

**E-DISCOVERY CONFERENCE**

**New York, New York  
February 20-21, 2004**

**CONFERENCE ON ELECTRONIC DISCOVERY**

**PRESENTED BY THE**

**JUDICIAL CONFERENCE**

**ADVISORY COMMITTEE ON THE FEDERAL RULES OF CIVIL PROCEDURE**

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9. Annotated Case Law and Further Reading

AGENDA FOR CIVIL RULES E-DISCOVERY CONFERENCE  
FEBRUARY 2004  
FORDHAM UNIVERSITY SCHOOL OF LAW

DAY ONE

7:45 - 8:45 AM - Registration/Continental Breakfast

8:45 - 8:55 AM - Greeting from Fordham University School of Law (Dean William M. Treanor or Professor Daniel J. Capra)

8:55 - 9:05 AM - Welcome to the Conference (Hon. Lee H. Rosenthal, United States District Judge, Southern District of Texas and Chair, Civil Rules Committee)

9:05 - 9:15 AM - Introduction of Conference Program (Professor Myles V. Lynk, Arizona State University College of Law, Chair, Discovery Subcommittee of the Civil Rules Committee)

9:15 - 9:45 AM - Introductory Presentation – The Evolution of Rulemaking Responses to the Issues of E-Discovery (Professor Richard L. Marcus, University of California, Hastings College of Law and Consultant to the Civil Rules Committee)

9:45 - 10:30 AM - Panel One: Technical Aspects of Document Production and E-Discovery. What is the current state of the technology, what is likely to become available in the near future, and how does this affect the ability of companies and individuals to store and retrieve data from electronic data bases? The discussion of the technology for creating, storing, retrieving, producing, searching, and manipulating data sets the context for the issues to be considered.

Panelists:                 Joan E. Feldman, Computer Forensics, Inc.  
                                  George J. Socha, Jr., Esq., Socha Consulting, LLC  
                                  Kenneth J. Withers, Esq., Federal Judicial Center

Moderator: Professor Richard L. Marcus

10:30 - 10:45 AM - Break

10:45 AM - 12:00 Noon - Panel Two: Rules 33 and 34 – Defining E-Documents and the Form of Production. What should constitute a “document” for e-discovery purposes? How do definitions of “document” and “data” interact? How should metadata and embedded data be treated for purposes of initial responses to discovery requests? How should electronic responses to interrogatories be handled?

Panelists:                 David R. Buchanan, Esq., Seeger Weiss LLP  
                                  Adam I. Cohen, Esq., Weil, Gotshal & Manges LLP  
                                  Hon. James C. Francis IV, United States Magistrate Judge, Southern  
                                  District of New York  
                                  Paul M. Robertson, Esq., Bingham McCutchen LLP

Moderator: Hon. Shira Ann Scheindlin, United States District Judge, Southern District of New York

Noon - 1:15 PM -- Lunch

1:15 - 2:30 PM - Panel Three: Rules 26, 33 and/or 34 -- Burdens of Production: Locating and Accessing Electronically-Stored Data. Should backup tapes, deleted data and other data not ordinarily used or accessed by the producing party, or not reasonably accessible, be subject to discovery? If so, under what circumstances and conditions? What should be the standard for limiting or requiring “heroic production?”

Panelists: Hon. John M. Facciola, United States Magistrate Judge, District of Columbia  
Gary L. Hayden, Esq., Counsel, Ford Motor Company  
Robert M. Hollis, Esq., Civil Division, United States Department of Justice  
Joseph M. Sellers, Esq., Cohen, Milstein, Hausfeld & Toll, P.L.L.C.

Moderator: Robert C. Heim, Esq., Dechert LLP

2:30 - 3:45 PM - Panel Four - Rules 37 and/or a New Rule 34.1 – Safe Harbors for E-Document Preservation and Sanctions. Should there be a safe harbor provision in the rules to protect a party which has put in place certain data preservation protocols? Would a safe harbor provide suitable protection for IT people? Should the rules provide specific sanctions for data loss or destruction? Are the rules clear as to when “atomic bomb” sanctions are appropriate in order to make the e-discovery process work properly?

Panelists: Thomas Y. Allman, Former Senior Vice President, Secretary and General Counsel, BASF Corporation  
Gregory P. Joseph, Esq., Gregory P. Joseph Law Offices LLC  
Laura Lewis Owens, Esq., Alston & Bird, LLC  
Anthony Tarricone, Esq., Sarrouf, Tarricone & Flemming

Moderator: Andrew M. Scherffius, Esq., Scherffius, Ballard, Still & Ayers, L.L.P.

3:45 - 4:00 PM - Break

4:00 - 5:15 PM - Panel Five - E-Discovery Under State Court Rules and United States District Court Local Rules. Have these rules made a difference in the discovery and production of data stored electronically? What perceived needs of the bench and bar led to the promulgation of these rules?

Panelists: Hon. Jerry W. Cavaneau, United States Magistrate Judge, Eastern District of Arkansas  
Mary Sue Henifin, Esq., Hale and Dorr LLP  
Hon. John J. Hughes, United States Magistrate Judge, District of New Jersey  
Stephen D. Susman, Esq., Susman Godfrey LLP

Moderator: Hon. Nathan L. Hecht, Justice, Supreme Court of Texas

DAY TWO

8:00 - 8:30 AM - Continental Breakfast

8:30 - 9:45 AM - Panel Six - Rules 26 and/or 34 - Protection Against Inadvertent Privilege Waiver. Such protection would affect all forms of discovery and production, not just e-discovery. Are the problems of identifying privileged materials significantly different for electronically stored data? How are these issues addressed under the Texas civil rule provision on preserving privilege? Two approaches under consideration are the “quick peek” and the inadvertent production rule. Does

either approach respond effectively to current problems? Does the Rules Enabling Act limit what can be done to address this issue through the civil rules process?

Panelists: Sheila L. Birnbaum, Esq., Skadden, Arps, Slate, Meagher & Flom LLP  
Professor Daniel J. Capra, Fordham University School of Law  
Jonathan M. Redgrave, Esq., Jones Day LLP, The Sedona Conference  
Joseph R. Saveri, Esq., Lief Cabraser Heimann & Bernstein, LLP

Moderator: Professor Edward H. Cooper, University of Michigan Law School and Reporter, Civil Rules Committee

9:45 - 11:00 AM - Panel Seven: Rule-making and E-Discovery - Is there a Need to Amend the Civil Rules? – In light of this two day discussion, can we conclude that reliance on “private ordering” among the parties, the “inherent authority” of the court and development of federal common law in this area will resolve e-discovery questions that arise in federal civil litigation? Does current case law suggest that the existing rules are satisfactory or in need of revision to meet demands of e-discovery? For example, would amending Rules 16(b) and 26(f) to specifically require the parties to address e-discovery issues in the discovery planning process be helpful, or unnecessary?

Panelists: Allen D. Black, Esq., Fine, Kaplan and Black, R.P.C.  
Carol Heckman, Esq., Harter, Secrest & Emery, LLP  
Carol Hansen Posegate, Esq., Posegate & Denes, P.C.  
H. Thomas Wells, Jr., Esq., Maynard, Cooper & Gale, P.C.

Moderator: Professor Myles V. Lynk

11:00 - 11:15 AM - Break

11:15 AM - 12:30 PM - Panel Eight - Civil Rules Advisory Committee Alumni Panel - The Process of Amending the Civil Rules – If we conclude that there is a need for specific rule changes to address the issues presented in the conference, how should these changes be addressed through the rule-making process? Which existing rules should be amended? Should we consider adding new rules? How can we make best use of the Committee Notes to illuminate these issues?

Panelists: Hon. John L. Carroll, Dean & Professor, Cumberland School of Law  
Hon. Patrick E. Higginbotham, United States Circuit Judge, United States Court of Appeals for the Fifth Circuit  
Professor Thomas D. Rowe, Jr., Duke University School of Law  
Hon. C. Roger Vinson, Chief Judge, United States District Court, Northern District of Florida

Moderator: Hon. Lee H. Rosenthal

12:30 - 12:45 PM -- Close and End of Conference (Hon. David F. Levi, Chief Judge, United States District Court, Eastern District of California and Chair, Standing Committee on Rules of Practice and Procedure )

## MEMORANDUM

**To:** Participants in February 2004 Fordham E-Discovery Conference

**From:** Myles V. Lynk, Chair, Discovery Subcommittee, and Richard Marcus, Special Reporter, Advisory Committee on Civil Rules

**Date:** January 27, 2004

**Re:** Discussion Topics

### I. INTRODUCTION

#### A. Purpose

This memorandum introduces aspects of e-discovery<sup>1</sup> that have been discussed by the Advisory Committee on Civil Rules and its Discovery Subcommittee. Neither this memorandum nor the September 2003 memorandum from the Special Reporter to the Advisory Committee proposes amendments to the civil rules. Whether any amendments should be proposed and what such proposals might be are questions that the Discovery Subcommittee is considering. This Conference will provide a valuable opportunity to examine the threshold question of whether any rules changes to address electronic discovery are necessary, and to explore ideas for such changes.

