate four or five years ago, but today advances in computer forensic software have made computer forensics a primary tool for discovery because the cost has gone down so much. The Note seems to reflect policy decisions that are hostile to the advance of technology, and to insulate the responding party from producing data, regardless of whether technology makes that relatively easy. Actually, in a large number of cases there is good reason to go after these data. Often, data has been deleted to prevent detection.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The rule should offer as examples of the sort of information that may be inaccessible metadata, embedded data, and dynamic databases. In addition, it should be made clear that some active data may not be reasonably accessible. Much such information is very difficult and costly to preserve unaltered, or to retrieve and get into a format that is usable in litigation. One example is health care claims, which reside in large mainframe claim engines. Broad requests may require extensive diversion of resources to extract this information, which cannot be performed during most of the day because the engine is being used for its intended purpose. Thus, the Note should say that active data is not accessible if "obtaining such active data would be unduly costly or disruptive."

David McDermott (President, ARMA Int'l) (testimony and 04-CV-041): The language for determining whether information is reasonably accessible should be clarified. It is true that if a corporation has a good electronic records management system in place, much more information will be reasonably accessible. The current proposal allows a party to determine what is reasonably accessible. This may have the unintended consequence of promoting poor recordkeeping in order to avoid discovery. With hard-copy materials, courts have rejected arguments that poor record-keeping reduces the burden of a responding party. See *Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73 (D.Mass. 1976) (fact defendant had no index to its old claims files did not relieve it of the obligation to produce what plaintiff requested). With regard to accessibility of deleted data and disaster recovery data, it is important to determine whether the destruction of the data occurred in the context of a formal records retention program. Generalizing legacy information into a category of inaccessible information should be reconsidered. The Note says that accessible data is usually the "active" data. But many federal regulations require the retention of data beyond the "active" use within a corporation, thereby requiring that "inactive" data be accessible if required by the regulatory authority. Such requirements typically direct that the data be usable during its required retention period. Similarly, good records management practices distinguish between backup tapes used for disaster recovery or restoration, and records being retained in an electronic form in order to meet the requirements of a retention schedule. We support the verbiage in the Note to Rule 26(b)(2) saying that information stored solely for disaster-recovery purposes may be expensive to recover. (See ARMA submission, p. 11.) Tapes that are appropriately used for backup purposes may be considered inaccessible. The rule should acknowledge that legacy data can be considered reasonably accessible during its entire retention period. We suggest something like the following:

Legacy data can be considered reasonably accessible during its entire retention period, whether it is in active use or being retained to meet legal and regulatory requirements, and regardless of the format or technology used for storage.

M. James Daley (testimony and 04-CV-053): The better distinction would be "active" v. "inactive." What is accessible is accessible is a function of time and effort. Almost any data,

unless corrupted or completely wiped is accessible with enough effort. The rule language should be changed to "active" data. Inactive data should be presumptively non-discoverable, even if it is occasionally "mounted" or "read." The mere fact of accessing the data should not affect this conclusion. The bottom line is that this is a question of cost and effort. This is a problem of translation between the legal community and the technology community.

Paul Lewis & Carole Longendyke (testimony and 04-CV-082): There is no such thing as "inaccessible" data. It either exists or it does not exist. If it exists, it can be recovered. We feel that the term "inaccessible" should not be in the rules. The test has to depend on cost and complexity. The ease with which a person can render a document "inaccessible" is very troubling. Consider a document in a computer's recycle bin. This is no longer "active," but it is quite accessible since it can be recovered easily. Moreover, the value of "inaccessible" information for the litigation is not related to its being "inaccessible." In the Enron cases, we found most of the important stuff in "inaccessible" sources.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We would regard information stored on multiple computers at many locations as generally accessible. Particularly if the people involved were on our network, we would consider that we could collect their data and store it in a central repository.

Alfred Cortese (testimony and 04-CV- 054): Reasonably accessible is an appropriate phrase in the rule, but it appears to warrant further explanation in the Note. The current Note contrasts "active data" that is routinely accessed or used with information that is costly and time-consuming to restore. The Note might cite practical examples of why it is necessary to deal differently with information that is not reasonably accessible under current practice. Production should initially focus on active electronic information purposely stored in a manner that anticipates future use and permits efficient searching and retrieval. Production of backup tapes and similar sources of information should require the requesting party to demonstrate need and relevance that outweigh the cost, burden and disruption of retrieving, reviewing, and processing such information.

Ariana Tadler (testimony and 04-CV-076): I think that it is premature to try to devise a standard for accessibility. The responding party is the one who knows about the difficulties, and adopting a standard for this will effectively impose burdens on the requesting party. How do I prepare a motion with no information? In essence, I'm being put on a good cause standard just because the other side has claimed that this information is not accessible. Why shouldn't the other side have to file a motion for a protective order? I don't know whether we get instant messaging material, although we do include it in our requests in some cases. We want that if the case involves investment bankers because they use this method of communicating all the time.

Craig Ball (testimony and 04-CV-112): We can translate documents in foreign languages; that's not inaccessible. One should view electronically stored information the same way -- it's just relevant information that is stored in an unfamiliar language. Some of the types of data that people seem to think of as inaccessible (deleted files or backup tapes) may be easier to access than some active data (e.g., relational databases, voicemail, and instant messaging). The "reasonably accessible" test really has not meaning, and the closer you get to the data, the less meaningful it seems. Using new Google products, you can find things on your hard drive even though you've "deleted" them. They are accessible. This is all a question of burden and cost. What the party seeking discovery will have to do is bring in an expert immediately.

Cheri Grosvenor: This is just formalizing what responding parties have already been doing. Our clients look to something like Sedona Principle 8. This is not a problem of

information being dispersed; clients know they have to deal with that. That's where the balancing test already in 26(b)(2) is useful. The preservation obligation is not entirely unrelated to accessibility. This has to be evaluated in a case-by-case manner. Companies realize that there can be a risk in failing to retain inaccessible information.

Michael Ryan (testimony and 04-CV-083): There is a two-tier actuality to my approach, in that I don't want to be inundated with information and imagine often that the "active" data is the most important. But I'm not sure whether there is a good way to describe the difference. I've repeated found, however, that defendants say that they don't access databases that contain information I need. But in depositions, I then find that there is an active, living, breathing universe of information. I heard Sedona Principle 8 this morning, and it sounded like a good definition. There are two tiers of information. That's clearly the case. But by adopting this rule you would create an incentive to say that information is not accessible. That will prompt more motions. And there is some issue of accessibility for many things. Most databases, for instance, require some effort to make them usable by anyone. An offline database would be second tier, by my definition, but I don't think it would be "inaccessible."

Keith Altman (testimony and 04-CV-079): I think the concept in the rule is too subjective. If necessary, I think one can break electronically stored information into two broad categories based on how the information is stored. One category is "sequential access" information, like backup tapes. In reality, it is very rare that information from backup tapes is produced. In all the litigations I've been involved in, information was restored off of backup tapes only once. The second category is "random access" information sources. These kinds of media allow information to be retrieved virtually instantly from any location. I am hard pressed to describe information on random access media as inaccessible. Here, there is a major problem with abuse of the concept. Does it depend on whether the specific person knows how to retrieve the information? Without this rule, parties routinely object to production of information when they deem it burdensome to produce the information. So this is already going on, and judges can evaluate the issues already. But there are wild overestimates of the amount of time it will take to access information. I think that data on random access media should always be deemed accessible.

Rudy Kleysteuber (testimony and 04-CV-049): In the relatively near future, the words "backup tape" will sound as antiquated as "mimeograph" sounds today. Storage and search capacities will probably make quantities of data that we would regard as unthinkable today quite manageable tomorrow. The goal Google has with its new email program is that there is no need to organize data at all; everything will be accessible for ever using smart search techniques. But if the words used serve certain interests, you will enshrine the status quo. This is too easy a term to grab onto and put data off limits.

Michael Heidler (testimony and 04-CV-057): The "reasonably accessible" standard is necessary because, unlike paper documents, electronic data must be restored, and the technologies on which that depends can become obsolete. Restoring older data could cost a small organization a crippling amount of money. As an estimate, the cost of restoring a medium size project would be from \$40,000 to \$90,000. Software obsolescence would add considerably to the cost. But ultimately this is a question of cost.

Joseph Masters (testimony and 04-CV-063): I believe that deleted data is harder to access than others have said. That's because files are often spread across on chunks all across the hard drive. The deletion removes the identification of those chunks from the table, and various chunks can be overwritten. As time goes by, parts are lost, and the task of finding them

is considerable, particularly if the first chunk is overwritten. The first chunk probably points the way to the second one, etc., but if you don't have the first you have a problem.

David Tannenbaum (testimony and 04-CV-047): The rule should take account of responding parties' ex ante decisions and requesting parties' willingness to bear costs. The "reasonably accessible" standard relies too heavily on the parties' assessment and report of the costs. The courts should take account of advances in technology that parties have chosen not to adopt, perhaps to keep the data inaccessible for litigation purposes. One solution would be to require the responding party to make a showing why it did not choose a more accessible system. Perhaps that would be accomplished by requiring that responding parties show that "the information is not reasonably accessible using currently available methods of technology." At the same time, when the costs are unavoidably substantial, the rule should give the requesting party the option to pay some or all of those costs to get the information.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: In the paper world, it was very rare to require retrieval of material from the dumpster or a landfill. But with the Outlook email program things work differently. For a while, the user can retrieve "deleted" email with the help of an IT professional. We believe that an appropriate description for that which is reasonably accessible is "in active use for the day-to-day operation" of a party's business. To the extent that effort and expense are important to deciding whether something is reasonably accessible, it would be desirable for the Note to address the cost of locating, retrieving, restoring, reviewing and producing the information. In addition, backup tapes should be specifically mentioned as a type of data that should generally be considered not reasonably accessible. Other forms of data similarly become increasingly inaccessible with the passage of time. Data may be stored in "fragments" located at various points on the hard drive. Various fragments may be overwritten while others remain; for a substantial price it is possible to restore some of these pieces. Similarly, encrypted data should be deemed inaccessible even though it can sometimes be accessed by sophisticated and expensive means. The Note says that a party may not claim that information is inaccessible if it has accessed the information. Although a party that regularly accesses specific "inaccessible" information for use in litigation should not be able to use this rule to avoid discovery of that information, there are many situations in which this observation would work mischief. For example, the fact that a backup tape has been accessed to restore data on a server that failed should not bear on whether the party who used the backup tape for its intended purpose can rely on the rule to resist initial discovery of that data from that source. "There is a major difference between using a backup tape for disaster recovery proposes to restore an entire server, and looking for a specific document."

Allen Black (04-CV-011): I suggest adding two sentences along the following lines at the end of the first full paragraph of the Committee Note to Rule 26(b)(2):

On the other hand, information may be reasonably accessible even though a party does not use the information on a regular basis, or even at all, in the ordinary course of its business. If the information can be retrieved without extraordinary or heroic effort, it is reasonably accessible.

This is necessary for balance, as the several preceding sentences have focused on what information is not reasonably accessible. I also applaud the perspicacious and savvy comment on page 13: "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." Don't let anyone talk you into taking that out. There is

something wrong, however, with the logic of the second paragraph of the Note to 26(b)(2), because it confuses the volume of information involved with whether certain information is accessible. Those are different topics; volume is dealt with in current Rule 26(b)(2), and accessibility is the focus of the proposed amendment. If the goal is to say that the volume of reasonably accessible information is so staggering that the court should consider cost-bearing in regard to that discovery, this should be said clearly. Finally, I think that the quotation from the Manual on p. 14 about production of word-processing files and all associated metadata being more expensive should be deleted. I doubt that this assertion is accurate. Indeed, production with associated metadata would be less expensive than production without it, for creating the metadata-free item requires additional effort.

Clifford Rieders (04-CV-017): The phraseology of the rule will create a barrier in almost every case and impose a burden of motions practice on the party seeking the data. The "reasonably accessible" nomenclature is extremely vague, and parties upon whom requests are served will routinely indicate that the information sought is not accessible. The self-executing nature of the rules, which was the goal of the 1938 drafters, will be eroded and the parties put at loggerheads.

James Rooks (04-CV-019) (attaching article from Trial Magazine): In the electronic data age, the concept of inaccessibility is absurd. Searches of electronic information can be conducted at lightning speed once the proper media and search program are identified. There are degrees of accessibility, but true inaccessibility occurs only when a business has gone to special lengths to encrypt or hide its data to avoid detection and accountability for bad deeds. Requiring the requesting party to obtain the information through an extra hearing before an already-overburdened federal judge is oppressive and flies in the face of Rule 1.

Dennis Gerl (04-CV-030): The term "not reasonably accessible" makes no sense to me because searches of electronic information can be conducted very quickly. Where a company has gone to lengths to encrypt or hide its data, or where data has been overwritten by ongoing business operations, it is still relatively easy and quick for a computer expert to make a copy of the data. Opposing parties should be allowed to copy this data so that it can be analyzed without affecting a party's ongoing business.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We are concerned that the Note statement that accessibility may look to whether at party "routinely accesses or uses the information" may cause confusion in conjunction with the provision in proposed Rule 37(f) regarding "routine" computer operations. "Routine" is otherwise undefined. For example, backup tapes may be "routinely" accessed in connection with disaster recovery efforts, but that should not mean that they would be "reasonably accessible" for purposes of Rule 26(b)(2). Additionally, the fact that a party accessed backup media in order to demonstrate the difficulty of doing so should not show that they are reasonably accessible. Similarly, the fact that a source of information was accessed once in the past should not mean that it is "reasonably accessible" for all discovery purposes thereafter. Regarding deleted data, it is important for the Note to take account of the very limited circumstances in which courts have authorized access to a party's hard disk for forensic purposes. Courts have been very cautious about such access, and the Note should cite some of this caselaw (at pp. 12-13 of the comment).

ABA Section of Litigation (04-CV-062): Further explanation of what "reasonably accessible" means would be appropriate. It should mean active data and information stored in a manner that anticipates future business use and efficient searching and retrieval. It should not include disaster recovery backup tapes that are not indexed or regularly accessed by the responding party. Nor should it include legacy data or data that have been deleted.

Gregory Joseph (04-CV-066): The standard does not seem to differ in substance from existing 26(b)(2)(iii). Access to backup tapes is a concern for large corporations, particularly those that are routinely subject to product liability suits. These are the parties who have been funding lobbyists at Advisory Committee meetings since at least the mid-90s, when I served on the Evidence Rules Committee. There is nothing wrong with lobbying, but the problems are different for other defendants. Similar problems should be addressed the same, however. In all cases, the issue is really one of undue burden. However the information is stored -- electronically or in hard copy -- a company with 50 or 100 offices will have a large burden in gathering all of it. The "reasonably accessible" standard in the proposal does not address this problem. I think that the "reasonably accessible" standard an express part of Rule 26(b)(2)(iii) and that the two-tiered approach should be expanded to all discovery.

Dwight Davis, Jameson Carroll & Cheri Grosvenor, LLP (04-CV-107): We believe that the determination whether information is reasonably accessible should be made expressly subject to the factors in Rule 26(b)(2)(iii). Otherwise, production of reasonably accessible data without any inclusion of these considerations could still lead to a burdensome, costly production with very limited probative value.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): "Not reasonably accessible" should be defined as unduly burdensome and costly to retrieve or produce. And the party asserting this excuse from responding to discovery should be required to submit a declaration under penalty of perjury so establishing, and providing sufficient detail to permit the court to determine whether the claim is justified. The party seeking discovery should be able to depose the deponent to test the conclusion.

Federal Magistrate Judges Ass'n (04-CV-127): The term "reasonably accessible" is not adequately defined, creating a great potential for confusion. The Note says that the term's meaning may depend on a variety of circumstances, and provides some useful examples of information that "ordinarily" would be deemed inaccessible. But the Note also indicates that if the responding party routinely accesses or uses this information, it would be accessible. At the same time, it says that it may be accessible even though the party does not often access it. In any event, one salient fact trumps these "guidelines" if the information was actually accessed, then it is reasonably accessible.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP suggests revising the sentence in the Note on p. 13 regarding whether a party has actually accessed information (and suggesting that makes it presumptively accessible) be clarified. Presumably this is intended to apply to a situation in which a party accessed the information in response to a discovery request, and it should not be read to mean that any past access requires providing discovery. For example, accessing disaster-recovery data if there is a disaster should not make it presumptively accessible for responding to discovery.

Gary Epperley (American Airlines) (04-CV-177): American recommends that the Note include Sedona Principle 8: "Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources." It feels that the "good cause" standard is not sufficient for overcoming objections to production of such data. Requiring a party to show "substantial need" would be preferable.

American Petroleum Institute (04-CV-178): API believes that the term used in the current proposal is adequate and consistent with other rules that generally rely on an element of reasonableness. It also provides needed flexibility. But it would be helpful to link the term in

the Note with the idea of "active" systems that is stored in anticipation of future use in a manner that permits efficient retrieval. API suggests that the Note more clearly emphasize that metadata normally is not considered reasonably accessible.

Assoc. of the Bar of N.Y. (04-CV-179): The Note places too much emphasis on a party's ability to access the data, and not enough on the cost and burden of doing so. The current Note assumes that the cost of "accessing" "active" data would always be less than the cost of accessing "disaster recovery" copies. Although that may often be true, it is not invariably so. That would depend on the technologies and the volumes of data involved. It can take as little as a few hours to restore e-mail boxes from a Microsoft Exchange backup tape, but it could take days of programming and testing to extract relevant information from a live database server. In addition, active data that is "routinely accessed" may be so voluminous that, as a whole, it cannot be said to be reasonable to collect and search it. Moreover, looking to whether information is "routinely accessed" may be even less useful in the future, given changed technologies. For example, some companies are moving their "disaster recovery" information to large Storage Area Networks, which can be accessed in the same manner as a live server. We believe that the primary determinant of whether electronic information is "reasonably accessible" should be the relative cost of (1) accessing the data in question, and (2) arranging it into a form in which it can meaningfully be reviewed and produced. Cost is the common denominator that will serve as a more objective test of what is reasonably accessible, as opposed to the distinctions highlighted by the Note, which are dependent on the differences in the parties' network architecture and on changing technologies.

Katherine Greenzang (Assurant) (04-CV-180): We suggest that reasonably accessible be limited to information accessed within the daily and routine operations of the business. It would be helpful if the description included certain types of data that are typically involved in the daily and routine operations of the business. The definition should also specifically exclude certain information and storage devices such as backup tapes, encrypted data and deleted and fragmented data.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): The term "reasonably accessible" is not adequately defined. The rule does not define the term at all, and the Note provides insufficient guidance, although there is some. It seems to invoke cost and burden as the bottom line concern, but is not clear on whether these concerns should be evaluated in light of other things, such as the issues at stake in the litigation. The uncertainty is compounded by the issue of good cause for production of such data. How should that determination be done in comparison to the determination called for by 26(b)(2)(iii) or 26(c)? The good cause analysis uses terms like those in (b)(2)(iii). If they are the same, why have the new rule provision? If they are different, what is meant here? The Note does not appear to define good cause, so the question is not clearly answered. And it appears that the good cause determination involves consideration of the burden to the responding party. Who has the burden of persuasion with regard to that? It seems that the initial burden on accessibility rests on the producing party, but that the good cause analysis also turns on burden so that in a sense it becomes part of the burden of the requesting party. That may be unfair. The quotation from the Manual for Complex Litigation about the difficulty of producing metadata conveys an incorrect impression that this sort of information is inaccessible or extremely burdensome to produce. Finally, the last phrase of the proposed rule -- "and may specify terms and conditions for such discovery -- is redundant, as even the Note acknowledges.

Federal Bar Council (04-CV-191): To the extent that the "reasonably accessible" standard is substantially similar to the undue burden standard contained in present 26(b)(2), it must be considered whether this new standard may result in unnecessary confusion. But the

Note explains the concept using terms that are commonly associated with objections based on "undue burden" or "expense." The focus on "accessibility" may subordinate the merits of objections for burden or expense. The Note does not address the problem faced by a party presented with a request for voluminous but accessible electronically stored information. In such a circumstances, it is unclear whether the responding party can stand on its objection based on burden. Why should a requesting party have to show good cause to get the inaccessible material but not to obtain accessible material that may require great burden and expense to compile? The proposed two-tier approach is not demonstrably different from the existing approach to hard-copy discovery. The case law is developing standards for solving this problem without the need for a different rule-based provision. Before a new standard is introduced into this area, more guidance is needed on what factors should be considered in determining what is "reasonably accessible."

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The Note should be revised to provide a fuller explanation of the term "not reasonably accessible" by giving more examples, including but not limited to metadata, embedded data, fragmented data, backup files, cached data, and dynamic databases. Also, the Note should specifically reference the balancing test of Rule 26(b)(2) that is the underlying purpose for the amendment, whether or not information falls within a particular category of storage medium or system. As noted in the Sedona Principles, the primary source of discovery should be active information.

Edward Wolve (General Motors) (04-CV-197): This proposal should create an important framework for national standards. The proposal reflects accepted practice which has worked well in more traditional discovery contexts. It is important to emphasize, however, that even accessible electronically stored information may be too burdensome to review and produce. The Note is not presently clear on this point.

Peter Keisler (Dep't of Justice) (04-CV-203): The Department points out that there may be some difficulties defining the term "reasonably accessible" by reference to the producing party's practices on accessing the information. The statement on p. 55 that information that a party has accessed is therefore reasonably accessible, regardless of the purpose for that access in the past, is overly broad. Some might be prompted to launch discovery to find out whether certain sources had even been accessed to try to defeat a contention that certain sources were "solely for disaster recovery." The better way to put it would be "the frequency and circumstances under which the producing party accesses the requested information are important factors in determining 'reasonable' accessibility." The Department does not read the Note regarding such things as legacy data, backup tapes, etc. as creating "categories" of information that are deemed not to be reasonably accessible, nor should the Note be interpreted as creating such categories. Instead, the focus of the Note should be on determining the ease or difficulty, and the associated costs and burdens, of the retrieval of requested information. For example, the Antitrust Division has often negotiated agreements with companies on retrieval from backup tapes of information the Division needed.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The rule could give guidance on whether deleted data, archived data, embedded data, or legacy data is included in the definition. Although recovering such data may sometimes be inconvenient, it may not necessarily be "inaccessible." Without further guidance, parties may try to exclude documents that go to the very heart of a dispute. In addition, it would be helpful to expand on what constitutes "good cause," such as the necessity of the data, the availability of the data from other sources, and the ability of the parties to bear the production costs.

Wachovia Corp. (04-CV-214): The term is indefinite and could create inconsistent standard among federal courts. It could also be interpreted to require such a rigorous standard (e.g., requiring the production of any extant data that can be extracted regardless of expense) as to be little improvement over the current situation.

Metro-North Railroad (04-CV-216): Metro-North believes that the definition should be information "routinely accessed or used by the party itself, and easily located and retrieved." Whether information is reasonably accessible should be determined by the steps needed to make it usable. In addition, courts should evaluate the frequency with which the electronically stored information has been accessed in the past when deciding whether it is reasonably accessible.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We believe that further explanation of the concept is neither necessary nor advisable. What is reasonably accessible will likely be an issue of dispute, but it should be resolved on a case-specific basis. Moreover, with the rapid rate of technology change, a current explication of the term could become outdated in the near future. For these reasons, the Committee recommends that no definition of reasonably accessible be provided in the Note.

New York City Transit (04-CV-221): Reasonably accessible may vary from one organization to another or even with respect to entities within an organization.

Ashish Prasad (04-CV-225): It is imperative that the Note be revised to provide a clearer, though not necessarily more detailed, explanation. In regard to discovery, it should mean "reasonably accessible for discovery in litigation," not "reasonably accessible in the course of business operation." This distinction is important because many types of electronically stored information are routinely accessed as active data, yet would require an unreasonable and burdensome amount of time and expense in order to be identified, preserved, collected, reviewed and produced in litigation. This situation is particularly important with regard to dynamic databases. A business's proprietary database may contain many categories of information, but only certain categories may be searchable, because the database was created to perform specific functions. Of course, the converse may also be true: certain information may not be routinely accessed in the course of business, but may nonetheless be reasonably accessible.

Marshon Robinson (04-CV-226): The problem with this rule is specificity. Any rule in this area would have to be very clear on what is considered accessible and what is not. The reason is the velocity of technological change. What is cutting today is obsolete tomorrow. The judicial system does not have time to keep up with all these changes in technology. Judges would have to base their decisions on what is or is not accessible. This could vary widely. This rule change really leaves everything as it is now, completely in the hands of judges. If this is the Committee's goal, perhaps it should just leave well enough alone and not make a rule. If it does make a change, it would be better to make the rule depend on the nature of the data. There are significant differences between deleted data, legacy data, and backup data. With this in mind, trying to make a blanket rule for all of them is very difficult. By addressing them individually, the Committee can give judges and litigants a clearer view. With legacy data, time frame is the most important criterion. A rule could make data over a few years old inaccessible unless it has been used. With backup data, restoration can be expensive. But there is a wide range of options for backing up data, including some that will not result in high costs. A similar case can be made about legacy data. The choices a party makes affect how hard it is to use these data. Deleted data is far different, and it may or may not still be on the computer.

Joe Hollingsworth and Marc Mayerson (04-CV-233): The demarcation of material to be produced based on whether it is reasonably accessible is a good start. This standard may not

prove workable in practice, but it is a reasonable effort to strike a balance between the needs for production and the burden of identifying and producing the information. Nonetheless, it would be desirable to explain in the Note that metadata, embedded data, fragmented data, cached data, echoed copies, and similar electronic detritus are not considered to be the "document" itself that has to be produced. In the ordinary case, the modest informational value of this material is outweighed by the difficulty of trying to produce it.

Texas Employment Lawyers Ass'n (04-CV-238): The lack of definitional substance to the term "not reasonably accessible" is troubling. Although in some cases certain legacy and backup data may not be reasonably accessible, most of it usually will be. Backup data is usually easily retrievable and accessed using today's systems. In employment cases, information on a terminated employee is placed in an electronic file that is not routinely accessed but is easily accessible. Is this "reasonably accessible" under the proposed rule? Often, the only information in employment cases is in electronic form; companies don't usually keep paper versions. Although these image files are archived and stored offsite, that should not make the information not reasonably accessible. The concept of accessibility in the electronic context is too amorphous, and therefore subject to mischievous manipulation. Although responding parties will not ultimately be able to justify their contention that information of this sort is not reasonably accessible, they will be able to delay the case and impose costs on the other side using this rule. If the hard copy has been imaged, does that mean that it becomes less accessible? Perhaps this proposal would even impede access to conventional paper documents.

Connecticut Bar Ass'n (04-CV-250): We do not think that "reasonably accessible" is adequately defined. Although the commentary refers to cost, we think that more attention should be paid to the costs of electronic discovery. Although parties could define reasonably accessible in their 26(f) reports, we felt that this would not be achieve in cases where counsel could not get along.

James Sturdevant (04-CV-253): The term "not reasonably accessible" should be changed to "unduly burdensome and costly." That is in accord with existing law that a party must produce information unless doing so would be unduly burdensome or costly. And the party claiming this protection should have to submit detailed declarations establishing that the information is not accessible, and the declarants should be subject to deposition on these topics.

Rule 26(b)(2) -- costs

San Francisco

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: The rule should contain a presumption that costs should be shared if discovery of inaccessible information is ordered. The presumption could be overcome by a showing based on the facts and circumstances of the given case. This would avoid use of "weapons of mass discovery." Texas already has such a rule, and California does too, as shown by a recent case. See *Toshiba Am. Elect. Components, Inc. v. Superior Court*, 2004 WL 2757873 (Cal.Ct.App., Dec. 3, 2004).

Kathryn Burkett Dickson (California Employment Lawyers Ass'n) (oral and written testimony): The cost issue can sink a meritorious employment discrimination claim.

Michael Brown: Currently the cost of producing reasonably accessible data is high. The rules should take that on more directly by creating a rebuttable presumption that it should be shared. That would prompt parties seeking discovery to narrow their requests. In pharmaceutical cases, plaintiffs always ask for back-up tapes. But Brown is not aware of any case in which useful information was actually found on a back-up tape.

Joan Feldman (testimony and 04-CV-037): I have seen a range of responses to this issue over the past decade. In many cases, producing parties solicit bids from internal and external service providers, and in many cases they submit the highest dollar bids to the requesting party. The requesting party should have some say in the manner of data restoration; sampling techniques should be applied to minimize the costs of production of relevant information.

Thomas Allman (testimony and 04-CV-007): The preference for cost-shifting should be more clearly articulated. The proposed method for ordering production of inaccessible information does not adequately deter unreasonable requests for information that has no substantial importance. This problem is true even of some cases in which both sides have considerable electronically stored information. The Note should articulate a preference for allocating costs.

Jeffrey Judd: Ideally, the E-discovery rules would create a presumption that the propounding party would pay for E-discovery and production costs in order to encourage litigants to focus their discovery demands, and to make reasonable decisions about whether to seek production of certain categories of information.

Jocelyn Larkin (The Impact Fund): "To take into account their lack of information about electronic sources, plaintiffs will frame discovery requests broadly. There are few things that haunt a plaintiff's lawyer quite like the fear that the key piece of evidence in a case never gets produced because you didn't ask for it -- or ask for it in just the right way."

Frank Hunger: I suggest language to the effect that after the court rules that good cause has been shown for production of inaccessible information (which the court has found to be inaccessible), there should arise a presumption that the requesting party will pay the actual cost incurred by the responding party in making the information available. This presumption could be overcome by clear and convincing evidence that it would be unjust to require such payment. Requiring such payment as an initial matter will result in a narrowing of the request to what is truly relevant and needed. It will reduce requests for unnecessary information, and will militate against prompting settlements to avoid the costs of this sort of discovery. To the extent the information so obtained is actually useful in the litigation, provision should be made in Rule 54

and/or 28 U.S.C. § 1920 for recovery of this expense at the end of the case by the discovering party if it prevails.

Dallas

Gregory Lederer: When these issues come up, my position has been "You have to pay." This has been very useful in getting discovery focused and what really matters. Cost-bearing should be presumed to be correct whenever inaccessible information is involved.

Darren Sumerville (testimony and 04-CV-089): For decades, the assumption has been that the responding party should bear the costs involved in producing the information. Decades of precedent exist on the general issue of cost-shifting. There is no reason to add to that (or vary it) with the proposed amendment.

David Fish (testimony and 04-CV-021): The proposal is contrary to years of jurisprudence that has established a presumption that the responding party must bear the cost of response. If a company is involved in litigation, it has an obligation to make its documents accessible to the extent they are relevant or likely to lead to admissible evidence.

Stephen Morrison: There should be a specific reference in the rule to cost-sharing. The Texas experience shows that it works. Both the plaintiff and the defendant bar say that it has helped. Right now, both Texas and California say that cost bearing is presumed. They are major players, and the litigation world seems to continue to function there. If the rule does not say this, there is in effect an invitation to go for everything.

John Martin (DRI) (testimony and 04-CV-055): The balance struck in Texas should be adopted nationally. It requires that the court make the party seeking discovery pay the cost of any extraordinary steps required to retrieve and produce the information. The current proposal here does not go far enough. Taking the Texas approach will prompt litigants to moderate what would otherwise be unreasonably discovery demands.

Laura Lewis Owens: The current Note is not sufficient on this subject. The Texas approach works. There should be a presumption of cost-shifting.

Jeffrey Cody: Cost-shifting is important and should be mandatory. The Texas rule shows that this is true. The experience under that rule is a success, as proved by the fact that there is only one reported case under the rule.

Washington

Sanford Svetcov & Henry Rosen: The quoted costs of restoring backup tapes vary widely -- perhaps as much as 100 to 1. On a frequent basis we are willing to share costs, but only with some control over who is doing the restoration.

Darnley Stewart: We would accept the cost-bearing approach of Zubulake I. That's a very fair rule.

Jonathan Redgrave (04-CV-048): The Note should make a more express reference to cost allocation. See Sedona Principle No. 13.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should specifically reference cost allocation, and should include a presumption of cost shifting. Large

companies face exorbitant costs in searching for such information. A cost-shifting presumption would help reduce those costs.

Michael Nelson (testimony and 04-CV-005): The rules should presume that if discovery is ordered of inaccessible information the party seeking the discovery should pay.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): There should be a presumption that the party seeking access to inaccessible information should pay the cost of that access. It has never happened that CIGNA had to restore inaccessible data for a case, although it has seemed as if it might be possible in a couple of cases.

Dabney Carr (testimony and 04-CV-003): The rule should require cost sharing when there is production of inaccessible information.

Paul Lewis & Carole Longendyke (testimony and 04-CV-082): We have found that the cost of accessing "inaccessible" information is far lower than those unfamiliar with the process may realize. Current technology is fast, reliable, thorough, and cost-effective. For example, many machines are configured to recover "discarded" information even after the recycle bin has been emptied. Moreover, imaging of hard disks is not intrusive, and has the capacity for privilege exclusion to prevent the copying of certain sensitive data.

Alfred Cortese (testimony and 04-CV-054): The rule should include specific reference to cost allocation. Allocation of costs is a most effective deterrent against overbroad, marginally relevant discovery and is not a bar that will prevent litigants from obtaining all the information they need. I propose adding after the "terms and conditions" phrase further language that would create a presumption of cost sharing for the extraordinary costs of storage, retrieval, review, and production of electronically stored information that is not reasonably accessible. The Note should explain that the presumption can be overcome by a clear and convincing demonstration of relevance and need.

Keith Altman (testimony and 04-CV-079): I find it disturbing that there is a trend toward permitting producing parties to seek cost shifting. With paper documents, the producing party had to pay these sorts of costs. There should not be a different expectation with electronically stored information. This information is generally far easier to collect and review. Courts can assess the cost of producing this information as they have done with paper.

Comments

Thomas Burt (V.P., Microsoft Corp.) testimony and 04-CV-001: The rule should impose a presumption of cost-shifting that can be overcome by a clear and convincing demonstration of relevance and need. This will serve as an effective deterrent against overbroad, marginally relevant E-discovery. It is justified by the substantial burden of reviewing and producing relevant information even from accessible sources.

J. Walter Sinclair (04-CV-004): I would strongly recommend something more similar to the Texas approach, or mandatory cost shifting. The court could still decide not to shift costs, but the burden would be on the party seeking discovery to justify deviating from the norm. In my firm's experience, our clients have incurred tremendous expense due to this sort of discovery. In one case, the cost of discovery has exceeded \$1,000,000 and we are just beginning our discovery efforts. The allocation of costs would be the most effective deterrent against overbroad, marginally relevant discovery.

Philadelphia Bar Association (04-CV-031): We considered whether the factors articulated in *Zubulake v. UBS Warburg LLC* and *Rowe Entertainment, Inc v. William Morris Agency* and similar cases should be codified or enumerated in the Note. We ultimately decided that such factors are better left to the courts and that the citation of some of those cases in the Note was sufficient. We also considered whether these factors should be applied not only to the cost-shifting analysis but also to the threshold inquiry whether the request for further electronic discovery should be permitted at all. We also rejected that option on the ground that the existing language in Rule 26(b)(2) is adequate to incorporate those factors. In the ninth paragraph of the proposed Note, however, it would be preferable to number the examples to avoid the interpretation that "the importance of that information, and the burdens and costs of production" might be interpreted as independent examples:

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, the importance of that information, and the burdens and costs of production; (b) limits on the amount of information to be produced; and (c) provisions regarding the cost of production.

ABA Section of Litigation (04-CV-062): The Rule and the Note do not give adequate attention to when cost shifting should be imposed. Recent cases have addressed these questions, but more elaboration may be appropriate in the Note.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The rule should contain an express presumption of cost sharing when information is not reasonably accessible.

Gary Epperley (American Airlines) (04-CV-177): We urge that the Committee adopt the approach in the Texas rule. Mandatory cost shifting would be the most effective deterrent against overbroad discovery requests.

American Petroleum Institute (04-CV-178): API favors sharing of costs whenever the court orders that there be discovery of information that is not reasonably accessible. By definition, the effort to obtain the information in these instances is considerable, and the party insisting on it should bear some of the cost. This is already the rule in New York, Texas, and California.

Katherine Greenzang (Assurant) (04-CV-180): The costs of electronic discovery call for a rule that will prompt the party seeking discovery to tailor its requests properly.

William Herr (Dow) (04-CV-195): A cost-shifting provision should be built into the rule to prevent abusive use of discovery. The Texas approach seems a fair way of doing this.

Wachovia Corp. (04-CV-214): Unless there is a presumption that costs will be shifted, this will not sufficiently deter overbroad and burdensome requests.

Metro-North Railroad (04-CV-216): There should be a presumption of cost bearing.

New York City Transit (04-CV-221): Cost-shifting is essential, absent extraordinary circumstances, e.g., a showing of malicious destruction of records.

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): When discovery of inaccessible information is ordered, the requesting party should have to pay the resulting costs unless extraordinary circumstances make that unjust.

Rule 26(b)5)(B)

San Francisco

Greg McCurdy, Esq. (Microsoft): Microsoft will focus its privilege review on what went to the legal department, or otherwise is identifiable as potentially of concern. This is a small fraction of the total information called for in discovery. But for that review, technology won't eliminate the need for old-fashioned page-by-page examination. "We won't let it go out the door without looking at it."

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): The impetus behind this proposal is understandable, but it goes too far. Producing voluminous quantities of electronically stored information in a timely fashion may impair the ability of counsel to review the material for privilege. But the proposal would require the receiving party to immediately return, sequester, or destroy the material claimed to be privileged with respect to information produced inadvertently or on purpose. The receiving party should be able to go to the court to get a ruling on whether the privilege claim is justified. In addition, the rule does not specify the period of time during which the producing party must exercise this "claw-back" right, stating only that it must be in a "reasonable period." These provisions will multiply the number of discovery hearings for years to come.

Thomas Allman (testimony and 04-CV-007): Adding a requirement that the party that received the information certify that it has complied with its obligations to destroy, etc., would be cumbersome and would unnecessarily complicate the rule.

Gerson Smoger (testimony and 04-CV-046): There is no need for this addition to the rules. The concerns it addresses have long been readily handled by courts under the circumstances of individual cases. Courts understand the burdens of production, and they don't need institutionalized case law generated by interpretations of the new rules' standards which would likely be out of date within months of being reported.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): Do not make this change. Attorneys will read the new rule as protecting them against waiver, but it does not. In addition, the "reasonable period" issue is likely to provoke litigation. This is unnecessary. In California, the rules require me to make sure that I'm not producing privileged information.

Charles Ragan: I favor requiring that the attorney certify compliance with the rule. I have had the experience at trial of facing an argument by one lawyer in a firm that was clearly based on such information after another lawyer in the firm assured us that the documents were returned and that no further use of the information would be made. This is required by our state rules. If certification of destruction or sequestration were made, there would be a heightened awareness and attention paid to the issue. that would prompt greater diligence and minimize the risk of the sort of thing we confronted.

Dallas

James Wren (testimony and written statement): In many cases, the production of material can be facilitated by a claw back provision, there must be reasonable limits on how long the privilege can be asserted after production. If there is no definite end point provided in the rule, many problems can result. Discovery information is routinely shared among experts and

other attorneys, and reclaiming that information months after production becomes truly problematic. Late assertion of privilege can also disrupt trial preparation. I suggest something like the following:

When a party produces information without intending to waive a claim of privilege it may, within 10 days after learning of the disclosure of privileged material (and in any event not later than 90 days after original production) or within such other time as may be established by court order or agreement of the parties, notify any party that received the information of its claim of privilege

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): This proposal will encourage sloppy initial production and gamesmanship. NACA is not aware of any basis for concluding that privilege review is costly or delays discovery. The true reasons for delay are that plaintiffs have to spend a great deal of time getting defendants to produce what they are clearly obligated to produce. This proposal therefore addresses a very rare problem with a "solution" that will create a frequent problem. Defendants will always review every document and make every possible objection to production. This proposal will therefore not reduce the review time. Moreover, it seems to make a substantive rule change in altering the rules of privilege. I've given privileged stuff back when it was mistakenly produced, but this will just promote sloppy review. Defendants will bring it up when I use documents on a motion for summary judgment or at trial. I know of no instance in which mistaken production has caused a real problem for the producing party that would warrant a rule such as this one. Usually there is a protective order that provides for inadvertent production. That's the only part of the protective order we don't have to argue about. I have only once gotten documents sooner through such an arrangement.

Darren Sumerville (testimony and 04-CV-089): The proposal is disadvantageous. It is unclear whether this rule, despite its explicit caveat, effects a substantive change in privilege law, thus running afoul of 28 U.S.C. § 2074(b). Moreover, it is unclear that this amendment would remove the troublesome problem to which it is directed. The cost of privilege review is difficult to segregate from review for responsiveness, which will still be necessary. And the searchability of electronic records might very well make privilege review of electronically stored information easier than a parallel review of hard copy materials. The follow-on litigation that would attend the proposed amendment would likely defeat any advantages in efficiency otherwise inherent in "quick peek" arrangements. Third party issues are easy to envision, as are disputes about what is a "reasonable" time to demand return of a document.

Daniel Regard (testimony and 04-CV-044): I am in favor of this amendment. One reason is the volume of material that is now involved in discovery. The second is that some of this information is very difficult to locate and review. The ability for a small group of highly knowledgeable individuals to review a production is gone in many of our larger cases. The pressure to handle the increasing volumes must have a safety-release valve. This amendment can provide that valve. Further consideration should be given to the fact that some electronic information may be easily discernable (such as the contents of an e-mail) while other information may be examined only with great difficulty or using specialized tools. Not all types of embedded information in various spreadsheet and document files are documented.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): This rule oversteps the Committee's authority. Although allowing the receiving party to take the question of privilege or

waiver to the court would be an improvement, it would not remedy all my concerns with this rule. ATLA is not familiar with successful use of claw-back agreements.

Kelly Kuchta (testimony and 04-CV-081): Even with the best technology, given the volume of information involved in discovery of electronically stored information it is impossible to assure that no privileged material will slip through.

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We think that the obligation of the receiving party not to use the material pending a ruling should be in the rule, not just the Note. It's really important to have that out there where people will see it. We are a bit worried that the obligation to destroy or sequester will be hard to implement with electronically stored information. Saying in the rule that the recipient can't use the information seems a good addition to us. We regard it as implicit that either party can seek a ruling by the court on the propriety of the privilege claim. The "reasonable time" limit seems suitable because these issues are very fact-driven.

Darnley Stewart: Since I've been a plaintiff's lawyer, I've never agreed to a document return arrangement. There is a well-developed body of law on this issue, and one factor is whether there is a public interest in the matter. And sometimes the documents I get are real bombshells. These have helped resolve cases.

Jonathan Redgrave (04-CV-048): This rule is an appropriate and advisable rule. Without guidance from the rule, a patchwork of negotiated and standing protective orders have sprouted. I do not believe this rule will lead to additional motions practice. There is no reason to believe a uniform procedural standard will encourage parties to be less careful in guarding privileged information. Allowing the receiving party to challenge the privilege claim would be desirable. Certification should not be required. Indeed, given the characteristics of electronically stored information, it may be impossible so to certify.

Anthony Tarricone (testimony and 04-CV-091): I have never agreed to a claw-back arrangement. It has only been raised a couple of times with me, and I've refused to go along.

Dennis Kiker (testimony and 04-CV-077): The Note should discuss the need for uniform waiver of privilege law. Inadvertent disclosure is not merely a possibility in an electronic production of any size -- it is a virtual certainty. In some jurisdictions, any disclosure of privileged information waives the privilege. This prospect should strike fear in the heart of every practitioner. The problem is exacerbated by the frequency of "sharing" orders that allow parties to share documents with other parties in other jurisdictions. Although the Committee cannot change the law of any jurisdiction, it should at least acknowledge this issue in the Note, perhaps even suggesting the need for uniform treatment of this issue among the federal courts.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): A huge majority of our respondents thought that inadvertent production of privileged electronically stored information should be addressed.

Michael Nelson (testimony and 04-CV-005): The rule should incorporate uniform standards to determine the circumstances under which the inadvertent production of privileged material will constitute waiver of the privilege.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): Given the massive volumes of electronically stored information that are now turned over in litigation, there is bound to be

inadvertent production of privileged information. The receiving party should have to certify that such materials have been returned and all copies destroyed. The "reasonable time" should be measured from when the party learns of the mistaken production, not from when the production occurs.

Brain Leddin (testimony and 04-CV-029): I represent products liability defendants, and I have been involved in large-scale production of electronically stored information. I can tell you that the effort to identify privileged material is much greater than with hard copies. There is not only a very large volume, but also a high degree of informality. People use multiple e-mail addresses, and communications happen in more media than before. In my experience, the claw-back agreement has worked well. The "reasonable time" to give notice is going to depend on the circumstances. Allowing the receiving party to take the issue to the court would be fine. There should be reasonable efforts to obtain return of the material if it has been disseminated, but at some point the dissemination is so broad that the document is beyond effective return.

M. James Daley (testimony and 04-CV-053): This provision is very balanced and provides part of the predictability that should be sought in rule changes.

Alfred Cortese (testimony and 04-CV-054): Some say that the rules should be further revised to require consideration of all relevant circumstances in determining whether the waiver of a privilege is fair, together with a more detailed explanation in the Note of the factors most courts apply in determining those issues. But such an approach might test the limits of the rulemaking power. Because it is so easy to circulate materials, once obtained, certification of compliance with the requirement to return or sequester should probably be required.

Craig Ball (testimony and 04-CV-112): The toothpaste won't go back in the tube once the information has been used in a deposition or shared with others. Moreover, the term "return, sequester, or destroy" simply won't work with electronically stored information. You cannot return the information, and it lingers on the metadata, commingled with other deleted data if you try to "destroy" it. Perhaps it would work if the rule said "a party must take reasonable steps to return, destroy, or sequester the specified information and any reasonably accessible copies."

Michael Ryan (testimony and 04-CV-083): I would welcome a claw-back process if I thought it were achievable and realistic. But this provision is unnecessary and should be left to the parties. The rule change will not accelerate discovery or offer any real gains to the courts or the requesting parties. In my experience, producing parties guard carefully the production of privileged documents, to the point of line-by-line, document-by-document reviews. The need for this change is nonexistent. To permit this sort of demand for return of all copies will lead to chaos. The requesting party cannot even seek court review of the propriety of the claim that the document is privileged. Even if that were possible, the public safety issues that sometimes arise (particularly in the settlement context) make this rule dubious.

Comments

Thomas Burt (V.P., Microsoft Corp.) testimony and 04-CV-001: Microsoft supports this proposal. In addition, the rule should require that the party that receives the notice certify that it has complied with its responsibilities under the rule. This requirement is not burdensome, and is warranted in light of the ease with which the party could otherwise continue to use or circulate the privileged material.

J. Walter Sinclair (04-CV-004): The party who receives a notice that privileged material has been produced should be required to certify that it has complied with the obligation to sequester or destroy all copies. It is essential that inadvertent production be protected in light of the tremendous amount of information that can be sought through discovery.

Clifford Rieders (04-CV-017): The rule provides no opportunity to claim that the privilege assertion is frivolous, inappropriate, or otherwise wrong. The rule then inexplicably states that the producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it. What does this mean? The privilege should be claimed at the time this information is produced or it is waived. If the rule are intending to set up some sort of procedure for an unintentional disclosure of privileged material, then the burden certainly should be on the party who made the error when it produced the information to begin with. To create this new procedure, particularly one fraught with uncertainty, does not address whatever problem currently exists.

James Rooks (04-CV-019) (attaching article from Trial Magazine): This rule would authorize late declarations of privilege made when the producing party believes that the requesting party has found a way to use the items in question. At the drop of a notice, the defendant can impose on the plaintiff lawyer the duty to locate and destroy or "sequester" all copies of the material that she may have sent to others. It is hard to imagine a real problem that this change would solve. It would lead to more motions to compel production since that's the only recourse left to the plaintiff. It would create a new substantive right with regard to privileged material. The rulemakers' authority to do that will inevitably be challenged. Constitutional challenges might also be anticipated, as the proposed amendment would in effect preempt state substantive law that directs waiver for production.

Marilyn Heiken (04-CV-024): This would allow a party to make a late claim of privilege if it believes an opposing party may find a use for the documents. Where the plaintiff has already provided the information to experts or other attorneys, plaintiff would have to locate the material she sent to others and request that it be returned. The amendment invites secondary litigation.

Philadelphia Bar Association (04-CV-031): We endorse the amendment as currently drafted. We believe, however, that it would be preferable to require that a party that receives a notice under this rule must certify compliance with it. That would avoid uncertainty and potential litigation regarding the status of whatever privileged information was produced. The certification could be made in any reasonable form of written communication to make it clear that a formal court filing is not required.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support the proposed change to provide a procedure for handling privileged information that is inadvertently disclosed. We think that the rule should include a statement of the obligation not to use, disclose or disseminate information once notified that it has been inadvertently produced and is privileged. We do not think that a requirement for certification of destruction or sequestration is necessary. We would like to see more explanation in the Note of the sequestration option. Presently, the obligation of the party who receives the notice is stated only in the Note, not the rule, and we think it should be in the rule. (Note: The proposed rule does say "After being notified, a party must promptly return, sequester, or destroy the specified information and any copies.") Although it is not stated, we assume that the party who received the information may use it in a motion seeking resolution of the privilege claim, although any filing should probably be under seal. Attorneys have an ethical obligation in New York not to use privileged information they received by mistake, so a certification requirement adds no significant deterrent

value. In addition, some versions of the information may be in storage media that would make confident certification difficult.

ABA Section of Litigation (04-CV-062): We agree with the procedure provided in this proposal, but see three questions. First, what is a "reasonable time"? That should probably refer to a reasonable time from when the party learns, or reasonably should have learned, that the production has been made, rather than from the actual production, which seems to be what is suggested in the proposal. Second, there is a question whether the Note or the Rule should provide more guidance on the factors to be used to resolve the question whether there has been a waiver. Third, there is the question of certification by the party given the notice that it has complied. We believe there should be some requirement of acknowledgement by that party, but that a certification should not be required. The responding party's mistake should not lead to imposing a burden on the requesting party.