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<sup>1</sup> The term, "e-discovery," will be used throughout as a shorthand for the discovery of data that is used or stored on and retrievable from a computer or other electronic source or platform.

B. Prior Consideration of these Issues by the Advisory Committee

Concerns about e-discovery were raised with the Advisory Committee in 1997, when the Committee was engaged in a comprehensive study of the operation of discovery that ultimately led to the rule amendments adopted in 2000. Because the subject was unfamiliar and the problems unclear, no effort was made to address the distinctive characteristics of e-discovery during the 1997-98 general examination of discovery.

In 2000, however, the Discovery Subcommittee began to examine this topic in detail. It held two mini-conferences – one in San Francisco and the other in Brooklyn – to begin exploring the unique features of electronic discovery as compared to conventional forms. That work led to continued examination of how well the civil rules accommodate electronic discovery. The rapid increase in the use of electronic discovery has provided the Committee with much additional information to consider. The case law on electronic discovery issues is developing, sharpening the question of whether rule changes are necessary and whether such changes might limit the flexibility of courts and litigants to adapt to technological changes as they occur and to differences among the cases. At least two states – Texas and Mississippi – have adopted court rules specifically addressing these issues. Four United States district courts – E. & W. Dist. Ark, D.N.J., and D. Wyo. – have adopted local rules that do the same. The Manual for Complex Litigation (4<sup>th</sup> edition) contains expanded treatment of these questions. A number of organized bar and other groups have proposed standards and best practices protocols to deal specifically with e-discovery. Some of these materials are included in a package of materials, with an

annotated list of cases and citations to other reading prepared by the Federal Judicial Center, attached to this memorandum.

Given these developments, the Advisory Committee is carefully considering whether amendments to the Federal Rules of Civil Procedure are needed. This memorandum sets out some of the ideas for areas of rule amendment the Committee has considered, as a means of focusing the discussion. This memorandum is not intended to limit the topics to be considered or to answer the question of whether rule amendments are necessary at all. A major focus of this Conference is to examine whether any amendments to the Civil Rules to address e-discovery should be proposed. Another is to identify the specific objectives that any such amendments should seek to achieve. Depending on the resolution of these issues, it may ultimately be necessary to draft specific rule language, but that will not be done at this Conference. Rather, we invite Conference participants to share with the Advisory Committee their thoughts about:

- 1) whether amendments are necessary; 2) if so, what such amendments should achieve; and
- 3) what language they would propose to achieve these objectives.

If the Advisory Committee decides to proceed with proposals to amend various rules, these proposals must be internally consistent and complement each other. Accordingly, although each item below is presented and will be discussed separately, it is important to think how they would fit together as a balanced package. If there are problems with the discovery of electronically-stored data, it is likely that they would affect varieties of litigants and litigation. The relationship among the topics to be considered is an important part of examining whether, and how, the problems of e-discovery are amenable to rulemaking solutions.

As some participants in the Conference may know, the Advisory Committee is in the midst of a project to modernize the expression and presentation of the Civil Rules and to remove inconsistent uses of words and phrases, without changing the substantive meaning. The Federal Rules of Appellate Procedure and the Federal Rules of Criminal Procedure have both been similarly "styled," with great success. The work on the Civil Rules is proceeding well, with publication for public comment expected in the next twelve months. In anticipation of the completion of this project, any discussion of proposed rule amendments is most usefully presented using modern style, format, and expression. This Conference is not, however, the forum to focus on the style project or related issues; there will be ample time for such discussion during the public comment period.

## II. SPECIFIC TOPICS

### A. Defining the Subject: A New Rule 26(h)

An obvious first task is to define the subject matter. One possibility is to add a new section (h) to Rule 26 to define the term “electronic data” when used in the rules. Subsection (h)(1) would apply to presumptively discoverable electronic data and subsection (h)(2) to “inaccessible” electronic data that could only be discovered on motion and court order.

If such provisions were to be added to the rules, a threshold question is which term should be used in (h)(1) for the definition. Should we refer to “electronically-stored data,” “digital data,” or “computer-based data,” or would some other term be more descriptive or comprehensive?

While there is a general reluctance to include definitions in the rules, if there is a need to identify a term that can be used throughout the rules and that will continue to be useful as technology evolves, a definition might be worthwhile.<sup>2</sup> A definition could, for example, refer to “all information stored, in digital form, on magnetic, optical or other media, accessible by the use of electronic technology.” Would it be helpful to add language intended to illustrate what is meant by “use of electronic technology,” perhaps by adding the following words at the end of this definition: “such as, but not limited to, computers, telephones, personal digital assistants, media players and [or?] media viewers?”

A proposed version of a possible new Rule 26(h)(1) is set out below. It includes a place for a new Rule 26(h)(2) that would include in the definition electronically-stored data that is not readily accessible or is inaccessible in the ordinary course of the producing party’s business.

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<sup>2</sup> For purpose of discussion, the definition used herein is "electronically stored data."



Is it possible to devise a definition that will stand the test of time?<sup>3</sup> In this area, the speed and extent of technological advances can be breathtaking. There is legitimate concern that any definition we adopt now could be meaningless within five or ten years. If we include a definition, our goal should be to use terms that will both anticipate technological developments and be sufficiently flexible to be of use once those occur. For example, if current consideration of chemical or biological computing leads to viable techniques, those new techniques can be encompassed within the terms used here because information will be in digital format and the manner of access will in some sense still depend on electronic technology.

As noted above, definitions in the Civil Rules are not favored. If it is desirable to add one here, we should consider why and how this issue is different from other places in the Civil Rules where definitions might be useful, and whether the inclusion of a definition limits judicial flexibility.

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<sup>3</sup> One possible statutory reference for a definition would be 15 U.S.C. § 7006, which contains definitions for the Electronic Signatures in Global and National Commerce Act. It includes the following:

(2) Electronic

The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(4) Electronic record

The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

B. Including Discussion of these Issues in Early Discovery Planning – Rules 26(f), 16(b) and Form 35

Many have advocated a “best practices” rule change that would add to the list of subjects to be addressed in the Rule 26(f)(3) Discovery Plan a new paragraph, which asks each party to indicate whether it anticipates the disclosure or discovery of electronically-stored data and if so, what arrangements should be made to facilitate or manage such disclosure or discovery. An amendment to Rule 26(f) to promote early consideration of e-discovery issues is likely to be generally acceptable. In fact, such activity already is required by local rule in four United States district courts.

Would such an amendment to the Civil Rules be a substitute for adopting other rules addressing particular e-discovery topics? Having specific rule provisions in addition to an amendment to Rule 26(f) might be a useful addition to the generalized directive in that rule. Specific provisions that set a default or presumptive procedure for various discovery problems that are most acute when dealing with electronic data could provide a measure of clarity and predictability now lacking. Such provisions would also provide a starting point from which the parties could adapt procedures tailored to specific cases, either by agreement or court order. For example, an amendment to facilitate the consideration of arrangements to protect against inadvertent privilege waiver might be a worthwhile topic to raise in a Rule 26(f) conference. Such a provision relates directly to one of the possible measures regarding waiver considered below – the “quick peek” approach. It might also be helpful to include under 26(f)(3) a new provision applicable to all discovery but perhaps most relevant in the context of electronic

discovery, indicating whether the parties have made provisions to facilitate discovery by protecting the right to assert privilege after the [inadvertent?] disclosure or production of a privileged document.

Possible language for amending Rule 26(f) is set out below:

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**Rule 26**

\* \* \*

**(f) Conference of the Parties; Planning**

- (1) *Conference Timing.*** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must hold a conference 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).
- (2) *Conference Content; Parties’ Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26 (a) (1); and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.
- (3) *Discovery Plan.*** A discovery plan must state the parties’ views and proposals on:

  - (A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a) (1), including a statement of when initial disclosures were made or will be made;
  - (B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery

29 should be completed, and whether discovery should be  
30 conducted in phases or be limited to or focused on  
31 particular issues;

32 (C) whether any party anticipates disclosure or discovery of  
33 electronically-stored data, and if so what arrangements  
34 should be made to facilitate [management of] such  
35 disclosure or discovery; and

36 (D) whether provision should be made to facilitate discovery  
37 by protecting the right to assert privilege after the  
38 [inadvertent] disclosure or production of a privileged  
39 document; and

40 (E) what changes should be made in the limitations on  
41 discovery imposed under these rules or by local rule, and  
42 what other limitations should be imposed; and

43 (F) any other orders that should be entered by the court under  
44 Rule 26(c) or under Rule 16(b) and (c).

\* \* \*

A corollary to the proposal to change Rule 26(f) is a change to Form 35, used by the parties in their report to the court on their joint discovery plan, specifically to address electronic discovery issues. This expansion of Form 35 may be useful to call lawyers' (and perhaps judges') attention to these matters, particularly if an amended Rule 26(f)(3) mandates that they be discussed.

\* \* \*

1 **Form 35. Report of Parties' Planning Meeting**

2 \* \* \*

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

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

8 Disclosure or discovery of electronically-stored data is  
9 anticipated, and should be handled as follows: (brief description  
10 of parties' proposals)

11 A privilege preservation order is needed, as follows: (brief  
12 description of provisions of proposed order

13 All discovery commenced in time to be completed by  (date) .  
14 [Discovery on  (issue for early discovery)  to be completed  
15 by  (date) .]

\* \* \*

Changing Rule 16 to include a reference to electronic discovery in the scheduling order would be consistent with the changes discussed above to Rule 26 and Form 35. Such a change could, for example, require the parties to either discuss at the pretrial conference or provide in the scheduling order for “disclosure of electronically-stored data” and to also address the issues presented by the [inadvertent?] waiver of privilege in the production of any document, data or information. Illustrative language follows.

\* \* \*

1 **Rule 16. Pretrial Conferences; Scheduling; Management**

2 **(b) Scheduling.**

3 **(1) *Scheduling Order.*** Except in categories of actions exempted by  
4 local rule as inappropriate, the district judge – or a magistrate  
5 judge when authorized by local rule – must issue a scheduling  
6 order:

7 **(A)** after receiving the parties’ report under Rule 26 (f); or

- 8 (B) after consulting with the parties’ attorneys and any  
9 unrepresented parties at a scheduling conference or by  
10 telephone, mail, or other suitable means.
- 11 (2) **Time to Issue.** The judge must issue the scheduling order as soon  
12 as practicable, but in any event within 120 days after any  
13 defendant has been served with the complaint and within 90 days  
14 after any defendant has appeared.
- 15 (3) **Contents of the Order.**
- 16 (A) **Required Contents.** The scheduling order must limit the  
17 time to join other parties, amend the pleadings, complete  
18 discovery, and file motions.
- 19 (B) **Permitted Contents.** The scheduling order may:
- 20 (i) modify the timing of disclosures under Rules  
21 26(a) and 26(e) (1);
- 22 (ii) modify the extent of discovery;
- 23 (iii) provide for disclosure or discovery of  
24 electronically-stored data;
- 25 (iv) provide for protection against [inadvertent] waiver  
26 of privilege; and
- 27 (v) set dates for other conferences and for trial; and
- 28 (vi) include other appropriate matters.
- 29 (4) **Modifying Schedule.** A schedule may be modified only for good  
30 cause and by leave of the district judge or, when authorized by  
31 local rule, of a magistrate judge.  
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If such a change is made, should it be included under 16(a) or 16(b)? Although the title for 16(b) is “scheduling,” because Rule 26(f) is tied to Rule 16(b) and is the impetus for party discussion of e-discovery, it may be best to put this Rule 16 provision into Rule 16(b). If the

provision is included under 16(b), should it be added as a mandatory provision under 16(b)(3)(A)? Perhaps not. It might be unduly aggressive to make this mandatory, particularly because the possible addition to 26(f)(3)(C) suggested above would, by definition, be limited to situations in which discovery of this data is expected.

### C. Definition of “Document” in Rule 34

A rule change to address the issues presented by the discovery of electronically-stored "data" may be particularly useful in the definition of "document" under Rule 34(a). Because parties are seeking information and data, the term “document” has traditionally been used to describe the medium (e.g., books, memoranda, sound recordings, pictures) in which such information and data are to be found. Should Rule 34(a)’s focus on the production of documents “from which information can be obtained” be changed to a focus on the production of “data” or information, regardless of the form or medium in which the data or information is to be found? Would a more limited change to 34(a) be appropriate, one which simply adds to the 34(a)(1)(A) definition of “document” a reference to “‘data or data compilations in any [magnetic or other?] media’ from which information can be obtained or when necessary, translated by the responding party into a reasonably usable form?” Is this useful? Any revision to 34(a) should state clearly that all electronically-stored data are subject to discovery, and do so in a way that will remain in accord with changing technology.

The definition of “document” to include electronically-stored data in Rule 34(a) triggers the issue of whether metadata and embedded data should be routinely or presumptively required in what must be produced. The rule could provide that a discoverable "document" includes “all data stored or maintained on that document.” Would this make metadata and embedded data routinely discoverable? Opposition to a routine requirement could be based on the low likelihood that this material – particularly embedded data – will be used by the requesting party and on added costs that may result from requiring that it be produced, although costs may also be added if it is necessary to remove such data before producing the “documents” in

electronic form. On the other hand, the requesting party may need the producing party's metadata in order to access, search, and manipulate the data that is produced. Certain formats for electronic production that are currently used – .tiff images, for example – require time-consuming and costly computer inputting before the information is searchable. We therefore should consider whether the production of such data should be routine or depend on court order issued on a motion and a showing of some degree of cause. Such a provision could make access to certain data a form of “second tier” discovery, available only under court supervision.

Illustrative possible rule language for 34(a) follows.

\* \* \*

1           **Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for**  
2           **Inspection and Other Purposes**

3           **(a) In General. Any Party May Serve on Any Other Party a Request**  
4           **Within the Scope of Rule 26(b):**

5           **(1)**       to produce and permit the requesting party or its representative to  
6                   inspect and copy the following items in the responding party’s  
7                   possession, custody, or control:

8                   **(A)**       any designated documents – including writings, drawings,  
9                           graphs, charts, photographs, sound recordings, and other  
10                           data or data compilations in any [magnetic or other]  
11                           media from which information can be obtained either  
12                           directly or after the responding party translates them into  
13                           a reasonably usable form, [and including, for  
14                           electronically-stored data, all data stored or maintained on  
15                           that document] [if the court so orders for good cause], or

16                   **(B)**       any tangible things – and to test or sample these things; or

17           **(2)**       to permit entry onto designated land or other property possessed  
18                   or controlled by the responding party, so that the requesting party  
19                   may inspect, measure, survey, photograph, test, or sample the  
20                   property or any designated object or operation on it.

D. The Form of Production – Rule 34(b)

A proposal to amend Rule 34 to define what must be produced could also address the presumptive form of production. Given the various technologies of electronically-stored data, it seems reasonable to consider adding language to 34(b)(1) to address the form in which such data is to be produced. Should the requesting party be permitted ("may") or required ("must") to specify the form in which electronically-stored data is to be produced? Arguments in favor of each alternative are presented below.

If the requesting party is either permitted or required to specify a form of production of electronic data, the responding party should be afforded an opportunity to object to the form requested, under Rule 34(b)(2). What should be the permissible bases for such objection? For example, a responding party might object on the ground that the data is not accessible (or “reasonably accessible”) in the form requested without undue burden or expense, or it is not available (or “reasonably available”) in the form requested in the usual course of the producing party’s business activities.<sup>4</sup> Are either or both of these grounds sufficient? If the court agrees with the producing party, should that party then be able to produce the data in a form easily available to it, even if this form of production imposes a burden on the receiving party?

An alternative would be to add a provision under 34(b)(2)(D) that would permit the producing party to produce electronically-stored data in the form in which it is ordinarily stored, and also require the producing party to produce such data only once unless the court orders

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<sup>4</sup> Note that we will look at this question again from the perspective of a possible new Rule 26(h)(2) to deal with the inaccessible data problem. See subsection F below. Assuming (as is the intent) that such a provision would serve for all forms of discovery, is it unnecessary to add a parallel provision here in Rule 34? If such an alternative is adopted, then the Committee Note to Rule 34 probably should call attention to the application here of any new inaccessible-data provision in another rule, and point out that an accessibility objection under 34(b)(2) is not needed.



8 (B) specify a reasonable time, place, and manner for the  
9 inspection and for performing the related acts. The  
10 request may specify the form in which electronically-  
11 stored data are to be produced.

12 [Alternative]<sup>5</sup>

13 (D) specify the form in which electronically-stored data are to  
14 be produced.

15 (2) ***Responses and Objections.***

16 (A) *Time to Respond.* The party to whom the request is  
17 directed must respond in writing within 30 days after  
18 being served. A shorter or longer time may be directed by  
19 the court or stipulated by the parties under Rule 29.

20 (B) *Responding to Each Item.* For each item or category, the  
21 response must either state that inspection and related  
22 activities will be permitted as requested or state an  
23 objection to the request, including the reasons.

24 (C) *Objections.* An objection to part of a request must specify  
25 the part and permit inspection and related activities with  
26 respect to the rest. A party may object to the requested  
27 form for producing electronically-stored data [and to  
28 production of electronically-stored data that are not  
29 {reasonably} accessible [without undue burden or  
30 expense] {reasonably available} in the usual course of the  
31 producing party's business {activities}].<sup>6</sup>

32 (D) *Producing the Documents.*

33 (i) *In general.* A party producing documents for inspection must  
34 produce them as they are kept in the usual course of business  
35 or must organize them and label them to correspond to the  
36 categories in the request.

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<sup>5</sup> This alternative makes it mandatory to specify the form of production.