Gregory Joseph (04-CV-066): This proposal is sound but not optimal. It bars the party who got the information from presenting it to the court for decision, and from arguing from the document's contents in urging that it's not actually privileged at all. The requesting party should be allowed to present the document to the court promptly after the request is made if it contests the claim that the document is privileged.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): We oppose this proposal. The rule intrudes on substantive law in jurisdictions that do not recognize an inadvertent production exception to the waiver doctrine. In any event, careful responding parties make a thorough review before production. Finally, the "reasonable" time standard will become a tool for delay. These proposals are particularly onerous with regard to electronically stored information because, once a database is produced, the requesting party will make and distribute multiple copies to co-counsel, investigators and paralegals. Copies may also be placed in witness files, investigative files, and evidence files. If the responding party is allowed to assert privilege many months after production, but burden on the requesting party of finding and deleting or returning copies is not only unduly onerous, it presents the responding party with a tool for distraction. If the Committee goes forward with this proposal, it should adopt a fixed time period -- no more than 30 days -- for assertion of the privilege after production.

Duncan Lott (04-CV-085): This proposal flies in the face of existing State law that declares the privilege nonexistent once disclosure is made. This would require return and/or destruction of liability establishing material that attorneys forward to cooperative programs that provide information to other litigants that may not have been produced by the corporate defendant in other litigation. I have been a victim of this very conduct.

Alan Morrison (04-CV-086): State law is (in cases governed by state law on the merits) the governing law regarding privileges. But the federal courts have a valid interest in facilitating discovery they supervise, and that may outweigh a state's interest in having its privilege law apply in full force in all federal-court cases. It seems that there are actually very few (if any) instances in which inadvertent production results in revelation of a document that is important evidence in a case. All of this suggests that the problems are not sufficiently pressing to warrant this difficult fix, particularly as it may be challenged as beyond the rulemaking power. Moreover, the concept of timely notification is difficult to grasp and apply. The producing party is not likely to review the material after production until some action by the other side calls its attention to something. By then, it may be precisely the items that do matter in the case that are the focus of the right that the rule creates. Moreover, the rule does not specifically forbid the party who got the information from "using" it in the litigation. Suppose the information is that producing counsel is worried that a certain witness will be ineffective on the stand. How does

one sequester or destroy that insight? There is, in short, no reason to have a rule provision on interim use of such materials before the court rules. I note also that there is no obligation on the party who got the material to alert the other side to the possible mistake. This is a wise omission, for including it could lead to motions to enforce the "duty."

Scott Lucas (04-CV-098): This proposal is inherently inefficient, and encourages sloppy discovery practices. At the same time, it penalizes litigants who are proactively preparing their cases (e.g., those who have already provided the documents to experts when the retrieval request is received).

Michelle Smith (04-CV-099): This amendment invites secondary litigation, and imposes a burden on a party that has already provided the information to experts or other attorneys.

Edward Bassett (04-CV-110) (attaching article from Massachusetts Bar Association Section Review Journal): History is replete with situations in which parties have inadvertently turned over materials that led to improved safety. This change would seek to undo that history. The proposal is unworkable. As some judges have observed, once documents are viewed by third parties there is little that anyone can do about the waiver that results.

Brian King (04-CV-123): This rule would cause more disputes between defendants and plaintiffs. At present, such problems are usually resolved in an amicable manner. But under the proposed change, there would be additional hearings. Moreover, this may preempt state law on privilege.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA questions the need to adopt a general rule of inadvertent waiver. The Note suggests that the motivation is the cost of reviewing voluminous material before production. But that concern is addressed in Rules 26(f) and 16(b), regarding agreement to inspection without a prior review. This rule would operate after production. As the Note recognizes, the courts have developed methods of dealing with this situation, and there is not an adequate explanation of the need for rules to deal with the problem. There is no reason to discourage parties from conducting a careful privilege review before production in any but the exceptional case. Should the rule nevertheless remain in the package, the FMJA suggests that a specific time limitation be placed on asserting the proposed right to take back a document. The rule should make clear that the producing party cannot wait to act on a claim of privilege until, for example, the receiving party has relied on the information in formulating or refining its claims or defenses, or has used the information against the producing party. The FMJA suggests the addition of a specific time limitation, such as a 30-day deadline with court extensions allowed by court approval upon a showing of good cause.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We object to this proposal. It would create a sweeping change in the law of privilege by creating a presumption that a party can unilaterally retract production simply by stating that it did not intend to waive a privilege. As the law now stands, disclosure waives a claim of privilege. This rule would turn that principle on its head.

Donna Bader (04-CV-130): This would place the burden on the party seeking the information to prove that there was a waiver, and would create a need for additional court hearings.

Timothy Cogan (04-CV-136): This proposal is contrary to fundamental notions of waiver of privilege and undercuts efforts to narrow the issues in dispute in litigation.

Floyd Ivey (04-CV-154): Adding the power to demand return or destruction to the existing methods of dealing with this problem is not warranted, and is an unreasonably expense to impose on the party not at fault.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee generally supports this proposal. Some members were concerned that the amendment might prompt strategic assertions of privilege, and noted that California law itself calls for a finding of an "intent to disclose" in order to support a finding of waiver. See *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal.App.4th 644, 652-54 (1999). The Committee believes that the rule proposal properly addresses the important policies underlying the attorney-client privilege. It recommends, however, that the rule require that notice be in writing in order to minimize disputes about whether a party actually provided notice. The Committee also supports requiring the party who is notified to certify compliance with the requirements of the rule.

Gary Epperley (American Airlines) (04-CV-177): American supports the effort to provide a uniform procedure for asserting privilege after production of documents or electronic information. We believe that the receiving party should be required to certify that the material has been sequestered or destroyed.

Assoc. of the Bar of N.Y. (04-CV-179): This proposal does not address the more fundamental question of third-party waiver, and it could not under 28 U.S.C. § 2074(b). In some jurisdictions, claw back agreements don't affect the right of third parties to argue waiver. Recognizing the limitations of the amendments, the Association still supports them, and their application to all forms of discoverable material. It does suggest one change -- that the recipient be allowed to submit the document to the court under seal for a ruling on whether the claimed privilege applies.

Marion Walker (04-CV-181): This amendment is imperative in light of the enormous amount of national litigation and the broad disparity in state rules regarding waiver of privilege. The requirement of a certification that the material has been destroyed or sequestered is likewise essential to provide the full measure of protection.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): We support the proposed amendment. The proposed amendment would create a more effective and immediate remedy for a party who has mistakenly produced privileged information than exists under current 9th Circuit law. But the prohibition on dissemination of the information appears only in the Note and not in the rule. It should be in the rule. The Note should state that it is not intended to preempt any existing obligations to return such information. In California there is such an ethical obligation.

Federal Bar Council (04-CV-191): We believe that the receiving party should have to certify compliance if the material is not returned. This would eliminate any confusion or uncertainty as to the steps taken by the party in sequestering the information. This would be particularly important with electronically stored information because some of it may be difficult to separate from non-privileged information. Regarding form, the Council recommends a simple, plain-language certification, which could be in the form of a letter.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): We support this change because of the magnitude of even a relatively limited production of electronically stored information. Requiring a producing party to perform a detailed and thorough review of this data in order to avoid an inadvertent waiver is often impracticable and, at minimum, can impose a substantial burden and expense.

Henry Courtney (04-CV-193): I oppose the change. It would allow defendants to retrieve evidence they claim is "privileged," and would mean that there would be little evidence that could be accumulated to force manufacturers to make necessary safety improvements in their products.

William Herr (Dow) (04-CV-195): There are serious problems with using this approach in pattern litigation where the concept of inadvertent waiver is not recognized. In such instances, the inadvertent waiver in one case will let such privileged information "out of the bag" forever. This rule will do little, if anything, to facilitate privilege review cost savings for parties involved in such cases.

Peter Keisler (Dep't of Justice) (04-CV-203): This procedure may be of considerable benefit to litigants, who have legitimate concerns that they will produce masses of electronically stored information without a fully adequate opportunity to review the information for privilege. The rule should permit the receiving party to submit the specified information to the court under seal and in camera for a ruling on privilege. The Note should say that the copies that must be returned are limited to copies made from the produced information; if the receiving party has also obtained copies of the information from another source, that should not be affected by this rule. Finally, the rule should cover work product information as well as privileged information.

Clinton Krislov (04-CV-206): The claw back procedure is an excellent idea, and should be applied to hard copy as well as electronic materials. Honest mistakes by lawyers should not harm their clients' cases. But it is important to recognize as well that it is easy, in a server search, to tag all communications to or from inside or outside counsel.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We support this amendment because of the ease of inadvertently producing privileged electronically stored information. We also agree that the request should be reasonably prompt.

Wachovia Corp. (04-CV-214): The intent behind that proposal is a good one. But the amendment provides little protection. The requirement that the party give notice within a reasonable time means that it will usually not provide protection. And the rule says nothing about the receiving party's obligation if it finds such privileged material. Should it notify the producing party? The rule should be changed to require notice within a reasonable time of when the producing party "first learns" of the mistake, and should place an obligation on receiving parties to notify producing parties whenever they find that there is privileged material.

Metro-North Railroad (04-CV-216): Metro-North supports the proposed amendment.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We believe that the receiving party should provide a written confirmation of compliance with the destruction provision, but that no "certification" should be required.

City of New York Law Department (04-CV-220): The Law Department supports this amendment, which essentially codifies existing law.

New York City Transit (04-CV-221): We support this proposal, but would also recommend that the rule require that privileged material must be returned and that the receiving party must certify that it has destroyed any and all copies of the material.

J.W. Phebus (04-CV-224): This rule would be subject to abuse. If the party that got the document has formulated the case on the basis of the documents, this retrieval right could upset

all that preparation. If there is to be such a right, it should be required that it be exercised promptly.

Alex Scheingloss (04-CV-230): This proposal is absolutely preposterous. We are going to be rewarding sloppy lawyering. Doesn't a party who sends out documents have an obligation to look at them first? Why should we penalize the innocent party?

Securities Industry Assoc. (04-CV-231): We support this proposal. But because this addresses inadvertent production comprehensively, we see no reason to retain 26(f)(4). We recommend its deletion. But if it remains, we feel that the Note to that rule should make clear that it is not intended to restrict a party's ability to assert its privilege if no agreement is reached. It should also be made clear there that there is no requirement that privilege issues be discussed.

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): The rules should make clear that courts will be very unwilling to find a party has waived or forfeited the privilege. The rule should say that inadvertent production does not waive the privilege.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): We will sometimes agree to claw back arrangements to speed up discovery. But this change would unfairly favor the producing party. There is no adverse consequence under the rule for shoddy or careless review because it offers an automatic claw back. This open-ended approach will promote laxity, prejudice the party with the burden of proof, and lead to further motion practice.

Heller, White, Ehrman & McAuliffe (04-CV-246): Although harmless on its face, this will generate substantial resistance and debate and fail its ascribed purpose. It will add, not subtract, time and expense associated with the discovery process. It does not change the way parties do a privilege review. Moreover, it creates a risk that courts will impose discovery deadlines that don't allow sufficient time for that review. There will also be more court hearings regarding privilege issues. Moreover, the amendment creates more questions than it provides answers. What is a reasonable time? What form of notice is sufficient? How are disputes over returning the information to be resolved? How can attorneys handle conflicts between the rule and ethics provisions that require them to use all disclosed information? Arguably, this creates a new substantive right.

Zwerling, Schachter & Zwerling (04-CV-247): The search capabilities in computer programs today render privilege reviews faster, easier, and more accurate than manual review of rooms full of boxes. Moreover, for the rule to work, the party must re-review the documents after production. That is not reasonable.

Rule 26(f) -- preservation

San Francisco

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): The proposal for early discussion of a preservation agreement is highly desirable.

Michael Brown: The reference to preservation in Rule 26(f) should be removed. It will encourage plaintiffs to seek preservation orders too often.

Joan Feldman (testimony and 04-CV-037): Preservation has to be discussed ASAP. To discuss the subject, the producing party must have an understanding of client technology. The language in the current proposal is too general.

Thomas Allman (testimony and 04-CV-007): He would not put this into the rule. in 75% of the cases, it's not a problem.

Jeffrey Judd: The emphasis on preserving discoverable information misses the mark. Instead, the effort should be made early to attempt to obtain some agreement as to the universe of "documents" that is reasonably likely to contain discoverable information, and to begin to define any issues that are likely to arise in connection with the preservation of electronic information. A substantial body of common law has in recent years evolved that defines a litigant's obligations to preserve electronic documents, and a strong argument can be made that such preservation obligations are a matter of substantive law and thus inappropriate for treatment by rule.

Jocelyn Larkin (The Impact Fund): It has been our practice for more than ten years to raise the matter of preservation of documents with opposing counsel within days of filing a complaint, by forwarding a proposed Stipulation and Order addressing these issues. This gives us a chance to notify defendant of the kinds of documents and data we believe will be relevant and open up negotiations, which is useful to both sides. We do not usually say that recycling of backup tapes must stop. Sometimes there is resistance, and having the provision in the rule will serve the purpose of eliminating once and for all arguments that there is no authority for addressing such issues or entry of a preservation order.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): Putting preservation into the rule places undue emphasis on the topic.

Dallas

Anne Kershaw (testimony and Feb. 15 survey results, 04-CV-036): From her experience, the delay until the 26(f) conference is a major disadvantage from the perspective of corporate defendants because they may feel that they have to suspend ordinary recycling of backup tapes and the like during that time. Getting to the conference sooner would be desirable. Her Feb. survey results of corporate clients show that some are experienced with blanket pre-discovery preservation orders. Two companies characterized them as routine. One cited a federal court preservation order issued sua sponte that stated "Each party shall preserve all documents and other records potentially relevant to the subject matter of this litigation."

Washington

Jeffrey Greenbaum (ABA Section of Litigation): I'm concerned about routine entry of broad preservation orders. We should not have broad preservation orders. And they surely should not be entered ex parte. Right now, plaintiff counsel seem routinely to send very broad demands for preservation of information at the inception of litigation. Although the rule says preservation should be discussed, it says nothing about what should happen if the parties don't agree. But there should be no obligation to preserve inaccessible information without a court order. There is an obligation to have a litigation hold, but that should not normally extend to inaccessible data.

Michael Nelson (testimony and 04-CV-005): The proposed amendment to Rule 26(f) may be interpreted as implying an obligation to enter into preservation orders at the outset of the case. But in many cases the common-law of spoliation provides ample protection for the parties. To avoid this result, the rule should be changed to say the parties must "discuss any issues relating to disclosure or discovery of electronically stored information."

Brain Leddin (testimony and 04-CV-029): I believe that the rule should require the parties to address this issue before any documents are produced.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): This conference is the place to work out preservation issues. That is much better than having people go in for broad preservation orders. A tailored arrangement after the conference is the way to go.

Theodore Van Itallie (Johnson & Johnson) (04-CV-096): We believe that it's a good idea to have discussion of preservation early in the litigation. The problem with broad orders is where there is no understanding at the outset of the actual dynamics of preservation. We feel we can convey what the practicalities are. We have our headquarters in New Jersey, and we have a local rule there that mandates this sort of discussion.

Alfred Cortese (testimony and 04-CV-054): These amendments seek to implement the very desirable impact that early discussion should have on increasingly abusive sanctions practice. But I think that the Committee should consider changing the provision at lines 64-65 as follows:

. . .to discuss any issues relating to disclosure or discovery of electronically stored preserving discoverable information . . .

The suggestion that parties discuss preservation issues could be moved to the Note. Retaining the provision in the rule could unduly focus on the preservation question in all cases. Discussion of preservation of discoverable information should occur only in appropriate cases. Otherwise, unnecessary or overly broad preservation orders are likely. The Note should also emphasize that care should be taken in crafting and issuing preservation orders. On further reflection, however (see testimony p. 52), it seems that this is the elephant in the room, and it ought to be out on the table. We'd still prefer that it be in the Note. Getting a sensible early order could be a good thing. We are concerned about the drive-by preservation order.

Craig Ball (testimony and 04-CV-112): The way to deal with preservation is to discuss it at the outset and allow a party unsatisfied with that resolution to go to court and seek judicial resolution.

Cheri Grosvenor: The question of preservation of inaccessible information is something that it is helpful to address at an initial conference. That will be a way to get the problem before

the court if there is going to be a problem. I think that it is a good idea to have preservation in the rule as a topic to be addressed. It makes both sides aware of the circumstances.

Michael Ryan (testimony and 04-CV-083): I advocate negotiating a preservation protocol early in the case. There are very efficient ways to deal with this problem if there are rational parties on both sides.

Keith Altman (testimony and 04-CV-079): I believe that it is necessary to get a very strong preservation order signed at the same time the complaint is filed. Electronic information is very fragile. It can be destroyed inadvertently in quantities that could not be destroyed inadvertently in paper. I believe that such an order should direct that (1) all relevant information should be saved; (2) all routine records recycling should be stopped; and (3) everyone that is involved should be told to comply with both the above directives. It is clear that compliance with such an order can be very difficult for the party subjected to it, which is one of the purposes of the order, but the main purpose is to maintain the information. The problem currently is that there is a delay at the start of the case before this is attended to. In drug cases, where a drug is taken off the market, it is urgent to get the e-mails that are sent around the time it is withdrawn. If preservation doesn't start until six months later things are much more difficult. I recommend that depositions of information management people occur as soon as possible. My retention policy is that I have kept every e-mail I've ever sent or received.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft is concerned that this provision comes close to the limits of rulemaking authority. The rules may address discovery and disclosure, but not preservation. In addition, the language could encourage the entry of unnecessary preservation orders. If the language remains, it is crucial that the Note contain language that emphasizes that it is intended to encourage consideration of preservation early, and not to prompt requests for preservation orders.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support this proposed amendment. The many cases in which parties have been sanctioned for failing to preserve electronically stored information doubtless include situations in which the problems might have been avoided if the parties had discussed issues of preservation at the outset.

ABA Section of Litigation (04-CV-062): The Note does not provide clear enough guidance about how to resolve questions if the parties do not reach agreement on the appropriate steps for preservation. Recent caselaw on sanctions for failure to preserve information has led to posturing by parties to set up later claims of spoliation. For example, some counsel seem to have adopted a policy of sending the other side a letter early in the action placing opposing counsel "on notice" that electronically stored information would be sought and asserting that an adverse party has an obligation to discontinue all data destruction and backup tape recycling policies. We are not asking the Committee to define the scope of the parties' preservation obligations. The Note could, however, cross-reference what may be required to be disclosed or produced in the first instance (that which is "reasonably accessible"), and clearly state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause. The Note could also indicate that preservation orders should not be routinely included in Rule 16 orders. Discovery in the first instance is managed by the parties, and ordinarily the court should defer action until there is a better feel for the issues. As discussed elsewhere in the Notes, the availability of particular documents on a party's active computer system may obviate the need to preserve backup data. The Note should discourage ex parte preservation orders.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): Preservation should begin immediately upon notice of the suit. To deal with the built-in delay in suits governed by PSLRA, for example, Congress directed preservation from the time a party received "actual notice of the allegations contained in the complaint." See 15 U.S.C. § 78u-4(b)(3)(C). From that time, the defendant must preserve information as if it were subject to a continuing discovery request. Due to the importance of preservation, it is critical that all parties confer about it immediately after suit is filed, and not later than 21 days after service of the complaint. Such a practice will result in less motion practice. But defendants often delay such conferences until the last minute. As the rule is currently drafted, therefore, there would likely be a delay of months before the conference occurred. Given the risk that backup tapes would be overwritten or active data archived, much of the value of the proposed change would by then be lost.

Stephen Herman (04-CV-103): It has been our experience that early discussions with opposing counsel and active superintendence by the court are important in avoiding spoliation issues and other preservation problems.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We recommend that the rule be changed to call for discussion "relating to preserving documents and electronically stored information relevant to the subject matter of the litigation." This suggestion (1) makes clear that presentation of electronically stored information is to be separately discussed, and (2) clarifies the ambiguities of the meaning of "discoverable."

Gary Epperley (American Airlines) (04-CV-177): American has no objection to this rule provision, but suggests that the Note should caution that parties should take special care in negotiating the scope and extent of any stipulated preservation orders to avoid any misunderstandings later in the case.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): We are concerned that the provision in the rule will stimulate the entry of unnecessary or overly broad preservation orders. We suggest that the Note clearly state that when entered, preservation orders generally should be directed to preserving reasonably accessible information and should be carefully tailored to the specific matters in dispute. We also suggest that the Note state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause.

Guidance Software (04-CV-198): The assumption of comments about the disruptive effect of cessation of functions that erase or overwrite data is that cessation is the only option. But there are other options -- such as a system-wide keyword search -- and technology is still developing.

Peter Keisler (Dep't of Justice) (04-CV-203): The Department suggests that the sentence "Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted." on p. 61 should be moved so that it precedes the Note's citation on p. 60 to the Manual for Complex Litigation.

Metro-North Railroad (04-CV-216): Metro-North supports requiring parties to discuss preservation of information.

Securities Industry Assoc. (04-CV-231): Rules 16 and 26(f) should be clarified to ensure that they do not result in entry of overly broad or vague preservation orders. One risk is that a preservation order could conflict with the preservation requirements of the PSLRA. It should be

made clear that parties have no obligation to preserve inaccessible information unless so ordered by a court.

James Sturdevant (04-CV-253): I recommend that the rule be changed to "relating to preserving documents and electronically stored information relevant to the subject mater of the litigation." This would make clear that electronically stored information should be separately discussed.

Rule 26(f) -- discovery of electronically stored information

San Francisco

Greg McCurdy, Esq. (Microsoft): Discussion will work well if both sides have considerable amounts of electronically stored information.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): CELA supports the changes to Rule 16 and 26(f) requiring parties to address issues of preservation and production of electronically stored information at the earliest possible stage. The rule should make clear that the party maintaining such information should provide enough basic information about the relevant electronic systems it maintains to help in framing discovery and to reduce or narrow the need for Rule 30(b)(6) depositions of multiple employees familiar with these systems. Such depositions present unnecessary challenges to plaintiffs, in part because the number of people involved in electronic systems has multiplied in recent years. In addition, the limitation in Rule 30 to ten depositions without stipulation or court order inhibits such discovery. Perhaps the Note could mention this problem. The problem here more generally is in Rule 26(d), not Rule 26(f), because we usually can get defense counsel to participate only on the 89th day.

Joan Feldman (testimony and 04-CV-037): I heartily endorse this amendment, and offer the following additions:

(iv) any issues relating to the nature and volume of material to be produced including data sources, data types, data and time frames, and stipulations as to what constitutes duplicate or "near duplicate" data;

(v) use of a mutually agreed upon glossary of terms to be used throughout the discovery process.

In addition, the discussion of format at this point is important. The format of documents is critical. A native format Word document will often have embedded comments from counsel. There is no way to review all the active information, much less this embedded information. You have to narrow the search.

Gerson Smoger (testimony and 04-CV-046): I support the proposed amendments to Rules 16 and 26(f) regarding planning for E-discovery. These technical questions are readily resolved in litigation through informal means. Technical assistants to both parties routinely resolve the host of small issues that inevitably arise about how to collect, read and interpret data. This is the efficient way to address these issues.

Jocelyn Larkin (The Impact Fund): We commend the Committee for proposing to require the parties to address issues of preservation and production at the earliest possible time. Our success with "tech-to-tech" telephonic planning sessions at the beginning of cases prompts us to urge that this sort of exchange be included in the Note. The information gap for plaintiffs with regard to electronically stored information is often greater than with regard to hard-copy information. Even present employees (who may be plaintiffs in such cases) often have no idea what information systems apply in other parts of the company. Early discussion of the form for production would be welcome. But the presumption seems to be that the defendant will provide information about what kind of electronically stored information it possesses and maintains. In my experience, defendants don't often do that, preferring to force me to take costly and time-consuming 30(b)(6) depositions. We call this the "that's for me to know and you to find out"

approach. There should be some informal disclosure about the information systems. The Rule or the Note should say so.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): It is helpful to require the parties to meet and confer about preservation of information and any issues that may arise in regard to discovery of electronically stored information.

Charles Ragan: Requiring discussion of these issues is an excellent first step toward dealing with the burden of discovery of this sort. Indeed, one should consider borrowing the admonition of Rule 45(c)(1) that an attorney serving a subpoena thereby certifies that she has attempted to avoid undue burden or expense. The exchange in the Rule 26(f) conference can provide a basis for good faith limitation of discovery along those lines, and the Note might say so. In recent years, e-discovery seems to have become a game of "gotcha," and that is undesirable.

Dallas

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): 26(f) meetings are not useful. It is like pulling teeth to get defendants to pay attention to them or to their discovery obligations. The Texas rules on required disclosures are more honored in the breach.

Gregory Lederer: The meet and confer session is essential. It give the clients a chance to address the problems of E-discovery. The rule should be made more expansive.

Darren Sumerville (testimony and 04-CV-089): There is nothing inherently wrong about the changes suggested for Rule 26(f). But like the changes to Rules 26(b)(2) and 37(f), these changes are unnecessary. Savvy litigants already present such issues in Rule 26(f) conferences. Given the growing attention to the issue engendered by this review and comment process, it will be difficult to avoid confronting electronic discovery issues in future cases. Of the proposals being made, however, these are the ones that are most palatable. The rule would be strengthened if it required the defendant to provide detailed information about its information systems at the 26(f) conference. At least, add to the detail of what should be resolved at that session.

David Fish: The problem is that defendants do not take these meetings seriously. The lawyers are not prepared to discuss electronically stored information at these meetings. The only way that discussion can be productive is for the participants to be knowledgeable and to ask the right questions.

Michael Pope (testimony and 04-CV-065): Usually the party with the most electronically stored information is pressing for an early conference. The problem is not in cases in which both sides have considerable amounts of this information. It is the one-way cases that cause problems.

James Michalowicz (testimony and 04-CV-072): Addressing key issues early in the process reduces the risk that there will be breakdowns later. This is consistent with the early case assessment process that many companies use for litigation. I believe that a map for these would be the seven-step process that I have found useful: (1) define the scope of the request; (2) identify custodians and locations where records and information reside; (3) preserve potentially responsive materials; (4) collect responsive materials; (5) convert and index materials in order to begin reviewing them; (6) review materials for responsiveness and privilege; and (7) produce materials. One option that should be considered is development of an online repository of electronically stored information produced in the case.

Washington

Kelly Kuchta (testimony and 04-CV-081): My experience is that having a single person for each party who is responsible for the E-discovery aspects of the case is desirable. Ultimately, these people should know their systems and be accountable to the court.

Sanford Svetcov & Henry Rosen: The party conference is the way to address problems with discovery of electronically stored information, not the accessibility rule. We think that the meeting should occur within 21 days of the filing of the complaint. We have found that in securities cases the conference does not happen soon enough. This deadline could be relaxed if there were not going to be E-discovery in the case. Presently, we send out a letter immediately asking the other side to identify what steps it is taking to preserve electronically stored information. The uniform response is that they are complying with their obligations. Then we don't find out for a year and a half what they're really doing. And what they do varies a lot.

Darnley Stewart: I would strengthen the rule to mandate consideration of additional topics, such as preserving data from alteration, the anticipated scope, cost, and time required for production of data that one side says is inaccessible, and other topics. It's crucial to get to these topics early. Waiting until the request for discovery is made is waiting too long. I also think that, as in the District of New Jersey, counsel should be required to investigate their clients' systems before the meeting. This could avoid the need for 30(b)(6) depositions. A Special Master might often be involved at this stage.

Dennis Kiker (testimony and 04-CV-077): I'm a big advocate of the meet and confer. That's a big part of my job as national discovery counsel.

Jeffrey Greenbaum (ABA Section of Litigation): It's a good idea to discuss these issues early. I am concerned about what should happen if the parties don't agree on a form of production.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3) Meet and confer sessions are happening. It seems that some of the usual gamesmanship is not so prevalent in these sessions. Over 80% of our respondents who discussed electronically stored information were able to either agree without any assistance of the court or with some assistance of the court. Only some 17% needed court intervention.

Pamela Coukos (testimony and 04-CV 020): The potential burdens of E-discovery are best addressed when the parties work cooperatively. The proposed changes to Rule 16 and Rule 26(f) that require the parties to address these issues up front are likely to save time and resources. Requiring consideration of form of production and preservation up front should reduce conflicts later on. It is also important for counsel to be informed about the client's information systems. With knowledge of that sort, I can target my discovery to the kind of information the defendant maintains. Although an early 30(b)(6) deposition is one way to obtain this information, I find that less formal means work better.

George Socha (testimony and 04-CV-094): In the Note at the top of the second page, there is a reference to "form" and "format." It would be better to make those plural. In general, I think that it is very important to have people talk about form from the outset to avoid problems later on.

Dabney Carr (testimony and 04-CV-003): I think that the rule should provide for discussion in a broader way -- "to discuss any issues relating to disclosure or discovery of electronically stored information."

Ariana Tadler (testimony and 04-CV-076): I applaud the directive that the parties address electronic discovery early in the case. This educational element is critical in this era of technological innovation and communication. Highlighting this sort of information in the rules in the actual wording the rules helps to educate lawyers who, in the past, might not have considered or pursued this kind of discovery. The conference can be used to exchange information on the types of information available from the parties, the forms in which that information is maintained, how one can access the information, and the potential cost burden to access and produce it. This sort of discussion can lead to basic protocols on such things as recycling of backup tapes.

Craig Ball (testimony and 04-CV-112): I heartily endorse the effort to provide for discussion of E-discovery issues in meet and confer sessions.

Michael Ryan (testimony and 04-CV-083): I'm a strong advocate of this conference. When you get the technological people around the table, you eliminate the lawyers' plausible deniability, and 99% of the problems that people are talking about get solved. This requirement will simplify the courts' work, reduce expenditure by the parties, and survive the test of time whatever the technological changes of the future. Right now, there is far too much time wasted and money and court time spent on discovery of electronically stored information. The requirement that the parties engage in a meaningful conference on this subject is an essential advance. This is the way to handle two-tier -- have the parties work out a sequence of information retrieval in the conference.

Keith Altman (testimony and 04-CV-079): Up to this point, there have been too few opportunities to have meaningful dialogue in preparation for complex discovery. Far too often, parties make unilateral decisions about production of electronically stored information. In particular, production in a form that is not useful should lead to adverse consequences.

Steven Shepard (testimony and 04-CV-058): From my experience, the one sure and best way to understand a complicated computer system is to talk directly to the technical expert who runs it. Therefore, counsel should be required to identify that person and confer with him or her before the 26(f) meeting. The ideal solution would be for the tech experts for the two sides to meet face-to-face, in the presence of a neutral moderator, with a confidentiality agreement and blanket immunity from waiving privilege, to talk candidly about the types of computer systems used, and the steps needed to preserve, search, and reproduce the needed information.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft supports the idea that issues relating to electronic discovery should be discussed early in the discovery process. It is important that the accompanying Note say that the issues to be discussed depend on the particulars of the case. The Note's references to gaining familiarity with the party's computer systems should be limited to those that are relevant to the case. There should be no implication that the entirety of a party's computer systems should be under inquiry.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support this proposed amendment. Discussion about storage, preservation and retrieval of electronically stored

information should ease the way for this form of discovery, perhaps by facilitating the fashioning of specific discovery requests targeting particular sources of electronically stored information. In most current cases, this discovery has not become a subject of dispute. In at least some cases, forcing parties to confront these issues at the outset may have the effect of creating disputes. Nonetheless, the prevention of avoidable problems that might otherwise arise later is a far more important consideration.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): The requirement that the parties discuss issues related to production of electronically stored information is beneficial.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We applaud the Committee's requirement that the initial discovery conference include a discussion regarding the disclosure of electronically stored information. We suggest adding another mandatory topic of discussion: "the types of electronically stored information available, and the costs of producing that information."

Assoc. of the Bar of N.Y. (04-CV-179): The Association agrees on the need to urge the court and parties to address E-discovery issues at the earliest possible point. But this can be accomplished quite simply through the adoption of proposed 16(b)(5).

Marion Walker (04-CV-181): The general idea of early planning is good, but often it will be frustrated because the plaintiff lawyer has not given enough thought to what to seek in the case, and the defendant lawyer has not had sufficient time to become familiar with the client's computer systems. For this reason, it is important that any provision in the court's order be flexible enough to deal with future developments. Judges too often insist too vigorously on adhering to the schedule initially set forth.

Jeffrey Bannon (04-CV-182): I applaud the proposed changes to Rules 16 and 26(f), which will better focus the courts and the litigants on electronic discovery.

M. John Carson & Gregory Wood (04-CV-189): Although it is probably appropriate for the Federal Rules to describe these matters broadly, additional detail would be useful. (The authors describe six items to discuss regarding discovery of electronically stored information and three regarding preservation of electronically stored information -- see pp. 2-3 of their submission.)

Peter Keisler (Dep't of Justice) (04-CV-203): The Department supports the principle that the parties must discuss the possibility of electronic discovery issues.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We commend the proposal to prompt early discussion of issues relating to electronically stored information.

Eric Somers (Lexington Law Group) (04-CV-211): These changes create a structure for parties and the court to give attention to issues of discovery of electronically stored information at the outset. This is more efficient than adopting either 26(b)(2) or 37(f) amendments.

Wachovia Corp. (04-CV-214): These amendments will have a salutary effect. The proposed rule is appropriate as drafted.

New York City Transit (04-CV-221): Discussion of this form of discovery should be limited to extraordinary cases. Before ordering discovery of electronically stored information, a

court should look review a corporate party's record retention schedule to determine if "business records" are stored only in electronic form. NYCT's record retention schedule requires, for example, that e-mail that would otherwise constitute a "business record" must be retained in hard copy.

Chavez & Gertler (04-CV-222): If the amendment to Rule 26(b)(2) goes forward, the committee should direct here that there be discussion of "the types of electronically stored information available, and the cost of producing that information."

Zwerling, Schachter & Zwerling (04-CV-247): All parties should now expect some electronic discovery. Accordingly the rule should require discussion of these issues in all cases.

James Sturdevant (04-CV-253): I endorse the requirement that the conference include a discussion of discovery of electronically stored information. The discussion should include "the types of electronic information available, and the cost of producing that information."

Rule 26(f) -- agreement regarding privileged information

San Francisco

Thomas Allman (testimony and 04-CV-007): The rule should not be more general regarding the subject matter of the court order regarding production of privileged information. The proposal reflects concepts embodied in Sedona Principle 10 and is consistent with ABA Civil Discovery Standard 32.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): How useful is such an agreement if it is not clearly enforceable? This rule might encourage courts to adopt standing rules regarding privilege waiver that might not only be unenforceable but not helpful. I fear that the other side will use my refusal to agree against me if I don't agree. This is only one of many topics the parties might discuss during their Rule 26(f) conference, and should not be highlighted this way.

Charles Ragan: The assumption of the discussion seems to be that if the parties can agree to production without waiver that would be helpful. But unless the court can protect against waiver assertions by third parties, this could be a tenuous protection.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): Although we oppose the Rule 26(b)(5)(B) proposal, we have no problem with parties making a claw-back agreement. It's control by that rule, not by an agreement, that troubles us.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): We found that when people talked about privilege waiver in advance, they were likely to be able to have an amicable solution to the problem. But when it came up in the middle of a case without prior discussion, there was less likelihood of agreement at that point.

Michael Ryan (testimony and 04-CV-083): I commend the Committee on this idea. I've tried to negotiate such agreements, but have not succeeded very often. I find that there is still a document by document, line by line review, with all the time that takes.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft is concerned that the proposal may increase the pressure for premature production of possibly privileged information. Therefore, we would favor removing altogether this reference to protection of privilege. If the language is retained, the Note should make it clear that the provisions are meant to encourage discussion, but not intended in any way to influence parties to turn over material without first reviewing for privilege. Finally, to the extent that proposed 26(b)(5)(B) is adopted, this provision seems redundant and unnecessary.

Clifford Rieders (04-CV-017): This proposal creates another topic for the parties to dispute, although it is couched in terms of an agreement. The burden of solving the problem should rest on the party that is the source of the problem -- the one that produces privileged material. Absent some known difficulty in this area, the provision should be removed.

Philadelphia Bar Association (04-CV-031): We endorse most of the proposed changes to Rule 26(f), except the provision regarding preservation of privilege claims via agreement. We disagree with the inclusion of proposed 26(f)(4). The provision may lull parties into a false sense of security with respect to production of privileged information under a "quick peek" and "claw back" arrangement. The law is unsettled about whether orders preserving privilege work to bind third parties. In addition, the order may prove to be too restrictive at a later date and under other rule amendments.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The Section supports the requirement that the parties discuss protection of privileged information at their conference. In our view, these provisions implicitly, but correctly, endorse the position that inadvertent production, particularly in a case with voluminous information, should not automatically be considered a waiver. Privilege review is time-consuming and expensive.

ABA Section of Litigation (04-CV-062): The risks of inadvertent production of privileged information are greater with electronically stored information. It therefore makes sense to include the parties' voluntary agreements on this subject in the Rule 16 order. But it is not clear whether such an agreement would affect the claim of waiver by a third party who seeks the documents in another proceeding. The existence of a court order blessing the parties' agreement may give them some additional protection. The Note should, however, make clear that even if embodied in a court order, the parties' non-waiver agreement may not protect them from claims of waiver by third parties. Although we support efforts to further protect parties willing to experiment with novel approaches to privilege review, we do not support any suggestion that courts may properly encourage parties to adopt such agreements when the full effects of such agreements are so unclear.

Peter Riley (04-CV-064): I am opposed to this proposal. In a recent products liability case, I have no doubt that, had this provision been in place, the corporate defense would have created further discovery disputes. Without it, defendant was aggressive in assertion of privilege. If it had been able to designate documents already produced as privileged, defendant could have interfered more aggressively with plaintiff's preparation.

Hon. Ronald Hedges (D.N.J.) (04-CV-169): This proposal raises a number of questions with regard to the agreed order aspect: Why should a nonparty who has not agreed to a nonwaiver agreement be bound by the order? Is the idea that the standard of waiver should be changed to require the consideration of an order? Can that be done as a matter of "procedure"? How could this be applied in diversity cases in light of Evidence Rule 501? If the order is to have such an effect, should the Committee not include some specifics about what the order should contain?

Assoc. of the Bar of N.Y. (04-CV-179): This does not address (and cannot address) the binding effect on third parties of any such claw back agreements. In some jurisdictions, they are not honored. But nevertheless, the Association supports the proposal.

Marion Walker (04-CV-181): This provision seems to contradict 26(b)(5)(B). The latter is a much better method for handling the privilege waiver issue since the likelihood that the parties at the conference stage of case will resolve the issue of privilege is small. This pessimism is particularly justified in multiparty fraud cases. The cost of privilege review is a club by which plaintiffs bludgeon defendants into settlement.

Federal Bar Council (04-CV-191): The Council supports use of these agreements and believes that such procedures may help to curtail the costs of discovery. But it is important to

note that the law on whether such an agreement is effective is different in different jurisdictions. The Note should notify parties of possibly different interpretations in different courts.

J. Wylie Donald (04-CV-194): The Note commentary that "the time required for the privilege review can substantially delay access for the party seeking discovery" (p. 19) should be discarded. At the same time that the rules are giving support to discovery regarding ten times as much material, they are also saying that it takes too long to review all of that material for privilege. This should not be in the rules.

Metro-North Railroad (04-CV-216): Metro-North supports discussion of protecting privileged information during discovery, but opposes requiring the parties to discuss this issue.

City of New York Law Department (04-CV-220): This amendment should not be adopted because it would encourage some judges to coerce litigants to enter agreements requiring them to produce privileged documents subject to such agreements without sufficient time to do a proper review.

Ashish Prasad (04-CV-225): The Note should emphasize that a party's failure to enter into an agreement regarding inadvertent production should have no effect on whether an inadvertent production constitutes a waiver of the privilege.

Rule 33(d)

San Francisco

Charles Ragan: Simply allowing access to the electronic records may very rarely be a desirable option. Many databases are customized for individual clients, and contain proprietary information and many fields of information that would not be relevant. Technology provides a solution: Relevant information from databases can be extracted to other formats (e.g., elements of an Oracle database can be exported to an Excel spreadsheet), which would seem perfectly adequate to accomplish the goal of the rule change. I have no specific language to suggest, but think that a modification of the rule change would be in order to accommodate this sort of possibility.

Dallas

David Fish (testimony and 04-CV-021): This amendment is not objectionable, but it is unnecessary.

Washington

Jonathan Redgrave (04-CV-048): I endorse the rule, but suggest think that the Note overstates the obligation of the producing party when it says that it must enable the receiving party to use the data as readily as the responding party. All the rule says is that the burden must be equal. It would be better to say that "[t]he 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." It might be good to make clear in the Note that this rule does not invite routine computer system inspections.

Michael Nelson (testimony and 04-CV-005): The proposed language might be construed as requiring that the requesting party be provided with direct access to a proprietary database. But such access is rarely, if ever, required. The Note should clarify that the requesting parties ordinarily do not have such a right of access.

M. James Daley (testimony and 04-CV-053): I endorse this change. But I am sensitive of the risk of a "slippery slope" to motions to inspect computer systems. The Note should be reconsidered to make the point that this should not often happen.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft's view is that Rule 33(d) already adequately covers electronically stored information, and that no addition or change is required. If a change goes forward, however, the Note should say only that the electronically stored information should be provided in the format in which it is maintained in the ordinary course of business, in a format mutually agreed upon, or in a "reasonably usable" format.

Jack Horsley (04-CV-014): I note in the material speaking to Rule 33 there are incorporated in substance some of my suggestions previously submitted although I know many others no doubt submitted similar suggestions.

Philadelphia Bar Association (04-CV-031): We endorse the proposed expansion of the definition of "business records" to include electronically stored information.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The Section supports the changes to 33(d). The Note makes clear that if the responding party chooses to utilize this option it must ensure that the other side is able to use the information. There is no reason the rule should not be updated to reflect the current reality that business records are electronically stored and that answers to interrogatories may be derived from electronically stored information.

Gregory Joseph (04-CV-066): This proposal is sound.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment. The primary concern was that providing an adversary access to electronically stored information may be more complex than providing access to hard-copy business records. Thus, special considerations may need to be taken into account to ensure that the propounding party's burden of deriving the answer is actually "substantially the same" The proposed Note recognizes this issue by saying that the responding party may have to provide some combination of technical support, information on application software or other assistance. The Committee believes that the Note provides sufficient guidance.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The Note inappropriately suggests direct access to confidential proprietary databases. We believe that the statement in the Note that a party who wishes to answer an interrogatory in this manner may be required to provide "access to the pertinent computer system" should be deleted.

Metro-North Railroad (04-CV-216): Metro-North supports the amendment.

Ashish Prasad (04-CV-225): The Note seems to suggest that allowing the requesting party direct access to the responding party's computer system would be a routine event. The Note should make it absolutely clear that it does not mandate direct access as an alternative to answering an interrogatory, but production of copies of the electronically stored information, consistent with the provisions of Rule 34 regarding form of production, suffices.

Rule 34(a)

San Francisco

Thomas Allman (testimony and 04-CV-007): There is no need to specify in the rule that electronically stored information must be provided in response to a Rule 34 request. The Note could indicate a general understanding that, in the absence of a statement that electronically stored information is not sought, it is necessarily included. Electronically stored information is a good locution, but maybe it should be set up as a subset of "documents." Greg Joseph's comments on this point are persuasive. The term is not likely to become obsolete.

Kenneth Conour: A database is an example of something that exists as electronically stored information but cannot be considered a "document" in any meaningful way. It can provide information in response to queries or directions in "documentary" form, but the database itself cannot be provided. But perhaps it can be treated in the rule as a subset of "documents." His clients do not allow outsiders access to the database. Indeed, for pharmaceutical clients federal law forbids access to some of the private information on the database.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): No change is needed here. "Data compilations" are already included in the definition of "document." Courts have already interpreted this rule to include all sorts of electronically stored information. There is no need for this change, and similar provisions exist in other rules.

Charles Ragan: The "data compilation" language was added in 1970, when computers were still substantially driven by punch cards. Not to acknowledge the revolution in information technology we have witnessed in the last ten to twenty years is to blind oneself to reality. I would fortify the Note language that Rule 34 responses should address both electronically stored information and "documents" by adding to the Note, at the end of the first paragraph concerning subdivision (a): ", and, absent such a distinction, the response should address both 'documents' and electronically stored information."

Dallas

Darren Sumerville (testimony and 04-CV-089): The pragmatic need for this amendment is dubious. Practitioners have long treated electronically stored information as a type of document, particularly given Rule 34's explicit reference to "data compilations." Any explicit line-drawing in this area raises the specter of confused and confusing two-track document requests, differing standards for electronic records and paper records, and other definitional quibbles. A superior approach would be to take an inclusive approach and simply define "documents" to include "electronically stored information."

David Fish (testimony and 04-CV-021): This change is not needed. No lawyer worthy of carrying a bar card could contend now that electronically stored information is not discoverable.

Daniel Regard (testimony and 04-CV-044): At least today, it seems correct to say that a database cannot reasonably be conceived as a "document." A database may create thousands of tables on a transitory basis to respond to specific queries. It is hard to see how this can be treated as a "document" that is subject to production, as opposed to a system that can be used to generate specified information which in turn can be produced.

James Michalowicz (testimony and 04-CV-072): Production of native files is a problem. There is a need for an indexing system, which may be difficult with this material.

Washington

Kelly Kuchta (testimony and 04-CV-081): The change to allow the requesting party to specify the form of production is positive. But the proliferation of databases, which do not convert into an adequate searchable format, and the redaction of native files will make this a continuing issue.

Jonathan Redgrave (04-CV-048): I believe that the Amer. Coll. of Trial Lawyers' suggestion that the phrase to use would be "tangible information" has many advantages. That is a very expansive and versatile term that will survive the test of time. I strongly believe that electronically stored information should be recognized as a co-equal form of information. Although the courts have been able to adapt the term "document" to fit a host of situations, those uses have strained the term, and it is appropriate to have a separate term. I also suggest that the rule itself say that a request for "documents" includes electronically stored information.

Dennis Kiker (testimony and 04-CV-077): I agree very strongly with the distinction between "documents" and "electronically stored information." The traditional definition of "document," or even the most expansive definition embodied in the current rules, does not adequately cover current and emerging forms of electronically stored information.

Pamela Coukos (testimony and 04-CV 020): In general, I agree with those who say that it is unnecessary to create two categories of information -- documents and electronically stored information. This structure creates potential for confusion. If the change is made, please keep the comment in the Note that a request for "documents" applies to electronically stored information as well.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The rule should not say that the requesting party may "specify" the form, but that it can "request" the form. The ultimate decision on which form to use should be up to the producing party.

David Romine (testimony and 04-CV-080): There is no reason to create a distinction between "electronically stored information" and "documents." Courts and parties have been treating electronically stored information as documents with no problem.

George Socha (testimony and 04-CV-094): It is not clear what is meant by "images," as added to the rule. Is this intended to address image files (JPEG, GIF, TIFF, PDF, etc.) used by parties in the normal course of their activities? Or is it intended to address image files created by or for attorneys for the parties during litigation. A clarification would be useful. If the latter is what is meant, this seems to open up a whole new area of dispute that I believe has not been contemplated as part of the rule-making process.

M. James Daley (testimony and 04-CV-053): I agree with expressly identifying electronically stored information in Rule 34. I would not use "tangible information" instead.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We are concerned that there might be a controversy down the road from the adoption of the term electronically stored information. For example, instant messenger communications are not "stored" at the end of a session. Is that meant to be included. In hopes that it is not, we suggest that the Note make clear that it is not. There is no business need to store such messages after a

session is completed, and we do not think there should be a litigation obligation to reconfigure systems so that these are retained.

Steven Shepard (testimony and 04-CV-058): The Committee has wisely decided to adopt an expansive definitions of "electronically stored information." I suggest broadening this term even further, by using "electronically stored data" instead. The use of the term "information" implies knowledge, created by a human user of the computer, and is likely to be underinclusive. Lots of discoverable information is created by the computer itself. At least, it would be desirable to include a broader definition in the Note, perhaps with something like the following: "The term 'electronically stored information' shall be construed broadly, so as to include data automatically generated by an electronic device."

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft agrees with using the phrase "electronically stored information" in Rule 34 to introduce the concept, rather than attempting to introduce it as a definition in Rule 26. The addition of this phrase is important because the definition of "document" under Rule 34 has long lagged reality when it comes to electronically stored information. Not only is the phrase more accurate than "data," but it also provides both the guidance and flexibility to deal with the new technology that enters the market constantly. "We believe that this shift in thinking will help alleviate the struggles faced by courts and parties in deciding what constitutes a document and how to address issues regarding 'embedded data,' 'metadata' and 'native formats.'" The currently proposed wording in the Note at page 28 correctly and adequately clarifies that, despite the newly introduced concept, requests for production of "documents" should be understood to include electronically stored information. It is important that the rule refers only to "stored" information, because much that might be stored is not. For example, all phone calls could be recorded, but they usually are not. Many new devices such as PDAs have the capacity to record and to store information, but unless the user chooses to store the information it is not within the meaning of the new phrase in the rule. This is as it should be. Thus, although email is generally stored and subject to the rule, instant messaging is not. Like a phone call, the instant messaging session is over when the text window is closed.