<sup>6</sup> This is an alternative to a Rule 26(h)(2) proposal as the method for dealing with the issue of inaccessible data. See subsection F below. If a Rule 26(h)(2) provision is used, it would seem unnecessary to add a parallel provision here in Rule 34. But the Committee Note should call attention to the application here of the inaccessible-data proposal. If so, the Committee Note could point out that an accessibility objection is not needed.

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(ii) Electronically-Stored data. A party producing electronically-stored data may produce them in the form in which they are ordinarily [created or] stored. Unless the court orders otherwise for good cause, a party producing electronically-stored data need only produce it in one form.

\* \* \*

A key question is whether the party requesting production must specify in its request the form of production. Arguments for required specification are that it facilitates discovery generally and forestalls demands that material that already has been produced in one form be produced again, but in another form. One argument in favor of making the request optional is the possibility that the requesting party may not know the format it wants, or which formats the other parties use, when it makes its request. Technological developments may make some or all of these issues less important in the future, but the timing and predictability of that future is uncertain.

Therefore, it may be best to focus on how a conflict between the parties about the form of production should be resolved. A sensible approach might be to balance the burden on the producing party of producing the data in a certain form against the utility to the requesting party of receiving the data in that form. The first major case involving discovery of computer-readable material<sup>7</sup> considered these issues. More recently, there have been repeated suggestions that parties producing materials stored electronically sometimes select a form of production that

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<sup>7</sup> In National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257 (E.D. Pa. 1980), Judge Becker required production of a computer-readable version of lengthy interrogatory answers initially provided in hard copy form to save the discovering party the burden of inputting the material in order to analyze it. There the court was confronted with work product objections based on the fact that the computerized version had been created by counsel. The court emphasized that the computer-readable production ordered had the same content as the hard copy answers, but in a different form.

minimizes their utility to the other side. There is often a wide range of reasonably possible forms of production, and a rule could be more or less directive about the way in which the court is to oversee the parties' debates about choosing a proper form of production.

A separate problem is that there may be proprietary aspects to the form in which the data are kept. One way of addressing this issue would be in a Committee Note which suggests that the court could grant a protective order when a proprietary data problem is presented.

In any event, this format problem is one of the topics the parties should discuss in their Rule 26(f) conference. It might be desirable to highlight it somehow in connection with that activity or in Rule 16(b). As suggested above, the confidentiality consideration probably should be mentioned in a Committee Note accompanying any amendment to Rule 26(f).

If Rule 26(f) is amended to require the parties to address this issue if they expect to conduct e-discovery, is it nonetheless important also to add changes of this sort to Rule 34(b)? Doing so may be justified on the ground that it is worthwhile to list these specifics about Rule 34 requests in Rule 34. In addition, assuming no agreement among the parties, putting the provision here would provide a platform for a Committee Note outlining general attitudes toward how to handle these problems if the parties have a dispute about them.



if such software is proprietary, a protective order would be available to facilitate discovery while insuring that such software is used by the requesting party only in this case.

Should the suggested language supplant, and not just be added to, current Rule 33(d)? In current practice, do parties seeking to employ the option offered by 33(d) do so with regard to hard copy information as well as computerized files? In many cases, data produced in response to an interrogatory will be in a form that did not previously exist, but was prepared just for the purpose of the response.<sup>9</sup> How does this mesh with the obligation imposed under Rule 34?

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<sup>9</sup> Indeed, it would be helpful to know more about how parties currently deal with computerized material under current Rule 33(d).

F. Addressing the Producing Party's Burden of Retrieving, Reviewing, and Producing “Inaccessible” Data – New Rule 26(h)(2)

We return now to Rule 26 and to a possible new 26(h)(2) regarding electronically-stored data that is difficult or expensive to produce. Note, initially, that while this discussion is focused on responses to discovery requests, such a provision could also apply to disclosures under 26(a). Should parties be required to identify or produce inaccessible materials if they come within the scope of 26(a)? It might seem that disclosure of ordinary inaccessible material should be excused because a requirement that a party restore and search through this material to make its initial disclosures would be burdensome and would overwhelm any protection afforded by a provision that the discovery responses need not involve mining such data unless the court so orders. But that concern may be satisfied by the "may use to support its claims or defenses" limitation now included in Rule 26(a)(1)(A) and (B). If a party decides to mine ordinarily inaccessible data to obtain good evidence, should we override the duty to disclose that material under Rule 26(a)(1)(B) (along with the duty to supplement under Rule 26(e))?

In addressing the issue of “inaccessible” data and the burdens and costs of production, there are a number of questions to consider. Should back-up tapes – “electronically stored-data from systems created only for disaster-recovery purposes” – be excluded from a general duty to respond to a discovery request, absent a court order? If so, should such an exclusion apply only if the producing party has preserved a single day’s full set of backup tapes which can be produced for a “snapshot” of the material that was backed up? Is this a common “best practice” for businesses that use computerized data bases? Should current preferred practices be codified in a rule as a required practice for civil litigation in federal courts?

Should we exclude from routine discovery electronically-stored data that is not [reasonably?] accessible without undue burden or expense, or accessible only if restored or migrated to accessible media and format, or not accessible [reasonably available?] in the usual course of the responding party's [business] {activities}? At a minimum, it would seem odd for electronically-stored data that a party routinely accesses to be considered inaccessible when the other side seeks it through discovery. If this approach is taken, the focus should be on the producing party's "activities" rather than "business." If business is defined broadly, as in Federal Rule of Evidence 803(6), it covers a broad range of activities, but there are other activities that would remain outside the definition. Most natural persons who are litigants, for example, might not be able to rely on such a protective provision with regard to the hard disks on their home computers. So "activities" would be a useful term to include everyday activities for non-business litigants.

But focusing on what the party ordinarily uses may be too narrow. Perhaps the better question is whether there would be undue burden or expense in accessing the data, without regard to whether the producing party frequently does so for its own purposes. If the data would be easy to access, is there a reason to inhibit discovery of it absent court order, just because it is not normally accessed? The phrase "not [reasonably] accessible without undue burden or expense" is designed to respond to this point. Is it useful to add "reasonably" to this formulation? The third phrase – "accessible only if restored or migrated to accessible media and format" – may be a more precise way of capturing the idea behind "not accessible without undue burden or expense." Yet this very precision could be a drawback if there are obstacles to "access" that are not encompassed within the phrase "restored or migrated to accessible media and format."



Need we highlight the court's inherent authority under Rules 26 and 37 to compel production subject to conditions? Federal courts have inherent authority to impose reasonable conditions on a party's duty to comply with a discovery request, including shifting the costs of complying with a discovery request from the producing party to the requesting party in appropriate cases.<sup>10</sup>

Finally, the invocation of Rule 26(b)(2) seems to address the concerns that should influence the court in deciding whether to require the responding party to produce the information sought, and if so, under what terms. Factors for the court to consider would include whether the information can be obtained more readily by another method, and whether the effort the responding party must expend to obtain it is justified by the importance of the information to the requesting party. Is there a risk of supplanting case law treatment of this topic by adopting such a rule?

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<sup>10</sup>In Texas Rule 196.4, cost-shifting in the context of electronic discovery is tied to "extraordinary steps," with the idea that the producing party must incur ordinary expenses of producing electronic data, the same as in producing hard-copy materials, and cost-shifting would be permitted only for extraordinary measures. What is extraordinary would vary from party to party, and for reasons that could be unrelated to the net worth of the party. For example, a business or agency might have the technical ability readily to access categories of information that another entity might only be able to access with great effort and expense. Thus, including data retrievable through "extraordinary efforts" in the category of data presumptively excluded from production may curtail occasions in which cost-shifting should be granted. Conversely, it may be troublesome to have in the rule a term that has not been well defined in practice.

## G. Addressing Inadvertent Privilege Waivers

### (1) The "Quick Peek" Approach

The issue of accidental, unintended and inadvertent privilege waivers during voluminous pretrial production is not unique to electronic discovery and has been on the Discovery Subcommittee's agenda for a number of years. Our consideration of electronic discovery may, however, afford us an opportunity to address this issue. The sheer volume of electronic data potentially produceable may make the prospect of an unintended privilege waiver a more likely occurrence than would otherwise be the case.

One important factor to consider in connection with rules about privilege waiver is 28 U.S.C. § 2072(b), which says that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." There appears to be virtually no case law about this limitation. Of course, relevant case law could arise only if such a rule were adopted. If addressing privilege waivers in the Civil Rules is forbidden, one could argue that Civil Rules 26(a)(2)(B) and 26(b)(5) might be challenged on this ground. Both these rules can affect issues of waiver, but no serious question about them has been raised. So there may be some latitude to adopt rules dealing with privilege waiver as a function of discovery.

Nonetheless, there is reason for caution in this area. Relying on the consent of the parties and a court order based on that consent to address this issue may be as much as rulemaking can accomplish, perhaps in addition to including this subject as a topic in the Rule 26(f) conference. Accordingly, the first idea is one that might be called a "quick peek" approach. Illustrative rule language is set out below.