Philadelphia Bar Association (04-CV-031): We disagree with the proposed amendment that would provide that electronically stored information is not a type of "document." This structure might require parties to make separate or specific requests for the production of electronically stored information as opposed to "documents." Rather than solving a problem, it could cause confusion and increase the number of discovery disputes. In addition, this could cause parties to treat electronically stored information and other documents differently with regard to preservation and other matters. We find the Note confusing on this subject. On one hand, it acknowledges that the change would separate electronically stored information and "document," but it also says that a request for production of "documents" should be understood to include electronically stored information. For these reasons, it would be better to define "documents" to include electronically stored information:

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 documents (including but not limited to electronically stored information, writings, drawings

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): It should not be controversial to update the rule to use the term electronically stored information. As a practical matter, courts have been treating electronically stored information as discoverable Rule 34 or decades. Nonetheless, the current language is clearly out of step with this reality; as the Note observes, it is a stretch to include all electronically stored information within "documents." Even the phrase "data compilations" seems arcane because it is not a term used in referring to the most common subjects of discovery. Indeed, just how far the discovery of electronically stored information extends has been the subject of debate. Given the ongoing development of technology, it was wise to avoid a closed list. The question about whether the Note should state that a party responding to a Rule 34 request should include electronically stored information addresses an issue that should not cause a problem. The topic should have been discussed at the Rule 26(f) conference, and that should remove any ambiguity by the time Rule 34 requests are made. Moreover, all the requesting party need do is point out that its requests cover all information discoverable under Rule 34 to solve the problem. Under the circumstances, it is probably reasonable for a responding party to assume that if the requesting party has not asked for electronically stored information in either a Rule 16 or a Rule 26 conference or in the Rule 34 request, it is not interested in that information. Accordingly, the Note should not say that "a Rule 34 request for production of 'documents' should be understood to include electronically stored information." The addition here (and in Rule 45) of a right to test or sample is a good idea, and may be of particular importance with electronically stored information.

ABA Section of Litigation (04-CV-062): We support the broad flexibility of the term "electronically stored information." But we do not support putting that term in the heading of Rule 34 or using it as a concept separate from "document." The term "document" is broad enough to include electronically stored information. Many attorneys' definition of "document" in their Rule 34 requests includes electronically stored information. The proposed change would require them to modify their document requests to ask for production of both "documents" and "electronically stored information." This is not worthwhile, and there should not be a suggestion that electronically stored information need not be provided unless specifically requested.

Gregory Joseph (04-CV-066): Life for practicing lawyers, district and magistrate judges would be enhanced dramatically if "electronically stored information" were made a subset of "document," rather than something expressly distinct from a "document."

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): We agree with the ABA that there is no need to amend Rule 34 to separately define documents and electronically stored information. The current rule is sufficient.

Alan Morrison (04-CV-086): It is correct to see that the term "document" does not suitably cover electronic information. Although a rule change to deal with that would not be justified, as part of a larger package it is sensible. There is a perfectly good term that should be used rather than electronically stored information, however -- "record." Unless something is recorded, it cannot be used in litigation. The term "record" would include anything a party might sensibly want through discovery. Using this term would bring the rules into line with the Freedom of Information Act, the Federal Records Act, and the Presidential Records Act.

Stephen Herman (04-CV-103): I commend the Committee on this proposal. Although the decisions have been fairly uniform regarding the discoverability of electronic data as a "document," the express recognition that electronically stored information falls squarely within Rule 34 will likely eliminate the needless back-and-forth that occurs with respect to this threshold issue in some cases.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Although the adoption of the concept of electronically stored information in many rules makes sense, it may do mischief as used here because it treats this as different from documents. We see no need to treat it as a category of information unto itself. We agree that arcane words such as "phonorecords" should be removed from the rule, but the emphasis on "electronically stored information" uses today's jargon to create tomorrow's arcanity. There is already great buzz that the next generation of computing will be based not on silicon but upon biometrics. We believe that the emphasis in the rule should be on the production of information, no matter how maintained. So we suggest that Rule 34(a) might be amended to read:

(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, copy, test or sample any designated information which exists in tangible form or is stored in some medium capable of retrieval in tangible form no matter how maintained, including but not limited to writings, drawings, graphs, charts, photographs, sound recordings, data compilations . . .

Our committee is not unanimous on this language or any other language because we've found it difficult to arrive at simple language to convey a simple thought. The idea is that Rule 34 is intended to provide discovery of information which already exists in some way retrievable in tangible form. Other rules address other types of information. Rule 30 permits retrieval of information stored in the human mind, and Rule 33 requires creation of information to respond to written questions.

Chicago Bar Ass'n (04-CV-167): Electronically stored information should not be defined separately from the term "documents." The CBA feels that the current definition of documents is sufficiently broad and flexible to make the addition of a new concept for "electronically stored information" is unnecessary. Up to now, the term "documents" has sufficed to address types of electronic information that did not exist when the rules were written. The creation of this new category may have unintended consequences.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment.

Assoc. of the Bar of N.Y. (04-CV-179): Although the Association agrees that it is appropriate to include electronic information expressly within the scope of discoverable information, it does not believe that there is a good reason to establish it as a separate category. Moreover, there could be confusion about some information that could fall into both categories.

Marion Walker (04-CV-181): Expanding discovery to include electronically stored information is a bad idea. Current Rule 34 is sufficiently broad to include electronically stored documents. The proposal to add electronically stored information suggests that this is something beyond data compilations. It would be better simply to keep the current definition. The fact that a computer will create metadata should not lead to a requirement to produce the metadata about every document.

M. John Carson & Gregory Wood (04-CV-189): Providing electronically stored information without also disclosing the way in which the information was obtained would seem to encourage overly narrow interpretations of requests. Disclosure of the mechanism by which the information was derived should be appropriate and would eliminate the need for follow-up discovery. This could be done by the following language:

Each response to a discovery request that includes electronically stored information should include a statement identifying the electronic media searched; the selection criteria; the methodology incorporated; and the technologies (including the identify of software) utilized.

Clinton Krislov (04-CV-206): The evolving notion of "documents" was broad and flexible, and electronically stored information should be included within this definition rather than as a separate category. Carving that out encourages the practice of shell game obstruction.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): This proposal modernizes the definition of discoverable material, but could be clarified. "Images" should be defined to clarify whether it includes only document images (such as tiff images) or also includes "mirror images," which are exact copies. If mirror images are included, that may magnify the burden on responding parties. In addition, the rule does not state whether metadata is included. We suggest including it in the text of the rule. In litigation, a document is incomplete without this information.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We find the statement that requests for "documents" should be interpreted usually to include electronically stored information to be ambiguous. The rule should clearly provide either that (1) all requests include electronically stored information or that (2) requests do not include electronically stored information unless they specifically say so. We recommend the former. This could be done by including electronically stored information in the parenthetical rather than as a separate category outside the parenthetical.

New York City Transit (04-CV-221): Discovery of electronically stored information should be deemed the exception rather than the rule. When it is required, a party should be required to produce only that which is specifically requested.

Marshon Robinson (04-CV-226): The distinction between documents and electronically stored information is a good thing because it means that requesting parties would have to frame their discovery requests to ask for documents, electronically stored information, or both.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): We like the addition of the right to test and sample in this rule. That will be particularly important if the change to Rule 26(b)(2) is made because it will provide a device for testing the other side's claims of inaccessibility.

Texas Employment Lawyers Ass'n (04-CV-238): Our membership is uneasy with the very concept of electronically stored information. Is some electronic information not stored? Does "stored" equate with archived? How is this different from electronically "maintained" information? What is the purpose of the word "stored"?

Prof. Ettie Ward (04-CV-240): The clarification that documents and electronically stored information can be tested and sampled is helpful. But it is unnecessary to distinguish between documents and electronically stored information. And the new configuration does not clarify which is which. For example, how is electronically stored information different from "data or data compilations in any medium"? Creating a distinction between documents and electronically stored information will only breed confusion.

Zwerling, Schachter & Zwerling (04-CV-247): The addition of the right to test and sample may foreclose the need for expensive and time-consuming motion practice. It will enable a party to test the other side's claim that certain information is not reasonably accessible.

Rule 34(b)

San Francisco

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): In employment discrimination litigation, once defendants do finally produce data, they often produce it in hard-copy form. This is inherently unfair and unreasonable. Defendants have the data in a form which can be automatically searched, and calculations and analyses can readily be made. To re-key or re-input the data from hard copy is very costly and time-consuming. Generally, the producing party will have the ability to produce the information in a number of formats, some of which will be easier for the receiving party to use. The proposed rule reasonably allows the producing party to object to the requested form. The proposal that, if no form is specified, the material should be produced in its ordinarily maintained form or an electronically searchable form, is also reasonable. But it would be desirable instead to direct that the form be "reasonably usable [to the receiving party]".

Joan Feldman (testimony and 04-CV-037): The format of documents is critical. A native format Word document will often have embedded comments from counsel. There is no way to review all the active information, much less this embedded information. You have to narrow the search.

Thomas Allman (testimony and 04-CV-007): The default rule on production in the absence of a designation of desired form should be changed to focus more on the burdens and ease of production than on the similarity to former practice. The early discussion under Rule 26(f) should allow for better self-regulation, and if a default form is needed it should be to produce in a "useable" form. The rule should allow the requesting party to designate the form requested and allow the producing party to object and explain the basis for its preference. In addition, the Note should be changed to refer to electronic information systems, rather than a singular system, because most have many.

Jocelyn Larkin (The Impact Fund): Allowing the plaintiffs to specify the form for electronically stored information is a welcome addition. There is nothing more wasteful and aggravating than when an employer, with a simple Excel database, prints out the database in hard copy form and produces, leaving me to re-input the data by hand so it can be analyzed electronically.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 *Tenn.L.Rev.* 585 (2004)): Regarding form of production, he would require production in every form in which it is maintained by the producing party, subject to the working of the meet-and-confer process.

Charles Ragan: Producing in native format as the norm presents important problems. In the first place, there is no reason to assume that it is always best to produce in electronic rather than hard copy form. Beyond that, the difficulties of conducting privilege review and other oversight of embedded data make native format production dubious. Therefore, "production in the form in which it is ordinarily maintained" may create problems. But the only alternative is an electronic version, even though hard copy might actually work better. At least .pdf should suffice. I would change Rule 34(b)(i) to say that the default provision is to "produce the information in a form reasonable to the circumstances." The same change should be considered for Rule 45(d)(1)(C).

Dallas

Peter Sloan: The reference to electronically stored information might be better if it were to "digitally stored information." Much information is not stored electronically, but it is all stored digitally. The goal should be to have rules that endure, and emphasizing electronic storage may undercut that goal. If "digitally stored information" is not used, he does not have a second choice.

Anne Kershaw (Feb. survey results, 04-CV-036): Survey participants generally reported difficulties in producing information "as ordinarily maintained." And they said that "electronically searchable" is much too limiting. One respondent said his company would like to produce his documents on a website, creating a single document database for all parties. Doing this would be more difficult under the new rule. And there was concern that the default form of production could undermine the discussion of this topic at the Rule 26(f) conference, owing to possible gamesmanship.

David Fish (testimony and 04-CV-021): The provision that allows the requesting party to specify the form of production is useful. Common practice has been to print out the documents rather than producing the information in electronic form. This is better.

Washington

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): This proposal should be modified. The rule might be said to create a presumption in favor of the requesting party's favored form of production. For a company like PM USA, which must produce the same information in many cases, it is critical not to give any one plaintiff carte blanche to choose the form of production. Giving opposing parties the choice of the form of production would lead to impossible results in such litigation. Moreover, the seeming inclination toward production in native format is undesirable. Information in that form cannot be numbered or marked confidential. Redacting is not possible with native format documents. And native format documents are easier to modify. And this form of production is rarely needed. The authorization for the requesting party to set the form should be removed from the rule. Instead, the rule should simply direct the responding party to produce the information in a form that is "reasonably useful." A default form of production can suitably be included in the rules. But there should be room for something like what my company has done in repetitive products liability litigation -- create a plaintiffs-only website and refer plaintiffs to that site. The documents on that site are already in a certain format, and allowing plaintiffs to select their own favorites would create havoc.

Jonathan Redgrave (04-CV-048): I endorse the presumptions and procedures of proposed 34(b), except that the responding party should have the right to designate the form of production without being limited to those listed in the default. Many defendants involved in multiple cases across jurisdictions will need to identify a single form for production of the same information in multiple actions.

Dennis Kiker (testimony and 04-CV-077): The default form of disclosure if the requesting party has not specified a form will create problems and drive up the cost of litigation. Neither of these forms is necessarily the best format in which to produce electronically stored information. In addition, prescribing these forms makes it difficult for companies to protect proprietary business information. Many companies maintain information in formats that cannot readily be adapted to production under this rule. A proprietary relational database permits information about a specific product to be extracted and exported to a flat file for import into a

spreadsheet or another database program. But the resulting report is far less useful than the report as formatted by the proprietary system. Under the proposed rule, my client would be required either to produce the entire proprietary database, together with all software required to extract and review data, or produce the electronically searchable, but much less useful flat file. The hard-copy printout, which is actually the most useful form of production, would not be allowed. True, the parties can agree to another format, but sometimes they are not sensible about that. Producing in all formats would raise serious issues of disclosure of proprietary information. Ordinarily, the parties will agree that confidential business information will be produced subject to restrictions, and it is marked confidential before production. That is easy to do with paper, or with TIFF or PDF documents. But proposed Rule 34(b)(ii) complicates matters by limiting the formats allowed. I understand that it is virtually impossible to create a confidentiality designation for electronically stored information in "native" formats. Converting to TIFF or PDF causes potentially significant costs for document conversion. And if this is done by OCR, there are likely to be errors. Although the rules surely must accommodate the changes that will result from the technologies of the future, they also need to be adapted to the technology of today. I would therefore suggest rewriting Rule 34(b)(ii) as follows:

(ii) if a request for electronically stored information does not specify the form of production, a responding party must, if practicable, produce the information in a form in which it is usually maintained, or in an electronically searchable form. However, in appropriate circumstances, the information may be produced in an alternative form, including hard copy. The party need only produce such information in one form.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): Our survey indicates that paper is still the most common form of production. But some 30% of respondents said that they had produced electronically stored information in native format. And 39% used TIFF.

Pamela Coukos (testimony and 04-CV 020): The default format requirement is helpful. In addition to specifying the default format, however, the rule should also specify that production of electronically stored information be in "complete, readable and useable" form. The fact something is electronically searchable does not mean that the other side will be able to read or work with it. There should be an obligation on the part of the producing party, particularly where format is unspecified, to provide information necessary to read and understand the material.

Michael Nelson (testimony and 04-CV-005): The default form of production provision places unnecessary limitations on the form of production by precluding parties from producing data in a form that is reasonably usable but is not searchable (such as graphic or audio files). The rule should only require that production be in a "reasonably usable form."

George Socha (testimony and 04-CV-094): The Note should not imply that all electronically stored information should be produced in the same form. There are times when multiple forms would be more appropriate. The Note would benefit from addition of something like the following after the paragraph ending "Advance communication about the form that will be used for production might avoid that difficulty":

A party may be asked to produce a range of types of electronically stored information, so that a single production might include word processing documents, email messages, electronic spreadsheets, complete databases and subsets of other databases. Requiring that such diverse ranges of electronically stored information all be produced in one single form may reduce meaningful access to the information while at the same time increasing

the costs of producing and working with the information. The amendment therefore permits the requesting party to choose different forms of production for different types of electronically stored information and provides the same option for the producing party.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The proposed rule suggests a preference for native format. But the dynamic nature of that format produces real problems, such as the inability to "Bates stamp" the materials being produced. The rule should simply require the parties to discuss form of production at an early stage. The directive to produce in searchable format should be changed to "usable" format. Some information, such as graphic or audio data, can't be made searchable. In addition, it should be made perfectly clear that there is no intention to allow a party to obtain direct access to the opposing party's systems.

Dabney Carr (testimony and 04-CV-003): It would be better for the default to be "reasonably usable form." that is more familiar to lawyers and judges. It also allows greater latitude to tailor the form of production to the needs of a particular case.

M. James Daley (testimony and 04-CV-053): I disagree with the form of production language. As drafted, it does not allow the responding party to choose the form of production, even where the request is silent on the issue.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): In the default provision for form of production, we see difficulties. The word "form" seems to be used in two ways. References to the form in which electronically stored information is maintained seems to preclude the movement of such information from the location where it is maintained to another location. That might be unworkable if it meant that we could not move information from dozens of personal computers to a central location. The Note should clarify that no such restriction is intended. The second "form" is similarly burdensome if it means that materials must be converted into a searchable form if not already in such a form. The rule should say that a party need not make electronically stored information any more searchable than it already is.

Alfred Cortese (testimony and 04-CV-054): The production option under Rule 34(b)(ii) should be analogous to the existing option to produce in a "reasonably usable form." This better reflects the requirement that the requesting party receive information in a format that is useful to that party, without mandating specific formats. This would also accommodate the large number of parties that still prefer producing hard copy. This approach would also be in accord with the generally accepted view that "direct access" to a party's proprietary data should be quite rare. The default format provision could have the unfortunate consequence of mandating production in "native format." "Electronically searchable form" seems to mandate software required to search TIFF or PDF images. There already are formats that are not meaningfully electronically searchable (e.g., mpg, jpg, wave) and more may be on the way. For these, the only option would be to produce in the form in which it is ordinarily maintained, i.e., native format. If "reasonably usable" were substituted the nonsearchable files could be produced and would be useful.

Craig Ball (testimony and 04-CV-112): I believe that "form(s)" should be substituted for "form." Often there is no single form that will work for all the information. In the same vein, the language "The party need only produce such information in one form" should also be reconsidered.

Keith Altman (testimony and 04-CV-079): We break electronically stored information into three categories, and produce differently for each. (1) Images: These can generally be produced as images. (2) Word processing documents: These should be produced in image format and simple text format. The image is to be used as evidence. The text is to be searched.

(3) Complex documents: These are handled like word processing documents. Redactions can be done on the original electronic version before conversion to images.

Michael Heidler (testimony and 04-CV-057): The rule should require that requests specify at least one data format. Otherwise the responding party can unreasonably burden the requesting party by supplying data in a cumbersome format.

Joseph Masters (testimony and 04-CV-063): The rule would allow companies to produce ASCII text files instead of Microsoft Word files to avoid production of metadata. I am not clear why the producing party is limited to a single format for production. That would encourage companies to keep data in strange formats that cannot easily be read. Both the "electronically searchable" term and the "ordinarily maintained" formulation produce ambiguities and difficulties. The cost of software to use the company's usual format may be very large. And electronically searchable could include the "sort of searchable" scenario, in which might prove to be virtually useless to the requesting party. I propose the following changed language:

(ii) 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 common file format. The party need only produce such information in one format as long as that format is readable by the requesting party.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft believes that "a reasonably usable form" is preferable to "an electronically searchable form" in Rule 34(b)(ii). The alternative language avoid making any unwarranted assumptions regarding the appropriate format for electronically stored information. It is not clear what exactly is meant by "electronically searchable." Much electronically stored information is not truly searchable in a manner that would be of much use to parties in discovery. There are already file types such as .gif, .jpg, .wav, .mpg, and many more may emerge. Whether these would be considered searchable is debatable. At the same time, the rule should not privilege or favor any specific format of production, and particular the rules should not favor production in native format. The format for production is always the subject of legitimate discussion between the parties. We believe that the current wording favors production in native format, and that this slant is undesirable. In many cases, production in native format can greatly add to the production burden on the producing party. There is, for example, the need for additional review and an increased risk of producing privileged material. In addition, there is presently no way to number such materials, and data integrity is a major concern because many types of documents can be easily altered. Protective order designations pose problems like those with numbering of produced materials. Finally, there is no good way to use the ordinary native format file in a deposition. It is therefore very important for the Note to make it clear that there is no preference for any particular format.

Allen Black (04-CV-011): In the Note to 34(b), I think it would be helpful to include some examples of the forms of production we are talking about. Many users of the rules will not know about "native format," "metadata," "embedded data," "pdf files," or the like. Just mentioning some of them in the Note will prompt thinking users to find out what they mean.

Philadelphia Bar Association (04-CV-031): We have formed no consensus with respect to these changes. The proposal is consistent with current practice by placing emphasis on the

parties' ability to agree on a form of production, and recognition that the court may ultimately determine this issue. But some maintain that information should be produced in the form in which it is ordinarily maintained only if that form is readable by the requesting party. This concern arises from the possibility that certain electronically stored information may only be readable if viewed with proprietary software, or obsolete hardware. Others believe that it is already implicit in the rules that a production that cannot be read is not an adequate response to a discovery request. The Note should state, as does the Note to Rule 33, that "satisfying these provisions . . . may require the responding party to provide some combination of technical support, information on application software, access to the pertinent computer system or other assistance. The key question is whether such support enables the [requesting] party to use the electronically stored information as readily as the responding party." The two Notes should be consistent.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support the proposal, but recommend that the Note provide greater guidance regarding production in native format or in an electronically searchable form. Given that the form of production has become a frequent source of controversy, it makes sense to establish some procedure for the issue to be raised and resolved in discovery. The procedure proposed is flexible and reasonable. But production in the format in which files are maintained suggests native electronic files. Such files raise concerns about spoliation, disclosure of privileged or confidential information, redacting privileged information, the impossibility of numbering the files for identification purposes and accessibility. The alternative default offered -- an electronically searchable form -- is not clear because the extent of "searchability" is uncertain. To convert native files to static but searchable images requires very substantial technology, time and money (see pp. 21-22 of the submission). The Section believes that the Note should not designate any specific technology, but should provide more guidance about the level of functionality contemplated. Additional specific concerns exist (see *id.* at pp. 22-24). These include whether e-mail attachments must be searchable, whether all forms of metadata must be searchable, how spreadsheets should be handled, how encryption or password protection should be addressed, and the appropriate way of dealing with databases. The concern is that the overall statement that such items should be "searchable" is not sufficient, and will lead to a patchwork of judicial constructions. But the rule clearly cannot speak to all the hundreds of formats that currently exist, much less anticipate developments of the future. We agree that, in theory, producing a searchable form is a viable form of production.

ABA Section of Litigation (04-CV-062): We believe that the proposal to provide the responding party with several choices is sound. But the Committee's approach raises several issues. First, the rule provides the responding party with two choices only if a form is not specified by the requesting party. We believe that responding party should always have this choice in the first instance, consistent with current practice, and that the burden should be on the opposing party to show why the form chosen by the producing party is not adequate. Second, the two most controversial issues are whether responding parties should be required to produce in native format and whether metadata and embedded data should be produced. Such information is easily altered. Moreover, it is not necessarily true that metadata will be important with any frequency. Production of embedded data possibly showing prior drafts and other information compounds the difficulties. Although we believe that a party should be allowed to ask for this information, the default should exclude it and the requesting party should be required to show that it is needed and why. The option of producing in electronically searchable form would probably lead to a common practice or default in which documents are produced in that way. But some types of electronic documents may not be electronically searchable, such as .jpg or .mpg files.

Gregory Joseph (04-CV-066): The proposal is sound, but there is no reason to limit the requesting party to electronically stored information. It is common for document requests to specify an electronic production format for hard copies.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): The proposal allowing production of electronically stored information as "ordinarily maintained" may be helpful, but permitting the responding party instead to produce in a form that is "electronically searchable" will lead to delay and diversion. This option will permit evasion and will foster satellite litigation. The data may not be as easily searched in the format produced as in the form in which originally kept. In a recent case, this sort of problem resulted in two rounds of motions. By providing options other than those already in the rule, the proposed amendments will produce distracting, costly litigation.

David Shub (04-CV-068): The rule should specify that information must be produced in "a reasonable electronically searchable form." This would give the party who got the information grounds to dispute certain formats for production, such as an undifferentiated data dump. These may be electronically searchable, but may also present data in an incomprehensible form.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We recommend that the rule provide that "if a request for electronically stored information does not specify the form of production, a responding party must produce the information . . . in an electronically searchable form."

Steve Waldman (04-CV-143): Parties should be required to submit or e-mail all discovery requests and responses in "doc" or "wpd" format, so that parties can incorporate those requests and responses into further pleadings without scanning them. When they are submitted in "pdf" format it builds additional work into the process of responding.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP favors a default form of production like "in a reasonably usable form." The more general formulation is appropriate in light of changing technology and technology limitations. Not all electronically stored information is searchable in a usable sense. Some data, such as proprietary or highly technical databases, cannot practically be produced as ordinarily maintained.

Gary Epperley (American Airlines) (04-CV-177): We suggest that the default form of production be in a "reasonably usable form." That is the standard contained in existing Rule 34, and would allow the parties greater flexibility.

Assoc. of the Bar of N.Y. (04-CV-179): The default rule could prove problematic. On the one hand, converting large amounts of electronic information into .tiff or .pdf files could be extremely costly. On the other hand, receiving a large dump of native electronic files could be useless to the requesting party absent significant expenditure of time and money to convert it into a usable form. A better solution would be to permit the responding party to indicate the form of production it proposes to use, permitting the party who sought the information to object, leading to a consultation between the parties on what form to use, which the court could resolve if needed.

Marion Walker (04-CV-181): The proposed amendment allowing designation of the form in which information is to be produced is appropriate. But my experience has been that plaintiffs usually request both electronic and hard copy form.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The option under 34(b)(ii) should be to produce electronically stored information in a "reasonably usable form." Directing that production be in the "ordinarily maintained" form or an "electronically searchable" form could be interpreted to mandate production in native format or to require accompanying specialized software.

William Herr (Dow) (04-CV-195): These changes will impose new burdens on producing parties to the extent that they require the company to make searchable environments available, independent of the company's information infrastructure(s). The cost of doing this should be presumptively shifted.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The rule could clarify definitions pertaining to the default production option. We think that it should be explained that "ordinarily maintained" does not mean exclusively in native format. It could be construed to mean merely producing data electronically, in which case the responding party could potentially produce in an electronic format that might be virtually unusable by the demanding party.

Wachovia Corp. (04-CV-214): We believe that the right of the requesting party to designate the form for production is unwise since this party has the least knowledge about the nature of the electronic data. Instead, the rule should simply specify that the producing party has the obligation to produce data in a "reasonably usable form." The rule should also be revised to make sure that it is not interpreted to require the conversion of hard copy material into electronically stored information. We recommend: "This rule shall not be construed to require a producing party to convert hard copy documents into electronically searchable form." Finally, the Note should confirm that the producing party does not have an obligation to provide software or hardware necessary to review the electronically stored information it produces. The burden should rest on the requesting party to pay for such equipment.

Metro-North Railroad (04-CV-216): Metro-North believes that unless the requesting party specifically asks for electronically stored information, there should be no burden to search for it.

Ashish Prasad (04-CV-225): The default mode of production is deeply flawed. The form in which it is ordinarily maintained has clear meaning for many types of electronically stored information, but not for others, such as databases. For many types of databases, replication would require re-creating not only the individual data elements and tables of the database, but the underlying database environment and computer platform. And an electronically searchable form is meaningless for some sorts of electronically stored information, such as pictures or graphics files. I agree with the recommendation of Microsoft (04-CV-001) that production should be in "a reasonably usable format."

Joe Hollingsworth and Marc Mayerson (04-CV-233): The rules should permit production in electronic format but make clear that "native" format is not required. It should be sufficient to produce the document in image form rather than native format. Production in native format, and the attendant need to review embedded data, would magnify costs.

Zwerling, Schachter & Zwerling (04-CV-247): This proposal's provision of a right for the responding party to object to the form of production requested by the requesting party, or to

choose the form if none is designated, returns discovery to a game of chance. It may defeat the very purpose of requesting discovery in electronic form if the responding party can choose the form, or unilaterally refuse to produce in electronic form. In addition, any hint that metadata are not reasonably accessible should not be entertained. Metadata are essential. The paper analogue is the routing slip, and that could not be held back from discovery.

Connecticut Bar Ass'n (04-CV-250): Since the parties can plan about the form of production under 26(f), we think that the requesting party should bear the cost of using a format other than the one agreed upon. We suggest the following:

Whenever a requesting party seeks electronically stored information in a form other than that in which it is maintained or, if the information is sought from a party, than that form in which the parties agreed to in their Rule 26(f) report, the requesting party shall bear the additional costs of that alternative form of production and shall seek prior court permission for such request [subpoena], which permission shall be freely granted for a reasonable form of production.

Rule 37(f) -- overall

San Francisco

Michael Brown: E-discovery is a sanctions trap. Therefore, the rule should introduce a higher level of culpability by requiring that deletion of information be willful to justify sanctions.

Thomas Allman (testimony and 04-CV-007, as supplemented on Jan. 19): It is unreasonable to expect parties to sequester every remotely relevant piece of discoverable electronically stored information in advance of litigation. Yet some unreported sanctions decisions seem to imply that this should be done and that failure to do so is intentional spoliation. This promotes repeated and unwarranted requests for sanctions. Preservation in anticipation of litigation is not an absolute value; the ordinary operation of electronic information systems produces -- and discards -- information on a regular basis. All that should be required are "reasonable steps" to preserve information. I strongly support a safe harbor. I believe that this safe harbor should focus on a party's good faith operation of its systems and that sanctions should not be imposed in the absence of a finding of willful deletion of information, as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information that is deleted or lost as a result of the routine operation in good faith of the party's electronic information systems unless the party willfully violated an order issued in the action requiring the preservation of that information.

Although I understand why the Committee might be inclined to require that the party demonstrate that it met its preservation obligations in this case, I believe that the "good faith" approach is preferable and would identify those instances in which a party acted to avoid its obligations. This would help avoid confusion in applying litigation holds and would not overstep the limitations on the Committee's power. Finally, adoption of a safe harbor rule would reinforce the movement toward reasonable and responsible records retention policies that has resulted from increased awareness of the importance of these issues.

Jeffrey Judd: I have observed over the past six or seven years that litigation adversaries have with greater frequency adopted the tactic of litigating about the adequacy of a client's production, as it can be an effective means of increasing litigation exposure and thereby inflating the settlement value of a case. Allegations questioning the adequacy of a client's efforts to identify and preserve potentially responsive electronically stored information have become a litigation weapon of choice.

Gerson Smoger (testimony and 04-CV-046): This provision is unnecessary. Sanctions are never imposed without a noticed motion and hearing in which the party's conduct are fully examined, and the imposition of sanctions is very rare. District courts are fully able to evaluate whether sanctions are appropriate in a particular case without new rules. No special exemption is necessary for electronically stored information. Adopting one sends the message that destruction of this information is per se permissible.

Jocelyn Larkin (The Impact Fund): The "safe harbor" is unnecessary and inconsistent with the goal of ensuring that relevant evidence is produced. Sanctions are never imposed without a noticed motion and hearing, allowing full exploration of the party's conduct. District courts are in the best position to evaluate -- in a particular case -- whether sanctions are

necessary based on the individual facts. No special exemption is needed for electronically stored information and adding this one sends the wrong message. In employment cases, it is also inconsistent with the substantive obligations employers have to maintain payroll and personnel data, apart from any common law obligation that results from the prospect of litigation.

David Dukes (testimony and 04-CV-034): I support the creation of a safe harbor, but urge the adoption of the alternate language with a higher standard of culpability.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): The solution should be to require a "snapshot" on the day the party becomes aware of the possible claim. A new Rule 26(b)(6) should be added, providing as follows:

(6) Preservation Obligations. When a party reasonably should know that evidence may be relevant to anticipated litigation, that party must preserve those documents and tangible things that are discoverable pursuant to Rule 26(b)(1) and reasonably accessible. Upon notice of commencement of an action, a party shall preserve a single day's full set of inaccessible materials that it stores for disaster recovery or otherwise maintains only as backup data. A party need not preserve materials beyond those described unless the court so orders for good cause.

There is presently no rule provision that explicitly addresses a party's obligation to preserve discoverable information. This provision would indicate when the obligation arises and what it requires. This proposal applies to all sorts of information, not just electronically stored information. There should also be some possibility of pre-suit discovery. The point is that the snapshot does not freeze the business.

Dallas

James Wren (testimony and written statement): The combination of the safe harbor with the presumed non-discoverability of inaccessible information invites abuse. A party that has taken steps to make data inaccessible via encryption, archiving, etc., and thereafter anticipates future litigation, may be encouraged to discard this information without running the risk of sanctions. Having good faith limits on a party's adoption of an automatic destruction policy would be desirable. Although the Note says that there are instances in which a party must preserve inaccessible information, that one sentence is simply not sufficient to thwart the potential for abuse. The sentence says this preservation need only occur if the data is "not otherwise available," but that contingency factor weakens any protection the sentence otherwise would provide. The inaccessibility of data should not be a justification for providing safe harbor protection for its loss. It is true that spoliation doctrine coming from other sources such as state law is not directly subject to a Federal Rule, but such a rule will likely influence that doctrine.

Anne Kershaw (survey results 04-CV-036): The survey was of large corporate clients. A number reported very broad pre-discovery preservation orders. One reported a case in federal court in which the judge sua sponte entered a very broad preservation order, and the company was later sanctioned for employee error, even though none of the errors were willful, negligent, or even had a substantively significant effect. The company has since suspended all system email deletions had has 56 servers housing all its email, 40 of which Microsoft has classified as "un-maintainable." It estimates that compliance with this preservation order has cost it \$10 million since 2002. Another company reports it spends \$2 million per month in tape and people costs alone to comply with a blanket hold.

Paul Bland (TLPJ) (testimony and prepared statement): This proposal will encourage corporations to regularly destroy electronically stored information at short intervals. It is hard to say how the rule would play out with spoliation law if it were adopted. But probably the rule will prompt plaintiffs to seek a preservation order in every case to guard against the spoliation the rule invites. Heretofore, we would be content with a letter notifying the defendant about what it should preserve. Now we will be uneasy about whether the letter is reliable due to the rule. A particular problem in consumer lawsuits is preservation of databases; otherwise the company won't have any record when the lawsuit ends which consumers were overcharged, because the dynamic database would be changed as new customers signed up and old ones dropped out. There is no widespread tyranny of federal courts via sanctions orders that this rule is needed to correct. Litigation is driving what companies preserve and try to discard.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): It is almost always cheaper and easier to store e-documents than paper ones, and it will always be cheaper to maintain them. In addition, companies that use electronically stored information are careful to store backup versions of the data. This is cheap and easy. This proposal would rewrite the laws relating to spoliation so long as electronically stored information is lost due to the ordinary operation of a party's electronic information system. Some companies already have document retention plans that seem intended to destroy potentially-damaging documents before suits are filed, and this proposal would make that the standard practice. It would be foolish for any company to retain any e-document any longer than was necessary. Since it will be rare that a party will be asked to produce e-documents less than a year after the event, it will be easy to insulate against discovery. At present spoliation law put defendants at some risk, and this rule will put that at risk.

Darren Sumerville (testimony and 04-CV-089): Although limited in impact to actions already commenced, the amendment would directly affect the pre-litigation behavior of all but the clumsiest of defendants. The safe harbor provision gives a strong incentive to retool electronic information systems to quickly and comprehensively delete or overwrite data. Corporate defendants, in particular, would establish the type of "routine" policy that will simultaneously insulate information destruction from sanctions and eliminate a rich source of data that could one day prove incriminating. Together with the proposed change to Rule 26(b)(2), this change will prompt a broad reconfiguring of corporate information systems to frustrate discovery. That flies in the face of the purposes identified in Rule 1.

David Fish (testimony and 04-CV-021): This change would give a stamp of approval to document destruction policies. There is nothing inherently wrong with a company having a document retention policy, but if a new rule like this is adopted companies will respond by encouraging destruction. It is critical not to tell companies in advance that there will not be sanctions. A litigation hold is essential. The way to do it is to sit down with the other side and specify terms for identifying the materials that must be preserved.

John Martin (DRI) (testimony and 04-CV-055): Companies should not be required to continually and indefinitely retain all electronic information produced in the routine operation of their computer systems. The safe harbor should protect companies that abide by their own routine records retention policies. I would favor protecting a company unless its loss of information violated a court order.

Daniel Regard (testimony and 04-CV-044): I am in favor of a safe harbor. I would caution the Committee to look beyond the relatively well-understood paradigm of emails and user files to consider the more complex environment of database systems. Identifying all the aspects of a complex system that are responsive takes a significant investment of time and effort.

Even as this process is ongoing, automatic processes often are deleting information. The ability of most companies to turn off deletion processes in such systems is limited at best, impossible at worst. Large systems, although capable of being copied (sometimes) as a single "snapshot," may limit restoration of that snapshot. There may be data on the system, such as temporary or transitional tables, that were never intended to be retained for any measurable duration of time. Changing these schedules may be difficult, and restoring the resulting data streams impossible. Against this background, reasonable action by trained engineers should suffice to guard against sanctions.

Michael Pope (testimony and 04-CV-065): The concept is sound. Parties need to be reassured that they will not be sanctioned if they conduct themselves reasonably. This is particularly important with electronically stored information because there are so many employees who can create, alter, or delete this information that no CEO or general counsel, much less outside counsel, can effectively control all their actions. Absent an intentional violation of an order or agreement of the parties, reasonable behavior is all that should be required.

Laura Lewis Owens: As things are now, lawyers and clients who act in good faith cannot sleep at night for fear that they have not contained electronically stored information in a way that guards against serious sanctions.

James Michalowicz (testimony and 04-CV-072): The rule has merit in that it supports a company's reasonable records and information practices and makes a distinction between reasonable practices and spoliation. This proposed amendment can be effective if companies operate a records and information program which includes the life cycle process with a records preservation protocol. This would recognize that there is a routine life cycle of company records. That cycle can be impacted by "life changing" events such as litigation, investigations, mergers, audits, and physical disasters. A company has a responsibility to manage the life cycle of records with a view to the business value of the records, and the needs of the sorts of events mentioned above. A company should not be required to keep information that does not have a business value, does not meet a regulatory requirement, and is not needed as evidentiary material.

Washington

Todd Smith (testimony and 04-CV-012) (President, ATLA): Adopting this rule will prompt companies to speed up their "routine" deletion of records. (An exhibit to the testimony reproduces exchanges by e-mail among information professionals about speeding up their automatic deletion of e-mails.) Our information shows that people are deleting information to avoid its availability in litigation, and that these rules would promote that activity.

Kelly Kuchta (testimony and 04-CV-081): The safe harbor proposal is a noble one. But I fear that it provides a substantial opportunity for abuse because it suggests that no extra steps are required to preserve data. I have found that sanctions are most often imposed for failure to do something, rather than for acting proactively and responsibly. Therefore, I recommend that the proposed changes be withdrawn.

Jonathan Redgrave (04-CV-048): I endorse the concept of a safe harbor. The distinctive features of electronically stored information make it appropriate. But the protections should be expressed in terms of the sorts of sanctions precluded rather than saying sanctions "under these rules" are forbidden. Moreover, the rule as drafted does not provide much of a safe harbor at all. It will leave large organizations in a state of great uncertainty. All that need be said is that there

is a presumption that loss of information in the ordinary operation of the computer system should not subject a party to serious sanctions absent a reason to know that it should be preserved.

Anthony Tarricone (testimony and 04-CV-091): This rule would alter substantive rights by creating a de facto preservation standard. Saying that the duty to preserve only arises after the party knew that the information would be discoverable in the action relaxes the requirements of common-law preservation considerably. In addition, forbidding sanctions when a party loses data due to the routine operation of a system contravenes the reasonableness standard that applies in most jurisdictions.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): Our survey indicates that spoliation sanctions are not coming up that often. Very, very few respondents said that they had sanctions requested against them. Over 90% said it had never happened to them, and less than one percent had been sanctioned. But almost all said they thought that taking action about sanctions was a good idea.

Pamela Coukos (testimony and 04-CV 020): This rule is not necessary for the scenario it is designed to address, and creates a risk of sweeping under the rule a variety of other scenarios that it was not designed for. Clearly, the common practice of recycling backup tapes should not under ordinary circumstances give rise to sanctions. I cannot imagine a federal judge imposing sanctions for that. The current law is therefore more than sufficient to address these issues. And creating this rule will encourage end runs around preservation obligations. The Rule 26(f) discussion is the way to go, not this rule.

Dabney Carr (testimony and 04-CV-003): Currently, it is very difficult to provide clients with advice on what they should preserve. A safe harbor provision addresses that problem, and is important because more information is now produced in discovery than ever before. Most litigants preserve more than enough information through their litigation hold procedures.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): We strongly support the creation of the safe harbor. This would be a way to ensure that records retention and documents discovery systems fulfill the purposes of the Rules. Those who say that corporations would design systems to put information beyond discovery don't know how corporations work. The people who run corporations want to do what the corporation does for a business. When the legal department suggests changing that routine for a legal reason, there is almost always a negative reception. It is simply inconceivable that a corporation would take information that it needs to run its business and convert it to a format that renders it unusable. Right now, businesses are being urged by their legal departments to adopt inefficient records retention systems for litigation reasons.

M. James Daley (testimony and 04-CV-053): This is not a true harbor, and it is not very safe. But it would improve the status quo.

Alfred Cortese (testimony and 04-CV-054): There is a real need for the safe harbor. The logic behind it is that the cost and disruption of interrupting the regular operation of a computer systems are not justified when there exist other means such as an effective litigation hold to preserve needed information.

David Romine (testimony and 04-CV-080): Creating a safe harbor for failure to produce relevant, discoverable information would create the wrong incentives. The failure to respond to

legitimate discovery requests is a more serious systemic problem than the cost of responding to requests for discovery that call for electronically stored information.

Michael Ryan (testimony and 04-CV-083): The rule change will encourage companies to adopt stringent and expedited routine destruction policies. Coupled with the unilateral decision what is "not reasonably accessible" under Rule 26(b)(2), it will result in the very real prospect of motion practice for months under that rule combined with loss of data caused by this rule.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The safe harbor should provide that companies do not need to suspend their normal operation of business unless there is a preservation order. Large companies cannot save all information. Companies should not be required to stop recycling of backup tapes.

William Butterfield (testimony and 04-CV-075): This rule appears to abrogate well-established legal authority requiring parties to retain discoverable information before suit is filed, and to create a loophole for destruction of material even after suit is filed. Moreover, recent developments in technology indicate that backup storage will no longer be a serious problem. The rule will also prompt an increase in the number of requests for preservation orders.

Craig Ball (testimony and 04-CV-112): This merely codifies the principle of "the dog ate my homework." We don't need this rule; judges can discern when sanctions are needed. If the rule is not abandoned, it should be changed to refer to "information sought in discovery" as well as "discoverable information." The fact that the information was sought in discovery should, by itself, be sufficient to require its preservation. And if you think about it, there is no disaster recovery reason for keeping backup tapes very long. What we have essentially are companies that are asking to be saved from the consequences of their own ineptitude in terms of what they retain. The reality is that information lasts in active data until somebody decides to "delete" it, and that's when backup tapes become important. When that happens, we need to make sure it doesn't disappear from the backup media also. There is no functional business reason to keep backup up tapes from six months ago. You wouldn't want to bring your systems back up as they were six months ago.

Rudy Kleysteuber (testimony and 04-CV-049): This rule is misleading and flawed. At least, it should distinguish between deletion and erasure. A computer system won't delete data without having been programmed to do so. It's not the computer's idea. At least, the rule should distinguish between deletion and erasure, a distinction that is based on intent. Deletion is intentional action to mark a file no longer needed. That doesn't actually affect the file at all; it's still exactly where it was. the same thing happens with backup tapes. Some person decides how long tapes should be kept, and then they are "deleted." The rule could be rewritten as follows:

. . . 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 the unintended erasure of already-deleted data consistent with normal use of the electronic information system.

Furthermore, the practice of recycling backup tapes should not be sued to justify this rule. Just because expensive tapes are currently in use for this purpose does not mean that things will not change.

Michael Heidler (testimony and 04-CV-057): My experience is that computer systems do not delete data. They may hide it, but they archive and retain it. Adding this rule will protect only the owner of a poorly-designed system that deletes useful data.

David Tannenbaum (testimony and 04-CV-047): This rule provides incentives to routinely destroy data. The Note's reference to the "nature" of the party's system promotes selection of systems with a nature that defeats access to information. Although the Note also cautions against system arrangements that are designed to remove litigation data, it will be hard for judges to spot this sort of activity.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The safe harbor is a reasonable effort to permit the automatic processes that are at the heart of large modern IT systems to keep operating without threat of sanction so long as the party takes reasonable steps to comply with its discovery obligations.

J. Walter Sinclair (04-CV-004): It is essential that we identify appropriate litigation hold practices and provide a reasonable safe harbor. The lack of clarity on this issue presently is causing my clients to ask me to tell them when they have to preserve what, and it is impossible to know the true boundaries of that requirement under the various court decisions on this issue. The focus of preservation should be on reasonably accessible information, not backup tapes and other disaster recovery material. The cost of putting a hold on the systematic business destruction practice, or the reuse of backup tapes, can be astronomical. Without some showing of extraordinary need, my clients should not be forced to incur this expense. I would allow sanctions only if the loss of data was reckless or intentional and violated an order requiring preservation.

James Rooks (04-CV-019) (attaching article from Trial Magazine): This change will green-light destruction of information that would establish liability. Giving companies a safe harbor when they destroy information through the "routine" operation of their document retention systems will invite them to set up "routine" data purges at short intervals. It is bad business practice to purge recent records, and the cheapest thing to do with a computer is to add storage capacity.

Herbert Ogden (04-CV-023): The rule unreasonably distinguishes between electronic records and all others. Since electronic records take up much less space than paper records, there is no point in requiring people to keep the latter but letting them discard the former. the proposed addition could be made to read better by putting all the conditions in one place:

A court may impose sanctions under these rules when a party fails to preserve electronically stored information if (1) the party violates an order in the action requiring it to preserve information, (2) the party fails to take reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action, or (3) the failure resulted from the loss of information because the party's electronic information system was not operated in a routine fashion.

Marilyn Heiken (04-CV-024): The proposed amendment would allow the routine destruction of information that would establish liability. Companies would set up "routine" data purges at short intervals. With modern computer systems, vast amounts of information can be stored indefinitely and searched quickly. this is both bad policy and technologically unjustified.

Dennis Gerl (04-CV-030): If a party knows, or should know, that important electronically stored information needs to be saved, then this data can be copied quickly and cheaply. Businesses often routinely do this through the use of backup disks. If the party does not do this, then the loss of the data due to "routine" operation of the party's electronic information should not be a defense to sanctions. A compromise rule would prohibit the court from sanctioning a party that destroys electronically stored information if (1) the party took reasonable steps to preserve it; and (2) the loss resulted from routine operation of the party's electronic information system before the party knew or should have known that such electronically stored data needed to be saved. This would still not directly address the issue of companies that "routinely" purge their system over short intervals of time to eliminate important data.

Philadelphia Bar Association (04-CV-031): We disagree with the proposed amendment. The current rules and caselaw regarding spoliation adequately address any issues that may arise regarding failure to preserve electronically stored information. In addition, the use of the phrase "should have known" is confusing and unclear.

Steven Flexman (04-CV-035): If this rule is adopted, we will see an immediate effort to change to data storage systems that do frequent purges of e-mail. Shouldn't the rule be designed to preserve evidence instead of destroying it?

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): Although there is some concern that a safe harbor will encourage parties not to preserve information, the Section endorses the safe harbor proposed by the majority and embodied in the text (not the footnote). It may help to identify sanctionable, culpable conduct by providing an objective standard against which the loss, alteration or destruction of electronically stored information may be measured.

ABA Section of Litigation (04-CV-062): We agree that the concept of a safe harbor is warranted by the unique issues of spoliation of electronically stored information. We are concerned, however, that the proposed safe harbor does not provide enough protection. The proposal has been criticized for permitting sanctions to be imposed for simple negligence, and the safe harbor does not apply if the party failed to preserve information as required by a court order.

Peter Riley (04-CV-064): This is entirely ill advised. Had such a rule been in place during a recent products case I handled, I'm certain defendants would have utilized it to greatly impede additional discovery, knowing that they could hide behind the safe harbor provisions.

Gregory Joseph (04-CV-066): The concept of a safe harbor is sound, but this one does not work. It affords a safe harbor only from sanctions under the rules, but does not appear to apply to any conduct that would be subject to sanction under the rules. It lacks a preservation standard, but the rules should articulate one -- reasonableness -- and then expand the safe harbor to cover anyone who took reasonable measures to preserve information that was lost.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): This proposal will produce increased motion practice and will encourage the destruction of relevant data. In our experience, the parties will meet soon after service of the complaint in securities fraud litigation in an effort to confirm that adequate preservation efforts have been undertaken. Although plaintiffs may send a letter demanding complete preservation of defendants' information systems, and defendants generally refuse to specifically identify their preservation efforts, the process allows the parties to informally address discovery concerns. But under the proposed rule, plaintiffs will be compelled to move for a preservation order in every case.

Plaintiff will have to move to preserve, and also to prove that any destruction that occurs was not routine -- a nearly impossible task. There is no justification for such burden shifts, which serve to create an ethical escape hatch for responding parties. Unless defendants are required to specify their preservation efforts at the outset, careful plaintiffs will always have to assume that relevant data will be destroyed, and that the only way to prevent such destruction is to move immediately for a preservation order. This is particularly true in cases governed by the PSLRA. This prospect is particularly troubling in conjunction with proposed changes to Rule 26(b)(2) that would put "inaccessible" information beyond initial discovery responses. If that provision is adopted, older and archived data will often not be produced until after a party has reviewed production including "accessible" information. And this data is most likely to be overwritten due to the routine operation of the computer system. The costs of preserving electronically stored information have been dramatically reduced due to technological changes. The cost for backup tapes has dropped as much as 85% in the past five years, to less than \$100 each. Increasingly inexpensive storage devices also allow a party to quickly and cheaply "mirror image" servers and hard drives. The right way to deal with preservation is through Rule 26(f), not through this rule.

David Shub (04-CV-068): I am concerned about the effectiveness of this proposal. It limits the safe harbor to sanctions under the rules, but there is no limitation on the court's inherent authority to sanction a party, so the protection is severely diminished. But it is likely that no rule language would effectively curtail the court's inherent authority. Under the rules, however, Rule 37 sanctions are only available when a party violated an order in the action, and that seems to be an exception to the rule. If the rule does provide protection, why is that limited to actions taken by the object of the sanctions motion after the suit was filed? Rule 27 allows discovery before the suit is filed. Why shouldn't Rule 37(f) apply in regard to that period of time?

Duncan Lott (04-CV-085): I object to exempting defendants from sanctions when they destroy electronic files through their routine document retention system as this would give corporations an incentive to routinely purge their data at very short intervals.

Alan Morrison (04-CV-086): Once a motion has been made to preserve, specifying the records that cannot be routinely destroyed, there is no need for a safe harbor since the party should act to prevent destruction until the court rules. But proponents of the safe harbor want total safety until there is either a specific request or a court order. Whatever powers the Rules Enabling Act confers on the rulemakers, it does not authorize regulation of pre-litigation conduct. So the earliest any rule-based immunity can apply is when the suit is filed. It is true that, once the suit is filed, the defendant may have some difficulty determining exactly what it is about since complaints are often written broadly. Proposed 37(f) does not appear to provide a workable solution to these and other problems. It doesn't help defendants very much because the safe harbor begins only when they receive the required notice. But then the key word is "discoverable," which is very difficult to interpret and apply in this context with limited information available. And it's odd to forbid all sanctions, not just very severe ones. Having heard both sides of this debate, I think that it will be impossible to write detailed rules in this area. The better approach is to direct district judges to exercise their discretion in these situations based on all the circumstances, and make it clear that the most severe sanctions should be used only in the most egregious cases. A new Note to Rule 37 would not suffice, but I don't have rule language in hand that would do the job.

Scott Lucas (04-CV-098): This proposal invites wrongdoers to establish document retention policies that will hide their wrongdoing. Given the ease and low cost of storing electronic data, this proposal unnecessarily invites abuse.

Michelle Smith (04-CV-099): this proposal would not only allow but would encourage routine destruction of evidence that would establish liability. Parties will set up "routine" data purges at short intervals. This is both extremely bad policy and technologically unjustified. Vast amounts of data can be stored indefinitely and searched quickly.

Richard Broussard (04-CV-100): This change invites corporations to destroy otherwise useful information before a court can have an opportunity to determine the importance of the data.

Gary Berne (04-CV-101): This provision would make destruction of electronically stored information more likely. This evidence is among the easiest and cheapest to preserve, and our rules should never countenance more destruction of evidence. There is no similar protection for destruction of hard copy evidence.

Mica Notz (04-CV-102): You might as well give every defendant corporation out there permission to destroy all evidence at any time pertaining to any matter. What if Enron had gotten this protection? "I am sickened inside to think that our legal system would even consider placing such a rule into effect." The fact remains that six months of electronic communications could easily be stored on a backup hard drive that costs under \$300 in the average business.

Stephen Herman (04-CV-103): I am troubled that such a rule will inevitably have an effect on substantive rights. On its face, it is limited to "sanctions under these Rules," but parties would undoubtedly cite the Rule, if adopted, for the proposition that no affirmative duty to preserve evidence arises until an action is filed. Some courts will agree. But in many jurisdictions there is a requirement to preserve before a suit is filed. Moreover, it will prompt the destruction of information and, in conjunction with the Rule 26(b)(2) proposal, will lead to routine destruction of a large amount of information.

Hon. Michael Baylson (04-CV-106): I think this is a sensible proposal. The Note might be expanded to discuss the difficult practicalities facing a large corporation in maintaining backup tapes. Very often a corporation with a large collection of backup tapes has no idea that it may be facing litigation on a specific topic about which there is some material on those tapes.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Our committee had great difficulty trying to come to a consensus about this, and ultimately we urge that your Committee take a further hard look at the proposal. We offer some thoughts. We unanimously recognize the validity of the concerns behind the proposal and support the principle of a safe harbor. But some of us believe that the current proposal is illusory because it only protects things that would not be sanctioned anyway. Those who see the proposal as illusory think that the rules should articulate a standard for preservation. The discovery rules are about production of information, but Rule 37(f) is not about that and instead is focused solely on preservation. It would enhance the rules if they included a standard for preservation and for production. As to both, we believe that it should be reasonableness. This rule should not be limited to electronically stored information. As drafted, it would seem to permit sanctions for any loss of information not caused by routine operation of a computer system, and we see no reason for keeping that possibility open. With the focus on the routine operation of computer systems, the proposed rule could encourage parties to adjust those operations to accelerate deletion of information.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): Because sanctions are rarely granted, and only after a hearing, we do not believe that this rule is needed. If it is adopted, we recommend that it be modified to require that the party take reasonable steps to preserve information "after it knew or should have known the information was relevant to the

subject matter of the action." The phrase "relevant to the subject matter" is clearer than the word "discoverable," particularly with the proposed addition of the "not reasonably accessible" exemption from discovery.

Brian King (04-CV-123): This would create real problems because unscrupulous parties would destroy evidence and then claim that the loss resulted from routine operation of their electronic information systems. But my clients are not going to have information lost because of "routine" operation of their systems. This will benefit unscrupulous parties.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA opposes this proposal. It recommends that there be no special safe harbor for electronically stored information. The current Rule 37 procedures are adequate to deal with the problem. The narrowness of the harbor provided means that it would only apply in situations in which there would not be sanctions in any event. Moreover, the litigation hold specified in proposed 37(f)(1) is related to the provisions of new 26(b)(2), and the scenario contemplated in 37(f) could be addressed in a Note to that rule. Finally, the language creates as many questions as it answers. The terms "reasonable steps to preserve the information," "knew or should have known the information was discoverable," and "routine operation of the party's electronic information system" all invite disputes over their meaning. It makes more sense to use case law to develop suitable responses to these problems.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We object to this proposal, which inappropriately minimizes the possibility of sanctions where parties destroy electronically stored information. It would give incentives to create routine procedures to destroy electronically stored information.

Donna Bader (04-CV-130): This change would encourage parties to destroy files routinely using their document retention policies, arranging that these purges occur at very short intervals.

Caryn Groedel (04-CV-131): I strongly oppose this proposal. Under the current rules, spoliation sanctions deter destruction of information. The amendment would encourage companies to set up systems that routinely purge data at very short intervals. This change would be fatal to many civil rights claims.

James Buarnieri (04-CV-144): This rule would prompt companies to adopt procedures that would eliminate the ability of plaintiffs to obtain relevant information. They would purge information at very short intervals. But the cost of storage of this material is very low, so that this rule has no justification.

Mark Buchanan (04-CV-146): I represent employment discrimination plaintiffs. I fear that 37(f) would create a gaping hole in regulations requiring employers to retain information about treatment of employees who have alleged discrimination.

Bruce Elfin (04-CV-166): This will encourage companies to purge data routinely at very short intervals, a change that will be fatal to many employment and civil rights claims.

Chicago Bar Ass'n (04-CV-167): This proposal focuses on a problem that does not exist. Existing case law already protects innocents from sanctions for the truly inadvertent and unavoidable destruction of documents. Moreover, there could be adverse consequences. As one of our members put it, the safe harbor is akin to encouraging the breeding of dogs to eat homework assignments.

Hon. Ronald Hedges (D.N.J.): (04-CV-169): The proposed amendment is fatally underinclusive for two reasons. First, it says nothing about retention of information before the suit is filed. Second, it is limited to sanctions under the rules. Moreover, the proposal will interact with 26(b)(2) to encourage corporate entities to shift information from being accessible to inaccessible. How can this be guarded against? Do the proposals provide any incentives to counteract these tendencies? I would expect that parties will routinely seek preservation orders to protect themselves against the effects of the new rule provision.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The rules should contain a safe harbor to avoid use of E-discovery as a tactical weapon.

Gary Epperley (American Airlines) (04-CV-177): For American to have to shut down all its computers every time it is served with a complaint would be crippling. Provided a party has taken reasonable steps to preserve reasonably accessible information, it should be protected against sanctions.

American Petroleum Institute (04-CV-178): API favors this proposal. It dovetails with proposed 26(b)(2), since information not reasonably accessible under that rule would not be considered discoverable under this rule absent a court order requiring discovery for good cause. This proposal resolves the conflict between the necessity to continue operating computer systems that routinely overwrite, alter or delete data and the risk that such routine operations might result in onerous sanctions for spoliation.

Assoc. of the Bar of N.Y. (04-CV-179): The Association believes that the safe harbor proposal is ill conceived. There is no reason to believe that courts and litigants are not equipped to deal with issues of spoliation. It does believe that a substantial argument can be made in support of an amendment to the rules that (1) provides an express textual basis for sanctions in the preservation context for all forms of discovery; (2) clarifies when the duty to preserve is triggered, and (3) sets forth the appropriate standard of care for production and preservation. But the proposal does none of these things. Nor is the proposal well-suited to provide a meaningful safe harbor, as noted by Gregory Joseph. The Association agrees with his comment (04-CV-066). The amendment is inexplicably limited to sanctions "under these rules," and then only where no court-imposed preservation order has been violated. Because the rules do not provide an express basis for sanctioning for absent a violation of a discovery order, as a practical matter the proposed rule provides no safe harbor at all. The Association believes that any meaningful safe harbor must be part and parcel of a single rule that provides the standard for preservation and sanctions in the spoliation context. If there is to be such a rule, it should not be limited to failures to produce electronically stored information, or to losses of information resulting from the routine operation of a party's electronic information systems. The focus of this rule would prompt parties to speed up routine deletion of information.

Steve Berman (04-CV-183): It is clear that the rule would forbid sanctions for destruction of information deemed inaccessible by the defendant. Backup tapes, for example, could routinely be recycled or discarded because the Note to 26(b)(2) says they are not reasonably accessible. This would contradict legal precedent requiring the preservation of all relevant evidence from the time the party has notice of the possibility of a claim.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): Our committee was unable to reach agreement on this proposal and neither supports nor opposes it. We do suggest, however, that if it goes forward it would be improved with attention to two matters. First, we believe that there should be a statement that the rule does nothing to vitiate a party's common-law duties to preserve evidence. We also suggest that it might be wise to provide that negligence

is sufficient for lesser sanctions, but that a heightened standard should be employed for more severe sanctions, such as case termination, striking pleadings, issue sanctions, evidence sanctions, or establishing facts.

Stephen Chow (04-CV-190): The language "discoverable in" should be replaced with "material to" in proposed Rule 37(f)(1) of the draft rule. The concept of knowledge of discoverability is too narrow a standard for the litigation hold. The discoverability of information is based on relevance, which is measured in both materiality and absence of undue burden. The focus of the safe harbor should be on the materiality of the information.

Federal Bar Council (04-CV-191): We strongly support the safe harbor rule, but have some specific recommendations.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A safe harbor provision is integral to redressing the current problem of over-preservation. Presently, the uncertainty regarding what actions can be taken without fear of sanctions has compelled many to unnecessarily err on the side of extreme caution, resulting in excessive burden and expense. Sanctions should be imposed only for violation of a court order requiring preservation of specific information. We think the amendment should read as follows:

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 in good faith of the party's electronic information system unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information.

This sort of approach would reduce the problems created by the "Sanctions Tort" practice without reducing the ability to produce discoverable information.

William Herr (Dow) (04-CV-195): We support this change, but believe that it should make the standard higher than negligence. The complexity of company systems means that entirely innocent losses of information are almost bound to occur. Absent bad intent, these should not lead to sanctions. And stopping all automatic discard systems will prove very difficult.

Edward Wolfe (General Motors) (04-CV-197): We support this change. But it would be very helpful for the Note to clarify that usually accessible information will suffice, and that this point affects preservation obligations. We support the basic principle that sanctions for non-production of information should be limited to those instances where a producing party has acted contrary to its obligations under the rules or the terms of a specific preservation order. Under Rule 26(b)(2), the obligation to produce inaccessible information will not exist without a court order, which should be specific with regard to the source of that information. The Committee could emphasize this point by modifying the introductory clause to say it refers to an order that requires a party to "preserve specified electronically stored information." We support the general proposition that preservation obligations should not be explicitly included in the rules. But all parties will benefit from a common understanding that reasonableness guides such obligations.

Guidance Software (04-CV-198): The proposal uses the right standard in 37(f)(1), but the interplay between that rule and 37(f)(2) should be considered further. The Note suggests that routine operations that lead to loss of data may often continue. Suppose a party had a system that could not be operated without those effects. Would having such a system be beneficial for

the party in obtaining the protection of 37(f)? There should not be a rule that will impede the development of better systems. A better rule would require litigants to have up-to-date systems to qualify for the protection of the rules.

Eileen Inglesby-Houghton (04-CV-199): I think that the rule should also protect a party against sanctions for failure to produce electronically stored information unless the party violated an order requiring it to do so if it took reasonable measures to search for information within the scope of the discovery request, but the search did not identify the information. Different standards are needed for discovery of electronically stored information than hard copies because there are different methods of searching for this information. Using a keyword method for searching electronically stored information, for example, will not catch all responsive information that would come from a page-by-page review of hard copy versions of the information. In addition, the Note should go into more detail on what the party knows when responding to the discovery. In addition, it is worth noting that parties don't know what electronically stored information their employees have.

C. Richard Reese (04-CV-200): 26(b)(2) would seem to exempt "inaccessible" information from any need to preserve under 37((f)(1). The Note should say that the word "discoverable" is not meant to import whether the information is reasonably accessible. In addition, it seems to make no sense to say that the party must take reasonable steps to preserve information since the assumption is that the information was not preserved. Doesn't that fact mean that the steps were not reasonable?

Partrick Keegan (04-CV-205): This rule potentially abrogates well-established legal authority requiring parties to retain discoverable information prior to the filing of a complaint where there is reason to believe that it will be relevant to litigation. It also creates incentives for responding parties to destroy relevant electronically stored information with impunity. And new backup media technology eliminates many of the concerns expressed by corporations about the volume and expense of maintaining backup tapes.

Peter Kraus (04-CV-207): This will lead to the routine destruction of crucial evidence because it provides defendants an incentive to destroy evidence.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We think that the rule should consider conduct that violates a reasonable preservation letter to be outside the safe harbor. Otherwise lawyers will seek orders more frequently, and lead to unnecessary court involvement.

Eric Somers (Lexington Law Group) (04-CV-211): This would allow parties to bypass their obligation to implement a litigation hold. Moreover, the protection applies only to conduct that probably would not be sanctioned anyway.

Wachovia Corp. (04-CV-214): This proposal is well intended, but the exception carved out for preservation orders will swallow the rule. In many actions, a court will likely create a broad discovery order, especially in light of the changes to Rules 16 and 26, that will require the parties to preserve all discoverable information. So the safe harbor will be inapplicable in most actions. A better approach would be:

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 systems, unless the party intentionally or recklessly violated

an order issued in the action requiring the preservation of specified electronically stored information.

Metro-North Railroad (04-CV-216): Metro-North supports the safe harbor provision.

Prof. Arthur Miller (04-CV-219): Much of the burden and expense currently associated with electronic discovery results from the perceived duty to preserve virtually all electronically stored information that might be pertinent to what are often very complex cases involving the conduct of people over a number of years. That obligation cannot be applied without some attention to the cost and burden that result. Therefore, I recognize the need for an amendment that protects a party from sanctions under Rule 37 for information lost in the normal and good faith operation of computer systems.

City of New York Law Department (04-CV-220): The Law Department supports this amendment. But the "harbor" it provides is too narrow. The City of New York has hundreds of thousands of employees, many with direct access to some form of electronically stored information. The City should not be subject to sanctions for the acts of a low level employee who may negligently delete electronically stored information despite reasonable efforts by City attorneys and management personnel. We encourage a higher threshold.

Marshon Robinson (04-CV-226): This proposal simply will not work. What are reasonable steps? How does a party know that something is discoverable or needed for litigation? Judges will have to guess when a party knew something.

Alex Scheingloss (04-CV-230): If this rule is adopted, the document retention time will be as long as the tapes on Mission Impossible. It's hard for me to believe that serious fair minded and intelligent people are coming up with these ideas.

Securities Industry Assoc. (04-CV-231): We applaud this rule. Our only suggestion is that the safe harbor should not be withheld solely because a party violated a court's preservation order. If the violation occurred despite conscientious efforts to comply, it should not be a basis for sanctions. At least, the exclusion should only apply to orders that were specifically directed to the information in question.

Joe Hollingsworth and Marc Mayerson (04-CV-233): The creation of a safe harbor follows naturally from an appreciation of the limitations of computer technology for accomplishing what discovery asks of it. No "bad action" of the custodian of records can be inferred from the simple fact that data has been lost. This is a particular problem with "live" databases, which are contiguously updated. No prior version of the database is preserved by its very nature. The Note should make this clear.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): Corporate attorneys advise their clients to employ company-wide destruction policies and technologies that regularly purge electronically stored information. Unless defendants are obligated to take necessary steps at the commencement of litigation to suspend such routine procedures, critical evidence will be lost. Existing Rule 37 is sufficient to protect against unwarranted imposition of sanctions. Now the rule would tell a defendant that it can wait until it concludes that information is "discoverable" before taking steps to preserve it.

Richard Renner (04-CV-237): The change would absolve defense counsel of liability for sanctions if they have taken "reasonable steps" to preserve electronically stored information. Upon adoption of this rule, recalcitrant employers will no longer have any incentive to cooperate

in resolving discovery issues. They will face no sanction if they go to the mat, just to see how the judge would rule.

Texas Employment Lawyers Ass'n (04-CV-238): This change would encourage deliberate destruction and purging of electronically stored information. Current law adequately addresses these problems.

Trial Lawyers for Public Justice (04-CV-239): This rule would encourage companies to use systems that routinely destroy electronically stored information at short intervals. There is no reason to think it would solve a problem, the federal courts are not now imposing sanctions inappropriately. There is already a problem with major corporations destroying evidence. This will make it worse. To guard against this possibility, plaintiffs will now seek preservation orders in every case.

Connecticut Bar Ass'n (04-CV-250): We think that the trigger is not well defined. We suggest the following changes:

(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:

(i) the party took reasonable steps to preserve the information after it filed a Complaint or was served with a Complaint; and

(ii) the failure resulted from loss of the information because of the routine operation of the party's electronic information system or mistake.

James Sturdevant (04-CV-253): I recommend that Rule 37(f)(1) be modified to read: "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of the action."

Rule 37(f) -- routine operation

San Francisco

Greg McCurdy, Esq. (Microsoft): Adoption of Rule 37(f) should not create an incentive to speed up or broaden erasure of information. There are other legal requirements to preserve such information. It would be "insane beyond belief" for a company to curtail retention required by other statutes because of the addition of this rule.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): CELA opposes the safe harbor rule. We are concerned that it will simply encourage companies to accelerate their "purging programs" that delete important sources of data. The current system, which encompasses concepts of spoliation that may lead to adverse jury instructions is preferable because it will lead corporations to act more cautiously. Relevant evidence should not wind up in shredders or "Evidence Eliminator" programs that are claimed to be simply a part of the company's routine deletion programs.

Gerson Smoger: This rule will encourage people to set things up in a way that removes more information from what can be discovered. Sanctions are rare, and this rule is not a solution to an important problem.

Kenneth Conour: Dynamic databases change every day. There is no way for them to do what they are supposed to do and remain static. That is an example of routine operation of a computer system. But how does one deal with preservation in such circumstances?

Dallas

James Wren (testimony and written statement): Creating a safe harbor for "routine operation" blesses the destruction of data simply on the basis that it is routine without regard to the existence of a business or technological justification for the routine. This is an invitation for companies to set up "routine" data purges at short intervals, without regard to the legitimacy of the justification for the purges. There are legitimate reasons for such purges, but illegitimate ones as well. At a minimum, the routine operation should have been in place before the party suspected it might be the subject of litigation.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): The Note should provide more guidance on what is routine operation. There are really two factors that go into that determination. First would be the capabilities of the system, and second would be the policies that the party adopted in relation to the system.

Michael Nelson (testimony and 04-CV-005): The proposed rule could be interpreted to require that parties sometimes preserve inaccessible information. It should be clarified that there is no such obligation.

David McDermott (President, ARMA Int'l) (testimony and 04-CV-041): Destruction of records is acceptable, providing that it is conducted according to policies and procedures that have been established, based on the organization's operational, legal and regulatory, financial and historical needs. The policies and procedures must include a procedure for stopping destruction when records are relevant to reasonably anticipated or ongoing litigation or

investigation. Such procedures should include electronically stored information. We recommend that the following text be incorporated into the rules or the Note somewhere:

For corporate entities and any party subject to statutory or regulatory retention requirements, a party will be expected to provide a copy of its formal records retention policies and procedures or otherwise articulate its record retention practices in the absence of a written policy. Records subject to a party's records retention policies and procedures, whether formal or informal, will be assumed to be reasonably accessible and a party's failure to follow its practices and procedures will not relieve the party from the requirements of discovery.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The phrase "routine operation" is somewhat open-ended, which is generally a good approach. Microsoft favors a clear statement that the rule should be understood to include a party's good faith operation of its disaster recovery systems -- including the regular rotation of tapes to recycle them. But it is important as well to recognize that these issues go far beyond routine recycling of backup tapes. Today companies must find better ways to manage the huge volumes of email generated every day. Filters may delete as much as 85% to 90% of incoming Internet email as spam. Preserving this material would be a huge and pointless effort. There is an arms race between the filtering software and the spammers who try to circumvent it." It is conceivable that spam filters could block relevant information and delete it. Nonetheless, this automatic deletion serves a vital business purpose and should not give rise to spoliation arguments. Companies also limit the size of employees' email boxes to avoid the potentially large costs of retention of all email. The usual approach is to remove all email after a reasonable time period such as 30 or 60 days. It is also worth noting that some routine operation is not automatic; it requires people to recycle backup tapes and the like. The Note should make it clear that routine operations include those that are not entirely automatic.

Clifford Rieders (04-CV-017): The meaning of "routine operation" is difficult to decipher, and it creates an exception wide enough to swallow the general rule. It would be difficult, if not impossible, to litigate whether loss of information has occurred because of "routine operation" of the party's electronic information system. Further, information, as a matter of logic, does not become lost through "routine operation." If anything, "routine operation" should result in the proper accumulation and distribution of data rather than the loss thereof. At the very least, the court ought not to be denied the power to sanction absent wording that is clear and understandable.

Herbert Ogden (04-CV-023): At the very least, the rule should require that the "routine operation" have been in place before the party suspected it might be sued.

Gregory Joseph (04-CV-066): The safe harbor should not be limited to information lost due to the routine operation of the system. There are many other legitimate reasons why information may be lost (such as a tsunami). As it is, the draft encourages parties to adjust their retention systems to accelerate deletion of information. The safe harbor should apply to all kinds of information, not just electronically stored information.

David Shub (04-CV-068): This term is ambiguous and difficult to interpret without the Note. Rather than explain the meaning of the term in the Note, it would be better to add language to the rule itself, so that the rule would read something like: "routine operation of the party's electronic information system, including any way in which a specific piece of

electronically stored information disappears without any conscious human direction to destroy that specific information."

Assoc. of the Bar of N.Y. (04-CV-179): The proposal focuses on the wrong thing. By focusing on the party's routine operations, it would encourage parties to speed up automatic deletion, but would not apply in situations that truly deserve it, such as the loss of data due to September 11. Moreover, the focus should not be on the routine operations, but whether the party satisfies the requisite standard of care, notwithstanding whether it was destroyed due to routine computer operations. The relevant issue for spoliation is and should remain the degree of the party's culpability, not the precise manner in which the loss occurred. Finally, the Note should clarify that manual steps may be included within the definition of routine computer operations. For example, an organization's computer system may be programmed to move e-mails from a live server to backup tapes after a specified period, and the backup tapes may be scheduled for destruction or recycling. Such activity is common, and may involve manual intervention by an individual working for the organization. There is little reason to distinguish it because it involves action by a human being.

Federal Bar Council (04-CV-191): The concept of routine operation may need further consideration. Providing a safe harbor of "routine" operations of electronic information systems may discourage organizations from upgrading their technology systems during the pendency of litigation, notwithstanding their legitimate business needs. We believe that the rule should allow a company the opportunity to demonstrate that new techniques were motivated by a legitimate business reason unrelated to litigation.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The Note could state whether routine operation applies exclusively to functions that require human intervention, such as backup tape recycling, or whether it also applies to technology operations not requiring human intervention such as spam filtering, automatic email archiving and deletion, the routine booting of a computer, or data written to a hard drive.

Chavez & Gertler (04-CV-222): Rule 37(f)(1) should be amended to read:

the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of an action or reasonably anticipated litigation.

Ashish Prasad (04-CV-225): The Note should make clear that the kinds of routine loss of electronic data that are covered by the rule are not limited to the types of features described in the Note, but also include more subtle ways that data can be lost, such as through the overwriting of dynamic database records. For example, a party could preserve a "snapshot" of a database even though it does not make a new snapshot every time the database updates a single record.

Zwerling, Schachter & Zwerling (04-CV-247): The rule assumes that nonroutine operation of computers can be or should be altered. There is a difference between setting defaults to delete or archive e-mail after a certain date, and defragging a desktop to allow it to run more efficiently. By treating all "routine" operations as identical and unalterable, the rule renders otherwise relevant information not reasonably accessible within (b)(2).

Rule 37(f) -- steps to preserve

San Francisco

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: The rule should say that backup tapes can be recycled unless a court specifically orders otherwise. Otherwise, the value of the safe harbor is unduly lessened. The costs of retaining backup tapes can be millions of dollars. The value of retaining them is almost always zero. In those rare cases in which retention is warranted, it should be sought and directed by order, not by rule. In any event, there is a common law duty to preserve, so the rule is unnecessary on that score. The problem is that under Rule 26(b)(2) the court may order discovery of inaccessible information in some cases, so it is unclear how the party is to approach the provisions of Rule 37(f). Should the party anticipate there may be good cause to retrieve information, and therefore that it has to retain the backup tapes? "The combined effect of these two proposed rules [26(b)(2) and 37(f)] puts companies in a quandary." The Sedona Principles recognize that there are great difficulties in preserving backup tapes. Intel would prefer a rule that said "Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other electronic data systems unless the court so orders for good cause." We strongly urge the Committee to include such a provision in the rules, either in Rule 26(b) or in another rule.

Joan Feldman (testimony and 04-CV-037): The danger inherent in the proposed language is that in many cases, what a party "should have known" about discoverable electronically stored information may be too loosely interpreted. For example, critical, responsive evidence stored in a database may be routinely purged by ongoing programmatic routines. This rule change would be optimal if tied to a mandatory Rule 26(f) conference requiring full disclosure of systems, data stores, and well as stipulations regarding scope. Recycling of backup tapes should sometimes be stopped, for example. They are done by server, and it may be clear early on that a given server is likely to contain key information. That server's backup tapes should be saved.

Thomas Allman (testimony and 04-CV-007, as supplemented on Jan. 19): He advises people that they have to be able to suspend automatic deletion policies. But the rules themselves should not address preservation. A company must consider any special circumstances which might trigger a need to take extraordinary steps to suspend operation of those systems. For example, Guideline Five of the Sedona Guidelines lists various "best practice" triggers for suspension which should be considered. However, reference to a duty to act in "good faith" might better convey the broad obligation of a party to act rather than mere reference to what it "should" have known.

Kenneth Conour: Dynamic databases change every day. There is no way for them to do what they are supposed to do and remain static. That is an example of routine operation of a computer system. But how does one deal with preservation in such circumstances?

Charles Ragan: I agree with Allman that the problem of preserving inaccessible information is a source of great angst among clients. The same concerns apply to preservation of dynamic databases.

Dallas

James Wren (testimony and written statement): The sanctions issues should be connected with a party's knowledge that electronically stored information should be preserved. When a party knows, or should know, that important electronically stored information needs to be saved due to potential litigation, there should be no encouragement to continue with

destruction. The issue of sanctions should be connected to the reasonableness of a party's actions in light of what is known about the need for preservation, not whether destruction is "routine."

Peter Sloan: Preservation is "the elephant in the room." In his practice, he finds that he does not know what to tell his clients about this issue. He advises clients to have data deleted at specific durations, an on a specific day, not a rolling date. Thus, at any given time it could be 59 days before the next deletion date or one day before it when notice of a suit comes in. Regarding the need for backup tapes, his general experience is that three to ten days is sufficient to keep them, although in some instances it may make sense to keep them as long as 30 days. He hopes that clients will actively pursue preservation of active data from notice of possible claims. In particular, e-mail used for purposes of notifying employees of company decisions should be retained. He is worried about what he calls the "serial preservation dilemma" that results for some larger clients if they can never discard anything.

Charles Beach (Exxon Corp.): Our backup tapes will continue to run. You can't stop all of these. It is not likely to be true that one can pinpoint one or two and keep them to retain information about a given event or decision. It is seldom true at the company that a decision involves only those who use a given server, and probably one can't know where to stop. This will come out in the 26(f) conference; we will let everyone know that the backup tapes are still running. The hypothetical worst case -- the critical documents that are lost due to automatic deletion -- simply does not happen with any frequency. One should not make rules for the worst case scenario. This ignores the vast quantity of active data that is available. Despite some efforts to reduce the quantity of such data, people at Exxon have large amounts of it. Even he has data going back years. So long as there is a business reason for deleting data, the rules should not interfere with that.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): Companies take the position that they don't believe anything is discoverable, so a "litigation hold" that looks to what they should recognize to be discoverable is going to require nothing of them. They will delete information even though there is a pending discovery request for it.

Darren Summerville (testimony and 04-CV-089): It is not expected that the defendant will produce genuinely inaccessible material initially in response to a discovery request. But from that time they are obligated to retain all relevant information, whether or not accessible. Usually there's information about what's on backup media, so this does not mean the company must keep everything for ever.

David Fish (testimony and 04-CV-021): I believe that once you believe there will be litigation you have to maintain the information. The thing to do is to undertake a search right away then to identify what needs to be preserved. At that time, for example, "deleted" e-mails are accessible in Microsoft Outlook. But if nothing is done to preserve them, they probably won't be accessible later.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): Arneson stated that his experience (representing plaintiffs) was that counsel on the other side would instruct that pertinent material be saved. A litigation hold is the right way to go. But there are problems in implementing such a hold on occasion. Cohen confirmed that the litigation hold is the right idea, but also that the reason big companies and big law firms get into trouble is that it is very hard to implement one.

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): Since the early 1990s, PM USA has in essence been operating under a continuous "litigation hold" on a number of topics.

Jeffrey Greenbaum (ABA Section of Litigation): The rule should recognize that there's no obligation to preserve inaccessible data as part of a litigation hold. We will always be judged by 20/20 hindsight, at a time when things look very different than they do at the beginning of the case.

Damon Hacker & Donald Wochna (Vestige, Ltd.) (04-CV-093): We routinely assist attorneys in finding the stuff that ought to be preserved.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The safe harbor is important, and it ought to recognize that only accessible information should need to be preserved. The widely recognized best practices are that only discoverable information need be retained, and that does not include inaccessible information. The rule should make it clear that there is no requirement to retain inaccessible information.

David McDermott (ARMA, Int'l) (testimony and 04-CV-041): Good records management calls for putting a litigation hold in place when notice of litigation arrives. That involves conferring with the legal department and identifying the people who are likely to be involved, and the subjects of concern, and then stopping destruction of information on that basis, not keeping everything.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): Regarding inaccessible information, it is a judgment call whether to preserve. I would understand that it is a risk that I will be sanctioned if I don't retain that material. That is a judgment I have to make.

David McDermott (President, ARMA Int'l) (testimony and 04-CV-041): A company's policies and procedures regarding information management must include a procedure for stopping destruction when records are relevant to reasonably anticipated or ongoing litigation or investigation. Such procedures should include electronically stored information.

Dabney Carr (testimony and 04-CV-003): The rule can be improved with an explicit recognition that there is no requirement to preserve inaccessible information.

Alfred Cortese (testimony and 04-CV-054): The Note to 26(b)(2) or 37(f) should be clarified to confirm that electronically stored information that is not reasonably accessible need not be preserved absent a voluntary agreement of the parties or a specific court order. If proposed 26(f) continues to mandate discussion of preservation, any party who fails to obtain an agreed order or seek a preservation order should be deemed to waive any objection when, in good faith, the producing party does not preserve inaccessible information. Existing language in the Note describing the effect of the two-tier system could be amended to clarify this principle by specific reference to the relationship between two-tier and safe harbor. One way to do that would be to expand on statements in the safe harbor Note explaining that wholesale suspension of the ordinary operation of computer systems is rarely warranted. The people I represent at the Chambers of Commerce realize that they have to include inaccessible information within a litigation hold. They can't take the risk of not doing that. (p. 56) But this would apply when the party is aware that there is unique information in the inaccessible source. But you can't obviate the preservation requirement just by declaring something inaccessible. Given the multiplicity of systems, the obligation to preserve can't apply unless there is a basis for thinking that

information is uniquely available in the inaccessible sources. That insight might never occur to a company.

Keith Altman (testimony and 04-CV-079): It seems to me that 37(c)(1) means the same thing as current preservation rules -- the party must take reasonable steps to preserve. I think this requires suspension of recycling of backup tapes. That means that once a tape is used, it may never be reused, and a replacement tape must be purchased. The net result of this is to force a party to expend huge amounts of money. This is a major source of complaints from opposing parties. After litigation has started, the company recycles backup tapes at its peril, as the safe harbor does not protect it then. I think that the current rules do not help with the preservation problem. I've told companies to keep the tapes they now have and instruct employees on the preservation obligations on a going forward basis. Once this is done, the company can restart recycling with a new set of tapes. Although companies with automatic deletion programs tell people to retain copies of important items, there is great variation in the extent to which employees do that. I believe that people are trying, but they are not fully delivering. And it's usually not hard, in an era of e-mail, to send a message to the whole company about what needs to be done. In all of the litigations I've been in, I've never tried to get information off of backup tapes.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Routine operations that involve the automatic deletion of email and other unneeded items are consistent with a reasonable retention policy. For example, if a company learns of a potential lawsuit, it may instruct 20 employees who deal with the subject matter of the anticipated suit to preserve all relevant documents. When the complaint is served, its more specific allegations may indicate that additional materials should be retained, but during the time between the initial notice of the possible suit and the service of the complaint, the ordinary practices would have continued with regard to these employees.

ABA Section of Litigation (04-CV-062): More guidance is needed for parties seeking to comply with their obligations. The standard will always be applied using 20/20 hindsight. More of a bright line should be established. This could be accomplished by adopting the same two-tiered structure discussed above that protects a party that has taken "reasonable steps to preserve reasonably accessible electronically stored information after it knew or should have known the information was discoverable in the action." By the same token, if a party obtained a court order requiring the production of electronically stored information that was not reasonably accessible, to invoke the safe harbor the party would need to establish that it took reasonable steps to preserve that information after the issuance of the order.

Katherine Greenzang (Assurant) (04-CV-180): We ask the Committee to consider providing express guidance in the rules about what it considers to be a reasonable length of time for a company to recycle electronic information pursuant to an electronic records retention policy. We think that a 45 day period would be appropriate.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The Note could offer some examples of what constitutes a reasonable preservation effort. For example, that might require suspending automated document destruction policies, notifying opponents or third parties of the need to preserve data, or developing a "preservation response team" to develop a plan for responding to litigation.

Rule 37(f) -- standard of culpability

San Francisco

David Dukes (testimony and 04-CV-034): I support the creation of a safe harbor, but urge the adoption of the alternate language with a higher standard of culpability.

Charles Ragan: Based on consideration of the proposals, I would favor the higher culpability standard. My conclusion is driven by my experience advising clients. Whatever merit the negligence standard may have a matter of legal theory, the Rules are designed to govern the practice of law in federal courts, and only the higher standard will have a meaningful effect in the courts. Otherwise, the trend toward "gotcha" satellite litigation will continue despite the rule change.

Dallas

Anne Kershaw: The negligence standard provides no safe harbor at all, particularly with regard to the death penalty sanction. If the Note made it clear that litigation-ending sanctions should ordinarily not be entered in the absence of willful or reckless conduct, that would be helpful. The company should also get "brownie points" for having a sensible retention policy and following it. Companies can develop systems to preserve information. For example, she has heard of a company shows system has a pop-up window that includes a question about whether a document should be preserved for possible use in litigation.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): The standard should be negligence. Don't give defendants more reason to be sloppy. Negligence is not a low standard. Anything more relaxed says it's o.k. to be negligent.

Stephen Morrison: For the death penalty sanction, there should be a showing of willful or reckless conduct. There should be proportionality for sanctions. Adverse inferences should be regarded as death penalty sanctions for these purposes.

Laura Lewis Owens: Almost anything can be alleged to be negligent. The standard needs to be higher.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We favor the text approach, not the footnote. We feel that it is a more objective rule, and does not call for analysis of the state of mind of the person who should have retained the information.

Jonathan Redgrave (04-CV-048): The footnote version is a better formulation of a narrow safe harbor. This would not preclude the evaluation of reasonable and good faith preservation efforts under established law, but it does provide a presumptive level of protection. I would replace "intentionally or recklessly" with "willfully." This includes a concept of conscious conduct that is important.

Jeffrey Greenbaum (ABA Section of Litigation): The standard of culpability should be linked to the degree of sanctions. To retake a deposition or something like that would be justified by negligent loss of information, but for an adverse inference or striking of a defense or a claim, there would have to be more, something like willfulness.

Michael Nelson (testimony and 04-CV-005): The rule goes beyond the majority of jurisdictions that have limited the imposition of an adverse inference sanction to cases in which the loss of evidence was the result of intentional or bad faith conduct. I propose the following:

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 the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information.

Alfred Cortese (testimony and 04-CV-054): A high degree of culpability should be required. In my view, an "intentional or reckless" standard is required because of the extremely narrow scope of the proposed safe harbor and the better protection it would provide against abusive sanctions practices, the uncertainties created by dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable information. Best of all, it should key to a court order, as follows:

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 the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information.

Michael Ryan (testimony and 04-CV-083): The lack of a culpability measurement eliminates the ability of the requesting party to inquire into the motivation of the producing party in adopting routine destruction policies that may encourage expedited destruction of information. But that is the basis of current spoliation law. The footnote brings the rule more into line with current law.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should require a high degree of culpability if before sanctions are imposed. State Farm therefore supports the version of the rule in the footnote on p. 13 of the proposals.

Dabney Carr (testimony and 04-CV-003): The footnote language better addresses preservation of disaster-recovery materials. the "knew or should have known" standard is subject to abuse. For example, under the current approach a party can abrogate the safe harbor simply by notifying the other side that it believes that disaster recovery tapes are discoverable in the action.

M. James Daley (testimony and 04-CV-053): I agree with those who favor inserting the concept of willfulness into the rule as a limitation on sanctions. That would be better than the footnote version's "intentionally and recklessly." It would also be desirable to have the Note emphasize that consideration of a company's standards for retention should be a significant factor in evaluating whether it acted properly.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We believe that a showing of mere negligence should not be sufficient to overcome the safe harbor. It will always be possible to show that more care could have been taken to preserve information. The rule should require that the entity actually know, or be so close to knowing as to be reckless, that discoverable data is being lost. Any other approach would be paralyzing for large data producers.

Alfred Cortese (testimony and 04-CV-054): The more I look at it, the more I prefer the footnote alternative.

Commentary

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft believes that the current standard of negligence is too narrow, and that the alternative version in the footnote is preferable. Litigants strive every day to take all reasonable steps to comply with their discovery obligations. Parties seeking discovery know that they can gain an advantage by claiming that these obligations have not been satisfied. Even the threat of spoliation sanctions can have a substantial effect on discovery. The various deterrents -- including criminal sanctions -- "have the undivided attention of corporate America and its counselors." All those who hope to rely on the safe harbor intend to act reasonably, but mere negligence should not automatically make them ineligible for its protection. Responding parties that operate their businesses in a reasonable fashion should not be sanctioned because a requesting party later thinks that it was unreasonable that additional preservation steps were not taken. If the footnote version of the rule is adopted, it should also be made clear that the deletion of material that is done automatically by a computer system is in some sense intentional. Some person had to set the system to make the deletions. What should be emphasized is that the safe harbor applies unless a party intended to dispose of known potentially responsive documents that it was specifically ordered to maintain or disposed of materials in reckless disregard of such an obligation. Finally, it should be made clear that the fact the safe harbor does not apply is not itself a reason for imposition of sanctions.

Allen Black (04-CV-011): I favor the rule as drafted, with the negligence threshold. Recklessness is too high. However, it might be good to add a sentence in the Note to say that the court should consider the degree of culpability in deciding whether to impose a sanction, and its severity.

Philadelphia Bar Association (04-CV-031): We disagree with the Rule 37(f) proposal overall, but particularly with the footnoted recklessness standard. As a matter of public policy, a party should not be given a license to be negligent.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): By a divided vote, we endorse the standard in the text. The proposal in the footnote contains a gap between the routine operation of an electronic information system (within the safe harbor) and a reckless or intentional failure to preserve information (outside the safe harbor). The text's proposal clearly places actions in the gap outside the safe harbor, as they should be, although the question of culpability could certainly bear on the sanction imposed. The evolution of the sanction issue in the Zubulake case (see pp. 29-30) is an example of this sort of approach. The text's negligence standard is desirable as well because it is objective, and can be tied to the routine operation of the party's computer systems and any policies the entity has adopted for the preservation of information. The footnote uses a subjective standard, which may require greater collateral inquiry into actions of the entity that could be hindered by invocations of the attorney-client privilege. Moreover, the recklessness standard may encourage greater disregard for an entity's obligation to preserve electronically stored information.

ABA Section of Litigation (04-CV-062): The debate about the level of culpability could be resolved by specifying the remedies that courts could impose for each type of conduct. Corporations are alarmed over the prospect that severe sanctions, such as a devastating adverse inference, could be imposed as a result of merely negligent loss of data. A negligent loss of electronically stored information may well justify a search of backup tapes that would otherwise not be required, but it should not ordinarily be a ground for an adverse inference. The Note should specify the range of sanctions available for violations occurring due to negligence, and those available for violations due to intentional and willful spoliation.

Stephen Herman (04-CV-103): The footnote standard of recklessness is contrary to the substantive law of many jurisdictions. Adopting it would also undermine the primary purpose of Rule 37, to focus on effective management of the litigation rather than trial and punishment of discovery malefactors. That philosophy gives judges broad discretion, but this proposal takes that discretion away.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee believes that the idea of a safe harbor is sound. It concluded that the proper standard is negligence, as in the main proposal. The alternative standard set out in the footnote would unduly restrict the court's discretion. Whether a court chooses to impose -- or not to impose -- sanctions on a party who fails to take reasonable steps to preserve electronically stored information in a timely manner should be the court's decision to make.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP supports the standard in the footnote on p. 33. It also urges consideration of Sedona Principle 14, which provides that sanctions are appropriate only if there is a showing of a reasonable probability that the loss of the information materially prejudiced the party.

Gary Epperley (American Airlines) (04-CV-177): We support the footnoted version of the rule. But it could be interpreted to permit sanctions for loss of information that is not reasonably accessible. To avoid that, we suggest rewording the rule as follows:

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 the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information.

American Petroleum Institute (04-CV-178): API favors limiting sanctions to failure to preserve information specified in a court order. As presently written, the proposed rule might permit sanctions for loss of information that is not reasonably accessible, even where there is not applicable court order, if the responding party somehow should have known that it would be discoverable. But how would a party know that inaccessible information is discoverable absent a court order? Proposed 26(b)(2) presumes that inaccessible information is not discoverable absent a finding of good cause. It supports the footnoted version, with its emphasis on a showing of willfulness or intentional destruction. Overall, it proposes that the rule be rewritten as follows:

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 the party intentionally or recklessly violated an order issued in the action requiring preservation of specified information.

Katherine Greenzang (Assurant) (04-CV-180): It is strong medicine to take a company out of the safe harbor just because an employee in a remote location unknowingly or unwittingly deletes electronic information despite a litigation hold. We urge use of a willfulness or recklessness standard. Indeed, the Committee should consider requiring a showing of malice before sanctions are imposed.

Marion Walker (04-CV-181): The standard should be higher than negligence. Millions of people operate computers and do so without a full comprehension of how the equipment works. It is not feasible for each user to have a full course in the internal computer operations

and, as systems become more complicated, it will happen that data will be lost. A party should not be held accountable for such losses.

Steve Berman (04-CV-183): The footnote version would contradict existing precedent which allows sanctions for negligent spoliation.

M. John Carson & Gregory Wood (04-CV-189): The text option places a "perfection" standard into the rule, which unduly narrows the safe harbor. But the footnote alternative opens the door too wide, allowing a safe harbor for all but intentional or reckless loss of data. A middle ground that would expand the safe harbor of the text option to include failure that resulted from the unintentional loss of data whether as a result of the routine operation of the information system or otherwise including human action, would seem to strike a better balance.

Federal Bar Council (04-CV-191): It seems difficult to imagine situations that would lead to sanctions under the current rules that would not also be subject to sanctions were the safe harbor adopted. For the new provision to have actual impact, therefore, it may be necessary for the Committee to be more aggressive. We think that the idea behind the safe harbor is correct -- electronic information systems are complex and dynamic, and automatic deletions features are necessary in order to have systems that are efficient. It would be desirable for the Note to specify that negligence should not lightly be found in this complicated and evolving area if a party has made a good faith effort to preserve potentially relevant information. The Note should also explain that the assessment of the reasonableness of a party's behavior should take account of the complexity of the case and the factual issues it raises. Alternatively, the Committee might want to consider using a culpability standard closer to the one in the footnote. Whether the Committee approaches the problem in one manner or the other, it is likely that both plaintiffs and defendants will benefit. Indeed, a small corporate or individual plaintiff may have fewer means than a large corporation to ensure that automatic deletion mechanisms are disengaged, and may therefore derive greater benefit from adopting our suggestions.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A high degree of culpability should be required to preclude eligibility for the very narrow safe harbor. The "intentional or reckless" standard is required because of the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable electronically stored information.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We recommend that text version, not the footnote version. Absent an affirmative obligation to preserve discoverable electronically stored information, routine deletion operations can unintentionally destroy relevant information.

New York City Transit (04-CV-221): Mere negligence should not be sufficient to take a party out of the safe harbor.

Ashish Prasad (04-CV-225): Responding parties should not be subject to open-ended risk of sanctions for post-hoc judgments on the reasonableness of their behavior. Instead, the safe harbor should protect the good faith actions or parties who lose electronically stored information. This would be better than the standards in the principal rule proposal in the text or in the alternative one in the footnote.

Marshon Robinson (04-CV-226): The footnote rule is a much better rule because it gives a clearer indication of what is necessary to be inside the safe harbor. Rule 26 could be amended

to require that a party request a litigation hold along with discovery requests. That would give both the parties and the judge a clear starting point on what data should be retained.

Heller, White, Ehrman & McAuliffe (04-CV-246): The negligence standard raises risks for large corporate defendants. It would be prohibitively expensive to assure that everyone in offices around the world puts a litigation hold on the document retention policies in those offices. "[I]t would be expensive and burdensome for large corporations with multiple offices to follow up and police each of the offices to assure that each will fulfill its preservation obligation obligations." The rule will therefore impose a significant burden in terms of executive time and also entail significant increases in expenses for large corporations to comply with the standard.

Rule 37(f) -- effect of preservation order

San Francisco

Greg McCurdy (Microsoft Corp.): Preservation orders are often overbroad. Although a specific order can be helpful in identifying exactly what has to be preserved, many orders are not. There is no need to mention orders in the rule, because courts can always sanction for violation of their orders.

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: General preservation orders have become commonplace in litigation, and they should not suffice to rob a party of the protections of the safe harbor. Only an order that specifically requires that disaster recovery systems be suspended should qualify if the issue is loss of information on one of those systems.

Michael Brown: There are too many general preservation orders. Accordingly, the protection should apply even if one of those is violated, unless the violation was willful.

Dallas

Anne Kershaw: Blanket preservation orders are very costly. We need to educate the judiciary about this reality. It takes 90 days until the 26(f) conference, and a company that has to stop recycling for that period of time incurs a large cost.

Paul Bland (TLPJ) (testimony and prepared statement): He has never seen a "blanket" preservation order, if that means to keep everything. In a consumer class action, it might require preservation of "all information about consumers charged the challenged fee in 2002."

Washington

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): Preservation now costs his company over \$5 million per year. There is a risk that this rule will prompt more preservation orders. It should be made clear that preservation orders are for the extraordinary, not the ordinary case.

Jonathan Redgrave (04-CV-048): The rule should require that any order that triggers sanctions be for preservation of this specific type of information and be particularized. This will provide guidance for the parties and the courts.

George Socha (testimony and 04-CV-094): The Note contains the following sentence: "Should such information be lost even though a party took 'reasonable steps' to comply with the order, the court may impose sanctions." This sentence seems designed to discourage parties from entering into preservation orders. It also suggests that parties may be required to take "unreasonable" steps once a preservation order is in place.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): With this provision, the safe harbor is not a harbor at all. In one case, a federal judge imposed such a broad order on us that we had a choice between violating it and shutting down. It should be made clear that while preservation agreements are desirable preservation orders are not.

M. James Daley (testimony and 04-CV-053): Rule 37 should mandate that only a specific order will take a party out of the safe harbor.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): Broad preservation orders should not trump the safe harbor. We agree that "stop everything" orders should not be entered, and believe that such an order should not trump the safe harbor. Instead, only an order entered after a Rule 26(f) conference should qualify, and only one carefully tailored to suit the needs of the case. Otherwise, there will be a proliferation of requests for broad orders and of "gotcha" litigation. But we have been successful in getting broad orders revised, and there seems to be a growing recognition that such orders are inappropriate for large organizations like ours.