The purpose of this provision is to facilitate discovery by enabling parties to permit adversaries to inspect their materials without thereby waiving any privileges. For many years, the bar has complained about the practical consequences of the waiver doctrines: (1) that any disclosure to anyone waives as to the world, and (2) that any waiver applies not only to the disclosed material but also to any other material on the same subject matter. Yet because document requests are often very broad, much of the responsive material is often of no real value to the party seeking production. Reviewing all this material to extract items subject to privilege protection before the requesting party gets to look at it is highly wasteful if the requesting party then says it is really interested in only 10% of the material produced. Would it not be more sensible to postpone the privilege review until the 10% had been identified? That could save the producing party money and the requesting party time.

In fact, parties often agree to such an arrangement and the discussion of privilege waiver during the Rule 26(f) conference could facilitate the negotiation of such agreements. Conversely, while relying on a stipulation and court order might fortify arguments that this sort of order could be entered without exceeding the limits of 28 U.S.C. § 2074(b), the parties' agreement cannot expand this Committee's authority or a court's jurisdiction, or foreclose arguments by third parties that a waiver had occurred, whatever was the intent of the parties.

Alternatively, this provision could be rewritten as a rule that has the desired effect without the need for an agreement among the parties and perhaps without even a court order, but such a rule might exceed the Committee's rulemaking power. It also could produce practical problems; if a receiving party does not accept that the producing party is only doing an initial

examination, it might well take the position that the privilege was waived whatever the producing party had in mind. The stipulation approach avoids that possibility.

Either with or without a stipulation, the objective of this provision is to foreclose the arguments of third parties that the privilege has been waived in the situation described. Is this realistic or even possible? The quick peek idea was originally developed in the context of hard-copy, document discovery. With respect to electronically-stored data, it may not be of much use. Hard copy materials often reside in a warehouse and the party who asked for them reviews them in the warehouse and then designates the items it wants copied, thereby focusing the privilege review. Electronically-stored materials, by contrast, are often given to the requesting party on a CD. Because the party has all the documents, a second-tier production may not be contemplated.

In some instances, however, this model might be of considerable assistance in relation to discovery of electronically-stored data. For example, discovery regarding electronically-stored materials may involve having one party query its computer system according to directions from the other side. At the time the query is used, the parties do not know what it will elicit, much less whether what is found will be privileged. So a quick look might be quite helpful in that situation. Presently, courts that order such querying often appoint a neutral (perhaps as a master) to do the query and then deliver the material thus elicited to the producing party for privilege review. The master is needed so that the court can deputize this person as an agent of the court, with the result that any revelation to him or her is not a waiver. With a provision like the one above, it might be possible to "eliminate the middleman."

This quick peek approach may nonetheless be insufficient because it cuts off any privilege objection at the point the copies (or the query results) are delivered to the party seeking

production. A more aggressive approach to this problem has been suggested, building on "claw back" agreements sometimes used in large document cases,<sup>12</sup> but that approach might heighten concerns over the Committee's authority to accomplish it through rulemaking.

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<sup>12</sup> This approach would add a new Rule 34(b)(2)(E) along the following lines:

(E) *Privileged material.* If a party produces documents without intending to waive a claim of privilege, that production does not waive the privilege [under these rules or the Rules of Evidence] if, within 10 days of discovering that privileged documents have been produced, the producing party identifies the documents that it asserts are privileged and the grounds for such assertion. The requesting party must promptly return the specified documents [and any copies (electronic or paper)] to the producing party, who must preserve those documents pending a ruling by the court.

There are a number of issues that could be troublesome with this approach:

- (1) If it turns on "intending to waive" the privilege (rather than inadvertent disclosure), it could apply in a situation that would be quite difficult to justify – where the producing party acknowledges that it knew that the item was being produced and that it was privileged, but wanted to have the other side see it without waiving the privilege;
- (2) The focus on privileges "under these rules or the Rules of Evidence" might leave out privileges under state law, or limit the protection if waiver were later asserted in relation to an action in state court;
- (3) The timing problem is very serious. The proposal ties the producing party's obligation to make the objection to discovery that privileged documents have been produced. Would there be a requirement to make a post-production review of documents within a certain time? Does the other side have to give notice of the mistake? If there is no time cutoff, could the objection be raised for the first time at trial, by which time the other side might have built its case around the document? Perhaps invoking the "used in the proceeding" phrase from Rule 5(d) could be helpful here, as that excludes use in discovery but seems to include use in court filings.
- (4) Should the duty to return the documents include any other documents that refer to them (even work product)?
- (5) Should the preservation requirement turn on when the court makes a ruling? If there is no dispute about whether the documents are privileged, there may never be a motion for such a ruling. Perhaps this section II.H would best be left to the preservation requirements considered in item (7) below rather than including it in this rule.



and there is another minority view that any disclosure is a waiver, no matter what precautions were taken to avoid it.<sup>13</sup>

The majority position has been summarized as follows:

Many courts have taken a third position that recognizes the burdens of discovery and the reality that lawyer errors can in some instances waive client privileges. These courts commonly look to a series of factors in deciding whether to hold that a given disclosure should be regarded as waiving the privilege that would otherwise attach to the materials produced. First, they look to the reasonableness of the efforts to avoid disclosure. Second, they look to the delay in rectifying the error. Third, they consider the scope of discovery, particularly as it relates to the burden of preparing for that discovery. Fourth, they examine the extent of the disclosure. There is a relationship among these factors; as the volume of discovery mounts so should the efforts to avoid waiver but so also should the court's understanding that, particularly given the pressures of time, mistakes can happen. Finally, the courts using this middle test consider the "overriding issue of fairness.

8 Fed. Prac. & Proc. § 2016.2 at 242-45.

Given the problem of authority, if change is to be accomplished by rulemaking, should we adopt the majority view as the rule for the federal courts? Such a rule might include only certain of the factors that the courts have developed (or add to them, as suggested above) and could (in a Committee Note) articulate the desired approach to application of those factors. As the above treatise passage suggests, there is some variation among the expression of these criteria by the courts. If a rule proposal were to be presented as based on the case law, considerably more attention would have to be paid to that case law. But it might be a stronger case before Congress if based on the consensus of the majority of the courts. The above draft largely tracks the majority case law.

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<sup>13</sup> For examples of recent cases adopting these minority views, see 8 Fed. Prac. & Pro. § 2016.2 fn. 17 and 18 (2003 Pkt. Pt. at 61-62).

## H. Preservation, "Safe Harbor," and Sanctions

### (1) Preservation and Safe Harbor

A major reason to consider rule changes regarding the preservation of electronically-stored data that may be discoverable is the ease with which volumes of data and information in electronic form can be deleted, erased or otherwise “lost.” This fact leads to the conclusion that it might be useful to emphasize a party’s general obligation to preserve material that may be discoverable in a lawsuit in which it is, or has reason to believe it will be, a party, while also providing a “safe harbor” against sanctions for a party that lost discoverable information despite reasonable efforts to preserve it.

There are various ways to address this issue. One possibility would be to add a new Rule 34.1, which would specify the affirmative obligation of parties to preserve documents and tangible things. Another began as a proposal to amend Rule 37 to include a "safe harbor" regarding continuing normal operations of computer systems. These two features could be combined in a single rule, designated for our discussion as new Rule 34.1. Such a rule would advise all parties of their obligation, upon notice of commencement of an action,<sup>14</sup> to preserve all documents and tangible things that may be required to be disclosed under Rule 26(a)(1) or produced in discovery, except for materials described in 26(h)(2) as unavailable. Ordinarily such inaccessible materials need be preserved only if the court so orders. Should such a rule also provide that a party need not suspend or alter the operation in good faith of its disaster recovery or other computer-systems unless so ordered by the court, provided that the party preserves a single day’s worth of back up

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<sup>14</sup>This phrase would acknowledge that, for the defendant, notice does not occur upon the filing of the case. It also would provide plaintiff with an incentive to serve (or at least notify) defendant promptly.

tapes? Would such a provision be inconsistent with a party's duty to preserve all data, documents and information it knows are or might be relevant to a litigation in which it is or reasonably anticipates being a party?

This approach does not address preservation obligations that may arise before the beginning of a civil action, because the Civil Rules only address pending actions. The preservation obligation is not intended to require a party to preserve multiple copies of the same data – for example, successive backups when a single backup captures the same data. Because backup data may be required to be produced under Rule 26(b)(1), it may be appropriate to direct that one copy of such data must be preserved.<sup>15</sup>

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**Rule 34.1. Duty to Preserve**

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Upon [notice of] commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule [26(a)(1) and] 26(b)(1), [except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court for good cause]. Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other [computer] systems {for electronically-stored data} unless the court so orders for good cause, [providing that the party preserves a single day's full set of such backup data].

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Does such a proposal strike the right balance? One starting point is to observe that the preservation proposal reaches all material, not just electronically-stored materials. Is this wise?

There is presently no rule explicitly addressing preservation of hard-copy materials. The

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<sup>15</sup>It has been reported that prudent counsel will direct the client to make a “snapshot” backup tape (or tapes) of all that’s on its system on the day it becomes aware of the suit. This snapshot backup can then be stored for possible use if needed, and ordinary operation of the computer system can continue until the court directs otherwise.