Alfred Cortese (testimony and 04-CV-054): The rule should say that a preservation order should not abrogate the safe harbor unless it is directed to "specified information." The order should be tailored to the case.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: There is no need to except cases in which a court order has been violated. Violations can always be punished. An order may be vague and direct only that a party preserve all relevant documents, essentially the same as the common law duty to preserve, but such an order could neuter the protections of the safe harbor. If a party has reason to fear loss of a particular type of data, then it can request an order addressing that specific problem. Faced with a specific order, the responding party knows what it needs to do. But a vague order does not provide such notice. Particularly in light of our preference for the intentional/reckless standard in the footnote, this order provision seems to us to take away much of the good work done by the new rule. If violation of an order remains as a qualification of that protection, it is important to clarify that the order has that effect if it is "to preserve *specified* information." This clarification is important because some courts tend to enter somewhat vague preservation orders that include broad wording.

Stephen Herman (04-CV-103): In our experience, limiting this provision to an order "in the action" is undesirable. Frequently parties rely on an order issues in previous, companion, or other related cases. If a party is already under a court order to preserve evidence in more than one case, that should be sufficient.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): A question exists about what sort of court order will vitiate the safe harbor. A general order requiring the parties to preserve all relevant documents apparently does nothing more than memorialize the common-law obligation. It may be advisable to clarify the Note to say that the sort of order that affects the existence of the safe harbor is one that imposes an obligation to preserve specified electronic evidence or a specified category of substantive evidence that the party has reason to know is contained in electronic files that are subject to routine destruction.

Federal Bar Council (04-CV-191): We believe that it would be desirable to provide clarification as to what kind of orders are a basis for exclusion from the safe harbor. Blanket preservation orders that are entered at the outset of a case do not address specific alleged discovery issues. If such orders are sufficient to remove parties from the protection of the safe harbor, then one of the automatic first steps during litigation will be obtaining such an order. We believe that such blanket preservation orders should therefore not be a basis for invoking this exclusion from the safe harbor.

New York City Transit (04-CV-221): A preservation order that is wide in scope but short on detail serves no useful purpose. All such an order does is place large and complex entities at the risk of contempt.

Ed Amdahl (Starbucks Coffee Co.) (04-Cv-241): Complying with a broad preservation order would be very burdensome for Starbucks. For it to retain all its backup tapes would require it to store, rather than recycle, backup tapes that would cost in excess of \$3.5 million per year. This number will probably rise as the business expands. Already, it uses many different types of electronic systems in different facilities around the world. Accessing all of these is a major chore. To recover them would require Starbucks to declare a disaster situation and activate our third-party service provider to restore data. Against this background, it is clear that blanket preservation orders would impose extreme burdens on Starbucks.

Rule 45

Washington

Jonathan Redgrave (04-CV-048): The form of production language should allow the responding party to choose a form of production without limiting it to the listed alternatives. Rule 45 should also be revised to specify that the court may allow discovery of inaccessible information for good cause and "specify terms and conditions for such discovery." I think the Note should specifically reference cost shifting.

M. James Daley (testimony and 04-CV-053): Empirically, we know that nonparty discovery is on the rise. But the responding party here should be able to select the form of production. In addition, a more direct reference to cost shifting should be added.

Michael Heidler (testimony and 04-CV-057): The rule should require that the subpoena specify a form for production.

Comments

Clifford Rieders (04-CV-017): Rule 45(d)(1)(C) would place complete power to obstruct discovery in the hands of the party producing information during litigation. The burden is then shifted to the party seeking production to demonstrate something it is ill-equipped to demonstrate -- whether the information is "reasonably accessible." This should be removed. Similarly, Rule 45(d)(2)(B) should not create a right to pull back privileged material that has been produced.

Philadelphia Bar Association (04-CV-031): In conformity with our other positions, we recommend revising the proposed amendments to Rule 45(a)(2)(C) and (c)(2)(A) to treat electronically stored information as a type of document, not as a separate category of information.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): The committee supports the concept of providing protection for nonparties from inadvertent waiver of privilege, but we question whether that provision is valid under 28 U.S.C. § 2074. In addition, we question the inclusion here of the right to demand electronically stored information in certain specified forms. With party discovery under Rule 34(b), we can understand that, but for nonparties it seems to us that they should be allowed to choose the least burdensome method.

Federal Magistrate Judges Ass'n (04-CV-127): Regarding the provision paralleling the proposed Rule 26(b)(2) change, it is not clear why the last phrase of the proposed amendment to Rule 26(b)(2) was omitted from Rule 45(d)(1)(C). We feel that it should be omitted in both places, but it should be the same in both places.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee reacts to the Rule 45 proposals in the ways that it reacted to the analogous proposals for Rules 26-37. It notes, however, that owing to the burdens that can be imposed on nonparties, the Note should state, as proposed, that "the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made."

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): Rule 45(c)(2)(A) should be changed by taking out the word "designated." Ultimately the goal of the

rules should be to convey that the term "documents" universally includes electronically stored information.

Michael Patrick (04-CV-223): The revisions do not deal with the privacy issues that arise with third party discovery of electronically stored information. A number of cases I have handled involved requests for information on personal computers. Request that seek to examine the hard drives of these computers are becoming more common. In these situations, simply copying the hard drive will reproduce highly sensitive information that is on the drive.

(4) Supplemental Rule G, with Conforming Changes To Supplemental Rules A, C, E and Civil Rules 9 and 14; and Rule 26(a)(1)(E)

Admiralty Rule G: Civil Forfeiture

Admiralty Rule G represents the culmination of several years of work to adapt the Supplemental Rules to the great growth of civil forfeiture actions. Many civil forfeiture statutes explicitly invoke the Supplemental Rules. The procedures that best serve civil forfeiture actions, however, often depart from the procedures that best serve traditional admiralty and maritime actions. Rule G was developed in close cooperation with the Department of Justice and representatives of the National Association of Criminal Defense Lawyers to establish distinctive forfeiture procedures within the framework of the Supplemental Rules. In addition, Rule G establishes new provisions to reflect enactment of the Civil Asset Forfeiture Reform Act of 2000, and to reflect developments in decisional and constitutional law. The result is a nearly complete separation of civil forfeiture procedure from Supplemental Rules A through F, invoking them for civil forfeiture only to address interstitial questions that are not covered by Rule G.

The only lengthy comments on Rule G were provided by the Department of Justice. A summary of all the comments is set out below.

Several modest changes in Rule G and the Committee Note are proposed as a result of the comments.

Conforming amendments to other Supplemental Rules were published with Rule G. An addition to Rule 26(a)(1)(E) was published, adding “a forfeiture action in rem arising from a federal statute” to the exemptions from initial disclosure requirements. There was no comment on these amendments.

In addition to the published proposals, technical changes are needed to conform Rule 9(h) to the new Rule G title and to conform Rule 14 cross-references to the Supplemental Rule C(6) provisions redesignated in the conforming amendments that were published with Rule G. Because these changes are purely mechanical, they are recommended for adoption without publication.

With the changes proposed below, it is recommended that Rule G be sent to the Judicial Conference with a recommendation for adoption.

**SUPPLEMENTAL RULES FOR CERTAIN
ADMIRALTY AND OR MARITIME
AND ASSET FORFEITURE CLAIMS**

Rule G. Forfeiture Actions In Rem

1 **(1) Scope.** This rule governs a forfeiture action in rem arising
2 from a federal statute. To the extent that this rule does not
3 address an issue, Supplemental Rules C and E and the Federal
4 Rules of Civil Procedure also apply.

5 **(2) Complaint.** The complaint must:

6 **(a)** be verified;

7 **(b)** state the grounds for subject-matter jurisdiction, in rem
8 jurisdiction over the defendant property, and venue;

9 **(c)** describe the property with reasonable particularity;

10 **(d)** if the property is tangible, state its location when any
11 seizure occurred and—if different—its location when the
12 action is filed;

13 **(e)** identify the statute under which the forfeiture action is
14 brought; and

15 **(f)** state sufficiently detailed facts to support a reasonable
16 belief that the government will be able to meet its burden of
17 proof at trial.

18 **(3) Judicial Authorization and Process.**

19 **(a) Real Property.** If the defendant is real property, the
20 government must proceed under 18 U. S. C. § 985.

21 **(b) Other Property; Arrest Warrant.** If the defendant is
22 not real property:

23 **(i)** the clerk must issue a warrant to arrest the property
24 if it is in the government's possession, custody, or
25 control;

26 **(ii)** the court—on finding probable cause—must issue
27 a warrant to arrest the property if it is not in the
28 government's possession, custody, or control and is not
29 subject to a judicial restraining order; and

30 **(iii)** a warrant is not necessary if the property is subject
31 to a judicial restraining order.

32 **(c) Execution of Process.**

33 **(i)** The warrant and any supplemental process must be
34 delivered to a person or organization authorized to
35 execute it, who may be: (A) a marshal; (B) someone
36 under contract with the United States; (C) someone

37 especially appointed by the court for that purpose; or (D)
38 any United States officer or employee.

39 (ii) The authorized person or organization must execute
40 the warrant and any supplemental process on property in
41 the United States as soon as practicable unless:

42 (A) the property is in the government's possession,
43 custody, or control; or

44 (B) the court orders a different time when the
45 complaint is under seal, the action is stayed before
46 the warrant and supplemental process are executed,
47 or the court finds other good cause.

48 (iii) The warrant and any supplemental process may be
49 executed within the district or, when authorized by
50 statute, outside the district.

51 (iv) If executing a warrant on property outside the United
52 States is required, the warrant may be transmitted to an
53 appropriate authority for serving process where the
54 property is located.

55 **(4) Notice.**

56 **(a) Notice by Publication.**

57 **(i) When Publication Is Required.** A judgment of
58 forfeiture may be entered only if the government has
59 published notice of the action within a reasonable time
60 after filing the complaint or at a time the court orders.

61 But notice need not be published if:

62 (A) the defendant property is worth less than \$1,000
63 and direct notice is sent under Rule G(4)(b) to every
64 person the government can reasonably identify as a
65 potential claimant; or

66 (B) the court finds that the cost of publication
67 exceeds the property's value and that other means of
68 notice would satisfy due process.

69 **(ii) Content of the Notice.** Unless the court orders
70 otherwise, the notice must:

71 (A) describe the property with reasonable
72 particularity;

73 (B) state the times under Rule G(5) to file a claim
74 and to answer; and

75 (C) name the government attorney to be served with
76 the claim and answer.

77 **(iii) Frequency of Publication.** Published notice must
78 appear:

79 (A) once a week for three consecutive weeks; or
80 (B) only once if, before the action was filed, notice
81 of nonjudicial forfeiture of the same property was
82 published on an official internet government
83 forfeiture site for at least 30 consecutive days, or in
84 a newspaper of general circulation for three
85 consecutive weeks in a district where publication is
86 authorized under Rule G(4)(a)(iv).

87 **(iv) Means of Publication.** The government should
88 select from the following options a means of publication
89 reasonably calculated to notify potential claimants of the
90 action:

91 (A) if the property is in the United States,
92 publication in a newspaper generally circulated in
93 the district where the action is filed, where the
94 property was seized, or where property that was not
95 seized is located;

96 (B) if the property is outside the United States,
97 publication in a newspaper generally circulated in a
98 district where the action is filed, in a newspaper
99 generally circulated in the country where the
100 property is located, or in legal notices published and
101 generally circulated in the country where the
102 property is located; or
103 (C) instead of (A) or (B), posting a notice on an
104 official internet government forfeiture site for at least
105 30 consecutive days.

106 **(b) Notice to Known Potential Claimants.**

107 **(i) Direct Notice Required.** The government must send
108 notice of the action and a copy of the complaint to any
109 person who reasonably appears to be a potential claimant
110 on the facts known to the government before the end of
111 the time for filing a claim under Rule G(5)(a)(ii)(B).

112 **(ii) Content of the Notice.** The notice must state:

113 (A) the date when the notice is sent;

114 (B) a deadline for filing a claim, at least 35 days
115 after the notice is sent;

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116 (C) that an answer or a motion under Rule 12 must
117 be filed no later than 20 days after filing the claim;

118 and

119 (D) the name of the government attorney to be
120 served with the claim and answer.

121 **(iii) Sending Notice.**

122 (A) The notice must be sent by means reasonably
123 calculated to reach the potential claimant.

124 (B) Notice may be sent to the potential claimant or
125 to the attorney representing the potential claimant
126 with respect to the seizure of the property or in a
127 related investigation, administrative forfeiture
128 proceeding, or criminal case.

129 (C) Notice sent to a potential claimant who is
130 incarcerated must be sent to the place of
131 incarceration.

132 (D) Notice to a person arrested in connection with an
133 offense giving rise to the forfeiture who is not
134 incarcerated when notice is sent may be sent to the

135 address that person last gave to the agency that
136 arrested or released the person.

137 (E) Notice to a person from whom the property was
138 seized who is not incarcerated when notice is sent
139 may be sent to the last address that person gave to
140 the agency that seized the property.

141 (iv) When Notice Is Sent. Notice by the following
142 means is sent on the date when it is placed in the mail,
143 delivered to a commercial carrier, or sent by electronic
144 mail.

145 (v) Actual Notice. A potential claimant who had actual
146 notice of a forfeiture action may not oppose or seek
147 relief from forfeiture because of the government's failure
148 to send the required notice.

149 **(5) Responsive Pleadings.**

150 **(a) Filing a Claim.**

151 (i) A person who asserts an interest in the defendant
152 property may contest the forfeiture by filing a claim in
153 the court where the action is pending. The claim must:

154 (A) identify the specific property claimed;

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155 (B) identify the claimant and state the claimant's
156 interest in the property;

157 (C) be signed by the claimant under penalty of
158 perjury; and

159 (D) be served on the government attorney designated
160 under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

161 (ii) Unless the court for good cause sets a different time,
162 the claim must be filed:

163 (A) by the time stated in a direct notice sent under
164 Rule G(4)(b);

165 (B) if notice was published but direct notice was not
166 sent to the claimant or the claimant's attorney, no
167 later than 30 days after final publication of
168 newspaper notice or legal notice under Rule G(4)(a)
169 or no later than 60 days after the first day of
170 publication on an official internet government
171 forfeiture site; or

172 (C) if notice was not published and direct notice was
173 not sent to the claimant or the claimant's attorney;

174 (1) if the property was in the government's
175 possession, custody, or control when the
176 complaint was filed, no later than 60 days after
177 the filing, not counting any time when the
178 complaint was under seal or when the action
179 was stayed before execution of a warrant issued
180 under Rule G(3)(b); or

181 (2) if the property was not in the government's
182 possession, custody, or control when the
183 complaint was filed, no later than 60 days after
184 the government complied with 18 U.S.C
185 § 985(c) as to real property, or 60 days after
186 process was executed on the property under Rule
187 G(3).

188 (iii) A claim filed by a person asserting an interest as a
189 bailee must identify the bailor, and if filed on the bailor's
190 behalf must state the authority to do so.

191 (b) Answer. A claimant must serve and file an answer to
192 the complaint or a motion under Rule 12 within 20 days after
193 filing the claim. A claimant waives an objection to in rem

194 jurisdiction or to venue if the objection is not made by
195 motion or stated in the answer.

196 **(6) Special Interrogatories.**

197 **(a) Time and Scope.** The government may serve special
198 interrogatories limited to the claimant's identity and
199 relationship to the defendant property without the court's
200 leave at any time after the claim is filed and before
201 discovery is closed. But if the claimant serves a motion to
202 dismiss the action, the government must serve the
203 interrogatories within 20 days after the motion is served.

204 **(b) Answers or Objections.** Answers or objections to these
205 interrogatories must be served within 20 days after the
206 interrogatories are served.

207 **(c) Government's Response Deferred.** The government
208 need not respond to a claimant's motion to dismiss the action
209 under Rule G(8)(b) until 20 days after the claimant has
210 answered these interrogatories.

211 **(7) Preserving, Preventing Criminal Use, and Disposing of**
212 **Property; Sales.**

213 **(a) Preserving and Preventing Criminal Use of Property.**

214 When the government does not have actual possession of the
215 defendant property the court, on motion or on its own, may
216 enter any order necessary to preserve the property, to prevent
217 its removal or encumbrance, or to prevent its use in a
218 criminal offense.

219 **(b) Interlocutory Sale or Delivery.**

220 **(i) Order to Sell.** On motion by a party or a person
221 having custody of the property, the court may order all or
222 part of the property sold if:

223 **(A)** the property is perishable or at risk of
224 deterioration, decay, or injury by being detained in
225 custody pending the action;

226 **(B)** the expense of keeping the property is excessive
227 or is disproportionate to its fair market value;

228 **(C)** the property is subject to a mortgage or to taxes
229 on which the owner is in default; or

230 **(D)** the court finds other good cause.

231 **(ii) Who Makes the Sale.** A sale must be made by a
232 United States agency that has authority to sell the

233 property, by the agency's contractor, or by any person the
234 court designates.

235 **(iii) Sale Procedures.** The sale is governed by 28 U.S.C.
236 §§ 2001, 2002, and 2004, unless all parties, with the
237 court's approval, agree to the sale, aspects of the sale, or
238 different procedures.

239 **(iv) Sale Proceeds.** Sale proceeds are a substitute res
240 subject to forfeiture in place of the property that was
241 sold. The proceeds must be held in an interest-bearing
242 account maintained by the United States pending the
243 conclusion of the forfeiture action.

244 **(v) Delivery on a Claimant's Motion.** The court may
245 order that the property be delivered to the claimant
246 pending the conclusion of the action if the claimant
247 shows circumstances that would permit sale under Rule
248 G(7)(b)(i) and gives security under these rules.

249 **(c) Disposing of Forfeited Property.** Upon entry of a
250 forfeiture judgment, the property or proceeds from selling
251 the property must be disposed of as provided by law.

252 **(8) Motions.**

253 **(a) Motion To Suppress Use of the Property as Evidence.**

254 If the defendant property was seized, a party with standing to
255 contest the lawfulness of the seizure may move to suppress
256 use of the property as evidence. Suppression does not affect
257 forfeiture of the property based on independently derived
258 evidence.

259 **(b) Motion To Dismiss the Action.**

260 (i) A claimant who establishes standing to contest
261 forfeiture may move to dismiss the action under Rule
262 12(b).

263 (ii) In an action governed by 18 U.S.C. § 983(a)(3)(D)
264 the complaint may not be dismissed on the ground that
265 the government did not have adequate evidence at the
266 time the complaint was filed to establish the
267 forfeitability of the property. The sufficiency of the
268 complaint is governed by Rule G(2).

269 **(c) Motion To Strike a Claim or Answer.**

270 (i) At any time before trial, the government may move to
271 strike a claim or answer:

272 (A) for failing to comply with Rule G(5) or (6);, or

273 (B) because the claimant lacks standing.

274 (ii) The motion:

275 (A) must be decided before any motion by the
276 claimant to dismiss the action; and

277 (B) may be presented as a motion for judgment on
278 the pleadings or as a motion to determine after a
279 hearing or by summary judgment whether the
280 claimant can carry the burden of establishing
281 standing by a preponderance of the evidence.

282 **(d) Petition To Release Property.**

283 (i) If a United States agency or an agency's contractor
284 holds property for judicial or nonjudicial forfeiture
285 under a statute governed by 18 U.S.C. § 983(f), a
286 person who has filed a claim to the property may
287 petition for its release under § 983(f).

288 (ii) If a petition for release is filed before a judicial
289 forfeiture action is filed against the property, the petition
290 may be filed either in the district where the property was
291 seized or in the district where a warrant to seize the
292 property issued. If a judicial forfeiture action against the

293 property is later filed in another district—or if the
294 government shows that the action will be filed in another
295 district—the petition may be transferred to that district
296 under 28 U.S.C. § 1404.

297 **(e) Excessive Fines.** A claimant may seek to mitigate a
298 forfeiture under the Excessive Fines Clause of the Eighth
299 Amendment by motion for summary judgment or by motion
300 made after entry of a forfeiture judgment if:

301 (i) the claimant has pleaded the defense under Rule 8;
302 and
303 (ii) the parties have had the opportunity to conduct civil
304 discovery on the defense.

305 **(9) Trial.** Trial is to the court unless any party demands trial by
306 jury under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel

interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit—subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action “state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts

and to frame a responsive pleading.” Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession, custody, or control. If the property is not in the government's possession, custody, or control and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession, custody, or control. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any

independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than \$1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision (4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. The government should choose from among these means a method that is reasonably likely to reach potential claimants at a cost reasonable in the circumstances.

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or—if the property was not seized—where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C.

§ 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed “not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *.” This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government's interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case.

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. *See Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The

address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government is not obliged to undertake an independent investigation to verify the address.

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not covered by § 983. “Claim” is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of “claim” in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor must be identified. A bailee who files a claim on behalf of a bailor must state the bailee's authority to do so.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and

the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim “shall file an answer to the Government’s complaint for forfeiture not later than 20 days after the date of the filing of the claim.” Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), *see U.S. v. \$8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant’s motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed to gather information that bears on the claimant’s standing. Subdivisions (8)(b) and (c) allow a

claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss—the interrogatories must be served within 20 days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

Special interrogatories served under Rule G(6) do not count against the presumptive 25-interrogatory limit established by Rule 33(a). Rule 33 procedure otherwise applies to these interrogatories.

Subdivision (6) supersedes the discovery “moratorium” of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Paragraph (a) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property. It also goes beyond Rule E(9) by recognizing the need to prevent use of the defendant property in ongoing criminal offenses.

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case.

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to

diminution in value. Care should be taken before ordering sale to avoid diminished value.

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying

nothing as to actions outside § 983(a)(3)(D). The adequacy of the complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing. It does not address the principles that govern claim standing.

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (c)(ii) directs that a motion to strike a claim or answer be decided before any motion by the claimant to dismiss the action. A claimant who lacks standing is not entitled to challenge the forfeiture on the merits.

Paragraph (c)(ii) further identifies three procedures for addressing claim standing. If a claim fails on its face to show facts that support claim standing, the claim can be dismissed by judgment on the pleadings. If the claim shows facts that would support claim standing, those facts can be tested by a motion for summary judgment. If material facts are disputed, precluding a grant of summary judgment, the court may hold an evidentiary hearing. The evidentiary hearing is held by the court without a jury. The claimant has the burden to establish claim standing at a hearing; procedure on a government summary-judgment motion reflects this allocation of the burden.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a “civil action” eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of different parts of the same forfeiture proceeding in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working—whether seizure of the claimant's automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a “petition” “to determine whether the forfeiture was constitutionally excessive” based on finding “that the forfeiture is grossly disproportional to the offense.” Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38. It does not expand the right to jury trial. *See U.S. v. One Parcel of Property Located at 32 Medley Lane*, 2005 WL 465241 (D.Conn.2005), ruling that the court, not the jury, determines whether a forfeiture is constitutionally excessive.

Changes Made After Publication and Comment

Rule G(6)(a) was amended to delete the provision that special interrogatories addressed to a claimant's standing are "under Rule 33." The government was concerned that some forfeitures raise factually complex standing issues that require many interrogatories, severely depleting the presumptive 25-interrogatory limit in Rule 33. The Committee Note is amended to state that the interrogatories do not count against the limit, but that Rule 33 governs the procedure.

Rule G(7)(a) was amended to recognize the court's authority to enter an order necessary to prevent use of the defendant property in a criminal offense.

Rule G(8)(c) was revised to clarify the use of three procedures to challenge a claimant's standing—judgment on the pleadings, summary judgment, or an evidentiary hearing.

Several other rule text changes were made to add clarity on small points or to conform to Style conventions.

Changes were made in the Committee Note to explain some of the rule text revisions, to add clarity on a few points, and to delete statements about complex matters that seemed better left to case-law development.

Supplemental Rules A, C, E Amended To Conform to G**Rule A. Scope of Rules**

1 **(1)** These Supplemental Rules apply to:

2 (A) the procedure in admiralty and maritime claims within
3 the meaning of Rule 9(h) with respect to the following
4 remedies:

- 5 (i) maritime attachment and garnishment;
- 6 (ii) actions in rem;
- 7 (iii) possessory, petitory, and partition actions, and;
- 8 (iv) actions for exoneration from or limitation of
9 liability;

10 (B) forfeiture actions in rem arising from a federal statute;
11 and

12 (C) ~~These rules also apply to~~ the procedure in statutory
13 condemnation proceedings analogous to maritime actions in
14 rem, whether within the admiralty and maritime jurisdiction
15 or not. Except as otherwise provided, references in these
16 Supplemental Rules to actions in rem include such
17 analogous statutory condemnation proceedings.

18 (2) ~~The general Federal Rules of Civil Procedure for the United~~
19 ~~States District Courts are also applicable~~ apply to the foregoing

20 proceedings except to the extent that they are inconsistent with
21 these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

- 1 **(1) When Available.** An action in rem may be brought:
- 2 (a) To enforce any maritime lien;
- 3 (b) Whenever a statute of the United States provides for a
4 maritime action in rem or a proceeding analogous thereto.
- 5 * * * * *
- 6 **(2) Complaint.** In an action in rem the complaint must:
- 7 (a) be verified;
- 8 (b) describe with reasonable particularity the property that
9 is the subject of the action; and
- 10 ~~(c) in an admiralty and maritime proceeding~~ state that the
11 property is within the district or will be within the district
12 while the action is pending;

13 ~~(d) in a forfeiture proceeding for violation of a federal~~
14 ~~statute, state:~~

15 ~~(i) the place of seizure and whether it was on land or on~~
16 ~~navigable waters;~~

17 ~~(ii) whether the property is within the district, and if the~~
18 ~~property is not within the district the statutory basis for~~
19 ~~the court's exercise of jurisdiction over the property; and~~

20 ~~(iii) all allegations required by the statute under which~~
21 ~~the action is brought.~~

22 **(3) Judicial Authorization and Process.**

23 **(a) Arrest Warrant.**

24 ~~(i) When the United States files a complaint demanding~~
25 ~~a forfeiture for violation of a federal statute, the clerk~~
26 ~~must promptly issue a summons and a warrant for the~~
27 ~~arrest of the vessel or other property without requiring a~~
28 ~~certification of exigent circumstances, but if the property~~
29 ~~is real property the United States must proceed under~~
30 ~~applicable statutory procedures.~~

31 ~~(ii)(A) In other actions, t~~The court must review the
32 ~~complaint and any supporting papers. If the conditions~~

33 for an in rem action appear to exist, the court must issue
34 an order directing the clerk to issue a warrant for the
35 arrest of the vessel or other property that is the subject of
36 the action.

37 **(iiB)** If the plaintiff or the plaintiff's attorney certifies
38 that exigent circumstances make court review
39 impracticable, the clerk must promptly issue a summons
40 and a warrant for the arrest of the vessel or other
41 property that is the subject of the action. The plaintiff has
42 the burden in any ~~postarrest~~ post-arrest hearing under
43 Rule E(4)(f) to show that exigent circumstances existed.

44 **(b) Service.**

45 **(i)** If the property that is the subject of the action is a
46 vessel or tangible property on board a vessel, the warrant
47 and any supplemental process must be delivered to the
48 marshal for service.

49 **(ii)** If the property that is the subject of the action is other
50 property, tangible or intangible, the warrant and any
51 supplemental process must be delivered to a person or
52 organization authorized to enforce it, who may be: (A)

53 a marshal; (B) someone under contract with the United
54 States; (C) someone specially appointed by the court for
55 that purpose; or (D) in an action brought by the United
56 States, any officer or employee of the United States.

57 * * * * *

58 **(6) Responsive Pleading; Interrogatories.**

59 ~~(a) Civil Forfeiture.~~ In an in rem forfeiture action for
60 violation of a federal statute:

61 ~~(i) a person who asserts an interest in or right against the~~
62 ~~property that is the subject of the action must file a~~
63 ~~verified statement identifying the interest or right:~~

64 ~~(A) within 30 days after the earlier of (1) the date of~~
65 ~~service of the Government's complaint or (2)~~
66 ~~completed publication of notice under Rule C(4), or~~
67 ~~(B) within the time that the court allows.~~

68 ~~(ii) an agent, bailee, or attorney must state the authority~~
69 ~~to file a statement of interest in or right against the~~
70 ~~property on behalf of another; and~~

71 ~~(iii) a person who files a statement of interest in or right~~
72 ~~against the property must serve and file an answer within~~
73 ~~20 days after filing the statement.~~

74 **(ab) Maritime Arrests and Other Proceedings.** ~~In an rem~~
75 ~~action not governed by Rule C(6)(a):~~

76 * * * * *

77 **(bc) Interrogatories.**

78 * * * * *

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

1 * * * * *

2 **(3) Process.**

3 **(a)** In admiralty and maritime proceedings process in rem or
4 of maritime attachment and garnishment may be served only
5 within the district.

6 ~~**(b)** In forfeiture cases process in rem may be served within~~
7 ~~the district or outside the district when authorized by statute.~~

8 **(bc) Issuance and Delivery.**

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(5) Release of Property.

(a) Special Bond. ~~Except in cases of seizures for forfeiture under any law of the United States, w~~Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisalment, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

* * * * *

29

30 **(9) Disposition of Property; Sales.**

31 **(a) Actions for Forfeitures.** In any action in rem to enforce
32 a forfeiture for violation of a statute of the United States the
33 property shall be disposed of as provided by statute.

34 **(ab) Interlocutory Sales; Delivery.**

* * * * *

35

36 **(ii)** In the circumstances described in Rule E(9)(ab)(i),
37 the court, on motion by a defendant or a person filing a
38 statement of interest or right under Rule C(6), may order
39 that the property, rather than being sold, be delivered to
40 the movant upon giving security under these rules.

41 **(bc) Sales, Proceeds.**

* * * * *

42

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

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

1 **(a) Required Disclosures; Methods to Discover Additional**
2 **Matter.**

3 **(1) Initial Disclosures.**

4 * * * * *

5 **(E)** The following categories of proceedings are exempt
6 from initial disclosure under Rule 26(a)(1):

7 * * * * *

8 **(ii)** a forfeiture action in rem arising from a federal
9 statute;

10 **(iii)** a petition for habeas corpus or other
11 proceeding to challenge a criminal conviction or
12 sentence;

13 **(iiiiv)** an action brought without counsel by a person
14 in custody of the United States, a state, or a state
15 subdivision;

16 **(ivv)** an action to enforce or quash an administrative
17 summons or subpoena;

18 **(vvi)** an action by the United States to recover
19 benefit payments;

20 **(vii)** an action by the United States to collect on a
21 student loan guaranteed by the United States;

22 (viiiii) a proceeding ancillary to proceedings in
23 other courts; and

24 (viiiix) an action to enforce an arbitration award.

25 * * * * *

Committee Note

Civil forfeiture actions are added to the list of exemptions from Rule 26(a)(1) disclosure requirements. These actions are governed by new Supplemental Rule G. Disclosure is not likely to be useful.

Technical Conforming Amendments, Civil Rules 9(h), 14

The process of revising Rule G included conforming amendments to the Supplemental Rules affected by the change, but overlooked the need to conform Civil Rule 9(h) to the new title for the Supplemental Rules and to conform Rules 14(a) and (c) to the changes made in Supplemental Rule C(6). It is recommended that the following technical conforming changes be transmitted to the Judicial Conference for adoption without a period for public comment.

Rule 9. Pleading Special Matters

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(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Certain Admiralty and or Maritime and Asset Forfeiture Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Committee Note

Rule 9(h) is amended to conform to the changed title of the Supplemental Rules.

Rule 14. Third-Party Practice

1 **(a) When Defendant May Bring in Third Party.**

2 * * * * *

3 The third-party complaint, if within the admiralty and maritime
4 jurisdiction, may be in rem against a vessel, cargo, or other
5 property subject to admiralty or maritime process in rem, in
6 which case references in this rule to the summons include the
7 warrant of arrest, and references to the third-party plaintiff or
8 defendant include, where appropriate, a person who asserts a
9 right under Supplemental Rule C(6)(b̄a)(1) in the property
10 arrested.

11 * * * * *

12 **(c) Admiralty and Maritime Claims.** When a plaintiff asserts
13 an admiralty or maritime claim within the meaning of Rule 9(h),
14 the defendant or person who asserts a right under Supplemental
15 Rule C(6)(b̄a)(1), as a third-party plaintiff, may bring in a third-
16 party defendant who may be wholly or partly liable, either to the
17 plaintiff or to the third-party plaintiff, by way of remedy over,
18 contribution, or otherwise on account of the same transaction,
19 occurrence, or series of transactions or occurrences. In such a

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20 case the third-party plaintiff may also demand judgment against
21 the third-party defendant in favor of the plaintiff, in which event
22 the third-party defendant shall make any defenses to the claim of
23 the plaintiff as well as to that of the third-party plaintiff in the
24 manner provided in Rule 12 and the action shall proceed as if the
25 plaintiff had commenced it against the third-party defendant as
26 well as the third-party plaintiff.

Committee Note

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).

Summary of Comments, Rule G

04-CV-127, Federal Magistrate Judges Assn., 04-CV-127: Supports. It is appropriate to adopt a rule that consolidates civil forfeiture procedure in one place and that takes account of the changes in forfeiture practice arising from CAFRA.

04-CV-203, U.S. Department of Justice: (These are long comments, focused on details rather than the larger enterprise. Adoption of Rule G is supported, with suggested refinements. “Consolidating civil forfeiture provisions in one rule will aid the administration of justice.” “Nevertheless, there are a number of areas in which the Rule could be improved by resolving unnecessary ambiguities.”)

Title: The title should be changed: “Supplemental Rules for Admiralty and Asset Forfeiture Claims.”

G(3): This rule authorizes the clerk to issue a warrant to arrest property already in the government's possession. It should be expanded

to include “custody or control” to avoid ambiguity in such circumstances as deposit in a financial institution account.

G(4): (1) The Note says that it suffices to make a reasonable choice of the means of notice most likely to reach potential claimants at a reasonable cost. The Rule says only that the government should select a means reasonably calculated to notify potential claimants. The Note should be revised to reflect the Rule.

(2) (a)(iv)(C) should read “instead of (A) and or (B).”

(3) (b)(i) requires notice to any person who reasonably appears to be a potential claimant. It seems clear, but a court has cited it to support notice to crime victims who do not have standing to contest forfeiture. The rule should include a new sentence: “Notice need not be sent to persons without standing to contest the forfeiture.”

(4) (b)(iii)(B) allows notice either to a potential claimant or to the potential claimant's attorney, without expressing a preference. The Note says that notice should be sent to the attorney only when that appears to be the most reliable means. This statement is inconsistent with Mullane. Typically the government sends notice to both. But notice to the attorney alone should suffice if for any reason the attempt to send notice to the claimant proves inadequate.

(5) (b)(iii)(D) and (E) provide for notice to the last address a potential claimant gave to the agency that arrested or released the claimant or to the agency that seized the property. This is ambiguous. As drafted, the rule could be read to require notice to an address given to an agent or employee acquainted with the claimant even though the agent or employee had no connection whatsoever with the case. The Note should be revised to make clear that this does not count.

(6) (b)(iv) is awkward; the cure is to delete some words: “Notice ~~by the following means~~ is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.”

G(5): (a)(iii) says a bailee filing a claim must identify the bailor. The Note only says “should”; it should be amended to say “must.”

(a)(iii) should be amended to reflect present C(6)(a)(ii), which says that a bailee who files a statement of interest must state the authority to file on behalf of another. This would be accomplished by adding: “A claim filed by a person asserting an interest as a bailee must identify the bailor and state the person is authorized to file a claim in the bailor's behalf.”

(b) should be amended for the sake of clarity: “A claimant must serve and file an answer * * * or a motion under Rule 12 * * *. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion under Rule 12 or stated in the answer.”

G(6): The rule describes the special interrogatories served by the government to address a claimant's identity and relationship to the defendant property as interrogatories “under Rule 33.” That is appropriate, but the Note is wrong in saying that these interrogatories count against the presumptive 25-interrogatory limit in Rule 33. The Note should say that they do not count against the limit. “Otherwise, a claimant who created complex standing issues by styling its claim in a particular way would enjoy a windfall vis a vis similarly situated claimants: the more complex the standing issues, the fewer interrogatories the Government could serve under Rule 33 on the merits of the case.”

G(7): (a) recognizes authority to enter orders “to preserve the property and to prevent its removal or encumbrance.” A restraining order also may be needed to prevent use of property in ongoing criminal offenses — examples are an Internet domain name or Website used to collect money for terrorists, to promote child pornography offenses, or to facilitate the distribution of illegal drugs. The rule should be amended: “to preserve the property, and to prevent its removal or encumbrance, or to present its use in the commission of a criminal offense.”

(b)(i) was drafted as a compromise. The government wanted it to include explicit authorization for sale to protect against diminution in the defendant property's value. The response was sale on this ground could be sought under item (D), which allows sale for “other good cause.” But the Note says that diminution in value is a ground that “should be invoked with restraint in circumstances that do not involve

physical deterioration.” The Note could frustrate the government’s effort to obtain fair market value in the many cases that do not involve physical deterioration. The Note should be revised to include a neutral statement about balancing interests of all parties, including victims.

(b)(1)(C) authorizes sale of property subject to defaulted mortgage or tax obligations. The Note says that the rule does not address the question whether a mortgagee or other lien holder can force sale of property held for forfeiture, or whether the court can enjoin the sale. Although intended to be neutral, this Note statement may be read to suggest that there is some uncertainty in the law. The Note should be revised to say that it does not change the existing law with respect to the court’s authority to enjoin third parties from collecting through foreclosure.

G(8): (b)(i) refers to dismissing the action, while (ii) refers to dismissing the complaint. “Complaint” should be used in both places, as well as in the caption. The same change should be made in (c)(ii).

(c) represents a compromise. The government relinquished arguments that Rule G should establish claim-standing standards, leading to provisions that define only the procedure for determining claim standing. Case law continues to develop, warranting further development of this procedure in subdivision (8). It should address separately a government motion for judgment on the pleadings (not simply a motion to strike the claim); a motion to dismiss the claim for lack of standing, imposing the burden of establishing standing on the claimant and leaving fact issues to be determined by the court; and disposition of the motion to dismiss the claim by summary judgment.

The Note to (8)(c) should be supplemented by a statement that it regulates only government motions addressed to standing and does not limit the government’s right to seek dismissal on other grounds.

04-CV-208, Hon. Mark Kravitz: Proposed G(9) states that trial is to the court unless any party demands trial by jury under Rule 38. Although “under Rule 38” is intended to incorporate all the limits of Rule 38 — a demand does not create a right to jury trial that does not otherwise exist — there is a risk that the rule will be read to expand the right to jury trial. In keeping with style conventions, the cure may be to add a sentence to the Committee Note stating that paragraph (9) does not expand the right to jury trial.

II. Action Items: Rule Amendment Recommended for Publication for Comment

The Advisory Committee recommends publication for comment of new Rule 5.2:

Rule 5.2. Privacy Protection For Filings Made with the Court

1 **(a) Redacted Filings.** Unless the court orders otherwise, an
2 electronic or paper filing made with the court that includes a
3 social security number or an individual's tax identification
4 number, a name of a person known to be a minor, a person's
5 birth date, or a financial account number may include only:

6 **(1) the last four digits of the social-security number and tax-**
7 **identification number;**

8 **(2) the minor's initials;**

9 **(3) the year of birth; and**

10 **(4) the last four digits of the financial account number.**

11 **(b) Exemptions from the Redaction Requirement.** The
12 redaction requirement of Rule 5.2(a) does not apply to the
13 following:

- 14 (1) in a civil [or criminal] forfeiture proceeding, a financial-
 15 account number that identifies the property alleged to be
 16 subject to forfeiture;
 17 (2) the record of an administrative or agency proceeding;
 18 (3) the official record of a state-court proceeding;
 19 (4) the record of a court or tribunal whose decision is being
 20 reviewed, if that record was not subject to Rule 5.2(a) when
 21 originally filed;
 22 (5) a filing covered by Rule 5.2(c) or (d); and
 23 (6) a filing made in an action brought under 28 U.S.C.
 24 §§ 2241, 2254, or 2255.⁹

⁹ This text is one version of a set of questions that remain to be worked out. The questions surround the role of § 2241 habeas corpus proceedings in general, and also with respect to immigration cases. As the text stands here, all § 2241 petitions are exempted from redaction. A § 2241 proceeding relating to immigration rights is twice exempted because (b)(5) exempts a filing covered by (c), which includes § 2241 proceedings relating to immigration rights. Subdivision (c) sharply limits remote electronic access to immigration rights files, so that filing without redaction poses little practical threat to privacy or security interests. If this is a satisfactory resolution for § 2241 petitions that involve immigration rights, the question remains whether all other § 2241 petitions also should be exempted from redaction. Section 2241 is used to challenge custody in a wide variety of situations that may not — or may — involve the concerns that counsel exempting § 2254 and § 2255 proceedings from the redaction requirement.

25 **(c) Limitations on Remote Access to Electronic Files; Social**
26 **Security Appeals and Immigration Cases.** Unless the court
27 orders otherwise, in an action for benefits under the Social
28 Security Act, and in an action or in a proceeding under 28 U.S.C.
29 § 2241 relating to an order of removal, relief from removal, or
30 immigration benefits or detention, access to an electronic file is
31 authorized as follows:

32 (1) the parties and their attorneys may have remote
33 electronic access to any part of the case file, including the
34 administrative record;

35 (2) any other person may have electronic access to the full
36 record at the courthouse, but may have remote electronic
37 access only to:

38 (A) the docket maintained by the court; and

39 (B) an opinion, order, judgment, or other disposition of
40 the court, but not any other part of the case file or the
41 administrative record.

42 **(d) Filings Made Under Seal.** The court may order that a filing
43 be made under seal without redaction. The court may later

44 unseal the filing or order the person who made the filing to file
45 a redacted version for the public record.

46 **(e) Protective Orders.** If necessary to protect private or
47 sensitive information that is not otherwise protected under Rule
48 5.2(a), a court may by order in a case require redaction of
49 additional information or limit or prohibit remote access by
50 nonparties to a document filed with the court.

51 **(f) Option for Additional Unredacted Filing Under Seal.** A
52 party making a redacted filing under Rule 5.2(a) may also file an
53 unredacted copy under seal. The court must retain the unredacted
54 copy as part of the record.

55 **(g) Option for Filing a Reference List.** A filing that contains
56 information redacted under Rule 5.2(a) may be filed together
57 with a reference list that identifies each item of redacted
58 information and specifies an appropriate identifier that uniquely
59 corresponds to each item listed. The reference list must be filed
60 under seal and may be amended as of right. Any reference in the
61 case to an identifier in the reference list will be construed to refer
62 to the corresponding item of information.

63 (h) Waiver of Protection of Identifiers. A party waives the
64 protection of (a) as to the party's own information to the extent
65 that the party files such information not under seal and without
66 redaction.

Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* <http://www.privacy.uscourts.gov/Policy.htm> The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license

numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.

Subdivision (e) provides that the court can by order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) refers to “redacted” information. The term “redacted” is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

“CLEAN-TEXT” VERSION
OF
PROPOSED RULES AMENDMENTS

**AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE**

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or — if reasonable exceptions are allowed — require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

Rule 5.2. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, an electronic or paper filing made with the court that includes a social security number or an individual's tax identification number, a name of a person known to be a minor, a person's birth date, or a financial account number may include only:

- (1) the last four digits of the social-security number and tax-identification number;
- (2) the minor's initials;
- (3) the year of birth; and
- (4) the last four digits of the financial account number.

(b) Exemptions from the Redaction Requirement. The redaction requirement of Rule 5.2(a) does not apply to the following:

- (1) in a civil [or criminal] forfeiture proceeding, a financial-account number that identifies the property alleged to be subject to forfeiture;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal whose decision is being reviewed, if that record was not subject to Rule 5.2(a) when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a filing made in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

(c) Limitations on Remote Access to Electronic Files; Social Security Appeals and Immigration Cases. Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or in a proceeding under 28 U.S.C. § 2241 relating to an order of removal, relief from removal, or immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;
- (2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:
 - (A) the docket maintained by the court; and
 - (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the

filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. If necessary to protect private or sensitive information that is not otherwise protected under Rule 5.2(a), a court may by order in a case require redaction of additional information or limit or prohibit remote access by nonparties to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A party making a redacted filing under Rule 5.2(a) may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains information redacted under Rule 5.2(a) may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The reference list must be filed under seal and may be amended as of right. Any reference in the case to an identifier in the reference list will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A party waives the protection of (a) as to the party's own information to the extent that the party files such information not under seal and without redaction.

* * * * *

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), and 82, and the Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

Rule 14. Third-Party Practice**(a) When Defendant May Bring in Third Party.**

* * * * *

The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(a)(1) in the property arrested.

* * * * *

(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(a)(1), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning.

* * * * *

The scheduling order may also include

* * * * *

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

(6) any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production;

* * * * *

Rule 26. General Provisions Governing Discovery; Duty of Disclosure**(a) Required Disclosures; Methods to Discover Additional Matter.**

(1) *Initial Disclosures.* Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

* * * * *

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

- (v) an action to enforce or quash an administrative summons or subpoena;
- (vi) an action by the United States to recover benefit payments;
- (vii) an action by the United States to collect on a student loan guaranteed by the United States;
- (viii) a proceeding ancillary to proceedings in other courts; and
- (ix) an action to enforce an arbitration award.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

* * * * *

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

* * * * *

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

(A) *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) *Information Produced.* If information is produced in discovery that is subject to a claim of privilege or protection as trial-preparation material, the party making the claim may within a reasonable time, notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * * * *

(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 or forms in which it should be produced;
- (4) any issues relating to claims of privilege or protection as trial-preparation material, including – if the parties agree on a procedure to assert such claims after production – whether to ask the court to include their agreement in an order;
- (5) 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) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

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 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.

* * * * *

Rule 34. Production of 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, copy, test, or sample any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium – from which information can be obtained, translated, if necessary, by

the respondent into reasonably usable form, or to inspect, 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).

* * * * *

(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 or forms in which electronically stored information is to be produced.

* * * * *

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 or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. 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 part thereof, or any failure to permit inspection as requested.

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

* * * * *

(ii) if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

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

* * * * *

(f) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

* * * * *

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, copying, testing, or sampling of designated books, documents, electronically stored 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 or forms 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, inspection, copying, testing, or sampling shall issue from the court for the district in which the production or inspection is to be made.

* * * * *

(b) Service.

* * * * *

(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, 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 deposition, hearing, trial, production, 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.

(c) Protection of Persons Subject to Subpoenas.

* * * * *

(2) (A) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents 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, 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 any or all of the designated materials or inspection of the premises — or to providing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, 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 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 the state in which the trial is held;
 - (iii)** requires disclosure of privileged or other protected matter and no exception or waiver applies; or
 - (iv)** subjects a person to undue burden.

* * * * *

(d) Duties in Responding to Subpoena.

* * * * *

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) The person producing electronically stored information need only produce the same information in one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify 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) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the

basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

* * * * *

Rule 50. Judgment as a Matter of Law in Jury Trials; Alternative Motion for New Trial; Conditional Rulings

(a) Judgment as a Matter of Law.

* * * * *

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under subdivision (a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment or—if the motion addresses a jury issue not decided by a verdict—by filing a motion no later than 10 days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

- (1) if a verdict was returned:
 - (A) allow the judgment to stand,
 - (B) order a new trial, or
 - (C) direct entry of judgment as a matter of law; or
- (2) if no verdict was returned:
 - (A) order a new trial, or
 - (B) direct entry of judgment as a matter of law.

* * * * *

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: * * *

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

The parties have agreed to an order regarding claims of privilege or protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order). * * *

* * * * *

**SUPPLEMENTAL RULES FOR
ADMIRALTY OR MARITIME
AND ASSET FORFEITURE CLAIMS**

Rule A. Scope of Rules

- (1) These Supplemental Rules apply to:
- (A) the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:
 - (i) maritime attachment and garnishment,
 - (ii) actions in rem,
 - (iii) possessory, petitory, and partition actions, and
 - (iv) actions for exoneration from or limitation of liability;
 - (B) forfeiture actions in rem arising from a federal statute; and
 - (C) the procedure in statutory condemnation proceedings analogous to maritime actions in rem, whether within the admiralty and maritime jurisdiction or not. Except as otherwise provided, references in these Supplemental Rules to actions in rem include such analogous statutory condemnation proceedings.
- (2) The Federal Rules of Civil Procedure also apply to the foregoing proceedings except to the extent that they are inconsistent with these Supplemental Rules.

Rule C. In Rem Actions: Special Provisions

- (1) When Available.** An action in rem may be brought:
- (a)** To enforce any maritime lien;
 - (b)** Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

* * * * *

- (2) Complaint.** In an action in rem the complaint must:
- (a)** be verified;
 - (b)** describe with reasonable particularity the property that is the subject of the action; and
 - (c)** state that the property is within the district or will be within the district while the action is pending.

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) The court must review the complaint and any supporting papers. If the conditions for an in rem action appear to exist, the court must issue an order directing the clerk to issue a warrant for the arrest of the vessel or other property that is the subject of the action.

(ii) If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make court review impracticable, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property that is the subject of the action. The plaintiff has the burden in any post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed.

(b) Service.

(i) If the property that is the subject of the action is a vessel or tangible property on board a vessel, the warrant and any

supplemental process must be delivered to the marshal for service.

(ii) If the property that is the subject of the action is other property, tangible or intangible, the warrant and any supplemental process must be delivered to a person or organization authorized to enforce it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) in an action brought by the United States, any officer or employee of the United States.

* * * * *

(6) Responsive Pleading; Interrogatories.

(a) Maritime Arrests and Other Proceedings.

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(b) Interrogatories.

* * * * *

Rule E. Actions in Rem and Quasi in Rem: General Provisions

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(3) Process.

(a) In admiralty and maritime proceedings process in rem or of maritime attachment and garnishment may be served only within the district.

(b) Issuance and Delivery.

* * * * *

(5) Release of Property.

(a) Special Bond. Whenever process of maritime attachment and garnishment or process in rem is issued the execution of such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court or of any appellate court. The parties may stipulate the amount and nature of such security. In the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs; but the principal sum shall in no event exceed (i) twice the amount of the plaintiff's claim or (ii) the value of the property on due appraisal, whichever is smaller. The bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum.

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(9) Disposition of Property; Sales.**(a) Interlocutory Sales; Delivery.**

* * * * *

(ii) In the circumstances described in Rule E(9)(a)(i), the court, on motion by a defendant or a person filing a statement of interest or right under Rule C(6), may order that the property, rather than being sold, be delivered to the movant upon giving security under these rules.

(b) Sales, Proceeds.

Rule G. Forfeiture Actions In Rem

(1) Scope. This rule governs a forfeiture action in rem arising from a federal statute. To the extent that this rule does not address an issue, Supplemental Rules C and E and the Federal Rules of Civil Procedure also apply.

(2) Complaint. The complaint must:

- (a)** be verified;
- (b)** state the grounds for subject-matter jurisdiction, in rem jurisdiction over the defendant property, and venue;
- (c)** describe the property with reasonable particularity;
- (d)** if the property is tangible, state its location when any seizure occurred and—if different—its location when the action is filed;
- (e)** identify the statute under which the forfeiture action is brought; and
- (f)** state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial.

(3) Judicial Authorization and Process.

- (a) Real Property.** If the defendant is real property, the government must proceed under 18 U. S. C. § 985.
- (b) Other Property; Arrest Warrant.** If the defendant is not real property:
 - (i)** the clerk must issue a warrant to arrest the property if it is in the government's possession, custody, or control;
 - (ii)** the court—on finding probable cause—must issue a warrant to arrest the property if it is not in the government's possession, custody, or control and is not subject to a judicial restraining order; and
 - (iii)** a warrant is not necessary if the property is subject to a judicial restraining order.

(c) Execution of Process.

(i) The warrant and any supplemental process must be delivered to a person or organization authorized to execute it, who may be: (A) a marshal; (B) someone under contract with the United States; (C) someone specially appointed by the court for that purpose; or (D) any United States officer or employee.

(ii) The authorized person or organization must execute the warrant and any supplemental process on property in the United States as soon as practicable unless:

(A) the property is in the government's possession, custody, or control; or

(B) the court orders a different time when the complaint is under seal, the action is stayed before the warrant and supplemental process are executed, or the court finds other good cause.

(iii) The warrant and any supplemental process may be executed within the district or, when authorized by statute, outside the district.

(iv) If executing a warrant on property outside the United States is required, the warrant may be transmitted to an appropriate authority for serving process where the property is located.

(4) Notice.**(a) Notice by Publication.**

(i) When Publication Is Required. A judgment of forfeiture may be entered only if the government has published notice of the action within a reasonable time after filing the complaint or at a time the court orders. But notice need not be published if:

(A) the defendant property is worth less than \$1,000 and direct notice is sent under Rule G(4)(b) to every person

the government can reasonably identify as a potential claimant; or

(B) the court finds that the cost of publication exceeds the property's value and that other means of notice would satisfy due process.

(ii) Content of the Notice. Unless the court orders otherwise, the notice must:

(A) describe the property with reasonable particularity;

(B) state the times under Rule G(5) to file a claim and to answer; and

(C) name the government attorney to be served with the claim and answer.

(iii) Frequency of Publication. Published notice must appear:

(A) once a week for three consecutive weeks; or

(B) only once if, before the action was filed, notice of nonjudicial forfeiture of the same property was published on an official internet government forfeiture site for at least 30 consecutive days, or in a newspaper of general circulation for three consecutive weeks in a district where publication is authorized under Rule G(4)(a)(iv).

(iv) Means of Publication. The government should select from the following options a means of publication reasonably calculated to notify potential claimants of the action:

(A) if the property is in the United States, publication in a newspaper generally circulated in the district where the action is filed, where the property was seized, or where property that was not seized is located;

(B) if the property is outside the United States, publication in a newspaper generally circulated in a district where the action is filed, in a newspaper generally circulated in the country where the property is located, or

in legal notices published and generally circulated in the country where the property is located; or

(C) instead of (A) or (B), posting a notice on an official internet government forfeiture site for at least 30 consecutive days.

(b) Notice to Known Potential Claimants.

(i) Direct Notice Required. The government must send notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant on the facts known to the government before the end of the time for filing a claim under Rule G(5)(a)(ii)(B).

(ii) Content of the Notice. The notice must state:

(A) the date when the notice is sent;

(B) a deadline for filing a claim, at least 35 days after the notice is sent;

(C) that an answer or a motion under Rule 12 must be filed no later than 20 days after filing the claim; and

(D) the name of the government attorney to be served with the claim and answer.

(iii) Sending Notice.

(A) The notice must be sent by means reasonably calculated to reach the potential claimant.

(B) Notice may be sent to the potential claimant or to the attorney representing the potential claimant with respect to the seizure of the property or in a related investigation, administrative forfeiture proceeding, or criminal case.

(C) Notice sent to a potential claimant who is incarcerated must be sent to the place of incarceration.

(D) Notice to a person arrested in connection with an offense giving rise to the forfeiture who is not incarcerated when notice is sent may be sent to the address that person last gave to the agency that arrested or released the person.

(E) Notice to a person from whom the property was seized who is not incarcerated when notice is sent may be sent to the last address that person gave to the agency that seized the property.

(iv) When Notice Is Sent. Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail.

(v) Actual Notice. A potential claimant who had actual notice of a forfeiture action may not oppose or seek relief from forfeiture because of the government's failure to send the required notice.

(5) Responsive Pleadings.

(a) Filing a Claim.

(i) A person who asserts an interest in the defendant property may contest the forfeiture by filing a claim in the court where the action is pending. The claim must:

(A) identify the specific property claimed;

(B) identify the claimant and state the claimant's interest in the property;

(C) be signed by the claimant under penalty of perjury; and

(D) be served on the government attorney designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

(ii) Unless the court for good cause sets a different time, the claim must be filed:

(A) by the time stated in a direct notice sent under Rule G(4)(b);

(B) if notice was published but direct notice was not sent to the claimant or the claimant's attorney, no later than 30 days after final publication of newspaper notice or legal notice under Rule G(4)(a) or no later than 60 days after

the first day of publication on an official internet government forfeiture site; or

(C) if notice was not published and direct notice was not sent to the claimant or the claimant's attorney:

(1) if the property was in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the filing, not counting any time when the complaint was under seal or when the action was stayed before execution of a warrant issued under Rule G(3)(b); or

(2) if the property was not in the government's possession, custody, or control when the complaint was filed, no later than 60 days after the government complied with 18 U.S.C. § 985(c) as to real property, or 60 days after process was executed on the property under Rule G(3).

(iii) A claim filed by a person asserting an interest as a bailee must identify the bailor, and if filed on the bailor's behalf must state the authority to do so.

(b) Answer. A claimant must serve and file an answer to the complaint or a motion under Rule 12 within 20 days after filing the claim. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion or stated in the answer.

(6) Special Interrogatories.

(a) Time and Scope. The government may serve special interrogatories limited to the claimant's identity and relationship to the defendant property without the court's leave at any time after the claim is filed and before discovery is closed. But if the claimant serves a motion to dismiss the action, the government must serve the interrogatories within 20 days after the motion is served.

(b) Answers or Objections. Answers or objections to these interrogatories must be served within 20 days after the interrogatories are served.

(c) Government's Response Deferred. The government need not respond to a claimant's motion to dismiss the action under Rule G(8)(b) until 20 days after the claimant has answered these interrogatories.

(7) Preserving, Preventing Criminal Use, and Disposing of Property; Sales.

(a) Preserving and Preventing Criminal Use of Property.

When the government does not have actual possession of the defendant property the court, on motion or on its own, may enter any order necessary to preserve the property, to prevent its removal or encumbrance, or to prevent its use in a criminal offense.

(b) Interlocutory Sale or Delivery.

(i) Order to Sell. On motion by a party or a person having custody of the property, the court may order all or part of the property sold if:

(A) the property is perishable or at risk of deterioration, decay, or injury by being detained in custody pending the action;

(B) the expense of keeping the property is excessive or is disproportionate to its fair market value;

(C) the property is subject to a mortgage or to taxes on which the owner is in default; or

(D) the court finds other good cause.

(ii) Who Makes the Sale. A sale must be made by a United States agency that has authority to sell the property, by the agency's contractor, or by any person the court designates.

(iii) Sale Procedures. The sale is governed by 28 U.S.C. §§ 2001, 2002, and 2004, unless all parties, with the court's

approval, agree to the sale, aspects of the sale, or different procedures.

(iv) Sale Proceeds. Sale proceeds are a substitute res subject to forfeiture in place of the property that was sold. The proceeds must be held in an interest-bearing account maintained by the United States pending the conclusion of the forfeiture action.

(v) Delivery on a Claimant's Motion. The court may order that the property be delivered to the claimant pending the conclusion of the action if the claimant shows circumstances that would permit sale under Rule G(7)(b)(i) and gives security under these rules.

(c) Disposing of Forfeited Property. Upon entry of a forfeiture judgment, the property or proceeds from selling the property must be disposed of as provided by law.

(8) Motions.

(a) Motion To Suppress Use of the Property as Evidence. If the defendant property was seized, a party with standing to contest the lawfulness of the seizure may move to suppress use of the property as evidence. Suppression does not affect forfeiture of the property based on independently derived evidence.

(b) Motion To Dismiss the Action.

(i) A claimant who establishes standing to contest forfeiture may move to dismiss the action under Rule 12(b).

(ii) In an action governed by 18 U.S.C. § 983(a)(3)(D) the complaint may not be dismissed on the ground that the government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property. The sufficiency of the complaint is governed by Rule G(2).

(c) Motion To Strike a Claim or Answer.

- (i) At any time before trial, the government may move to strike a claim or answer:
 - (A) for failing to comply with Rule G(5) or (6);, or
 - (B) because the claimant lacks standing.
 - (ii) The motion:
 - (A) must be decided before any motion by the claimant to dismiss the action; and
 - (B) may be presented as a motion for judgment on the pleadings or as a motion to determine after a hearing or by summary judgment whether the claimant can carry the burden of establishing standing by a preponderance of the evidence.
- (d) Petition To Release Property.**
- (i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).
 - (ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district—or if the government shows that the action will be filed in another district—the petition may be transferred to that district under 28 U.S.C. § 1404.
- (e) Excessive Fines.** A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment by motion for summary judgment or by motion made after entry of a forfeiture judgment if:
- (i) the claimant has pleaded the defense under Rule 8; and
 - (ii) the parties have had the opportunity to conduct civil discovery on the defense.

(9) Trial. Trial is to the court unless any party demands trial by jury under Rule 38.

III. Information Items

A Standing Committee Subcommittee, chaired by Judge Kravitz, is embarking on a project to revise the time-counting provisions in the several bodies of rules. The project will begin by developing uniform and clear methods for calculating time periods. Once these provisions have been developed, each advisory committee will consider the need to amend specific time periods. Adjustments may be made to reflect new methods for counting — elimination of the provision that excludes intermediate Saturdays, Sundays, and legal holidays from periods less than eleven days, for example, will require reconsideration of those periods. Adjustments also may be made because present periods seem intrinsically questionable. The rules that authorize or forbid abbreviation or extension will be reviewed. The events that trigger time calculations also will be reviewed. The Civil Rules include many time provisions; thorough review will be a significant task.

Three specific agenda items deserve brief note.

The Committee has deferred action on a proposal referred by the Appellate Rules Committee to address trial-court authority to vacate or modify a judgment that is pending on appeal. The proposal would adopt the practice that is followed in most but not all circuits. Although an explicit national rule would have the advantage of establishing uniformity in all circuits, a major reason for pursuing this proposal is that many courts and practitioners are not familiar with this corner of practice.

Prompted by a suggestion at last June's Standing Committee meeting, the Committee is considering a proposal to adopt a jury polling provision similar to Criminal Rule 31(d). The proposal has gained some early support from bar groups, and will be pursued further.

A New York State Bar Association committee has suggested that Rule 30(b)(6) depositions are being misused in various ways to extend beyond fact discovery. It has provided a detailed memorandum that will serve as the basis for further study.

Beyond these specific topics, the time has come to review accumulating agenda items. Some may be advanced for active consideration, while others may be discarded.

The Style Project package of all the Civil Rules was published in February. Dates have been designated for three public hearings to ensure ample opportunity for witnesses who may wish to testify. It may prove possible to consolidate these dates if most comments are made in writing.

Work is under way to style the official Forms. If it proves possible to prepare them promptly, Standing Committee approval may be sought for mid-summer publication to enable comments and adoption to proceed in tandem with the restyled rules.

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
APRIL 14-15, 2005

1 The Civil Rules Advisory Committee met on April 14 and 15, 2005, at the Administrative
2 Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Lee H.
3 Rosenthal, Chair; Judge Michael M. Baylson; Judge Jose A. Cabranes; Frank Cicero, Jr., Esq.;
4 Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice Nathan L. Hecht; Robert C. Heim, Esq.;
5 Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul J. Kelly, Jr.; Judge Thomas B. Russell;
6 Judge Shira Ann Scheindlin; and Chilton Davis Varner, Esq.. Professor Edward H. Cooper was
7 present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge David
8 F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented
9 the Standing Committee. Chief Judge Anthony J. Scirica, former Chair of the Standing Committee,
10 also was present. Judge James D. Walker, Jr., attended as liaison from the Bankruptcy Rules
11 Committee. Professor Daniel J. Capra, Reporter for the Evidence Rules Committee, attended the
12 discussion of draft Civil Rule 5.2 by telephone as Lead Reporter for the E-Government Act
13 Subcommittee. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeff Barr represented the
14 Administrative Office; Robert Deyling also attended. Thomas Willging represented the Federal
15 Judicial Center. Ted Hirt, Esq., Elizabeth Shapiro, Esq., and Stefan Cassella, Esq., Department of
16 Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk for Judge Levi.
17 Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison); Alfred W. Cortese,
18 Jr., Esq.; and Anne E. Kershaw.

19 Judge Rosenthal opened the meeting by asking all participants and observers to identify
20 themselves. New members Baylson and Varner were introduced. Judge McKnight's passing was
21 noted with deep sadness. He contributed to the Committee's work in many valuable ways, including
22 his service as chair of the subcommittee that worked so vigorously to develop the Supplemental Rule
23 G proposal on the present agenda to recommend for adoption. He will be greatly missed. The
24 impending conclusions of the terms of service of members Jeffries and Scheindlin also were noted,
25 with the hope that they would attend the fall meeting immediately after completion of their formal
26 duties.

27 Judge Rosenthal further noted that the Supreme Court has approved and transmitted to
28 Congress proposed amendments to Rules 6, 27, and 45, as well as Supplemental Rules B and C. The
29 Judicial Conference approved the proposed new Rule 5.1 at its March meeting, and sent the rule to
30 the Supreme Court. Congress, meanwhile, has enacted the Class Action Fairness Act. The
31 Committee will work with the Federal Judicial Center to monitor the short- and long-term effects
32 this new law may have on the numbers and types of class-action cases brought to the federal courts.

33 The Style Project has been posted on the web and published. In these early days there have
34 been 70 "hits" on the Style page, and 90 on the style-substance page. Work is going on with the
35 Forms. The consultants have collaborated on a first draft that has been reviewed by the Reporter and
36 is now being studied by Professor Rowe as consultant. If possible, it will be useful to ready the
37 Forms for presentation to the Standing Committee on a schedule that would enable publication at
38 a time that would correspond with completion of work on the Rules. Advisory Committee members
39 should expect to become involved in this work soon. There is a lot of work to do, both in details and
40 in the big questions. It will be important to avoid entanglement in the charms of detail. If the central
41 issues can be addressed promptly, some of the details may properly be deferred for further work
42 during the comment period.

43 John Rabiej delivered a legislation report. The current focus is on bills that would directly
44 amend Rule 11 to undo the 1993 revision of the 1983 amendments. The safe harbor added in 1993
45 would be eliminated. Mandatory sanctions would be restored. Similar bills have been introduced
46 in every Congress since 1995. The House passed such a bill in 2004. Now the proposal is back.

47 The Federal Judicial Center has undertaken a new survey of judges. The survey responses show an
48 astonishingly high level of support for the 1993 rule, and resistance to amendments that would revert
49 to the 1983 rule. The report is being transmitted to Congress.

50 Judge Rosenthal noted that the agenda materials have grown out of months of hearings,
51 hundreds of written comments, and intense work by Committee members. She thanked everyone
52 who participated in this arduous process.

53 **October 2004 Minutes**

54 The draft minutes for the October 2004 meeting were approved, subject to correction of
55 minor errors.

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I PUBLISHED RULES REVIEWED FOR ADOPTION

(A) Rule 5(e)

In November 2004 the Standing Committee published for comment rules that would authorize adoption of local district rules that require electronic filing. The Civil Rule version proposed a simple amendment of Rule 5(e):

* * * A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

The published Committee Note observed that the courts that already have adopted local rules that mandate electronic filing "recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general 'good cause' exceptions." The Note went on to suggest that experience with these local rules would facilitate gradual convergence on uniform exceptions.

There were not a great number of comments. The comments, however, suggested in many ways that the national rule should not rely on mere comment in a Committee Note to ensure that local rules will make sufficient accommodation for the needs of those who are unduly challenged by electronic filing. The Bankruptcy Rules Committee voted to include a new sentence: "Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing." The Appellate Rules Committee, scheduled to meet three days after conclusion of the Civil Rules Committee meeting, also is considering alternative rule text provisions that would require local rules to recognize the need for exceptions.

Discussion began by agreeing to follow the lead of the other advisory committees. It is difficult to find any concern unique to civil practice that distinguishes the Civil Rules from the Bankruptcy or Appellate Rules in this respect, nor for that matter any concern unique to criminal procedure that might suggest that because the Criminal Rules incorporate the Civil Rules filing provision the Civil Rules should depart from the other rules. Uniformity should be pursued under the leadership of the Standing Committee.

Drafting the exception was discussed briefly. Several alternatives were set out in the agenda book. One concern is that Rule 5(e) and the parallel rules authorize local rules, so that it may be better to speak to what a local rule may do rather than to what a court may do. A second concern was that "reasonably accommodate" has overtones of disability discrimination law and might complicate, by inapt analogies, disputes over the drafting and application of local rules exceptions. A third concern was that although the comments emphasized the challenges that face pro se litigants, including those lodged in prison facilities without ready access to Internet communication, it would be unwise to direct that pro se litigants must always be exempt from a mandatory e-filing requirement. Some courts are willing and able to support electronic filing by use of courthouse equipment, and both courts and the parties may benefit from it.

Responding to these concerns, one of the agenda book variations read: "may by local rule permit or — if exceptions are allowed for good cause — require papers to be filed, signed, or verified by electronic means." This formulation met the objection that "good cause" seems to call for individualized determinations on a case-by-case basis. On this view, it would be unwise to require that local rules provide for exceptions in terms that require a specific determination based on the circumstances of each litigant who requests paper filing.

99 A tentative variation was proposed and approved for further consideration as the several
100 advisory committees work together to achieve a uniform provision mandating that local e-filing rules
101 allow some exceptions from mandatory electronic filing:

102 may by local rule permit or — if reasonable exceptions are allowed — require papers
103 to be filed, signed, or verified by electronic means.

104 A second question was raised in reaction to the Appellate Rules Committee agenda. The
105 Appellate Rules Committee has been asked to recognize that a court that requires electronic filing
106 may also require that duplicate paper copies be filed. The request reflects the special concern that
107 appellate judges want paper briefs. There may be similar concerns with respect to some civil filings,
108 particularly briefs. It was noted that the cost of printing extensive papers is a serious drain on
109 district-court budgets. After brief discussion, it was concluded that the circumstances of civil-action
110 filings are so variable that the Civil Rules are properly distinguishable from whatever better-focused
111 needs may arise with appellate practice. Neither Rule 5(e) nor the Committee Note need say
112 anything about the prospect that a local rule may require duplicate electronic and paper filings. A
113 different approach in the Appellate Rules — if one is taken — does not require uniformity.

114 **B. Rule 50(b)**

115 The August 2004 proposals included revisions of Rule 50(a) to conform to current Style
116 conventions, and two substantive revisions of Rule 50(b). The first Rule 50(b) revision would
117 permit renewal after submission to the jury of any motion for judgment as a matter of law made
118 during trial. This would soften the current approach, which on the face of the rule permits a post-
119 submission motion only to renew a motion that was made at the close of all the evidence. Numerous
120 appellate decisions have begun to soften the present rule at the margins, and it has seemed time to
121 substitute a new and clear provision. The second revision would restore a feature present in Rule
122 50(b) until an unexplained disappearance in 1991, setting a time limit for renewing a pre-submission
123 motion after a jury has failed to agree.

124 Comments on the published rule generally were favorable, noting that despite nearly 70 years
125 of familiarity the close-of-all-the-evidence requirement remains a trap for the unwary and does not
126 serve any purposes that cannot be served by a motion made during trial. On the other hand, parts of
127 a few comments suggested that it is not too much to expect lawyers to be "wary of and follow the
128 rules."

129 The published rule text was approved with modest revisions. In Rule 50(a)(1)(A), a late
130 Style Project change was adopted: "(A) ~~determine~~ resolve the issue * * *." Also in keeping with a
131 Style Project volte face, "considered" was restored to its position in present Rule 50(b): "the court
132 is considered ~~deemed~~ to have submitted the action to the jury * * *." And at the suggestion of the
133 Style Consultant, a comma will be removed: "no later than 10 days after the entry of judgment; or
134 — if the motion addresses a jury issue * * *."

135 It was agreed that the Committee Note would be revised in one sentence to track the language
136 of the 1991 Committee Note:

137 Because the Rule 50(b) motion is only a renewal of the earlier pre-verdict motion, it
138 can be supported only by arguments made in support of the earlier motion it can be
139 granted only on grounds advanced in the pre-verdict motion.

140 **C. Supplemental Rule G (with A, C, E, 9(h), 14, 26(a))**

141 Supplemental Rule G was published in August 2004 to bring together in a single rule almost
142 all of the Supplemental Rule provisions dealing with civil forfeiture. Many new provisions are
143 added as well, to reflect developments in legislation, constitutional principles, and decisional law.
144 The proposal was hammered out in subcommittee and Committee discussions that spanned a long
145 period, and involved close cooperation with the Department of Justice and representatives of the
146 National Association of Criminal Defense Lawyers. Perhaps because of this lengthy development,
147 the published proposal drew few comments. But continuing review has pointed to several minor
148 revisions that are described in the agenda materials. Most of these revisions were approved without
149 further discussion, but several questions remained.

150 The first question went to the revised title for the Supplemental Rules. The agenda materials
151 picked up a suggestion that "Maritime" be deleted from the title on the theory that no one any longer
152 pays any attention to whatever technical distinctions may once have been drawn between "admiralty"
153 and "maritime" matters. Further consideration has suggested that this change not be made. Many
154 of the Civil Rules refer to the Supplemental Rules or otherwise refer to admiralty or maritime claims.
155 So too do statutes. 28 U.S.C. § 1333 establishes original jurisdiction of "[a]ny civil case of admiralty
156 or maritime jurisdiction," reflecting the Article III § 2 definition of the judicial power as extending
157 to "all Cases of admiralty and maritime jurisdiction." It was agreed that the title should become:

158 Supplemental Rules for Admiralty or Maritime and Asset Forfeiture Cases.

159 The next subject of discussion was Rule G(6)(a), which as published provides: "The
160 government may serve special interrogatories *under Rule 33 * * **." The cross-reference to Rule 33
161 was included to reflect a deliberate decision that these special interrogatories should count against
162 the presumptive 25-interrogatory limit established by Rule 33. The government, however, believes
163 that some cases present such complex standing issues that the special interrogatories directed to
164 standing may push it too close to the limit. The paths of ownership and the claimant's relationship
165 to the property may be very complex.

166 Discussion began by noting that generally the Committee has resisted making special
167 exceptions from rules that provide presumptive limits. The Committee Note could refer to the need
168 to get permission to exceed the 25-interrogatory limit in light of the occasional need to devote
169 several interrogatories to preliminary claim-standing issues. But it was responded that the
170 government is the only party doing discovery on standing. A typical example of the complex cases
171 would be that Corporation A is owned by Corporation B; Corporation B's owners have transferred
172 ownership to others, some of whom are fugitives. Working through the relationships to the
173 defendant property that may support or defeat claim standing can require elaborate inquiry.

174 Sympathy was expressed for this view, with a suggestion that the rule text should be revised
175 to retain the incorporation of Rule 33, but to add an express exemption of these special
176 interrogatories from the numerical limit. An express rule provision seems better than retaining the
177 published text and attempting to effect a release from the numerical limit solely by observations in
178 the Committee Note.

179 An alternative was suggested: the rule text incorporation of Rule 33 could be deleted, while
180 the Committee Note could observe that the Rule 33 numerical limit does not apply to Rule G(6)
181 special interrogatories, while Rule 33 otherwise applies to special interrogatories as well as all
182 others.

183 Both suggestions were resisted on the ground that a court will readily grant relief from the

184 25-interrogatory limit in cases that require a large number of special interrogatories.

185 On motion, the Committee voted, with one dissent, to strike "under Rule 33" from the rule
186 text. The Committee Note will observe that the special interrogatories do not count against the
187 presumptive limit to 25-interrogatories, but that Rule 33 procedures otherwise do apply.

188 The next question addressed revisions proposed for Rule G(8)(c). The revisions serve two
189 purposes. One is to correct a misleading implication in published (8)(c)(iii) that a motion on the
190 pleadings involves disputes of material fact. The other and more general purpose is to make it clear
191 that the government can use each of three different procedures, successively or in combination, to
192 raise the questions covered by (8)(c): motions addressed to the pleadings, summary judgment, or a
193 hearing. The Committee approved this revision:

194 **(c) Motion to Strike a Claim or Answer.**

195 (i) At any time before trial, the government may move to strike a claim or
196 answer:

197 (A) for failing to comply with Rule G(5) or (6), or

198 (B) because the claimant lacks standing to contest the forfeiture.

199 (ii) The government's motion:

200 (A) must be decided before any motion by the claimant to dismiss the
201 action.; and

202 ~~(iii) If, because material facts are in dispute, a motion under (i)(B) cannot be~~
203 ~~resolved on the pleadings, the court must conduct a hearing. The~~
204 ~~claimant has~~

205 (B) may be presented as a motion for judgment on the pleadings or as
206 a motion to determine after a hearing or by summary
207 judgment whether the claimant can carry the burden of
208 establishing standing based on by a preponderance of the
209 evidence.

210 It was pointed out that under Style Project conventions, the three alternatives described in
211 item (B) are independent; the government can pursue any or all of them.

212 The next question went to the Committee Note discussion of subdivision (4). The third
213 paragraph of the published Note, appearing at page 24 of the agenda materials, addressed the choice
214 among alternative means of publishing notice of a forfeiture proceeding in these words: "A
215 reasonable choice of the means likely to reach potential claimants at a cost reasonable in the
216 circumstances suffices." The government has suggested that the Note should be revised to reflect the
217 rule text: "The government should choose from among these means a method that is reasonably A
218 ~~reasonable choice of the means~~ likely to reach potential claimants at a cost reasonable in the
219 circumstances suffices." This change was recommended by the agenda memorandum, subject to
220 discussion whether both the published version and the revised version are unduly favorable to the
221 government's interest in saving publication costs.

222 Discussion began by noting that the subcommittee encountered difficulty with this question.
223 It was worried that the government might make arguments that weigh cost too heavily in the
224 competition between cost and effective notice. But it was responded that the rule requires that any

225 means chosen be reasonably likely to reach claimants. The reference to costs helps to reduce post-
226 forfeiture squabbles by late-appearing claimants that a different and more expensive means of notice
227 might have been more effective. It must be remembered that the published notice provisions of Rule
228 G(4)(a) are supplemented by the first-ever provisions in Rule G(4)(b) that require direct notice to
229 any person who reasonably appears to be a potential claimant on the facts known to the government.
230 The Committee approved the proposed revised language.

231 The next topic explored the published Committee Note discussion of subdivision
232 (4)(b)(iii)(B), which provides that notice to a potential claimant may be sent to "the attorney
233 representing the potential claimant with respect to the seizure of the property or in a related
234 investigation, administrative forfeiture proceeding, or criminal case." The published Note advised
235 that "[t]his provision should be used only when notice to counsel reasonably appears to be the most
236 reliable means of notice." The Department of Justice commented that this advice is contrary to the
237 rule text, and invites endless disputes. In response to this comment, the agenda materials proposed
238 a revised version: "Notice to counsel provides a desirable safety net when notice also is sent to the
239 potential claimant, adding protection against the risk that notice to the claimant may miscarry. But
240 this provision should be used to substitute for notice to a potential claimant only when notice to
241 counsel reasonably appears to be the most reliable means of notice." A footnote observed that the
242 Department of Justice would like one more sentence: "If notice is directed to the claimant but
243 miscarries, notice to counsel satisfies this rule."

244 Discussion began with the statement that the Department of Justice routinely sends notice
245 both to the potential claimant and to counsel. Typically counsel represents the claimant in a
246 prosecution related to the civil forfeiture. Notice to the claimant may fail — a common reason is
247 because, unknown to the Department, the claimant has been transferred from one jail to another.
248 Due process should be satisfied by notice to counsel. The Committee Note could provide
249 reassurance.

250 It was asked whether the better resolution of these questions might be to strike all of the
251 attempt to explain, reducing this Note paragraph to a simple statement that notice may be directed
252 to a potential claimant through counsel.

253 The first response was an observation that the attorney "may be long out of the case" when
254 the civil-forfeiture notice is sent. The attorney may have undertaken a limited representation. Why
255 should the attorney be subjected to additional obligations? Any provision for notice to the attorney
256 is a matter for concern.

257 A similar response observed that many lawyers believe they are no longer involved after a
258 conviction.

259 It was responded that Rule G(4)(b)(iii)(B) allows notice to the attorney "representing" the
260 potential claimant — it is satisfied only if there is a current representation. The civil forfeiture
261 complaint, moreover, typically comes before the criminal prosecution. This observation was picked
262 up with the suggestion that the rule text might be amended to refer to the attorney "then representing"
263 the potential claimant. But this suggestion was resisted on the ground that it would lead to
264 arguments based on the precise timing of the representation.

265 A Committee member noted that in his experience forfeiture is routinely sought in the
266 criminal prosecution. When it is not, the criminal defense lawyer often does not think that the
267 representation extends to civil forfeiture proceedings.

268 The rule was defended on the ground that the only obligation it imposes on the attorney is

269 to transmit the notice.

270 A motion was made to delete the last two sentences in the Committee Note paragraph
271 running from page 26 to page 27 of the agenda materials, so it would read:

272 Notice may be directed to a potential claimant through counsel, but only to
273 counsel already representing the claimant with respect to the seizure of the property,
274 or in a related investigation.

275 Discussion of the motion began with an expression of dissatisfaction with the rule itself. An
276 attorney who fails to forward the notice may later face a claim by the potential claimant for the
277 failure. This view was supported with the suggestion that Rule G(4)(b)(iii)(B) should be changed.

278 The rule text was defended on the ground that current law accepts notice to counsel as
279 satisfying due process. But it was recognized that the speaker was not sure whether notice to counsel
280 representing a potential claimant in a related investigation satisfies due process.

281 Those who questioned the rule itself recognized that notice to the attorney seems appropriate
282 if the attorney is representing the claimant with respect to the seizure of the defendant property. And
283 those who supported the rule agreed that it is important that the attorney's representation be in an
284 investigation, administrative forfeiture proceeding, or criminal case that is related to the seizure of
285 the property. An attorney providing representation in a matter of family law, estate planning, or
286 other separate matters should not be addressed with the notice. But it was asked whether
287 representation in an investigation or the like is "related" if the representation does not address the
288 seizure? There are clear cases — the attorney may represent the potential claimant in a prosecution
289 for the offense that gives rise to the forfeiture. But, it was protested, "related" is a potentially
290 expansive word and is "not all that clear."

291 The rule was further challenged directly. An attorney who represents the potential claimant
292 in the drug prosecution, which certainly looks like a related criminal case, does not want the
293 obligation to forward notice of the civil forfeiture proceeding.

294 The rule was defended on the ground that it deals with the client, seeking to defuse a post-
295 forfeiture challenge on the ground that there was no individual notice of the forfeiture proceeding.
296 But this defense was attacked as an effort to convert the government's problem into the attorney's
297 problem. And it was noted that the rule text may afford the government a choice among attorneys
298 when the potential claimant has different attorneys providing representation in a number of different
299 related proceedings.

300 A rule-friendly question asked how difficult is it for the attorney who gets notice to connect
301 the notice with the client? The government is able to identify the attorney only because there is in
302 fact a representation in a related proceeding of some sort. But the doubters renewed the question
303 whether "related" is too elastic.

304 A suggestion was ventured that the rule might require notice "to the potential claimant ~~or~~ and
305 to the attorney representing the potential claimant," etc. But this suggestion was promptly rejected.
306 At the least, notice to the potential claimant should suffice. The government may not yet know the
307 identity of the attorney, nor whether the potential claimant yet has an attorney.

308 Discussion turned back to the sentence that appeared in the published Committee Note: "This
309 provision should be used only when notice to counsel reasonably appears to be the most reliable
310 means of notice." It was suggested that this sentence was inconsistent with the rule text, which
311 simply provides an option to notify the potential claimant or the attorney. Rule G(4)(b)(iii)(A) does

312 require that the notice be sent by means reasonably calculated to reach the potential claimant, but
313 does not require the most reliable means.

314 The motion to delete all but the first sentence of the Committee Note paragraph describing
315 notice to counsel for the potential claimant passed, 7 Yes and 4 No.

316 A later question asked whether the Committee Note might still be expanded to state that if
317 notice is sent to a potential claimant but miscarries, notice received by an attorney representing the
318 potential claimant satisfies the rule. This question will be noted in the final version of Rule G that
319 will be circulated to the Committee before submission to the Standing Committee.

320 Going back to the rule text, a question was raised about Rule G(5)(a)(iii). The published text
321 says simply: "A claim filed by a person asserting an interest as a bailee must identify the bailor." The
322 government is concerned that the rule should impose a more specific requirement that a bailee
323 specify whether the claim is for the bailee's own interest, is on behalf of the bailor, or both. A
324 common illustration arises when cash is seized from a courier and claims are filed both by the
325 courier and by another person who asserts an interest as owner-bailor. It is possible that a bailee can
326 have a claim to protect its own possessory interest, while the bailor also has a claim. But the bailee
327 may be innocent, while the bailor is not. It was agreed that (5)(a)(iii) would be revised to read:

328 A claim filed by a person asserting an interest as a bailee must identify the bailor and,
329 if filed on the bailor's behalf, must state the authority to do so.

330 The Committee further approved a number of minor changes that were described and
331 explained in the agenda materials.

332 The Committee then voted to send the revised Rule G to the Standing Committee with a
333 recommendation that it be transmitted to the Judicial Conference for adoption. This action included
334 the published amendments to Supplemental Rules A, C, and E to conform to adoption of Rule G,
335 and also the published amendment of Civil Rule 26(a)(1)(E) that adds to the exemptions from initial
336 disclosure requirements "a forfeiture action in rem arising from a federal statute."

337 In addition, the approval of Rule G for adoption included two conforming amendments
338 recommended for adoption without publication. The first amends Rule 9(h) to reflect the changed
339 Supplemental Rules Title:

340 A pleading * * * may contain a statement identifying the claim as an admiralty or
341 maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental
342 Rules for ~~Certain Admiralty and~~ or Maritime and Asset Forfeiture Cases. * * *

343 The second amends Rules 14(a) and (c) to correct the cross-reference to Supplemental Rule C to
344 correspond with the new designation as Rule C(6)(ba)(1).

345 **D. Electronic Discovery: Rules 16, 26, 33, 34, 37, 45**

346 A package of proposals dealing with discovery of electronically stored information was
347 published in August 2004. Amendments were proposed for Rules 16, 26, 33, 34, 37, and 45. More
348 than 250 requests to testify and written comments were received, and testimony was taken from
349 many witnesses at more than three days of public hearings.

350 Judge Rosenthal introduced discussion the proposals by noting that the agenda book puts the
351 materials on context. For each rule, the materials propose changes from the published proposals and
352 frame the issues raised by the proposals and changes. The suggested changes have emerged as
353 Committee members have responded individually and in groups to the public comments, and have
354 continued to be made after the agenda book was distributed. The public comments provided "the
355 best CLE we've ever had." The comments and testimony provided a great deal of helpful and
356 sophisticated advice.

357 In 1999, Judge Paul Niemeyer, then Committee Chair, said that the Committee must address
358 the need to devise methods that will achieve full disclosure without imposing undue discovery
359 burdens in an era of almost unlimited access to information. The 2000 discovery rule amendments
360 set the stage for the work that followed. Now we have specific proposals and detailed reactions to
361 them. The next task is to evaluate the proposals in light of the reactions and — if possible — to
362 forge a final package that can be recommended for adoption.

363 *Rule 33*

364 The published proposal would add words to Rule 33(d) to make it clear that a party may
365 respond to an interrogatory by making available electronically stored information that enables the
366 requesting party to search for the information itself. The Committee Note describes the steps that
367 may be necessary to satisfy the existing Rule 33(d) requirements that the burden of deriving the
368 answer must be substantially the same for the requesting party as for the responding party, and that
369 the responding party specify the sources of information in a way that enables the requesting party
370 to identify the sources "as readily as can the [responding] party."

371 It was agreed that no reason had emerged to make any change in the published rule text.
372 Changes in the Committee Note, identified at footnotes 4, 5, and 6 on pages 4-5 of the agenda book
373 materials, were approved.

374 *Rule 34(a)*

375 One part of the changes proposed for Rule 34(a) is independent of the electronically stored
376 information issues. These changes make it clear that a party may ask to test or sample documents
377 or electronically stored information, just as it may ask to test or sample tangible things. The only
378 question raised during the comment period was whether this change might allow a party to demand
379 direct access to another party's electronic information storage system. Changes in the Committee
380 Note are recommended to address this concern. The changes say that the right of testing and
381 sampling "is not meant to create a routine right of direct access to a party's electronic information
382 system," and that courts should guard against undue intrusion through inspecting or testing such
383 systems. The Committee approved Rule 34(a) and the changes in the Committee Note.

384 A second question raised by the Rule 34(a) proposals is whether electronically stored
385 information should be defined in parallel with the definition of "documents," or whether
386 electronically stored information should be included within the parenthetical that identifies many
387 categories of information as subsets of "documents." This question was presented by alternative

388 drafts. Alternative 1 carries forward the published proposal, defining electronically stored
389 information in parallel with documents. Alternative 2 presents a "definition" or exemplification of
390 "documents" that includes electronically stored information.

391 Discussion began with the observation that one purpose in adding electronically stored
392 information to Rule 34(a) is to support drafting of the other rules provisions that address discovery
393 of such information. No set of words perfectly describes the phenomenon, but "electronically stored
394 information" seemed to do the job better than anything else. It seems broad enough to describe both
395 present storage techniques and future developments. If indeed technology finds ways to store and
396 retrieve information by means better described as chemical or biologic, language carried forward
397 from present Rule 34(a) will cover the new technology, either as a subset of documents or as a subset
398 of electronically stored information. Treatment as a subset of electronically stored information will
399 likely work better if the issues of storage and retrieval resemble current computer technology more
400 closely than traditional paper storage.

401 Alternative 1 "gives a touchstone that can be used in other rules." It recognizes that now, or
402 in the near future, most discovery will seek electronically stored information. Many practicing
403 lawyers have raised an objection that the bar has conducted discovery since 1970 under a Rule 34(a)
404 that clearly defines computer-based information within the category of documents, and should not
405 now be forced to make separate demands for production of "documents" and for production of
406 "electronically stored information." This minor adjustment of discovery requests, however, does not
407 seem to impose a significant burden. And over the years it has become increasingly awkward to
408 describe the more complex and constantly evolving forms of computer-based information as
409 "documents." Dynamic data bases are frequently cited as examples. The American College of Trial
410 Lawyers suggested that Rule 34(a) might instead be revised to refer to "information," but that term
411 is so broad as to require complicated qualifications.

412 Alternative 2 presents a different choice that is essentially a matter of rules architecture. By
413 including electronically stored information as one species of document, it makes it clear that a
414 request for documents includes electronically stored information. But that clarity is suggested as
415 well by the Committee Note for Alternative 1. This alternative may present a risk that other rules
416 drafted for electronically stored information do not have their intended meaning. A request for a
417 digital photograph, for example, might be met by the argument that it is a document, not
418 electronically stored information.

419 A motion to adopt the first alternative was supported with the observation that there is a
420 tendency for the Civil Rules to become archaic because they are so seldom changed. "Document"
421 does not easily describe dynamic data bases or other forms of computer-based information.

422 It was responded that "document" has long been a term of art. In daily practice, it is
423 understood that it includes information from all sources. And it avoids strained arguments such as
424 a contention that once electronically stored information has been printed it ceases to be electronically
425 stored information but has become a document. There is no benefit from alternative 1. It is better
426 to continue to use a single word — document — to describe all of these things.

427 A similar argument for Alternative 2 urged that neither approach is perfect. The rule aims
428 at obtaining information or data. At trial, a foundation must be laid to introduce the information as
429 evidence. "Document" has become the descriptive word of art. The real object is "information or
430 data in whatever form it is kept." It is better to stick with "document." So, for example, recordings
431 have come to be called documents.

432 Alternative 1 was then championed on the ground that "electronically stored information"

433 is becoming an accepted term in practice. It better reflects the dynamic character of such information
434 as something that exists and mutates apart from a piece of paper. The practicing bar will focus on
435 electronically stored information; there is no risk that discovery will fail because only documents are
436 requested. Setting electronically stored information before "documents" and outside the
437 exemplification of "documents" helps in drafting the other rules that address discovery of
438 electronically stored information, particularly the "two-tier" provisions of Rule 26(b)(2).

439 Support for Alternative 1 was also expressed on the ground that "there is no real difference
440 in practice." Alternative 1 corresponds with the published proposal, and is easier to adopt.

441 The suggestion that both Alternative 1 and Alternative 2 might be abandoned in favor of a
442 simple reference to "information" was brought back. It was urged that the underlying idea is
443 production of "media that retain information." It is important that the information be stored, not
444 "transient" in the way of things held briefly during computer operations and then discarded.
445 "Information" is not a desirable substitute.

446 Alternative 1 won further support on the ground that it supports the proposals to amend Rule
447 26(b). At the same time, it was asked whether we could abandon all of the material in the list of
448 items that are documents: why not simply use the Committee Note to remind people that writings,
449 drawings, graphs, and the rest are documents? Part of the response was that careful lawyers will
450 continue to use all of these items in defining a request for documents, so it makes no real difference.

451 Ambivalence was expressed by another Committee member. The advantage of Alternative
452 1 is that it was published, and it does support the drafting of the other proposals. Apart from that
453 concern, Alternative 2 is better. But we might as well adhere to Alternative 1.

454 Stronger support for Alternative 1 was expressed by suggesting that "Alternative 2 is too
455 arcane. Alternative 1 is evolutionary — it's kind of where we are now." The visionary alternative
456 would be "recorded information," but there is no need to adopt a visionary rule.

457 A motion to adopt Alternative 1 passed, 10 yes and zero no.

458 A related drafting issue was raised. Drawing from present Rule 34(a), the published proposal
459 carries forward "other data or data compilations stored in any medium — from which information
460 can be obtained, translated, if necessary by the respondent through detection devices into reasonably
461 usable form * * *." It has been suggested that we should delete "through detection devices." This
462 suggestion led back to the question whether the "list," described as long and complicated, is useful.
463 But the list has been very useful historically; it may remain useful to illustrate the range of examples
464 covered by Rule 34. And taking it out of the rule may have a practical effect, even if it is transferred
465 to a Committee Note. The rule text will endure and command attention; the Committee Note will
466 not.

467 Retention of most of the examples was further supported on the ground that the definition
468 of electronically stored information should be broad and to some extent open-ended. As the proposal
469 stands, the very same set of examples are used to "define" or exemplify both "documents" and
470 "electronically stored information." But some things are inherently one or the other. A digital
471 photograph seems more electronically stored information than document; a traditional negative or
472 print seem more a document than electronically stored information. The Committee has repeatedly
473 heard that future computers may rely on chemical or biologic technologies; retaining "other data or
474 data compilations stored in any medium" is important.

475 It was agreed to delete "through detection devices." These words, adopted cautiously in

476 1970, are now antiquated. The work of this rule segment is done by "translated, if necessary, by the
477 respondent ~~through detection devices~~ into reasonably usable form." A motion was then made to drop
478 all of the "translated" segment. It was protested that this would lose the allocation of the translation
479 burden to the respondent. It may be that there is some redundancy between these words and the
480 proposal to provide in Rule 34(b) that electronically stored information may be provided, absent
481 contrary agreement or order, in a reasonably usable form. But it is useful to carry forward an
482 expression that has endured in the rules for nearly 35 years. The question was deferred for possible
483 further consideration during the discussion of Rule 34(b).

484 Finally, it was agreed that it is useful to add one word to the published proposal by referring
485 to data or data compilations stored in any medium.

486 At the conclusion of the Rule 34(b) discussion, it was suggested that more words be deleted
487 from Rule 34(a): "and other data or data compilations stored in any medium — from which
488 information can be obtained, ~~translated, if necessary, by the respondent into reasonably usable form,~~
489 * * *." The suggestion was resisted. Again, it was observed that the Rule 34(b) provision for
490 producing electronically stored information in reasonably usable form only states one of two
491 alternative "default" forms of production to be invoked if the requesting party does not specify a
492 form in the request and the responding party does not state a form in the response. The proposed
493 new Rule 34(b) provisions, further, apply only to electronically stored information. If new non-
494 electronic technologies emerge, this part of Rule 34(a) will continue to be the central provision for
495 production in reasonably usable form. Finally, this provision may have some bearing on the
496 problems that may arise if a responding party seeks to produce information in a form in which it is
497 ordinarily maintained but that is not reasonably usable by the requesting party.

498 *Rule 34(b)*

499 Discussion of the proposed Rule 34(b) amendments began with some new drafting details.
500 Rather than refer simply to the "form" of production, the revised draft refers to the "form or forms"
501 of production. This change reflects the proposition that different forms of electronically stored
502 information may best be produced in different forms. An image, for example, is likely to be
503 produced in a form quite different from the form used for e-mail messages. Wordprocessing
504 documents maintained in different programs may be best produced in different forms, and so on.
505 It is recognized that a simple reference to the "form" of production is consistent with requesting or
506 providing in different forms for different sets of information, but it seems useful to emphasize the
507 point by this more expansive drafting. This proposition is further underscored by breaking out from
508 part (ii) the provision now made a separate (iii), stating that a party need not produce the same
509 electronically stored information in more than one form.

510 Other changes in the Rule 34(b) text were noted. The sentence appearing at lines 42 to 46
511 on page 20 of the agenda materials is presented as a conditional alternative to the proposal to add
512 a new Rule 26(b)(2)(B) to address the problem of information that may be stored in sources that are
513 difficult to access. If the 26(b)(2)(B) proposal is adopted, this sentence will be dropped from Rule
514 34(b).

515 New material is added to the sentence that appears at lines 46 to 49. The purpose is to
516 require the responding party to state the form or forms it intends to use for production when the
517 requesting party has not specified a form in the request. This requirement will ensure that the
518 requesting party understands what is intended and has an opportunity to request a different form
519 before production is made. An alternative might be found in the comments suggesting that the rule
520 require the requesting party to specify a form, but the requesting party may not know enough about

521 the responding party's system to be able to make an intelligent request. It was asked why the rules
522 at times refer to a responding party and at other times refer to a producing party. In this setting,
523 "responding" seems appropriate because there has not yet been any production. Rule 34(b) itself
524 describes the first step after a request to produce as a "written response."

525 Support was expressed for requiring that the response state the intended form of production,
526 whether as an objection to a form specified in the request or as a statement when the request does
527 not specify a form. To be sure, an lawyer not yet sophisticated in electronic discovery may not
528 recognize the possibility that alternative forms of production may be possible. But the form of
529 production is an important issue. The requesting party needs a form that has good search
530 characteristics. The requesting party, moreover, may not know enough about the forms of storage
531 used by the responding party to be able to specify a form. Often a party conference or discovery is
532 needed to provide that information. This issue should be flushed out in the response to the request;
533 there is no other logical time to set for the designation.

534 Additional support was expressed, with the caution that the rule should make it clear that the
535 responding party "does not have the final word." The responding party states the form it "intends"
536 to use. If that does not suit the requesting party's needs, the parties must negotiate; if negotiation
537 fails, the court must resolve the matter.

538 It was asked whether a responding party might simply turn over the information without first
539 making a response, and choose the form of production by the act of producing.

540 A different observation was that even the responding lawyer may not know at the time of the
541 response — 30 days after the request is served — what forms the client has, or what forms make the
542 best sense for production.

543 Discussion took a different tack with the suggestion that there is an ambiguity in "form or
544 forms." The responding party, for example, may have information in a form searchable by a program
545 that the requesting party is not licensed to use. The responding party may prefer to respond by
546 transferring the information to a form searchable by a different program that the requesting party is
547 licensed to use. The rule does not preclude response in that form. Indeed, it clearly allows the
548 responding party to designate the program form it will use for production.

549 An adverse reaction suggested that the responding party should not be required to state a form
550 of production if the requesting party does not specify a form. The responding party should be
551 allowed to produce in its choice of form, leaving it to the requesting party to work things out later
552 if need be.