Committee has not received comments indicating a need for rulemaking to deal with this topic. In addition, because the general focus of this possible amendment package would be on electronically-stored data,<sup>16</sup> it may be jarring to introduce a potentially-important rule provision, which also deals with hard copy materials, in this package of proposals.

Addressing hard copy materials may also require considerable inquiry into the current practice of preserving these materials. The rule presumably is not intended to displace any other laws that address preservation (e.g., The Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7201 *et seq.*). This point could be made explicit in the Committee Note if this method is pursued. Preservation obligations often arise before a civil action is filed. It is not the intention of this provision to alter that legal obligation.

Another question is where a provision of this sort should be located. Should it be located near Rule 34 because the rule would address a concern that is likely to be important in regard to document production? But this consideration can also matter in relation to other topics, including, for example, interrogatories and depositions particularly Rule 30(b)(6) depositions of Information Technology people. So it might be desirable to locate the provision instead in Rule 26, which deals with discovery generally.

Putting together the idea that it might be safer to limit the new provision to electronically-stored data and the idea that it would be better to locate it in Rule 26, one could proceed with a new Rule 26(h)(3) instead of a Rule 34.1, to address the same issues.

\* \* \*

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<sup>16</sup> The one exception is the treatment of privilege waiver, covered in item (6). On that subject, the Committee received numerous reports of problems with hard-copy documents before attention focused on electronically-stored data, so it is understandable that the discussion proposal reaches hard copy materials.

1           1.       **Preservation and Safe Harbor Rule 26. Duty to Disclose;**  
2                   **General Provisions Governing Discovery**

3                   **(h)     Electronically-Stored Data.**

4                   **(1)     [Scope of Electronically-Stored Data [defined].**  
5                   Electronic data [Digital data] {Computer-based data}  
6                   includes all information [created, maintained, or] stored in  
7                   digital form, on magnetic, optical or other media,  
8                   accessible by the use of electronic technology such as, but  
9                   not limited to, computers, telephones, personal digital  
10                   assistants, media players, and [or] media viewers.

11                   **(2)     Inaccessible Electronically-Stored Data.** In responding to  
12                   discovery requests, a party need not include electronically-  
13                   stored data created only for disaster-recovery purposes, or  
14                   that is {not [reasonably] accessible without undue burden  
15                   or expense} [accessible only if restored or migrated to  
16                   accessible media and format] {not accessible [reasonably  
17                   available] in the usual course of the responding party's  
18                   {business} [activities]}. For good cause, the court may  
19                   order a party to produce inaccessible electronically-stored  
20                   data subject to the limitations of Rule 26 (b)(2)(B), [and  
21                   may require the requesting party to bear some or all of the  
22                   reasonable costs of {any extraordinary efforts necessary  
23                   in} obtaining such information].

24                   **(3)     Preserving Electronically-Stored Data.** Upon [notice of]  
25                   commencement of an action, all parties must preserve  
26                   electronically-stored data that may be required to be  
27                   produced pursuant to Rule [26(a)(1) and] (b)(1), [except  
28                   that materials described by Rule 26 (h)(2) need not be  
29                   preserved unless so ordered by the court for good cause].  
30                   Nothing in these rules requires a party to suspend or alter  
31                   the operation in good faith of disaster recovery or other  
32                   [computer] systems {for electronically-stored data} unless  
33                   the court so orders for good cause, [providing that the party  
34                   preserves a single day's full set of such backup data].

\* \* \*

## (2) Sanctions

The volume, dynamic nature, and inability permanently to destroy electronic data make preservation and spoliation issues, already problematic for many large companies, even less predictable and more dangerous. One possible response is to add a new section in Rule 37 – 37(f) – to impose sanctions on a party that fails to comply with the preservation requirements with respect to electronically-stored data. Such a provision might provide that in order to impose sanctions on a party for failure to produce electronically-stored data, the court must first find either that the party deleted, destroyed or otherwise made unavailable electronically-stored data that were described with reasonable particularity in a discovery request, or deleted, destroyed or otherwise made unavailable electronically-stored data in violation of Rule 26(h)(3) (or 34.1). Should such a provision also authorize the imposition of sanctions on a party that failed to preserve (“deleted, destroyed or otherwise made unavailable”) electronically-stored data that it knew or should have known was discoverable prior to the commencement of this action?

A new 37(f) would be intended to complement the “permission” granted by possible new Rule 26(h)(2) or 34.1, described above, for a party to continue normal computer operations and the recycling of backup tapes. That ongoing operation may make unavailable data that were available on the date the complaint was served. This provision says that if data cannot be produced because they are no longer available, the party asked to produce it cannot be sanctioned for its failure to produce unless one of the two conditions listed above obtains.

\* \* \*



Finally, sometimes parties (particularly plaintiffs) serve notices to preserve data before formal discovery begins. Does serving such a notice have any effect on the obligation to preserve material? Such a notice would not seem to be a "discovery request" within the meaning of condition (1), but perhaps serving one would make it more likely that a court would find that deletion afterwards was "willful or reckless" within the meaning of condition (2).

### III. CONCLUSION

This memorandum summarizes lines of inquiry that we hope to explore in the February 2004 Fordham Conference on Electronic Discovery. This set of topics is not meant to be either comprehensive or dispositive. The draft rule language included above is not intended to be anything more than a point of departure for further discussion at the Conference. This memorandum and the Conference are above all an ongoing invitation to you to share your thoughts and ideas on these important subjects.

We look forward to seeing you at Fordham.

## **APPENDICES 1-9**

- (1) E.D. & W.D. Arkansas Local Rule 26.1**
- (2) D. New Jersey Local Rule 26.1**
- (3) D. Wyoming Local Rule 26.1 and Appendix D**
- (4) Texas Rules of Civil Procedure 193.3 and 196.4**
- (5) Mississippi Court Order 13, amending Miss. R. Civ. P. 26**
- (6) Manual for Complex Litigation (4<sup>th</sup> edition) § 11.446**
- (7) Manual for Complex Litigation (4<sup>th</sup> edition), Form 40.25**
- (8) Draft Amendments to ABA Civil Discovery Standards**
- (9) Annotated Case Law and Further Reading**

**APPENDIX "1"**

**LOCAL RULE 26.1  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DISTRICT OF ARKANSAS**

Eastern District of Arkansas  
Western District of Arkansas

Local Rule 26.1

Outline for FED.R.CIV.P. 26(f) Report

The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:

- (1) Any changes in timing, form, or requirements of mandatory disclosures under Fed.R.Civ.P. 26 (a).
- (2) Date when mandatory disclosures were or will be made.
- (3) Subjects on which discovery may be needed.
- (4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:
  - (a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;
  - (b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;
  - (c) the format and media agreed to by the parties for the production of such Data as well as agreed procedures for such production;
  - (d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;
  - (e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.
- (5) Date by which discovery should be completed.
- (6) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure.
- (7) Any Orders, e.g. protective orders, which should be entered.
- (8) Any objections to initial disclosures on the ground that mandatory disclosures are not appropriate in the circumstances of the action.

(9) Any objections to the proposed trial date.

(10) Proposed deadline for joining other parties and amending the pleadings.

(11) Proposed deadline for completing discovery. (Note: In the typical case, the deadline for completing discovery should be no later than sixty (60) days before trial.)

(12) Proposed deadline for filing motions other than motions for class certification. (Note: In the typical case, the deadline for filing motions should be no later than sixty (60) days before trial.)

(13) Class certification: In the case of a class action complaint, the proposed deadline for the parties to file a motion for class certification. (Note: In the typical case, the deadline for filing motions for class certification should be no later than ninety (90) days after the Fed.R.Civ.P. 26.(f) conference.)

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Effective December 1, 2000.

Amended and effective May 1, 2002 .

Also in effect in Western District of Arkansas.

**APPENDIX "2"**

**LOCAL RULE 26.1  
DISTRICT OF NEW JERSEY**

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# District of New Jersey

## Local Civil Rule 26.1

### DISCOVERY

#### **(a) Discovery – Generally**

All parties shall conduct discovery expeditiously and diligently.

#### **(b) Meeting of Parties, Discovery Plans, and Initial Disclosures**

(1) The requirements currently codified in Fed. R. Civ. P. 26 (a) and (f) pertaining to required disclosures, meetings of parties, and submission of discovery plans, shall apply to all civil cases filed after December 1, 1993 and to all civil cases pending on December 1, 1993 that have not had their initial scheduling conference prior to January 20, 1994; except that these requirements shall not apply to those civil cases described in L. Civ. R. 72.1(a)(3)(C) in which scheduling conferences are not normally held, unless the judicial officer otherwise directs. The judicial officer may modify or suspend these requirements in a case for good cause.

(2) The initial meeting of parties as required in Fed. R. Civ. P. 26(f) shall be convened at least 21 days before the initial scheduling conference, and the proposed discovery plan under Fed. R. Civ. P. 26(f) (1) - (4) shall be generated at that meeting and delivered to the Magistrate Judge within 14 days after the meeting of parties. The parties shall submit their Fed. R. Civ. P. 26(f) discovery plan containing the parties' views and proposals regarding the following:

(a) Any changes in timing, form, or requirements of mandatory disclosures under Fed. R. Civ. P. 26(a);

(b) The date on which mandatory disclosures were or will be made;

(c) The anticipated substantive scope of discovery, including both discovery relevant to the claims and defenses and discovery relevant to the subject matter of the dispute;

(d) Whether any party will likely request or produce computer-based or other digital information, and if so, the parties' discussions of the issues listed under the Duty to Meet and Confer in L. Civ. R. 26.1(d)(3) below;

(e) Date by which discovery should be completed;

(f) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure, local rule, or standing order;

(g) Any orders, such as data preservation orders, protective orders, etc., which should be entered;

(h) Proposed deadline for joining other parties and amending the pleadings;

(i) Proposed deadline for completing discovery;

(j) Proposed dates for filing motions and for trial;

(k) Whether the case is one which might be resolved in whole or in part by voluntary arbitration (pursuant to L. Civ. R. 201.1 or otherwise), mediation (pursuant to L. Civ. R. 301.1 or otherwise), appointment of a special master or other special procedure.

The parties shall make their initial disclosures under Fed. R. Civ. P. 26(a)(1) within 10 days after the initial meeting of the parties, unless otherwise stipulated or directed by the Court. Such discovery plans and disclosures shall not be filed with the Clerk.

**(c) Discovery Materials**

(1) Initial and expert disclosure materials under Fed. R. Civ.P.26(a)(1) and 26(a)(2), transcripts of depositions, interrogatories and answers thereto, requests for production of documents or to permit entry onto land and responses thereto, and requests for admissions and answers thereto shall not be filed until used in a proceeding or upon order of the Court. However, all such papers must be served on other counsel or parties entitled thereto under Fed. R. Civ.P.5 and 26(a)(4).

(2) Pretrial disclosure materials under Fed.R.Civ.P.26(a)(3) shall be incorporated by reference into the order entered after any final pretrial conference under Fed. R. Civ. P.16(d).

(3) In those instances when such discovery materials are properly filed, the Clerk shall place them in the open case file unless otherwise ordered.

(4) The party obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or ordered. It shall be the duty of the party taking a deposition to make certain that the officer before whom it was taken has delivered it to that party for preservation and to the Court as required by Fed. R. Civ. P. 30(f)(1) if needed or so ordered.

**(d) Discovery of Digital Information Including Computer-Based Information**

(1) Duty to Investigate and Disclose. Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is

stored and how it can be retrieved. To determine what must be disclosed pursuant to Fed. R. Civ. P. 26(a)(1), counsel shall further review with the client the client's information files, including currently maintained computer files as well as historical, archival, back-up, and legacy computer files, whether in current or historic media or formats, such as digital evidence which may be used to support claims or defenses. Counsel shall also identify a person or persons with knowledge about the client's information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.

(2) Duty to Notify. A party seeking discovery of computer-based or other digital information shall notify the opposing party as soon as possible, but no later than the Fed. R. Civ. P. 26(f) conference, and identify as clearly as possible the categories of information which may be sought. A party may supplement its request for computer-based and other digital information as soon as possible upon receipt of new information relating to digital evidence.

(3) Duty to Meet and Confer. During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including the following:

(a) Preservation and production of digital information; procedures to deal with inadvertent production of privileged information; whether restoration of deleted digital information may be necessary; whether back up or historic legacy data is within the scope of discovery; and the media, format, and procedures for producing digital information;

(b) Who will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery.

**Source:** L. Civ. R. 26.1(a) - G.R. 15.E.1; L. Civ. R. 26.1(b) - G.R. 15.B.1-2; L. Civ. R. 26.1(c) - G.R. 15.G.

**APPENDIX "3"**

**LOCAL RULE 26.1 & APPENDIX D  
DISTRICT OF WYOMING**

# District of Wyoming

## Local Rules

### **Rule 26.1 DISCOVERY**

(a) Applicability. This Rule is applicable to all cases filed in this District except where modified by Court order.

(b) Stay of Discovery. Formal discovery, including oral depositions, service of interrogatories, requests for production of documents and things, and requests for admissions, shall not commence until the parties have complied with Fed. R. Civ. P. 26(a)(1).

(c) Initial Disclosure (Self-Executing Routine Discovery Exchange). It is the policy of this District that discovery shall be open, full and complete within the parameters of the Federal Rules of Civil Procedure.

(1) Initial Disclosures. [Excerpted from Fed. R. Civ. P. 26(a)(1)(A)-(O)] Except in categories of proceedings specified in Fed. R. Civ. P. 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, data compilations, 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. In cases where it is impractical due to the volume or nature of the documents to provide such copies, parties shall provide a complete description by category and location in lieu thereof;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(d) Rule 26(f) Meeting of Counsel; Initial Disclosure Exchange.

The Court will set an initial pretrial conference no sooner than thirty-five (35) days after the last pleading pursuant to Fed. R. Civ. P. 7 or a dispositive motion is filed with the Court.

(1) Counsel must meet and confer in person or by telephone in accordance with Fed. R. Civ. P. 26(f) no later than twenty (20) days after the last pleading pursuant to Fed. R. Civ. P. 7 or a dispositive motion is filed with the Court. (See Appendix D)

(2) Counsel on behalf of the parties must exchange the initial disclosures (self-executing routine discovery) pursuant to Local Rule 26.1(c)(1) above, no later than thirty (30) days after the last pleading filed pursuant to Fed. R. Civ. P. 7 or a dispositive motion is filed with the Court.

(3) Prior to a Fed. R. Civ. P. 26(f) conference, counsel should carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Likewise, counsel shall reasonably review the client's computer files to ascertain the contents thereof, including archival and legacy data (outdated formats or media), and disclose in initial discovery (self-executing routine discovery) the computer based evidence which may be used to support claims or defenses.

(A) Duty to Notify. A party seeking discovery of computer-based information shall notify the opposing party immediately, but no later than the Fed. R. Civ. P. 26(f) conference of that fact and identify as clearly as possible the categories of information which may be sought.

(B) Duty to Meet and Confer. The parties shall meet and confer regarding the following matters during the Fed. R. Civ. P. 26(f) conference:

(i) Computer-based information (in general). Counsel shall attempt to agree on steps the parties will take to segregate and preserve computer-based information in order to avoid accusations of spoliation [sic];

(ii) E-mail information. Counsel shall attempt to agree as to the scope of e-mail discovery and attempt to agree upon an e-mail search protocol. This should include an agreement regarding inadvertent production of privileged e-mail messages.

(iii) Deleted information. Counsel shall confer and attempt to agree whether or not restoration of deleted information may be necessary, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration; and

(iv) Back-up data. Counsel shall attempt to agree whether or not back-up data may be necessary, the extent to which backup data is needed and who will bear the cost of obtaining back-up data.

(4) Counsel may either submit a written report or report orally on their discovery plan at the initial pretrial conference.

(e) Filing of Discovery Pleadings. Initial disclosures (self-executing routine discovery exchange pursuant to Local Rule 26.1 c), interrogatories under Fed. R. Civ. P. 33, and answers thereto, requests for production or inspection under Fed. R. Civ. P. 34, requests for admissions under Fed. R. Civ. P. 36, and responses thereto shall be served upon other counsel or parties, but shall not be filed with the Court. Certificates or notices of compliance are not required and shall not be filed with the Court. If relief is sought under Fed. R. Civ. P. 26(c) or 37 concerning any interrogatories, requests for production or inspection, requests for admissions, answers to interrogatories or responses to requests for admissions, copies of the portions of the interrogatories, requests, answers or responses in dispute shall be filed with the Court contemporaneously with any motion filed under Fed. R. Civ. P.26(c) or 37. If interrogatories, requests, answers or responses are to be used at trial, the portions to be used shall be filed with the Clerk of Court at the outset of the trial, insofar as their use reasonably can be anticipated.

(f) Discovery of Expert Testimony.

(1) The parties are limited to the designation of one expert witness to testify for each particular field of expertise.

(2) A party may depose any person who has been identified and designated as an expert whose opinions may be presented at trial. An expert witness is one who may be used at trial to present evidence under Fed. R. Evid. 702, 703 or 705 including, but not limited to, expert witnesses who have knowledge of facts and hold opinions which were acquired or developed in anticipation of litigation or for trial.

(3) At the time of the initial pretrial conference, the presiding judicial officer shall, unless good cause appears to the contrary:

(A) establish deadlines by which any party shall designate all of their expert witnesses and provide opposing counsel with a complete written designation of the testimony of each witness;

(B) require the party designating the expert witnesses to indicate in reasonable detail the areas and fields of expertise and the qualifications of the witness as an expert in said areas and fields;

(4) The written designation of expert witness opinions shall include a comprehensive statement of each of the opinions of such witness and the factual basis for each opinion

and shall be filed with the Court. See *Smith v. Ford Motor Company*, 626 F.2d. 784 (10th Cir. 1980). The written designation shall include the following:

(A) A written report prepared and signed by the expert witness as set forth in Fed. R. Civ. P. 26(a)(2)(B); or a written report prepared and signed by counsel for the party.