553 This reaction led in turn to an observation that this provision is tied to the "default" provision
554 in part (ii) that applies when the request does not specify a form of production. The responding party
555 may produce in a form or forms that are reasonably usable by the requesting party. (This default
556 provision was expanded in the later discussion.) This default provision will work better if the
557 responding party must state the form of production before producing, so that the requesting party can
558 determine whether the form is usable.

559 Drafting alternatives were discussed. It was suggested that the duty to state the form of
560 production should be separated. The first provision should apply only when the requesting party
561 specifies a form of production and the responding party objects to the form. The second provision
562 should be integrated with the part dealing with the default form of production when the request does
563 not specify a form. It was objected that this separation may lead to unnecessary courtroom steps; it
564 is better to get the statement in the response even if the request does not specify a form of

565 production. The statement fits nicely with the response to the request. There is no procedural strait
566 jacket here; if the responding party needs more than 30 days to state the form of production, it can
567 get more time to respond. The party who simply produces without first responding acts at its own
568 risk that the form it chooses, ignorant of the plaintiff's interests or needs, will not be reasonably
569 usable.

570 The drafting debate continued after the observation that the only dispute seemed to involve
571 drafting — everyone was agreed that the responding party should state the intended form of
572 production before producing.

573 The argument to provide two statements of the responding party's duty to specify the form
574 of production was renewed. A first provision when the request specifies a form; a second provision
575 coupled to the default form rules in (ii), requiring a statement to be made before actually producing.
576 And again it was asked just when the responding party is to provide its statement? The proponent
577 suggested these words: "before producing the information the responding party must specify the form
578 it intends to use."

579 This argument was again met by the counterargument that the question of form should be
580 raised at the very outset of the discovery process. It is important to confront the question before a
581 producing party can argue that it has invested in preparing to produce in one form and should not
582 have to shoulder the burden of switching to production in a different form. In every case involving
583 complex discovery, there will be initial deposition discovery directed at the form of production. It
584 would be better to state the duty twice, if need be, rather than separate it so that the responding
585 party's duty to state the form of production appears only in the default-form provisions.

586 A different compromise was suggested — the responding party's duty could be set out in (ii)
587 when then request does not specify a form, but the rule would direct that the statement must be
588 included in the written response to the discovery request.

589 It was agreed by several Committee members that the goal is to require that the responding
590 party state the intended form of production in the response to the discovery request. (ii), on the other
591 hand, addresses actual production. Stating the initial form fits well in the initial response, coupled
592 to the duty to state the intended form of production when the responding party objects to a form
593 specified in the request. If the responding party is not yet able to specify a form, the response likely
594 will say something general — production will be made "in a form or forms to be determined in
595 consultation with our technical experts." That response will do the job of focusing attention.

596 It was protested that providing that the responding party "must" state the form of production
597 "seems strong." The Committee Note should reflect that the responding party may need more than
598 30 days to determine the form of production, and that it should not always be bound to adhere to the
599 form initially stated. A response was that usually the request and response will occur after the Rule
600 26(f) conference; by that point the producing party ordinarily should be able to state a form or forms
601 of production.

602 It was agreed that the duty to state the intended form of production should remain as
603 proposed in lines 46 to 49. The Reporters will consider possible Note changes to reflect the concerns
604 expressed in the discussion: a responding party who fails to specify a form in its response should not
605 be forced to produce in whatever form the requesting party later demands. The 30 days allowed for
606 a response may not suffice to make an intelligent choice. And a party who produces without first
607 making a response may be vulnerable to a demand that it produce in another form better suited to
608 the requesting party's needs.

609 The default form of production then came on for direct discussion. The published proposal
610 provided a default form of production to be used when the request does not specify a form and a
611 form is not specified by party agreement or court order. The form could be either "a form in which
612 it [the information] is ordinarily maintained, or in an electronically searchable form." Public
613 comments suggested difficulties with each of these alternatives. The "ordinarily maintained" form
614 seemed to suggest that production must include metadata and embedded data, information not
615 apparent "on the screen" and often completely unknown to the person who generated the electronic
616 file. Reviewing such information for relevance, responsiveness, and privilege and other grounds for
617 protection can add significantly to discovery costs. There is no close analogue to such problems with
618 paper discovery, and the burdens may not be appropriate. Some comments, moreover, suggested that
619 production in "native format" generates problems of integrity—the information may be transformed
620 after production, often unintentionally, both in the hands of the requesting party and in the hands of
621 the producing party.

622 The alternative option to produce in an electronically searchable form also drew adverse
623 comment. There are many degrees of searchability; a party might produce in a form that is
624 marginally searchable rather than much more readily searchable forms that could be produced even
625 more easily. Some forms of electronically stored information, moreover, may not be electronically
626 searchable; "images" have been among the more frequently offered illustrations. This alternative
627 was proposed in the expectation that it would benefit from vigorous comment. The comments
628 suggest that it is not a workable provision.

629 The revised proposal presented in the agenda materials is that the default form of production
630 must be "reasonably usable by the requesting party."

631 Two difficulties were immediately suggested. The requesting party may have idiosyncratic
632 information systems that prevent reasonable use of most of the electronically stored information held
633 by other parties. It should not be able to impose the costs of its peculiar system on others. And the
634 responding party may have information in a form that is not reasonably usable by anyone, including
635 the responding party. "Legacy" data stored in antiquated formats and perhaps readable only on
636 museum hardware is an example.

637 The next observation was that the "default" provision is much more than a simple default.
638 It will become the baseline for negotiating the form of production. The producing party may want
639 to reduce functionality, searchability. "Reasonably usable" will encourage production in .pdf or
640 similar unsearchable forms, or even in paper. The proposed Committee Note language suggests that
641 usually electronically searchable form is required, but that may not fully reflect what is at stake.

642 "Reasonably usable" was defended as an attempt to reach the same goal as the published
643 "electronically searchable," but in a way less vulnerable to objections. But account must be taken
644 of the fear that the producing party will deliberately choose a form that degrades the searchable
645 qualities of the information. That is part of what makes it important that the parties discuss the form
646 of production at the Rule 26(f) conference, and that if the conference does not resolve the matter the
647 responding party specify the intended form of production before it actually produces the information.
648 The Committee Note revisions are designed to speak to these questions. The Note recognizes that
649 the responding party may have information in a form that the responding party cannot search
650 electronically, and accounts for that.

651 It was asked again whether the rule should say something about the need to limit production
652 in a form that reduces functionality. A spreadsheet, for example, may be producible at low cost in
653 a form that carries forward the full search capacities enjoyed by the responding party, or in a form

654 — perhaps at higher cost to the responding party — that is much less easily searched. At the same
655 time, it must be recognized that the processes that achieve an important "functionality" may
656 themselves deserve protection as proprietary information; some reductions in searchability may be
657 proper or even necessary. This topic is too important to be left to the Committee Note alone; it
658 should be addressed in rule text. This is a "big deal in current practice."

659 One possibility might be to attempt to express the element of searchability in defining the
660 form or forms of production. The first response was that although "electronically searchable" was
661 one of the alternatives in the published proposal, there was no clearly focused approach to the
662 question of maintaining or degrading the search functions. It was not meant to be "particularly
663 aggressive." But it was protested that "electronically searchable" was not meant to allow the
664 responding party to eliminate functional search characteristics that it is able to employ.

665 A different understanding of "electronically searchable" was expressed. This view was that
666 it was a "scaling down" from production of information in the form in which it is ordinarily
667 maintained. It contemplates a form that fits the requesting party's need for the information.

668 The proponent of addressing reduced search functions in the rule agreed that there must be
669 an accommodation for good reasons to reduce functions.

670 Another view was that the default form of production should not be "a lot less useful" to the
671 requesting party than it is to the responding party. But the rule should not require production in a
672 form that enables the requesting party to do things that the responding party could not do with the
673 form in which the information is ordinarily maintained. The producing party itself may not be
674 reasonably able to access or use information that it "has" only in an extended sense. This issue is
675 one that ties to the questions addressed by proposed Rule 26(b)(2)(B), which addresses discovery
676 of information stored in sources that are not reasonably accessible. Rule 34(b) does not override the
677 separate protection provided by 26(b)(2)(B). The Committee Note might say as much. But all of
678 Rule 26 qualifies all of the remaining discovery provisions in Rules 30, 31, 33, 34, 35, and 36;
679 perhaps there is no need for a redundant reminder. For that matter, the published rule did not require
680 production in a reasonably usable form, nor in an electronically searchable form — the responding
681 party could produce in the form in which the information is usually maintained.

682 The possibility of improved rule language was opened, but subordinated to possible guidance
683 in an expanded Committee Note. "Reasonably usable" is flexible, and draws directly from the
684 language of Rule 34(a) that calls for a responding party to translate data into reasonably usable form.
685 The Committee Note can give guidance on application in specific contexts. It might, for example,
686 say that a party who has information in a form that can be searched efficiently ordinarily should
687 produce in that form or in an equally searchable form, unless limited by proprietary interests in the
688 technology.

689 More directive Committee Note language was offered as an alternative. At a minimum, the
690 Note might say that "in most circumstances" production must be in a form as easily searched as the
691 form maintained by the responding party. It would be better to say that the responding party should
692 not be allowed to degrade functionality absent extraordinary circumstances or a showing of
693 prejudice. But the published proposal, requiring production either in the form ordinarily maintained
694 or in an electronically searchable form, would better support the appropriate directions in the
695 Committee Note.

696 Responding to a question whether a direction to produce in equally searchable form would
697 raise proportionality concerns, the proponent suggested that usually production in such form will cost
698 less. "Producing parties invest heavily to reduce functionality." Then the requesting party has to

699 invest more to restore the functionality. "Searchability" can be maintained without providing the
700 "full functionality" of the producing party's system.

701 With a passing note that the proposal says that the responding party "must," not "may" or
702 "should," produce in a specified default form, it was suggested that going beyond "search" "is wholly
703 uncharted waters."

704 A motion was made to adopt the proposed revised language to replace the published
705 proposal:

706 (ii) if a request for electronically stored information does not specify the form or
707 forms for producing electronically stored information, or production, a responding
708 party must produce the information in a form or forms that are reasonably usable by
709 the requesting party in which it is ordinarily maintained, or in an electronically
710 searchable form.

711 The motion failed, 6 Yes and 7 No. The result was to strike the "reasonably usable"
712 substitute and restore the alternative default forms in which ordinarily maintained or electronically
713 searchable.

714 One of the members who voted "no" then suggested that the matter should be reconsidered.
715 There continue to be good reasons to doubt the published version, particularly as to the alternative
716 to produce "in an electronically searchable form." A one-vote margin of decision, moreover,
717 suggests the need for further work.

718 It was suggested that it may be possible to combine elements of the published proposal and
719 the newer substitute. "Reasonably usable" is better than "electronically searchable." A form may
720 be electronically searchable but much less useful than the ordinarily maintained form. Beyond that,
721 in many cases .pdf or similar formats are perfectly usable. And even today, it is common to find that
722 all parties agree on production in paper form as sufficient to their needs.

723 The Committee was reminded that the comments expressed concern that a default calling for
724 production in a form ordinarily maintained by the responding party might call for "native format"
725 production, including metadata and embedded data. But it was noted that at least in many
726 circumstances the alternative default form would remain available — the responding party could
727 strip out the metadata and embedded data and still produce the information in a form that is
728 electronically searchable or that is reasonably usable by the requesting party.

729 A different problem with "native format" production was again recalled. Several of the
730 comments suggested that it is difficult to maintain the integrity of native format files. A "reasonably
731 usable" form is a requirement the parties can live with and work out. The requesting party, after all,
732 can specify a form it wants.

733 The analogy to paper records was invoked. With paper records, it is important to honor the
734 Rule 34(b) command to produce them "as they are kept in the usual course of business," or else
735 organized and labeled to correspond with the categories in the request. The present task is to adapt
736 this concept to production of electronically stored information. We do not want the responding party
737 to make it unnecessarily difficult for the requesting party to use the information.

738 A Committee member asked whether the rule need specify any default form at all. Why not
739 just rely on the parties to work it out? An earlier observation was repeated — the "default" form
740 specified in the rules will become the baseline for the parties' discussions and negotiations. "The
741 battleground is not the bumpkin litigant." The problem lies in attempts to produce in a format that

742 is not searchable. But the rejoining question asked why it is not enough that the rule will require the
743 responding party to state the form of production before it produces — the requesting party then has
744 an opportunity to negotiate for a different form, and to invoke the court's supervision if negotiations
745 fail.

746 It was suggested that Rule 34(a) already provides a default of sorts in requiring that a party
747 who produces "data or data compilations" must translate the data into reasonably usable form.
748 Perhaps that provision is enough of itself? The published "electronically searchable" does not
749 protect against production in degraded — less searchable — form. The central question may be the
750 level of guidance to be provided in the Committee Note.

751 Greater guidance in the rule was urged. "Reasonably usable," particularly as it appears in
752 Rule 34(a) — where it has appeared since 1970 — will always support arguments for production in
753 .pdf, similar nonsearchable forms, or paper. If the Committee does not want that argument to be
754 made in every case, Rule 34(b) should provide better guidance. And the Committee Note can say
755 that if special circumstances require, the court can order production in a form that is not
756 electronically searchable and that differs from the form ordinarily maintained.

757 A parallel observation was that the current draft Committee Note covers these points nicely.
758 The default rule will have effect not in the big cases, but in the "less heavily staffed" cases.

759 "Reasonably usable" was supported by the argument that courts continually rely on tests
760 expressed in terms of reasonableness. The words invite focus on the particular context. And that
761 is what this rule should do. It is the antithesis of a Manual on Electronic Discovery, something no
762 one wants the rule to become.

763 A motion was made to combine elements of the published proposal with elements of the
764 agenda book proposal:

765 **(ii)** if a request does not specify the form or forms for producing electronically stored
766 information, a responding party must produce the information in a form or forms in
767 which it is ordinarily maintained or that are reasonably usable by the requesting
768 party;

769 It was suggested that the Committee Note should be revised to provide stern warnings against
770 relying on the "reasonably usable" alternative to produce in a form that degrades the functionality
771 available to the responding party.

772 A related question asked whether, if the motion should pass, the Committee Note would take
773 a clear position on the question whether production in the form ordinarily maintained includes
774 embedded data and metadata? It is important to be clear, lest the question be litigated continually
775 and with conflicting results. Discussion of this question observed that however it may be for
776 wordprocessing programs, there are real problems with requiring production of embedded data and
777 metadata for other programs. It was noted again that "native format" information may not be stable,
778 and that a clear Committee Note statement that production in the form ordinarily maintained always
779 prohibits deletion of embedded data and metadata will lead to deletion and production as a form
780 "reasonably usable."

781 It was said again that the Committee must focus on preserving the search characteristics and
782 "functionality" available to the responding party. Issues as to embedded data and metadata arise only
783 if the responding party opts to produce in the form ordinarily maintained. They disappear if the
784 responding party falls back on a "reasonably usable" form. The Committee Note should focus on

785 search functionality.

786 Further agreement was expressed with the suggestion that the Committee Note should make
787 clear the impact of the alternative default forms on producing embedded data and metadata. But a
788 caution was raised: unless the Committee is quite confident of what it should say, "the less you say
789 the better."

790 Harking back to the rule text, it was observed that many of the comments by technically adept
791 lawyers and experts assume that production in the form ordinarily maintained includes embedded
792 data and metadata; that the form ordinarily maintained is "native format." "Reasonably usable," on
793 the other hand, does not have these connotations. It was protested that "reasonably usable" should
794 not be embellished in the Committee Note with references to embedded data or metadata.

795 Support for retaining the "form ordinarily maintained" alternative was expressed by
796 observing that some parties may prefer this as the simplest, lowest-cost alternative. If the form
797 ordinarily maintained is not reasonably usable by the requesting party, the responding party should
798 not be forced to bear the cost of converting the information to a form that is reasonably usable by the
799 requesting party. The court, after all, retains power to specify a different form of production.

800 Other Committee members argued that it is not possible to draft a Committee Note that will
801 provide "enough informed detail" about what "form ordinarily maintained" means. But the Note can
802 say that "reasonably usable" means searchable.

803 The embedded data and metadata question was put again: should the Committee Note say
804 that if the form ordinarily maintained includes such data, they must be produced under this
805 alternative? Or should it say something else on the subject? The Committee Note now says very
806 little. One occasional hint has been that metadata automatically generated by the computer are likely
807 to have greater functional value in discovery, while embedded data may be more likely to raise
808 privilege problems; it is unclear whether there is anything to this suggestion, nor what might be said
809 in response.

810 The motion was restated: the rule text should adopt as default alternatives production in a
811 form or forms in which the information is ordinarily maintained or that is reasonably usable by the
812 requesting party, coupled with "non-Manual but increased detail in the Committee Note." The
813 motion passed, 11 yes, 2 no.

814 It was suggested that consideration should be given to adding one word: "in a form or forms
815 in which it is ordinarily maintained or [an] other reasonably usable form."

816 Brief discussion of possible Committee Note revisions began by suggesting that the
817 "reasonably usable" form is important outside the default setting. If the requesting party specifies
818 a form, the responding party's opportunity to object does not mean that the responding party can
819 insist on production in a form that is not reasonably usable. But it was responded that this
820 proposition is so obvious that it need not be stated in the Note. A further response was that the
821 published Note included a statement that when an objection is made to a requested form of
822 production the court is not limited to the form specified by the requesting party or the specified
823 default forms. This language might be restored, perhaps with an additional statement the court also
824 is not limited to the form stated by the responding party.

825 It was agreed that the Committee Note should be further revised, particularly to address the
826 need for clarity on points that will recur frequently in practice.

827

Rule 26(a)

828 The August 2004 published proposals did not include any possible revision of Rule 26(a).
829 But it may be desirable to amend Rule 26(a)(1), and perhaps also 26(a)(3), to conform to the changes
830 recommended by the published proposals. No change in meaning is intended; to the contrary, the
831 purpose is to avoid possible unintended confusions.

832 Present Rule 26(a)(1)(B) calls for initial disclosure of "documents, data compilations, and
833 tangible things." Because the Committee has chosen to carry forward the published version of the
834 Rule 34(a) amendments, "data compilations" is unnecessary and perhaps confusing. As Rule 34(a)
835 would be adopted, "data compilations" often are both documents and electronically stored
836 information. It is better to revise (a)(1)(B) to read:

837 documents, electronically stored information, ~~data compilations~~, and tangible things
838 * * *

839 This change was approved as a conforming amendment, to be recommended to the Standing
840 Committee for adoption without publication for comment.

841 The pretrial disclosure provisions of Rule 26(a)(3)(C) present a similar question, but in a
842 context that may make a conforming amendment unnecessary. The revision would read:

843 (C) an appropriate identification of each document, all electronically stored
844 information, or other exhibits, including summaries of other evidence * * *

845 The inclusion of "all" was questioned, but defended on the ground that electronically stored
846 information "does not come in pieces." But "all" might suggest disclosure even if the electronically
847 stored information is not to be offered as a exhibit. The purpose of pretrial disclosure is to identify
848 things that will be offered in evidence at trial. If electronically stored information is to be offered,
849 it will be as an "exhibit"; the present rule requires disclosure without need for change. There should
850 be no confusion. A motion to retain present 26(a)(3)(C) without change passed, 12 yes, zero no.
851 But it was suggested that the Style Project may consider further the question whether "exhibit" is
852 sufficiently broad to include "document." The best revision may be "identification of each exhibit,
853 including * * *."

Rule 26(f)

854

The published proposals made three changes in Rule 26(f).

855

856 The first change appears in the initial unnumbered paragraph, adding to the directions for the
857 Rule 26(f) conference that the parties are "to discuss any issues relating to preserving discoverable
858 information." This provision applies to all forms of information, not only electronically stored
859 information. The comments expressed concern that although this is indeed a desirable subject for
860 discussion, explicit focus in the rule may invite profligate resort to preservation orders. Committee
861 Note language was prepared to respond to this concern, suggesting a strictly parsimonious approach
862 to preservation orders. The draft in the agenda materials included a statement that a preservation
863 order should be entered over objections only if "there is a substantial risk that discoverable
864 information will become unavailable unless an order is entered." Concerns have been expressed
865 about this advice as venturing too close to a statement of standards for preservation orders. It can
866 be cut back to the opening observation that a protective order entered over objections "should be
867 narrowly tailored." This reduction was supported on the ground that there is a body of decisional
868 law on the appropriateness of preservation orders. The Committee is not proposing a rule that sets
869 preservation-order standards. It is better not to intrude on the subject in the Committee Note.

870

A similar comment suggested that it is too broad to say that courts should not routinely issue
871 protective orders. Proposed Rule 37(f) will make preservation orders important.

872

A motion was made to abbreviate this Committee Note paragraph to say: "A preservation
873 order entered over objections should be narrowly tailored. Ex parte preservation orders should issue
874 only in extraordinary circumstances."

875

It was said that "issuing an order is the easy way out. Courts are tempted to do it, hoping to
876 reduce disputes." It was agreed that it is better that the parties work out these matters. The Note
877 language is designed to reduce the reflexive tendency to go to court, and responds to real concerns
878 expressed by the comments.

879

It was asked what are the arguments against routine preservation orders? The problem seems
880 to be that judges often are poorly informed about the consequences. As to electronically stored
881 information, many comments observed that overbroad orders can lead to paralysis of the information
882 system, or to great preservation costs.

883

This comment led to the observation that the real concern is with overbroad orders. This is
884 indeed a big issue. The parties sensibly negotiate narrower orders.

885

An added problem with overbroad orders is that they lead to "gotcha" litigation. Support was
886 voiced for retaining the first sentence of the agenda-book paragraph: "Courts should not routinely
887 issue preservation orders." Agreement for this view was added. The preservation order question ties
888 to the "two-tier" discovery proposal of Rule 26(b)(2)(B) and the "safe harbor" proposal of Rule 37(f).

889

An alternative approach was suggested. The Committee Note responds to the concern that
890 identifying preservation as a topic for discussion will lead to entry of overbroad protective orders.
891 The Note need only say that making preservation a topic for discussion does not imply that a
892 preservation order is appropriate. Something on the order of: "The rule encourages discussion, but
893 does not imply that discussion should lead to a preservation order." There is no need to state the
894 obvious — if an order is "overbroad," it is unwise.

895

The motion to strike the "Courts should not routinely" sentence was renewed. This led to a
896 revised motion: This Committee Note paragraph should begin with the statement that encouraging

897 discussion of preservation does not imply that a protective order should be entered. Then state that
898 an order entered over objections should be narrowly tailored, and conclude with the statement that
899 an order should be entered ex parte only in extraordinary circumstances.

900 A counter-motion to restore the statement that a preservation order should enter only on
901 showing a substantial risk that discoverable information will become unavailable failed. Deleting
902 these words will not change the law. And this statement goes beyond the published Committee Note
903 into sensitive territory; it also goes beyond the published and proposed rule text.

904 The motion to restate this Committee Note paragraph was adopted, 12 Yes, zero No.

905 *Rule 26(f)(4)*

906 The published proposal added a new paragraph 26(f)(4), describing as an added subject for
907 a proposed discovery plan:

908 whether, on agreement of the parties, the court should enter an order protecting the
909 right to assert privilege after production of privileged information;

910 The agenda book recommends deleting the final three words, "of privileged information,"
911 because what is protected is the right to assert privilege — the right to assert should not be limited
912 to correct assertions.

913 The published proposals included a parallel provision in Rule 16(b)(6), adding to the
914 elements that may be included in a scheduling order:

915 **(6)** adoption of the parties' agreement for protection against waiving privilege;

916 This proposal fits with proposed Rule 26(b)(5)(B). Many comments, beginning before the
917 e-discovery project was launched, emphasize the costs of guarding against inadvertent privilege
918 waiver in the course of providing discovery of electronically stored information. But comments on
919 the published proposal express concern that it may seem to promise more than it can deliver. The
920 great concern is subject-matter waiver. Although the parties' agreement should protect against
921 subject-matter waiver in the current litigation, a protection that is reinforced by adoption of the
922 agreement in a court order, there is no guarantee that nonparties will be bound by the agreement or
923 order in other litigation. This uncertainty is compounded by the fact that many privilege issues are
924 governed by state law. The language of the published Committee Note has been revised to soften
925 the possible appearance of uncertain assurance. It may be asked whether revisions should be made
926 in the rule text to respond to the same concern. The references to a court order and to protecting
927 might be dropped. Alternatives, dropping one or the other, are set out in the agenda book at footnote
928 8, page 18.

929 As published, Rule 26(f)(4) is intended to encourage parties to discuss agreement, without
930 encouraging courts to exert pressure to reach an agreement so as to speed up discovery. There has
931 been a gradual retreat from the more aggressive Committee Note suggestions that entry of an order
932 affirming an agreement may enhance the agreement's protective effect by encouraging other courts
933 to take the agreement and order into account in applying their own rules on waiver. It may be asked
934 whether, as so reduced, the proposal accomplishes anything useful? It still may be that court approval
935 of an agreement will influence other courts to protect against waiver, even in litigation involving
936 persons who were not parties to the agreement or order.

937 Discussion began with an expression of support for the second alternative described in
938 footnote 8: "(4) whether the court should enter an order confirming any agreement the parties reach

939 regarding the right to assert a privilege after production of information to a party." This alternative
940 contemplates a court order, but drops any reference to protecting a privilege. "Protecting" "gives a
941 false appearance"; "confirming that parties' agreement" avoids the false promise, but does not
942 encourage court action absent the parties' agreement.

943 A third alternative was proposed: "(4) any issues relating to assertion of privilege." There
944 would be no more — no reference to party agreement, to court order, or to protecting the right to
945 assert privilege. Indeed, this approach might be opened up by shortening it still further: "(4) any
946 issues relating to privilege."

947 Picking up on these suggestions, it was argued that the proposal's reference to "the right to
948 assert privilege" is too broad. In some courts, waiver follows from production without more; there
949 is no longer any privilege to assert.

950 A motion was made to adopt "(4) any issues relating to assertion of privilege."

951 It was suggested that this form could be combined with some parts of the other variations,
952 including such elements as entry of an order confirming the parties' agreement.

953 Another suggestion was that this provision should include work-product protection. Some
954 courts and lawyers will assume that work-product protection is covered even if the rule refers only
955 to "privilege"; it is not uncommon to refer to trial-preparation materials as protected by a qualified
956 privilege.

957 The stripped-down version proposed by the motion was challenged on the ground that the
958 rule should refer expressly to the opportunity to assert privilege after production. The purpose is to
959 ease production in discovery by protecting against waiver by producing. The "confirming the
960 parties' agreement" alternative is desirable.

961 A broad reminder was provided. The proposals related to privilege waiver began by
962 wondering whether a rule could be crafted to provide full protection against all the world. But
963 concerns were expressed that such a rule might be seen to "modify an evidentiary privilege" within
964 the meaning of 28 U.S.C. § 2074(b), so that it could take effect only if approved by an Act of
965 Congress. This question has not been resolved. Instead, it seemed better to avoid testing the limits
966 imposed by § 2074(b). The published rules do, however, plant a seed. They are not clear on the
967 extent to which court approval of the parties' agreement might expand the agreement's affects to
968 nonparties. The path of caution could be followed further, adding "the right to assert privilege after
969 production as against the other parties to the agreement." Without this limit, the published proposal
970 invites the parties to adopt agreements that speak to third parties. Judges will be reluctant to enter
971 orders confirming such agreements.

972 It was observed again that the problem is subject-matter waiver. Protecting against waiver
973 can expedite discovery. The published proposal "is not aggressive." It well may be that § 2072
974 enables a more vigorous approach that, in order to facilitate civil discovery and govern the
975 consequences of court-compelled disclosures, defeats waiver claims by anyone, party or nonparty.
976 But the Committee has chosen not to test those possibilities.

977 Speaking of protection, as in the published proposal, was defended on the ground that this
978 concept does no more than support an argument to other courts that their own privilege law should
979 be developed to give effect to the nonwaiver agreement and order. The central focus is to get party
980 agreement. It was protested, however, that this explanation "gives an argument, not protection." A
981 partial response was that the proposal attempts to say that an agreement is helpful as among the

982 parties to the agreement. The rule cannot promise protection elsewhere. If the Committee Note
983 makes it clear that the rule cannot assure the outcome of waiver arguments made in other courts by
984 persons not parties to the agreement, the rule text is not misleading.

985 The last observation was expanded by observing that the Committee has an institutional
986 interest in being clear.

987 The motion was renewed to substitute: "(4) any issues relating to assertion of privilege." The
988 motion failed, 5 Yes, 7 No.

989 An alternative was proposed. In its first form, it was: "(4) any issues relating to assertion of
990 privilege, including whether on agreement the parties may request the court to confirm their
991 agreement." This was met by a motion to adopt the second alternative on footnote 8, with a modest
992 change:

993 (4) any issues relating to assertion of privilege, including whether the court should
994 enter an order confirming any agreement the parties reach regarding the ~~right to assert~~
995 assertion of privilege after production of information to a party.

996 This motion was approved, 9 Yes, zero no. It was agreed that the Committee Note and Rule 16(b)(6)
997 would be conformed to this version. Consideration must be given to each place where the
998 Committee Notes now refer to "protection." In this vein, support was voiced for the alternative
999 sentence suggested at footnote 16, page 39 of the agenda materials: "Court adoption of the chosen
1000 procedure by order may advance enforcement of the parties' agreement."

1001 At the close of the later discussion of Rule 26(b)(5), it was agreed that Rule 26(f)(4) should
1002 be amended in parallel with the Rule 26(b)(5) proposal by adding a reference to trial-preparation
1003 material. The result would be something like this:

1004 (4) any issues relating to assertion of privilege or protection of trial-preparation
1005 materials, including whether the court should enter an order confirming any
1006 agreement the parties reach regarding the assertion of privilege or trial-preparation
1007 protection after production of information to a party.

1008

Rule 26(b)(5)(B)

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Proposed Rule 26(b)(5)(B) would establish a procedure for a party who has produced information in discovery to assert privilege after production. The published proposal read:

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(B) 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.

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In response to the public testimony and comments, a revised version was prepared for consideration by the Committee. The version in the agenda materials read:

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(B) When a party produces information without intending to waive a ~~claim of~~ privilege claim, it may, within a reasonable time, notify any party that received the information of the basis for its privilege claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies and may not disclose the information until the privilege claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the privilege claim. [If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.] The producing party must ~~comply with Rule 26(b)(5)(A) with regard to the information and preserve it the~~ information until the privilege claim is resolved pending a ruling by the court.

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Footnotes to the agenda book draft presented several drafting alternatives.

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Judge Rosenthal opened discussion of the privilege-recapture procedure by observing that the revised version carries forward the basic form and scope of the published version. The changes are not basic, but respond to refinements suggested by the public comments. In part, the changes shift into rule text matters that were covered in the published Committee Note. Four of the changes were noted. The rule now describes the receiving party's opportunity to present the information to the court for a ruling on the questions whether it is privileged and whether any privilege has been waived; many comments suggested that the rule should recognize this opportunity, lest it be argued that any such effort is inconsistent with the obligation to return, sequester, or destroy. The producing party is required to state the basis for its privilege claim; this facilitates the receiving party's presentation of the claim to the court. The rule text now states, as in the published Committee Note, that the receiving party may not disclose the information after being notified of the privilege claim. And the bracketed material, if adopted, would require the receiving party to take reasonable steps to retrieve the information if it was disclosed to others before receiving notice of the privilege claim.

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A few more changes were included in a text prepared in response to early comments on the agenda-book version, and presented at the beginning of the discussion:

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(B) *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 the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the privilege claim is resolved. A receiving party may [also] promptly

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1052 present the information to the court under seal for a determination of the
1053 privilege claim. [If the receiving party disclosed the information before being
1054 notified, it must take reasonable steps to cooperate with the producing party's
1055 efforts to retrieve the information.] The party must preserve the information
1056 until the privilege claim is resolved.

1057 Judge Rosenthal also noted that two important questions have not been reflected in these
1058 drafts, except in the footnote discussions. One is whether the "reasonable time" feature, which
1059 appears to be a functional limit on the opportunity to demand return, actually is misleading because
1060 it has no operating meaning. The other is whether the rule should be expanded to include claims to
1061 protect trial-preparation materials. If work-product materials are added here, the Committee should
1062 consider whether to add an explicit reference as well to proposed Rule 26(f)(4).

1063 Professor Marcus described some of the footnote questions. One suggests a way to add
1064 work-product materials to the rule. A second asks whether the rule text should require that the
1065 producing party's notice to the receiving party be in writing; the Committee Note says that writing
1066 is important, but recognizes that it is not always possible. He also observed that the agenda-book
1067 version imposes a potentially heavy burden on the receiving party by requiring the receiving party
1068 to take reasonable steps to retrieve material disclosed to others before receiving notice. The
1069 alternative in the handout calls only for reasonable steps to cooperate with the producing party's
1070 efforts to retrieve the materials. That seems a lesser burden, but it may lead a producing party to
1071 argue that it has a right to do the retrieving and that the receiving party must disclose the persons
1072 who received the information, infringing on the receiving party's work-product interests.

1073 Initial discussion of the work-product question noted that the pressures that led to proposal
1074 of 26(b)(5)(B) focus primarily on privileged material. The pressure is not as great with respect to
1075 work-product material. But the framework can easily include work-product material; is there any
1076 good reason not to include it? It was agreed that the law of waiver with respect to the subject-matter
1077 of the disclosed information is not as troubling with respect to work-product materials as it is with
1078 respect to privileged materials, but waiver is still an issue. And although there are likely to be fewer
1079 circumstances in which it is difficult to recognize the work-product character of discovery materials,
1080 the problem can arise. Normal turn-over in a large corporate legal staff, for example, can easily
1081 mean that a lawyer responding to discovery may not recognize that the person who prepared five-
1082 year old materials was a lawyer. The practicing bar, moreover, thinks of privilege and work-product
1083 protection as linked together; they are often argued together as alternative bases for protection. The
1084 very caption of Rule 26(b)(5), further, refers to trial-preparation materials. A motion to add trial-
1085 preparation materials to 26(b)(5)(B) was made but deferred for action after discussion of other
1086 issues.

1087 The "reasonable time" words became the focus of discussion. It was suggested that these
1088 words appear to be a limitation — a notice that is not given within a reasonable time is a nullity. But
1089 on closer examination, it is the words themselves that are null. A producing party will always send
1090 the notice, even if it recognizes that it has delayed unreasonably. And the underlying waiver law
1091 may encourage this — in California, for example, it is almost impossible to waive work-product
1092 protection by delay in requesting return after production. The receiving party, on getting notice, will
1093 understand that it is obliged to take the steps specified in (b)(5)(B). The party cannot use the
1094 material; must return, sequester, or destroy it; and must do something — what depends on which
1095 form of the proposal might be adopted — to retrieve the material from anyone to whom it has been
1096 disclosed. The only possible effect of the "reasonable time" words is to suggest a waiver rule, that
1097 unreasonable delay in giving notice waives the asserted privilege or protection. Yet the Committee

1098 has concluded that it is better not to attempt to address waiver. There have been vigorous
1099 discussions of the wisdom of addressing waiver, and some comments have suggested that a rule that
1100 directly affects the waiver determination can take effect only if approved by Congress under 28
1101 U.S.C. § 2074(b).

1102 These observations concluded by suggesting that the rule would remain effective if the
1103 reasonable-time words were removed. It still would establish a procedure for addressing privilege
1104 and waiver questions in an orderly way. The producing party is told to give notice, and notice of a
1105 certain quality. The receiving party is told how to respond to the notice, including the option to
1106 present the information to the court under seal for a ruling.

1107 Agreement was expressed by noting that the published rule seems to leave it to the receiving
1108 party to ignore a notice it concludes was not given within a reasonable time. That is not what the
1109 rule should do.

1110 It also was observed that the rules of professional responsibility address these issues. And
1111 those rules do not include time limits for giving notice.

1112 A different perspective was taken in observing that "reasonable time" gives too much
1113 opportunity for delay. Practice is to give notice immediately on discovering the mistake. Either the
1114 rule should require that notice be given promptly or it should remove any time reference.

1115 A familiar question was revived by asking "a reasonable time from what"? From production?
1116 Or from realizing the problem? Perhaps we should define reasonable time to run from production.
1117 And then we should determine whether we should use the same approach for work-product
1118 materials. In response, the discussion reviewed all the problems that have been noted with choosing
1119 among possible events to trigger the reasonable-time requirement. Setting the time from production
1120 offers little benefit in relation to the purpose to facilitate discovery by ensuring a procedure to
1121 address waiver questions, unless perhaps the time is quite long. Setting the time from realization
1122 that privileged material was produced might allow the claim to be pursued at a time that seriously
1123 disrupts the receiving party's trial preparation or even trial presentation. Choice of a specific trigger
1124 also invites consideration of a specific time period, although the reference could be to a reasonable
1125 period. There even can be questions whether the time should run forward from a specific event, such
1126 as production or the close of discovery, or backward from an event, such as trial.

1127 But, it was asked, why not require action promptly after the producing party actually learns
1128 of the privilege claim? We could require notice "promptly after learning that the material is subject
1129 to a claim of privilege." One response was that this allows undue delay; a producing party should
1130 have a continuing obligation to ensure that nothing privileged has been produced. At the same time,
1131 it is appropriate to preserve the "status quo" by requiring the receiving party to stop use for a brief
1132 period after getting notice.

1133 The question was renewed — what difference does it make under the proposed rule if the
1134 notice is not given within a reasonable time? One answer was that we should not have an unlimited
1135 opportunity to give notice. Another response was that many courts consider delay in asserting
1136 privilege in determining whether the privilege has been waived.

1137 But it was responded that under current practice a producing party can make the claim at any
1138 time. The rule should be the same.

1139 This argument was countered by arguing that if the rule says nothing about timeliness of
1140 notice, it will raise concerns about undue delay. And there also may be confusion whether a rule that

1141 sets no time limit on notice implicitly suggests that delay does not enter the waiver determination.

1142 A mid-discussion summary observed that the role of the reasonable-time element is difficult
1143 to articulate. As the discussion has evolved, many participants have attempted to reduce it to a
1144 purely hortatory behest. On this approach, (b)(5)(B) establishes a procedural framework for orderly
1145 presentation and disposition of the privilege and waiver issues. The "reasonable time" limit has no
1146 operating effect. The receiving party must comply with all the (b)(5)(B) requirements on receiving
1147 notice, no matter when it is given. But the cost of compliance is mollified by expressly recognizing
1148 that the receiving party can present the issues to the court. This presentation is facilitated by
1149 requiring that the notice state the basis for the privilege claim. Any delay in giving notice, no matter
1150 how measured, would be nothing more than one element in a waiver determination if the question
1151 arises under law that considers delay in the waiver calculus. But if that is the intent, it is better to
1152 omit "within a reasonable time." So long as it appears in the rule text, no matter what the Committee
1153 Note says, some lawyers and some courts will attempt to give it meaning. The meaning may be that
1154 a producing party is discouraged from giving notice for fear it has delayed unreasonably; it may be
1155 that a receiving party is encouraged to ignore a notice it thinks unreasonably delayed; it may be that
1156 a court believes that delay makes the notice ineffective and never addresses the privilege or waiver
1157 questions; it may be that a party or a court believes that the rule is intended to direct that a court find
1158 waiver if notice was not given within a reasonable time. On the other hand, if "within a reasonable
1159 time" is meant to have some meaning, it remains to decide just what that meaning might be.

1160 Another member repeated the earlier suggestion that the rule should provide that a party may
1161 give a privilege-retrieval notice promptly after it discovers that it has produced material that it
1162 believes to be privileged. The notice would impose the stand-still requirements in the rule.

1163 Separately, it was observed that the Committee Note should explain the relationship between
1164 (b)(5)(B) and any agreements the parties may make as to recapturing privileged materials. At least
1165 in most circumstances, the agreement should prevail. If the parties agree that notice can be given
1166 at any time, that should control — unless, perhaps, the court finds that its own interests supersede
1167 the agreement, as if denying use of the material would impede an imminent or ongoing trial. If the
1168 parties agree that notice must be given by a specified time, the agreed deadline should control.

1169 It also was suggested that if the rule requires notice within a reasonable time, or prompt
1170 notice, or sets some more specific time line, it should be made clear that failure to give notice as
1171 required does not of itself establish waiver. The rule is not designed to change the waiver rule in any
1172 way, whatever the waiver rule may be.

1173 This observation was extended by the suggestion that the purpose of (b)(5)(B) is to facilitate
1174 expeditious discovery. The hope is that an explicit procedure to recapture privileged material will
1175 enable a producing party to expedite the screening process, weeding out the materials whose
1176 privilege status can be identified with reasonable effort but not attempting to examine the more
1177 esoteric privilege possibilities. This can prove workable because the materials subject to a non-
1178 obvious privilege protection are not likely to be important; production is feared because of subject-
1179 matter waiver, not because of the material's intrinsic importance. But it is difficult to do that. An
1180 attempt to extend privilege requires cooperation with the Evidence Rules Committee, and affirmative
1181 congressional approval. Even an attempt to affect waiver-by-production is likely to provoke similar
1182 protests, whether or not they are correct. So, it was suggested, the rule text could require notice
1183 promptly after discovering the privilege claim, while the Committee Note could explain the limited
1184 scope of the rule.

1185 One member asked again what a party is to do if it gets notice but believes the notice was not

1186 given within a reasonable time, or was not prompt, or did not comply with whatever other timeliness
1187 requirement may be adopted. Again the response from another member was that the receiving party
1188 should be obliged to comply with the "hold" imposed by (b)(5)(B).

1189 Fears that tardy notices will disrupt progress toward trial were addressed by noting that under
1190 most law, a delay in asserting privilege supports a waiver finding.

1191 An opponent of "within a reasonable time" suggested that the rule be revised by striking out
1192 those words and imposing an absolute duty to give notice: "When a party produces information
1193 without intending to waive a claim of privilege, it may; ~~must within a reasonable time~~; notify any
1194 party that received the information * * *." But "must" was resisted as "too strong." The producing
1195 party may prefer to ignore the issue — among other things, if the receiving party fails to perceive the
1196 possibility of privilege and waiver there is little risk of subject-matter waiver.

1197 It was asked whether it would be simpler to require the producing party to file a motion,
1198 bypassing the notice step. The answer was that ordinarily these questions are resolved between the
1199 parties without a motion. Common practice is to return assertedly privileged materials immediately
1200 on being asked.

1201 A different question addressed the foundation of (b)(5)(B) — the requirement that the
1202 information have been produced "without intending to waive a claim of privilege." It would be
1203 better to refer to producing information "that the producing party believes is subject to a claim of
1204 privilege." We do not want to focus on "intent" because that also is an element of the waiver
1205 determination in many courts.

1206 Then it was asked whether the rule should be limited to privilege claims made by a party.
1207 A nonparty may, in discovery, produce information that a party believes is privileged; indeed there
1208 may be a conflict of interests. In an action against a corporation, for example, a former officer may
1209 produce material that is protected by the corporation's privilege. Or the corporate party may produce
1210 material that the former officer believes is privileged. Rule 45 was brought into the discussion: it
1211 enables a nonparty who wishes to make a belated privilege claim to invoke a procedure adopted
1212 verbatim from 26(b)(5)(B). The analogue to 26(b)(5)(B) for example, is 45(d)(2)(B). All of the
1213 published proposals to amend Rule 45, indeed, will be revised to conform to the changes ultimately
1214 made in Rules 26 and 34.

1215 It was suggested that the rule might begin:

1216 If information is produced in discovery that is subject to a claim of privilege, a party
1217 claiming privilege may notify any party who received the information of the basis for
1218 its claim * * *.

1219 This proposal, which eliminates "within a reasonable time," was adopted without dissent.

1220 Attention turned to some of the changes proposed in the version handed out at the meeting.
1221 One requires the receiving party to return, sequester, or destroy any copies "it has." The idea is that
1222 it would impose an undue burden to require that one of these alternatives be accomplished with
1223 respect to copies the receiving party no longer has. Another addition makes explicit a requirement
1224 that was implicit in the direction to return, sequester, or destroy: the receiving party may not use the
1225 information after being notified.

1226 The next question addressed the bracketed language in the agenda-book proposal: "If the
1227 receiving party disclosed the information before being notified, it must take reasonable steps to
1228 retrieve it." An alternative might be: "must take reasonable steps to cooperate with the producing

1229 party's efforts to retrieve the information." A concern was expressed in the opening discussion that
1230 a duty to cooperate might require the receiving party to identify recipients and thus reveal
1231 information about its trial-preparation efforts. This concern might be passed by. Or the Note could
1232 address it, perhaps saying that the receiving party need not reveal the identity of recipients if it
1233 undertakes to notify them and seek return of the information.

1234 An alternative to cooperation in retrieval efforts might be a simple requirement that the
1235 receiving party notify the persons who received the information from it. The notice would direct
1236 them not to use or disclose the information.

1237 Discussion of retrieval led to the observation that often the person receiving a document is
1238 outside the court's jurisdiction. Inevitably, the retrieving burden will fall on the producing party —
1239 it cannot rely on the receiving party for diligent efforts. For that matter, it may be asked whether it
1240 is fair to impose any significant retrieval burden on a party who innocently received information that
1241 the producing party failed to screen adequately in the first place. Even a duty to cooperate with the
1242 producing party is complicated. Perhaps the agenda-book proposal has it right: the receiving party
1243 is obliged to take reasonable steps, no more.

1244 Electronic information and its dissemination will complicate any retrieval obligation. How
1245 do you actually get the information "back"? Sequestration, a prohibition on use, seems sufficient.
1246 Lawyers act honorably in these matters, and will observe a sequestration. Notice will stop further
1247 disclosure or use.

1248 It was suggested that the rule should require the receiving party, after notice of the privilege
1249 claim, to "take reasonable steps to notify recipients of the information not to use or disseminate the
1250 information."

1251 A motion was made to adopt the agenda-book proposal, at p. 14 lines 29-31:

1252 If the receiving party disclosed the information before being notified, it must take
1253 reasonable steps to retrieve it.

1254 The motion was adopted with 8 votes in favor; 4 votes were cast for the alternative that would
1255 require reasonable steps to notify recipients. It was agreed that the Note should not attempt to
1256 describe what may be entailed by "reasonable steps to retrieve."

1257 It was asked whether a party can use a document that shows on its face that there is no
1258 alternative means of obtaining the same information. An answer was offered that the receiving party
1259 can present the information to the court under seal for a ruling. But that led to the question whether
1260 a seal should be required, pointing out that it may be possible to make a motion without revealing
1261 the information. The rule only says that the receiving party "may" "promptly present the information
1262 to the court under seal." If a motion can be made without presenting the information, the seal is not
1263 required. The Note could say that if the motion can be made without presenting the information, a
1264 seal is not required. It was agreed that the rule text should remain as proposed. The question
1265 whether the Note should discuss the possibility of moving without presenting the information was
1266 left open.

1267 The question of addressing trial preparation materials to Rule 26(b)(5)(B) came next. It was
1268 agreed that "trial-preparation materials" is the better rule language because that is the language of
1269 the captions for Rule 26(b)(3) and (4); "work-product" is not rule language. Although the published
1270 proposal was framed in the belief that there is less need to establish a recapture procedure for trial-
1271 preparation materials, parallel treatment is justified because work-product and privilege issues are

1272 frequently joined. It was agreed by unanimous vote that 26(b)(5)(B) will be expanded:

1273 If information is produced in discovery that is subject to a claim of privilege or
1274 protection as trial-preparation material, a party [claiming privilege or
1275 protection] {making the claim} may notify any party who received the information
1276 of the basis for the claim * * *.

1277 Rule 26(f)(4) will be considered for parallel revisions, perhaps to read:

1278 (4) whether, on agreement of the parties, the court should enter an order protecting
1279 the right to assert privilege or protection of trial-preparation material after
1280 production;

1281 (This language was further revised to conform to the revisions of Rule 26(f)(4) described above.)

1282 During the comment period, suggestions were made that Rule 26(b)(5)(B) should require a
1283 receiving party to certify sequestration or destruction if it does not return the material, or to certify
1284 that all copies have been returned. It was agreed by consensus that certification should not be
1285 required.

1286 A frequent suggestion during the public comment period was that the notice of privilege or
1287 work-product protection should be in writing. The published Committee Note says that writing is
1288 useful, but is not required. Establishing a writing requirement in the Rule text might be awkward
1289 in some circumstances; the familiar example is a privilege issue that is framed for the first time
1290 during a deposition. Lawyers will routinely provide a written memorial whenever that is possible.
1291 And it does not seem suitable to say in the rule text that written notice is required and then offer
1292 contradicting advice in the Committee Note that in some circumstances unwritten notice suffices.
1293 A motion to stick with the published "notify," without adding "in writing," passed 9 yes, 3 no.

1294

Rule 26(b)(2)(B)

1295 Judge Rosenthal introduced rule 26(b)(2)(B) by noting that for several weeks before the
1296 meeting there had been much discussion within the Committee and preparation of interim drafts.
1297 Further changes have been proposed since the agenda book was circulated. A new draft was
1298 distributed. In its initial form, it read:

1299 A party need not provide discovery of electronically stored information from sources
1300 that the party identifies as not reasonably accessible without undue burden or cost.
1301 On motion to compel discovery or for a protective order, the responding party must
1302 show that the information is not reasonably accessible without undue burden or cost.
1303 If that showing is made, the requesting party may obtain an order for discovery of the
1304 information by showing that it is consistent with Rule 26(b)(2)(C). The court may
1305 specify terms and conditions for such discovery.

1306 As compared to the published version, this draft amplifies "not reasonably accessible" by
1307 pointing to cost and burden as the measures of reasonable access. Many participants in the public
1308 comment period expressed this understanding of reasonable accessibility. This draft also addresses
1309 another matter that provoked extensive comment. The "good cause" concept in the published
1310 version was viewed by many as an indirect invocation of the proportionality factors set out in current
1311 Rule 26(b)(2). This draft dispenses entirely with "good cause," aiming directly at these
1312 proportionality factors through the cross-reference to what would be redesignated as subparagraph
1313 (C).

1314 Changes also have been made in the Committee Note. These changes reflect not only the
1315 revised rule text but also matters not touched in the rule text. Several comments express concern
1316 that a party's unilateral designation of material as not reasonably accessible will be thought to mean
1317 that it is not "discoverable" within the meaning of the safe-harbor provisions of proposed Rule 37(f),
1318 so that it need not be preserved. The revised Note observes that a Rule 26(b)(2)(B) designation does
1319 not of itself exempt the information from preservation. Preservation requirements are not addressed
1320 by the proposed e-discovery amendments, in this way or any other.

1321 A closer description of this draft, and an alternative, followed.

1322 The agenda book draft, as further revised, begins by referring to information "from sources"
1323 that are not reasonably accessible. This change responds to the objection that information cannot
1324 be identified by a party who does not know what the information is, nor even whether it actually
1325 exists. The point is to identify the sources that have not been searched. The draft also substitutes
1326 for a motion by the requesting party a motion either to compel discovery or for a protective order,
1327 recognizing that the party asked to produce information may wish to take the lead in clarifying its
1328 search responsibilities. The agenda book draft also included as a possible option an explicit
1329 suggestion that the court might order a requesting party to pay part or all of the reasonable costs of
1330 accessing the information as a condition of discovery. This option was deleted from the more recent
1331 draft; several Committee members had concurred in the recommendation that it is better to leave
1332 cost-sharing to the Committee Note as an illustration of the terms that may be imposed on ordering
1333 discovery.

1334 The agenda book also includes an alternative draft that departs more dramatically from the
1335 published version. The departures all are matters of expression; the underlying concepts are the
1336 same as those expressed in the published draft as refined by work in response to public comments.
1337 The goal was to achieve a draft that could be recommended for adoption without republication, while
1338 speaking still more directly to the nature of the underlying practices. In clean form, this draft read:

1339 In responding to a discovery request, a party need not search sources of electronically
1340 stored information that may be responsive if the party identifies the sources and
1341 describes the substantial barriers that impede access to the information. On motion
1342 to compel discovery or for a protective order, the responding party must show the
1343 nature and extent of the barriers that impede access. If substantial barriers are shown,
1344 the court may order discovery of the information if the requesting party shows that
1345 discovery is consistent with Rule 26(b)(2)(C) and may specify terms and conditions
1346 for such discovery.

1347 As compared to the drafts that hew closer to the published proposal, this draft makes several
1348 substitutions. (1) Rather than say that a party need not provide discovery, it looks directly to the
1349 underlying problem: the party need not search some sources. (2) The draft refers to sources of
1350 information "that may be responsive." No one would benefit from a requirement that the responding
1351 party name all of the sources of information that are difficult to search; the only matter of interest
1352 is sources that may include information responsive to the request. (3) Rather than refer to reasonable
1353 accessibility, the draft refers to "substantial barriers." This choice is made in order to separate out
1354 two separate inquiries. The first seeks to determine just how difficult it is to find out what these
1355 sources actually contain. The second asks whether the discovery needs of the action justify a search
1356 of these sources in light of the demonstrated difficulty. A reference to "reasonable" accessibility
1357 seems to anticipate the second question, to set up a two-stage process in which the first stage closely
1358 resembles the second stage, looking to cost and burden in relation to the reasonable discovery needs
1359 of the case. The reference to "barriers" was chosen as a neutral description of elements that may
1360 result from software limitations or hardware limitations; other words, such as "impediments" or
1361 "difficulties" might be used if "barriers" seems too arcane. (4) In the same stage, the burden on the
1362 requesting party is to show the nature and extent of the barriers. If "substantial barriers" are shown,
1363 the requesting party moves to the second stage by showing a need for the information that justifies
1364 at least some search attempt.

1365 This alternative draft was not discussed further, apart from a few incidental reflections.

1366 It was noted that the (b)(2)(B) proposal generated substantial concern during the public
1367 comment period.

1368 A motion was made to adopt the draft presented at the meeting. This "two-tier" approach to
1369 discovery of electronically stored information is important. To be sure, the "undue burden or cost"
1370 criteria are expressed in present Rule 26(b)(2), and several comments suggested that the present rule
1371 provides protection enough. But a better-developed rule is important to raise consciousness about
1372 electronic discovery problems and limits. This proposal may be the most important part of the
1373 package, focusing attention on the most important characteristics that make discovery of
1374 electronically stored information different from discovery of traditional documents. As revised, the
1375 draft puts a greater burden on the producing party than resulted from the published draft. It now
1376 makes specific the need to assert undue burden or cost as the foundation for asserting that the
1377 information is not reasonably accessible. This is better than the uncertainties conjured up by such
1378 alternative phrasing as "substantial barriers." The redrafting makes the rule much better.

1379 It was asked how the motion for a protective order would work. The purpose is to enable the
1380 party responding to a discovery request to seek a determination of the extent of its search obligations
1381 if it cannot work the matter out with the requesting party. It was observed that the draft's reference
1382 to a "responding" party was potentially obscure. But to the extent this party invokes the protection
1383 of (b)(2)(B) it is not yet a "producing" party. It was concluded that the draft should be revised: "On
1384 motion to compel discovery or for a protective order, the responding party from whom discovery is

1385 sought must show * * *."

1386 A judge observed that the parties will know more about the accessibility issues than the judge
1387 does. This observation was accepted with the further observation that it is the parties' responsibility
1388 to educate the judge when they are not able to resolve among themselves the extent of the proper
1389 search obligation. In turn, it was asked whether the Committee Note should recognize the judge's
1390 authority to appoint a special master to govern the discovery process. The response was that the
1391 Note should not be made into a "Manual for Electronic Discovery." A perpetual dilemma in drafting
1392 Committee Notes arises from the conflict between the desire to capture much of the useful
1393 information gathered in the public comment process, along with practice pointers, and the conflicting
1394 need to preserve the flexibility of the rule text to accommodate to the circumstances revealed by
1395 actual practice over the years. And Committee Notes should not become too long.

1396 It was asked whether "reasonably" should remain in the rule text now that "without undue
1397 burden or cost" would be added. Undue burden or cost seem to have become the definition of
1398 "reasonably," dispensing with the need to say "reasonably." It was concluded that it would be better
1399 to draw a causal nexus. The expression will be "not reasonably accessible ~~without~~ because of undue
1400 burden or cost" in both places where these words appear.

1401 The need for any version of published Rule 26(b)(2)(B) was challenged. It was said that a
1402 party who is not going to search a source of potentially responsive information will come forward
1403 with this decision now. "The existing process is extremely flexible." The comments tell us this is
1404 how people do it now. There is no indication that judges are insensitive to these problem. No one
1405 has testified to any benefit that would be realized by amending the rules. And strong observations
1406 were made that a party should not be required to reveal specific sources of electronically stored
1407 information. Beyond that, there was much disagreement as to what is meant by "not reasonably
1408 accessible." The ABA survey showed a wide divergence of understandings, and often showed
1409 widespread ignorance as well. Many respondents, for example, thought that information in personal
1410 digital assistants is not reasonably accessible; commonly it is. The magistrate judges oppose the
1411 proposal. The proposed procedure truncates the burden of proof. And the alternative draft "has only
1412 a passing resemblance to what was published."

1413 Sympathy for this view was expressed, but in terms that supported the revised proposal. The
1414 revisions clarify what "not reasonably accessible" means. The rule codifies best practices, and sets
1415 these practices out in one easily accessible place. The two-step process makes sense. And the
1416 Committee Note provides much useful guidance. Codification of good practice in a rule is a proper
1417 object of rules reform.

1418 This support was extended by another member, who observed that "reasonableness does not
1419 give specific answers." It restates the true issue and identifies the obvious ways to present the issues
1420 to the court.

1421 It was noted that the opposition of the magistrate judges association was based on the
1422 responses of the magistrate judges who were able to command the time and interest to respond to
1423 an on-line survey. There also appears to be some misunderstanding of what is intended. We should
1424 not attribute undue weight to this thoughtful and useful attempt to get the views of those who are on
1425 the front line of many discovery disputes.

1426 It was suggested that the reference to an order for discovery despite a showing that
1427 information is difficult to access should be revised: "the requesting party may obtain an order for
1428 discovery of the information not reasonably accessible ~~by showing that the discovery is consistent~~
1429 ~~with Rule 26(b)(2)(C).~~" This was resisted as too much abbreviated. Some further statement should

1430 be made of the showing required to justify discovery.

1431 It also was suggested that it would be better to refer to "such information" rather than "the
1432 information." But it was observed that it would be better to recognize that the sources not searched may
1433 hold responsive information but also may not. "the court may order discovery from such sources of
1434 such information * * *."

1435 Then it was asked how a requesting party is expected to show that discovery is consistent
1436 with Rule 26(b)(2)(C). These provisions are drafted as criteria for limiting discovery, not as criteria
1437 for granting discovery. The idea is that the requesting party must show reason to overcome the
1438 burdens and costs of the search, considering the burdens and costs but also considering the
1439 information that is available by other discovery. It may appear that without the costly search there
1440 is little or no information available on important subjects. It also may appear that the difficult
1441 sources are likely to have responsive information. Or the converse may appear — other discovery
1442 may have produced great volumes of information, there is no particular reason to believe that any
1443 useful information is missing, and the probable yield from searching the difficult sources may seem
1444 trivial. But it remains to decide whether this process can be expressed by a simple cross-reference
1445 to subparagraph (C). Even saying that the court may order discovery "after [upon] considering the
1446 factors in Rule 26(b)(2)(C)" may not convey the idea accurately.

1447 This dilemma was addressed by reviving the reference to "good cause" in the published
1448 proposal: "the court may order discovery from such sources for good cause, considering the
1449 limitations of Rule 26(b)(2)(C). The requirement that the requesting party show good cause provides
1450 a direct link to the subparagraph (C) limits.

1451 The two-step process came under renewed question. This is envisioned as one motion. How
1452 do we separate the showing of the obstacles that impede access, that make search difficult, from the
1453 burden of showing good cause?

1454 The process was explained as one of shifting burdens, but still questioned on the ground that
1455 the proposed language "does not give much guidance; we're boxing in the party who wants
1456 discovery." Why not just end it with "good cause," forgoing any reference to Rule 26(b)(2)(C)? This
1457 reference is new after publication, and is not needed.

1458 The need for the cross-reference was repeated. The published proposal drew many comments
1459 that "good cause" is inherently obscure, and inevitably will be explained — after some initial
1460 confusion — as invoking Rule 26(b)(2)(C) principles.

1461 Further drafting alternatives were explored. The rule might be drafted: "Subject to Rule
1462 26(b)(2)(C), if that showing is made, the requesting party * * *." This formula would better capture
1463 the basic principle of modern discovery that a requesting party gets the information unless a
1464 powerful-counter showing is made under (b)(2)(C). Or we could say "as limited by Rule
1465 26(b)(2)(C)." Or "good cause" could be removed again — the only proposed function is to serve as
1466 a bridge to consideration of the limiting principles. "good cause consistent with Rule 26(b)(2)(C)"
1467 would be an alternative. Or "by showing that production should not be limited by application of
1468 Rule 26(b)(2)(C)." The difficulty arises because we are directing the requesting party to show an
1469 absence of limitations, to show that discovery is not blocked by (C) factors (i), (ii), or (iii). "good
1470 cause" serves as a bridge, as in the agenda book version, p. 9 lines 20-21: "may order discovery for
1471 good cause when consistent with Rule 26(b)(2)(C)."

1472 All of this discussion prompted a further summary of the apparent difficulty. The reference
1473 to "reasonably accessible without undue burden or cost" in defining the first stage seems to invoke

1474 a balancing process that is difficult to distinguish from the second stage that looks to good cause
1475 consistent with the limiting factors embodied in Rule 26(b)(2)(C). What is "reasonable" depends
1476 on need for the information in light of the search costs and predictions of importance. What is an
1477 "undue" burden or an "undue" cost depends on the same balancing of cost and predicted benefit, no
1478 matter how uncertain the prediction may be. After a court has found that these elements bar
1479 discovery without a further showing, how is it carry forward to find that the same elements do not
1480 after all bar discovery? Why has it not already rejected a "good cause" conclusion?

1481 This question led to a further question — why should we impose this burden on a party
1482 requesting discovery of electronically stored information, but not on a party who requests discovery
1483 of information stored by other means, notably paper? It was responded that this burden should be
1484 on the requesting party precisely because electronically stored information frequently presents access
1485 problems of a kind rarely encountered with paper records. In a wide range of circumstances,
1486 electronically stored information may pass from easily retrieved form to forms that may or may not
1487 be accessible at all, and that can be searched only with great cost. The circumstances in which this
1488 happens continue to change as technology develops and as system designs evolve. It is difficult for
1489 a requesting party to know, at the time of its request, what information may lie, if anywhere, in
1490 sources that are difficult to search. The two-stage process is designed to convey this information to
1491 the requesting party by the initial identification of the sources and an identification of the cost and
1492 burden factors that impede access. The requesting party then can consider the possible need for the
1493 information in relation to the fruits of other discovery and its own investigations, and focus on the
1494 apparent need for further discovery. The parties can then discuss the problem and often will work
1495 out a sensible response. If the parties cannot work it out, the requesting party should undertake to
1496 show justification for the discovery.

1497 This two-stage process can be captured in words that do not seem to saddle the requesting
1498 party with the burden of proving a negative. By a vote of 12 yes to 1 no, the Committee approved
1499 this sentence:

1500 If that showing is made, the court nonetheless may order discovery from such sources
1501 if the requesting party shows good cause, considering the limitations of Rule
1502 26(b)(2)(C).

1503 It was suggested that here may be room for further small editorial revisions; if any are suggested,
1504 they will be included in materials circulated for Committee review before a recommendation for
1505 adoption is made to the Standing Committee. One proposal was that the second and third sentences
1506 could be integrated into one longer sentence. The full rule would read: "A party need not provide
1507 discovery of electronically stored information from sources that the party identifies as not reasonably
1508 accessible without undue burden or cost. If, on motion to compel discovery or for a protective order,
1509 the party from whom discovery is sought shows that the information is not reasonably accessible
1510 without undue burden or cost, the court may nonetheless order discovery from such sources for good
1511 cause shown by the party seeking discovery, considering the limitations of Rule 26(b)(2)(C). The
1512 court may specify conditions."

1513 Committee Note language will be devised to reflect this discussion. Committee members
1514 were invited to make suggestions immediately after the meeting. The Note, for example, must be
1515 revised to reincorporate references to a "good cause" showing. This will tie to the burden described
1516 in the revised rule text, which directs that the requesting party must show good cause.

1517 Earlier discussion was revived by asking whether all of this two-stage procedure would be
1518 accomplished by a single motion. The requesting party will have the information provided by the

1519 responding party when it designates information as not reasonably accessible. But it may not have
1520 the information needed to show good cause at the time of the initial hearing, and in any event may
1521 need discovery to be able to test the actual search burdens and costs, the probability of finding
1522 important information by the search, and for that matter the extent of the information that may be
1523 available by exhausting other discovery opportunities.

1524 The same theme was expanded by observing that most courts have little time to devote to
1525 discovery disputes. If the parties cannot work the matter out without court supervision, the hearing
1526 is likely to consist of a 10-minute telephone conference. That is not a promising vehicle for working
1527 through the complex issues presented by these electronic discovery difficulties.

1528 These comments were countered by noting that they seemed to invite a reopening of the
1529 entire discussion. The published proposal required a showing of good cause to get discovery of
1530 information not reasonably accessible, and it was understood that the burden of showing good cause
1531 lies on the party requesting discovery. Adding words to make the burden explicit does not change
1532 the two-stage process that has been intended from the beginning.

1533 The Committee again approved, again with one dissent, its approval of the formulation
1534 supporting discovery "if the requesting party shows good cause."

1535 It was observed that the current draft Committee Note refers to seven "factors" that will guide
1536 the determination of good cause and consideration of the Rule 26(b)(2)(C) factors. These elements,
1537 however, are not "factors" described in the rule. They are elements that inform application of the
1538 (b)(2)(C) criteria, and are better described by a word other than "factors."

1539 A separate question was raised as to the Committee Note discussion of the relationship
1540 between a Rule 26(b)(2)(B) designation of information not reasonably accessible and the duty to
1541 preserve that information. The agenda book, p. 15 note 7, includes as a possible alternative Note
1542 language these sentences:

1543 If the responding party has placed a litigation hold on reasonably accessible
1544 electronically stored information that may be discoverable in the action, information
1545 stored on inaccessible sources generally would not need to be preserved. A
1546 responding party would need to include in the litigation hold information that is not
1547 reasonably accessible if that party had a reasonable basis to believe that it may be
1548 discoverable in the action and was not available from accessible sources.

1549 Interest in this formulation was expressed, with the further observation that "everyone wants to know
1550 about the relationship between (b)(2)(B) and the duty to preserve." But it also was observed that it
1551 goes a long way to say that "information stored on inaccessible sources generally would not need to
1552 be preserved." That may be too specific to include as part of a process that has deliberately refrained
1553 from attempting to prescribe preservation obligations.

1554 It was agreed that the duty to preserve aspects of the Rule 26(b)(2)(B) Committee Note
1555 should be considered in conjunction with the Rule 37(f) text and Committee Note.

1556 A revised Committee Note will be circulated for Committee consideration soon after the
1557 meeting concludes.

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Rule 37(f)

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The agenda book included Rule 37(f) as published for comment, marking with brackets alternative words that might be considered:

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

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(1) the party took reasonable steps to preserve the information after it knew or should have known the information was [would be] {likely would be} discoverable in the action; and

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

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Judge Rosenthal introduced discussion of Rule 37(f) by noting that it had drawn much attention during the comment period. Criticism was offered from many perspectives. The proposed variations also have drawn criticism. The rule will apply to all civil actions. But some comments suggest that it does not go far enough — indeed that it does not accomplish anything. On this view, no court would ever impose sanctions for the conduct that it purports to protect. That leaves the question whether the correction is to expand the rule to give greater protection, or instead to abandon the project.

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The question is whether we can, by rule, offer meaningful guidance on the appropriate response to the discovery problems that can arise from the dynamic character of electronic information systems. Routine operation can banish information beyond recall or make retrieval much more difficult. One recurrent issue goes to the state-of-mind element. Many comments support the view that sanctions should be available only for intentional or reckless failure to preserve information against routine destruction. Another recurrent issue focuses on the relationship between Rule 26(b)(2)(B) and Rule 37(f): if a party identifies a source of information as not reasonably accessible, is it excused from any duty to protect against destruction in the routine operation of its system? Yet another question is framed by the "reasonable steps" standard of culpability — if the standard authorizes sanctions for merely negligent conduct, should the Committee Note comment on the need to calibrate the severity of sanctions to the relative degree of culpability?

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The rule text was introduced by observing that it remains much the same as the published proposal. The Note in the agenda book is expanded to address the relationship between Rule 26(b)(2)(B) and Rule 37(f). Options inserted in the rule text begin with the question whether the preservation order provision should recognize sanctions only for violating an order to preserve "specific" information. This option responds to complaints about entry of catch-all preservation orders that require preservation of "all" electronically stored information. It may be impossible to comply with such an order — if nothing else, the simple acts of turning a system off and on again may alter information in the system. In the Rule 26(f)(3) discussion, the Committee approved Committee Note language advising that a preservation order should be narrowly tailored. The same approach might be reflected here in rule text. On the other hand, this limitation implies criticism of the overbroad order, and more than criticism — it seems to say that the order cannot be enforced.

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It was noted that the Standing Committee added "under these Rules" to the rule text before publication. These words have been criticized by comments suggesting that Rule 37(f) would afford no meaningful protection if sanctions still can be imposed by drawing from authority outside the

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1602 rules, and particularly if a court can simply assert "inherent authority" to do what the rule seems to
1603 proscribe.

1604 Another drafting question is raised by the reference to information the party knew "was"
1605 discoverable. Proposed alternatives include "would be" discoverable or "likely would be"
1606 discoverable. The choice may relate in part to the interrelationship with the Rule 26(b)(2)(B)
1607 provisions on information stored in sources not reasonably accessible. Referring to information that
1608 "would be" discoverable may better reflect the obligation to preserve difficult-to-access information
1609 that will become discoverable only if the court finds good cause to order discovery; it may be
1610 difficult to say that such information "was" discoverable at the time the party identified it. On the
1611 other hand, "would be" may create a risk of hindsight judgment. "likely would be" may seem a more
1612 direct description of the litigation-hold calculation we want a party to make, but it may offer too
1613 much protection. (The Committee Note, at page 11 of the agenda book and note 9, also addresses
1614 the relationship between 26(b)(2)(B) designations and the duty to preserve. Preservation obligations
1615 also are addressed on the Committee Note at agenda book page 10, referring to the common-law duty
1616 as well as other preservation obligations.)

1617 Footnote 4 on page 6 of the agenda book addresses the standard of culpability, suggesting
1618 intent or recklessness, and even illustrating an approach that would allow sanctions for violating a
1619 preservation order or an order compelling discovery only if the party acted willfully or recklessly.

1620 Finally, the Committee Note at agenda book pages 15-16 adds language observing that the
1621 severity of sanctions should correspond to the culpability of the responding party's conduct. The
1622 most severe sanctions ordinarily should be reserved for intentional or reckless conduct.

1623 Discussion began by addressing the culpability standard. It was urged that "negligence" is
1624 the standard in the Second Circuit. it is right. "Simple sanctions" should be available to redress the
1625 negligent loss of discoverable information. At least one court in every circuit has recognized the
1626 appropriateness of sanctions in such circumstances.

1627 The offsetting view draw support from a comment submitted by Professor Arthur R. Miller.
1628 The challenge in drafting a safe-harbor provision is that we are dealing with very complex
1629 information systems that delete material even before a party knows whether it is there or whether it
1630 is responsive to a discovery request. The reaction today is to preserve more information than need
1631 be preserved, often at untoward cost. The lawyers are afraid of sanctions. Sanctions may have an
1632 impact on the outcome of the litigation. And they have an impact on a lawyer's career and
1633 professional standing that is not much limited by the seeming severity of the sanction in its own
1634 terms. The result of cautious over-preservation "geometrically increases the costs of discovery." A
1635 reasonableness standard offers little comfort because lawyers fear hindsight determinations of what
1636 is reasonable. A safe harbor that allows sanctions on a negligence standard offers little protection.
1637 And all of this is further complicated by the problem of inaccessible information.

1638 It was responded that courts in every circuit recognize that a party who negligently fails to
1639 protect information against destruction can properly be made to bear the costs of recreating the
1640 information or of additional discovery aimed at retrieving the information (or substitute information)
1641 from other sources.

1642 A further observation was that these problems resemble qualified immunity. It is not only
1643 lawyers but also clients who should be protected against concerns about routine computer operations
1644 that destroy discoverable information. A safe harbor rule should protect against "gotcha" discovery
1645 tactics, against the risk that a requesting party will benefit more from the loss of information than
1646 from the discovery of information. The rule should adopt an intent or recklessness standard, with

1647 the expectation that the question can be reviewed in another five years after experience shows
1648 whether a different standard should be adopted.

1649 The intent or recklessness standard was further supported by stating that it is impossible to
1650 prevent all overwriting. Information is destroyed by the simple act of turning a computer on or off.
1651 The published rule "does nothing; a court will not impose sanctions if you were not negligent." A
1652 party who takes reasonable steps will not be sanctioned if the computer system destroys information.
1653 The comments, moreover, show the need to protect against sanctions "that affect careers or cases."
1654 The provision excluding safe-harbor protection for violation of a court order, moreover, seems to
1655 authorize sanctions even though a party took all reasonable steps to comply.

1656 It was responded that a court should be able to impose sanctions when an order is violated.
1657 But rejoined that a party who takes reasonable steps to comply with an order should be protected.
1658 And sur-rejoined that a court should be able to protect an innocent requesting party against the
1659 prejudice that flows from loss of information caused by failure to comply with a court order.

1660 The dilemma was framed by observing that an "intentional" standard makes life "way too
1661 easy" for a party who fails to preserve information. But the published draft offers no meaningful
1662 protection. "It may be better to do nothing." The negligence standard adds nothing because courts
1663 do not sanction non-negligent conduct. An "intent" standard asks the Supreme Court to adopt a rule
1664 overriding what many courts have found appropriate. Again, the suggestion was that it may be better
1665 to abandon the Rule 37(f) effort.

1666 The attempt to craft a safe harbor was then defended. Beginning with the observation that
1667 it will make litigators nervous, it was suggested that "it aims at 'gotcha' with respect to electronically
1668 stored information." It is well calibrated to balance the competing concerns.

1669 Drawing back a bit, the genesis of the published proposal was explained. A party who
1670 violates an order in the action was excluded from the safe harbor because the Committee did not
1671 want to nullify the court's ability to enforce its order. At the same time, there was concern that this
1672 provision will encourage many litigants to seek protection orders as a matter of routine, and often
1673 to propose overbroad protective orders. The standard of culpability when no order is violated
1674 presents a related but separate issue: should sanctions be available whenever the conduct is not
1675 "reasonable"? Or, since the focus is only on routine operations, should a higher standard be adopted?
1676 These issues should be separated for discussion.

1677 The negligence standard was again defended on the ground that a party injured by another
1678 party's negligent failure to take reasonable steps to preserve information should be protected by
1679 sanctions calculated to reduce the prejudice. And it was again attacked on the ground that there is
1680 a risk that a party who does its best still may be found negligent after the event.

1681 A broader question was introduced: should the rule be revised to protect against sanctions
1682 imposed for failure to take reasonable steps to preserve information that was lost for reasons other
1683 than routine operation of an electronic storage system? The response was that a rule this broad
1684 would directly address the duty to preserve information. As much as many litigants would welcome
1685 an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good
1686 rule would be so great that there is no occasion even to consider the question whether a preservation
1687 rule would be an authorized or wise exercise of Enabling Act authority.

1688 The dilemma was then reiterated. A safe harbor should give meaningful, even strong,
1689 protection. But it is difficult to adopt a rule that excuses negligent failure to protect information.
1690 Perhaps a solution can be found by softening the rule to say that "ordinarily" sanctions should be

1691 imposed only for intentional or reckless failure to preserve, etc. This tack might be coupled with a
1692 statement, in rule text or Committee Note, that the central concern is that severe sanctions not be
1693 imposed for merely negligent conduct.

1694 The next suggestion was that violation of an order should impose "absolute" liability, leaving
1695 an intent or recklessness standard for the rest. But it was noted again that this approach will invite
1696 routine applications for protective orders.

1697 The published proposal was defended as "a check list — a warning on what to do when a
1698 case is filed." Preservation issues can be discussed when the parties sit down to talk, but that may
1699 not happen until 30 or 40 days or more after the case is filed. Counsel for a defendant is obliged to
1700 consider a litigation hold from the very beginning. The published rule heightens the obligations.
1701 But it is an interim thing — counsel requesting discovery will seek a preservation order. And the
1702 preservation order may actually help counsel for the producing party, because it makes it easier to
1703 prevail on the client to do what should be done. On balance, the proposal is useful because it forces
1704 the parties to deal up front with these issues.

1705 The published rule also was challenged as worse than no order. Many comments said that
1706 the first thing to do under this rule will be to get a preservation order. And the orders will be broad.
1707 The result will be that the producing party is worse off. Evidentiary sanctions for violating an order
1708 can be severe. And every sanction is severe in other ways. In the Department of Justice, for
1709 example, every sanction order automatically leads to an investigation; records are made and
1710 preserved. The higher intent standard would help give some value to the rule. Without the higher
1711 standard, we do not want a rule that serves only as a stimulus to seek protective orders. And a
1712 negligence standard will exert a gravitational pull — it will be the only preservation standard
1713 expressed anywhere in the rules, and will be viewed as a model for all circumstances.

1714 The frequent interrelationships between procedure and professional responsibility were
1715 brought into the discussion by a reminder that intentional destruction of evidence is subject to
1716 professional discipline. We do not need a rule that protects only against that.

1717 An alternative was suggested. This one would pick up the introduction that a court
1718 "ordinarily should not impose sanctions," but would omit any reference to routine operation of a
1719 party's electronic information system — "Ordinarily, a court may not impose sanctions under these
1720 rules on a party for failing to provide electronically stored information unless the party intentionally
1721 or recklessly failed to preserve the information." It was objected that this approach would adopt an
1722 express definition of preservation obligations.

1723 It was asked whether discussion had proceeded to a point making it appropriate to vote on
1724 abandonment of any Rule 37(f) proposal. The suggestion was resisted. Improvement seems
1725 possible. When and if discussion is exhausted at a seeming impasse, it would be better to table Rule
1726 37(f) for further work later. It would be a great disappointment to the bar to abandon the project
1727 completely. These problems drive up litigation costs exponentially. Tabling would mean that Rule
1728 37(f) should be "decoupled" from the rest of the e-discovery package. The other proposals can stand
1729 on their own, and it is important to carry them through the process to adoption without the delay
1730 occasioned by the uncertain prospects of eventually developing a successful Rule 37(f) proposal.
1731 A serious attempt to draft a meaningful safe harbor is important. Indeed, it is possible that an
1732 interruption of present discussion may be followed by fruitful further discussion after other agenda
1733 items are dispatched. There are great advantages in continuing the discussion now, while Committee
1734 members are closely focused on the problems. If there is to be no express rule, these problems will
1735 be resolved on a day-to-day basis in the district courts. Different approaches will emerge. Appellate

1736 review is seldom possible. The practical consequence will be that all litigants will feel obliged to
1737 tailor their preservation behavior to the most demanding standard identified by any reported case or
1738 known practice, for fear that that standard may be applied to them. We should continue to make the
1739 effort.

1740 Discussion was suspended for consideration of remaining agenda items, and then resumed.
1741 The discussion focused on the concepts that might be expressed in a revised Rule 37(f), recognizing
1742 that drafting implementation of the concepts likely must be left for post-meeting work and, in a few
1743 weeks, a meeting by conference call.

1744 Attention was again directed to the alternative draft set out in the agenda book at p. 6,
1745 footnote 4. It was suggested that there was an emerging consensus that the published proposal was
1746 too insipid, and this alternative might prove the foundation for crafting a more robust form of
1747 protection.

1748 One suggestion was that "routine operation" is a mysterious concept. The rule should protect
1749 against an "unintentional" loss so long as there was a "good-faith effort" to avoid loss. The rule also
1750 should provide for sanctions against a person who wilfully violated an order. This was developed
1751 into a proposal:

1752 "Ordinarily, a court may not impose sanctions under these rules on a party for failing
1753 to provide electronically stored information unintentionally deleted or lost solely as
1754 a result of the routine, good-faith operation of the party's electronic information
1755 system."

1756 "unintentionally" was questioned by observing that if the loss resulted from routine, good-
1757 faith operation, it could not be intentional.

1758 A parallel observation was that in framing the rule, the Committee has not supposed that
1759 there is any need to draft in a way that covers such matters as a fire that destroys the system.

1760 It was asked whether "good faith" captures the need to establish a reasonable litigation hold.
1761 A proponent of the good-faith proposal responded that there is an obligation to preserve what you
1762 reasonably know may be needed for the litigation. And it was observed that that is what the
1763 published proposal says: no sanctions are imposed if a party took reasonable steps to preserve the
1764 information. The proponent suggested that such is the problem — the published proposal goes too
1765 far.

1766 The good-faith element was explored from a different angle: is it strict enough that a
1767 producing party will not rely on it in allowing routine data destruction to go on unabated?

1768 A different question suggested that the good-faith proposal seems a modest suggestion that
1769 there is a presumption against sanctions, but we need to be clear on when it is that the presumption
1770 arises.

1771 The proposal was challenged on the ground that if it is designed to give guidance, it should
1772 be softened to say that ordinarily a court "should not" impose sanctions. And "solely" should be
1773 deleted as well. Substitution of "should not" for "may not" was resisted; it leaves too much room
1774 for sanctions.

1775 "Ordinarily" was questioned as not a good word, either in terms of general rule drafting or
1776 in terms of a rule that sets up a presumption. Drawing from Rule 11(c)(1)(A), it was suggested that
1777 it may be better to say "Absent exceptional circumstances."

1778 A mix-and-match approach was suggested: "Absent exceptional circumstances" is robust;
1779 "should not" is weak. Together, a rule saying that "absent exceptional circumstances, a court should
1780 not impose sanctions" may strike the proper balance.

1781 "Should not," however, was again criticized. It strongly implies that the court can order
1782 sanctions, eroding the premise that there must be exceptional circumstances. The result is not a safe
1783 harbor. Instead, everything turns on the perspective of the particular judge. And that will leave us
1784 in the predicament that lawyers and clients must preserve too much, for fear of coming under the
1785 most exacting scrutiny. The premise, it must be remembered, is that the party has acted in good
1786 faith.

1787 It was agreed that "may not" gives more production. "Should not" "is not a safe harbor." On
1788 the other hand, "should not" has the virtue of not fencing off remedial authority.

1789 The concept of "sanctions" also came under scrutiny. Is an order to restore backup takes a
1790 "sanction," or something else? Perhaps the rule should distinguish between "remedial" and
1791 "punitive" sanctions. On this approach, good faith would shield against the most severe sanctions,
1792 but would leave the court free to make orders that seem to adjust for the loss of information. This
1793 distinction, however, was questioned on the ground that almost all of the orders identified as
1794 "sanctions" have a remedial aspect. An adverse-inference instruction, one of the most feared
1795 consequences of failing to preserve information, is at least in part designed to provide a remedial
1796 substitute for the information that was lost. A different approach was taken by the suggestion that
1797 such orders as cost sharing for added discovery designed to make up for the loss of information fall
1798 within the "exceptional circumstances" proviso.

1799 Again, it was suggested that sanctions may be appropriate for negligent loss of information.
1800 And that rather than describe the appropriate order as a "sanction," it could be characterized as a
1801 "discovery order."

1802 The problem of court orders returned. If a court orders a party to stop routine operation of
1803 its system, the party attempts to comply, but there is a failure of internal communication and routine
1804 operation continues to lose discoverable information, can the court order sanctions? Or is this good
1805 faith? Or instead an exceptional circumstance that permits a sanction?

1806 Returning to good faith, it was asked again whether reasonable steps to preserve information
1807 are part of good faith? Should the Committee Note say something about this? A proponent of the
1808 good-faith standard said that good faith lies at a point intermediate between negligence and
1809 recklessness. It assumes the party has a reasonable litigation hold, and did not deliberately use the
1810 system's routine destruction functions. "If you know it will disappear and do nothing, that is not
1811 good faith." Another proponent suggested that there is routine good-faith operation if the system was
1812 not set up for the purpose of destroying litigation information. The first proponent agreed that it is
1813 not good faith if you know the system will destroy information, but suggested that it is good faith
1814 if you attempt to preserve the information. "The line is conscious awareness the system will destroy
1815 information."

1816 A noncontroversial example was suggested. In an individual employment case, it is not good
1817 faith if you give the plaintiff's supervisor a notice to preserve e-mail messages but the supervisor
1818 disregards the notice and no one follows up on the notice. But if you took steps to preserve, and
1819 some of the information was lost notwithstanding those efforts, there is good faith.

1820 It was protested that the proponents of the good-faith approach, when pushed, still seem to
1821 fall back on a requirement that there be reasonable steps to preserve information against routine

1822 destruction. A proponent responded that "good faith" "tries to get between an objective negligence
1823 test and intent — it is in part subjective."

1824 The focus on good faith was questioned on the ground that it "rewards the party who carries
1825 off a good act of indolence or stupidity." State-of-mind proof is difficult. It is better to invoke an
1826 objective reasonableness test. "reasonable operation" does not do it.

1827 The good-faith element was tested from a different direction by asking whether one
1828 component of good faith turns on compliance with preservation obligations arising independently
1829 from common law, statute, or regulation. A proponent of the good-faith test agreed that litigation
1830 hold and preservation requirements "are what they are." But "if you do not know enough to stop
1831 your computer from doing what computers do, that is good faith."

1832 Another observation was that "good faith" seems to capture part of the "intentionally or
1833 recklessly" approach: it implies some level of culpability. You cannot be in good faith, even with
1834 routine operation, if you act intentionally or recklessly.

1835 The "reasonable steps" question was renewed by asking whether the good-faith proposal
1836 abandons the objective inquiry whether a party took reasonable steps to preserve information, noting
1837 that the reasonable steps approach had won strong support throughout a long phase of this project.

1838 It was asked whether "discovery orders" would be carved out as not "sanctions." The
1839 response took the question to be whether the rule should continue to exclude all violations of court
1840 orders from the safe harbor, saying that the exclusion should be dropped because it simply invites
1841 routine applications for preservation orders.

1842 A return to a "should not" formulation was again urged on the ground that this would
1843 counterbalance the ambiguity of "good faith." When sanctions seem appropriate, a court could
1844 invoke them without the need for a refined determination whether there was "good faith." Judges,
1845 moreover, will be better pleased by a rule that does not so tightly confine the sanction authority. But
1846 "may not" was again defended on the ground that "should not" is not a safe harbor. The leeway
1847 provided by "absent exceptional circumstances" gives discretion enough.

1848 The motion was repeated, recommending adoption — subject to drafting "polishments" —
1849 of Rule 37(f) in this form:

1850 Absent exceptional circumstances, a court may not impose sanctions under these
1851 rules on a party for failing to provide electronically stored information lost solely as
1852 a result of the routine, good-faith operation of the party's electronic information
1853 system.

1854 The motion passed, 9 yes, 2 no. The purpose of the motion is to "recouple" the Rule 37(f) proposal
1855 with the package of electronic discovery amendments to be transmitted to the Standing Committee
1856 with a recommendation for adoption. It was agreed that the Advisory Committee would review a
1857 redrafted Committee Note, and any suggested changes in the proposed rule text, before the rule is
1858 transmitted.

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Rule 45

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The August 2004 publication included revisions of Rule 45 to maintain the parallels between the nonparty discovery provisions in Rule 45 and the e-discovery provisions to be added to the party discovery rules. Rule 45 will be adjusted to conform to the recommendations made for adoption of the other rules, and with them will be sent to the Standing Committee with a recommendation that they be approved for adoption.

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Republication

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Toward the conclusion of discussions of the electronic discovery proposals, the Committee was asked whether the multiple revisions that it will recommend are such departures from the published proposals as to make it wise to republish the revised proposals for a new round of public comment and testimony.

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An initial response was that changes had been made in the rule text for virtually all of the published proposals. Some of the changes seem significant. The Committee Notes have been revised extensively. There are a lot of material changes that would benefit from further comment. A general republication of the entire package also might avoid the need to separate Rule 37(f) from the package for republication alone if the final efforts at refinement encounter renewed difficulties. But this response was conditioned on the observation that the standard for republication is not clear.

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The standard for republication is open-ended. The Advisory Committee has discretion about what it recommends with respect to the Standing Committee's discretionary determination whether to republish. A common test is whether a "new concept" has been introduced, but that test is itself flexible. Republication is available, if that seems wise, when there is "any substantial change."

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Republication was supported by suggesting that it would entail only a one-year delay in adoption of the proposals. These are important issues, and still better proposals might emerge given more time. Further support was offered by noting that practicing lawyers are quickly adapting to the challenges of electronic discovery; republication will elicit new information about new practices. In addition, comments on specific language changes might reveal still better ways to express the basic ideas.

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It was agreed that publication generates a lot of useful information. But that proposition is one without end — multiple stages of publication might each yield improvements. The dynamics of the process must be taken into account. The Advisory Committee and Standing Committees change. Great effort has gone into this project, and it may be difficult to sustain the concentrated focus that has done so much to improve these proposals. The test should be whether there is a "fresh beginning." The revised proposals all keep within the broad approaches of the published proposals. The Advisory Committee has learned much in the process, and should be able to act now on what it has learned.

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Related observations noted that the testimony and comments have led to many useful improvements. But there has been no change in the framework or the basic concepts. Everything now proposed was discussed in the hearings and comments. The published proposals provoked exactly what they are aimed to provoke: rich information that both demonstrates the wisdom of the basic ideas and also shows better ways of implementing them.

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Another summary of the process was that there were more than 250 written comments, and dozens of witnesses at more than three days of hearings. The number of people involved in preparing the written comments far outstrips the number of comments. Most of the revisions being proposed "tune the same concepts." The reaction of the bar to republication would be "we've been there already."

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A motion to republish failed, 2 yes, 10 no.

1905 **II RULE RECOMMENDED FOR PUBLICATION**

1906 Proposed new Rule 5.2 is one of a set of rules that would implement the E-Government Act.
1907 The Appellate, Bankruptcy, Civil, and Criminal Rules Advisory Committees have considered
1908 parallel proposals under the guidance of a Standing Subcommittee chaired by Judge Fitzwater.
1909 Professor Capra, Reporter for the Evidence Rules Advisory Committee, has served as Chief Reporter
1910 for this project, drafting successive "template" rules for consideration by the several advisory
1911 committees. The purpose of the project is to adopt rules that are as nearly identical as possible for
1912 the Bankruptcy, Civil, and Criminal Rules, recognizing that the context of each rules set may at
1913 times justify departures from absolute uniformity. The Appellate Rules Committee seeks uniformity
1914 by a different path, carrying forward on appeal the rules that governed in the district court, and
1915 choosing between the district-court rules as appropriate for original proceedings in a circuit court of
1916 appeals. Professor Capra attended the meeting by telephone.

1917 The Rule 5.2 in the agenda book includes many questions, most of which address the best
1918 means of drafting uniform provisions that will apply across all the sets of rules. Only a few of the
1919 questions ask whether there are distinctive needs that justify Civil Rules provisions different from
1920 the Bankruptcy or Criminal Rules. It was noted that the Bankruptcy and Criminal Rules Committees
1921 had already met; their recommendations came too late to be included in the agenda book, but were
1922 available at this meeting.

1923 Judge Fitzwater noted that for the moment there are three sets of variations on the template
1924 rule. In part the variations reflect adaptations to meet distinctive needs — Civil Rule 5.2, for
1925 example, includes a subdivision addressing social security and immigration cases that has no
1926 counterpart in the Bankruptcy or Criminal Rules. The Subcommittee will consider the global
1927 questions that seem to apply alike to all of the rules.

1928 Professor Capra stated that the E-Government Act requires the rules to be as uniform as
1929 practicable. Variations are permissible when there are reasons for them — for example, the Criminal
1930 Rules require redaction of home addresses, while bankruptcy procedure needs full home addresses.
1931 He further noted that the project for the moment is to approve rules for publication. This is not the
1932 final stage of the project; time remains to make changes during the comment period. He also noted
1933 that the template rule was reviewed by the Style Subcommittee a year ago; quite recently, the Style
1934 Subcommittee has provided another set of suggestions. It is better to consider these suggestions
1935 during the comment period than to attempt to agree on them now.

1936 Professor Capra then provided a quick overview of the rule. The basic provision is
1937 subdivision (a), which calls for redaction of several categories of personal information to protect
1938 privacy in an era of electronic access to court filings. Subdivision (b) establishes exceptions to the
1939 redaction requirement for situations where redaction would be unduly costly or seems unnecessary.
1940 Subdivision (c), unique to the Civil Rules, limits remote public access to filings in social security
1941 and immigration cases. Subdivision (d) recognizes that there is no need for redaction if a filing is
1942 made under seal, and also governs when a sealed filing is later unsealed. Subdivision (e) allows the
1943 court to order redactions not required by subdivision (a), or to limit remote access by nonparties in
1944 situations outside subdivision (c). Subdivision (f), following the dictate of the E-Government Act,
1945 provides that a party who makes a redacted filing may also file an unredacted copy under seal.
1946 Subdivision (g) allows a party who makes a redacted filing to file a reference list that identifies each
1947 item of redacted information and specifies an appropriate identifier that corresponds to each item
1948 listed. This subdivision is dictated by an amendment of the E-Government Act enacted at the behest
1949 of the Department of Justice. Subdivision (h), finally, provides that a party waives the protection
1950 of Rule 5.2(a) by filing its own information not under seal and without redaction.

1951 The draft Civil Rule 5.2 in the agenda book introduces variations on the most recent
1952 "template" and in some respects departs from the revisions suggested by the Bankruptcy and
1953 Criminal Rules Committees. It also raises several questions, and incorporates most of the
1954 suggestions made by the Style Subcommittee. It may be that the civil action context justifies a small
1955 number of variations from the parallel rules because of distinguishing differences from the
1956 bankruptcy and criminal contexts. But most of the questions and variations are suggestions for the
1957 best drafting of a uniform rule. They are included in the draft to facilitate comment by Civil Rules
1958 Committee members, recognizing that for the most part uniform drafting must be accomplished by
1959 other and later means. It was agreed that there was no point in pursuing these variations in detail.

1960 One difficult set of issues was noted with respect to habeas corpus proceedings. Subdivision
1961 (b), drafted in parallel with the Criminal Rule, generally exempts habeas corpus proceedings from
1962 the redaction requirements of subdivision (a). This exemption reflects the volume of unredacted
1963 records often involved in habeas corpus proceedings, and may reflect as well concerns that habeas
1964 corpus petitioners are not well positioned to redact their filings. But § 2241 habeas corpus
1965 proceedings may present special difficulties. One difficulty, unique to the Civil Rules, arises from
1966 the occasional use of § 2241 habeas corpus to raise immigration law questions. Rule 5.2(c) limits
1967 remote public access to immigration proceedings; Rule 5.2(b)(5) exempts any filing covered by Rule
1968 5.2(c) from the redaction requirement. If immigration-related § 2241 proceedings are properly
1969 treated in this way — very limited public access and no redaction — the question remains whether
1970 other § 2241 proceedings should be exempt from redaction. Section 2241 may be used to challenge
1971 detention that does not flow from a state or federal criminal conviction. The reasons for exempting
1972 other habeas corpus proceedings from redaction may not apply, and there may be stronger reasons
1973 to mandate redaction. These questions will be explored further under the direction of the
1974 Subcommittee.

1975 One general question was addressed. The Bankruptcy Rules Committee recommended the
1976 provision in Rule 5.2(e) that recognizes the court's authority to order redactions not directed by Rule
1977 5.2(a). The agenda draft suggests that this authority might better be included in subdivision (a), so
1978 that mandatory and court-ordered redaction provisions are contained in the same place. That drafting
1979 question is one that will be worked out with the Subcommittee, either before the Standing
1980 Committee meeting or during the public comment period. But the general question whether the rule
1981 should somewhere recognize authority to order additional redactions was discussed, along with the
1982 authority to limit remote public access. The Committee unanimously agreed that the rule should
1983 recognize the court's authority to order redactions not mandated by the rule, and also the authority
1984 to limit remote public access in circumstances not covered by subdivision (c).

1985 The Committee voted to recommend publication for comment, in a version to be worked
1986 through by the Subcommittee and the Standing Committee.

1987 **III AGENDA**

1988 Judge Rosenthal noted that the full agenda for this meeting — and the high level of
1989 committee activity that prepared for it — foreclosed any opportunity to undertake a general review
1990 of the many items that remain on the agenda. An agenda review is planned in advance of the fall
1991 meeting. As in earlier years, it is likely that a memorandum suggesting topics to delete from the
1992 agenda will be circulated well in advance of the meeting, so that members can consider whether
1993 some of the suggested topics should be retained or advanced on the agenda.

1994 The Standing Committee has approved a cross-Committees project to review the methods
1995 used to calculate time periods. Review of the calculation methods will entail reconsideration of

1996 many of the time periods as well. A Subcommittee chaired by Judge Kravitz will coordinate the
1997 work of the several advisory Committees. The Administrative Office has prepared comprehensive
1998 tables of the time provisions in all of the sets of rules. The reporters will review these tables and
1999 begin to shape plans for pursuing the project. The practicing bar will be deeply grateful for any
2000 improvements that facilitate easy and assured calculation of time periods.

2001 Another project likely to come on for attention soon is a proposed Rule 48 amendment that
2002 would adopt jury polling provisions parallel to Criminal Rule 31(d). The Federal Judicial Center has
2003 already undertaken a review of civil jury trials over the last 20 years, finding that juries "hang"
2004 without returning a verdict in less than 1% of the trials. This information may assuage concerns that
2005 polling might lead to an undue number of mistrials. There may be some reason to distinguish Rule
2006 48 from the Criminal Rule, in part to adjust to the provisions in Rule 49(b) that address situations
2007 in which inconsistencies appear between a general verdict and the jury's answers to interrogatories.

2008 Several lawyers have already shown interest in another project, which would explore
2009 questions raised by expanding uses of Rule 30(b)(6) depositions.

2010 A long-standing agenda item briefly described in the materials was a proposed new Rule 62.1
2011 to address "indicative rulings" made by a district court to indicate what action it would take on a
2012 motion that it cannot decide because an appeal has transferred the case to an appellate court.

2013 **Next Meeting**

2014 The next Committee meeting has been set for October 27 to 28, most likely in San Francisco.
2015 The dates complement the public hearing scheduled for San Francisco on October 26. It is too early
2016 to know whether all three of the scheduled hearings will be required to meet the public interest in
2017 testifying on the Style Project. If fewer than three hearings are needed, the October 26 hearing may
2018 be canceled.

2019 Judge Rosenthal concluded the meeting by expressing the Committee's thanks and
2020 appreciation for the superb help provided by the Administrative Office staff in planning the meeting
2021 and supporting all the work that led up to it. Special thanks were extended to John Rabiej, Peter
2022 McCabe, and James Ishida. She also noted the Committee's appreciation and thanks to Myles V.
2023 Lynk for his work chairing the Discovery Subcommittee that brought to the Committee the proposals
for the e-discovery rules that are now well on the way to adoption.

Respectfully submitted,

Edward H. Cooper
Reporter