(B) The party designating the expert shall provide a current resume or curriculum vitae including a list of all publications authored by the witness within the preceding ten years and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years; [Fed. R. Civ. P. 26(a)(2)(B)].

(C) require the party designating the expert witness to set forth all special conditions or requirements which the designating party or the expert witnesses will insist upon with respect to the taking of their depositions, including the amount of compensation the expert witness will require and the rate per unit of time at which said compensation will be payable. In the event counsel is unable to obtain such information to include in the designation, the efforts to obtain the same and the inability to obtain such information shall be set forth in the designation;

(5) In the event a designation of an expert witness fails to set forth the compensation to be paid by a party for the deposition of the expert, or fails to set forth the efforts to obtain such information for designation, any adverse party shall be entitled to depose such witness at the fee provided by the Federal Rules of Civil Procedure.

(6) In the event the amount and rate of the compensation is designated for the expert witness, and the deposition of that expert witness is taken without further action, discussion or agreement between counsel, then the amount described in the designation shall be paid by the party or parties taking the deposition.

(7) Nothing herein contained shall prevent the parties involved from agreeing to other terms and conditions and amount of compensation following the designation.

(8) In all cases where there is a dispute as to the proper compensation or other conditions relative to the taking of an expert discovery deposition, or an inability to obtain information concerning compensation, a party may file a motion with the Court pursuant to Fed. R. Civ. P. 26(b)(4) and (c) or Fed. R. Civ. P. 45(c), as the case may be. The Court will, thereafter, issue its order setting forth the terms, conditions, protections, limitations and amounts of compensation to be paid by the party taking the deposition.

(g) Discovery Time Limit. Whenever possible, discovery proceedings in all civil actions filed in this Court shall be completed within ninety (90) days after joinder of issue or after such issues may have been determined at the initial pretrial conference. Exceptions hereto may be granted, upon good cause shown and upon timely application, and the time for completion of such discovery proceedings therein extended by order of this Court.

(h) Stay of Self-Executing Routine Discovery Exchange. The filing of pretrial dispositive and non-dispositive motions, including motions for protective order, shall not stay the requirement that the parties exchange routine discovery as prescribed by U.S.D.C.L.R. 26.1(c), absent an order of the Court granting a stay of self-executing routine discovery.

[...]

## **APPENDIX D**

### **RULE 26(f) CONFERENCE CHECKLIST**

Counsel shall be fully prepared to discuss in detail all aspects of discovery during the mandatory Rule 26(f) Conference. The subject matters to be discussed during the Rule 26(f) Conference shall include, but are not limited to, the following:

1. Jurisdiction;
2. Service of process;
3. Initial disclosures (self-executing routine discovery) pursuant to L. R. 26.1(c);
4. Formal written discovery--interrogatories, requests for production, requests for admission;
5. Computer data discovery pursuant to L.R. 26.1(d)(3);
6. Identity and number of potential fact depositions;
7. Identity and number of potential trial depositions;
8. Location of depositions, deposition schedules, deposition costs;
9. Identify the number and types of expert witnesses to be called to present testimony during trial (including the identity of treating medical/psychological doctors);
10. Discovery issues and potential disputes;
11. Protective orders;
12. Potential dispositive motions;
13. Settlement possibilities and a settlement discussion schedule.

[Effective August 20, 2001.]

**APPENDIX "4"**

**TEXAS RULES OF CIVIL PROCEDURE  
193.3 AND 196.4**

# Texas Rules of Civil Procedure

## Discovery Rules (excerpts)

**193.3 Asserting a Privilege.** A party may preserve a privilege from written discovery in accordance with this subdivision.

(a) ***Withholding privileged material or information.*** A party who claims that material or information responsive to written discovery is privileged may withhold the privileged material or information from the response. The party must state — in the response (or an amended or supplemental response) or in a separate document — that:

- (1) information or material responsive to the request has been withheld,
- (2) the request to which the information or material relates, and
- (3) the privilege or privileges asserted.

(b) ***Description of withheld material or information.*** After receiving a response indicating that material or information has been withheld from production, the party seeking discovery may serve a written request that the withholding party identify the information and material withheld. Within 15 days of service of that request, the withholding party must serve a response that:

- (1) describes the information or materials withheld that, without revealing the privileged information itself or otherwise waiving the privilege, enables other parties to assess the applicability of the privilege, and
- (2) asserts a specific privilege for each item or group of items withheld.

(c) ***Exemption.*** Without complying with paragraphs (a) and (b), a party may withhold a privileged communication to or from a lawyer or lawyer's representative or a privileged document of a lawyer or lawyer's representative —

- (1) created or made from the point at which a party consults a lawyer with a view to obtaining professional legal services from the

lawyer in the prosecution or defense of a specific claim in the litigation in which discovery is requested, and

(2) concerning the litigation in which the discovery is requested.

- (d) ***Privilege not waived by production.*** A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if — within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made — the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

[...]

### Notes and Comments

Comments to 1999 change:

[...]

4. Rule 193.3(d) is a new provision that allows a party to assert a claim of privilege to material or information produced inadvertently without intending to waive the privilege. The provision is commonly used in complex cases to reduce costs and risks in large document productions. The focus is on the intent to waive the privilege, not the intent to produce the material or information. A party who fails to diligently screen documents before producing them does not waive a claim of privilege. This rule is thus broader than Tex. R. Evid. 511 and overturns *Granada Corp. v. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992), to the extent the two conflict. The ten-day period (which may be shortened by the court) allowed for an amended response does not run from the production of the material or information but from the party's first awareness of the mistake. To avoid complications at trial, a party may identify prior to trial the documents intended to be offered, thereby triggering the obligation to assert any overlooked privilege under this rule. A trial court may also order this procedure.

[...]

**196.4 Electronic or Magnetic Data.** To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot — through reasonable efforts — retrieve the data or

information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

[...]

### **Notes and Comments**

Comments to 1999 change:

[...]

3. A party requesting production of magnetic or electronic data must specifically request the data, specify the form in which it wants the data produced, and specify any extraordinary steps for retrieval and translation. Unless ordered otherwise, the responding party need only produce the data reasonably available in the ordinary course of business in reasonably usable form.

**APPENDIX "5"**

**MISSISSIPPI SUPREME COURT ORDER 13  
(Amends Mississippi Rules of  
Civil Procedure 26)**

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 89-R-99001-SCT**

**COURT ORDER 13**

Dated May 29, 2003. Effective May 29, 2003

This matter has come before the Court en banc for consideration of technological changes in recent years in the area of data generation, storage and retrieval. Having considered the matter, the Court finds that the amendment of Rule 26 of the Mississippi Rules of Civil Procedure as set forth in Exhibit "A" hereto will promote the fair and efficient administration of justice.

IT IS THEREFORE ORDERED that Rule 26 of the Mississippi Rules of Civil Procedure and its Comment are amended as set forth in Exhibit "A" hereto.

IT IS FURTHER ORDERED that the Clerk of this Court shall spread this order upon the minutes of the Court and shall forthwith forward a true certified copy hereof to West Publishing Company for publication as soon as practical in the advance sheets of Southern Reporter, Second Series (Mississippi Edition) and in the next edition of Mississippi Rules of Court.

SO ORDERED, this the 29th day of May, 2003.

/s/ William L. Waller, Jr.

WILLIAM L. WALLER, JR., JUSTICE  
FOR THE COURT

McRAE, P.J. DISSENTS.

**EXHIBIT "A" TO ORDER**

**RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; and requests for admission. Unless the court orders otherwise under subdivisions (c) or (d) of this rule, the frequency of use of these methods is not limited.

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

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues raised by the claims or defenses of any party. The discovery may include the existence, description, nature, custody, condition and location of any books, documents, electronic or magnetic data, or other tangible things; and the identity and location of persons (i) having knowledge of any discoverable matter or (ii) who may be called as witnesses at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of that party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is: (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparations: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under subsection (b)(1) of this rule and acquired

or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subsection (b)(4)(C) of this rule, concerning fees and expenses, as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(4)(A)(ii) and (b)(4)(B) of this rule, and (ii) with respect to discovery obtained under subsection (b)(4)(A)(ii) of this rule, the court may require, and with respect to discovery obtained under subsection (b)(4)(B) of this rule, the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Electronic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

(c) Discovery Conference. At any time after the commencement of the action, the court may hold a conference on the subject of discovery, and shall do so if requested by any party. The request for discovery conference shall certify that counsel has conferred, or made reasonable effort to confer, with opposing counsel concerning the matters set forth in the request, and shall include:

1. a statement of the issues to be tried;
2. a plan and schedule of discovery;
3. limitations to be placed on discovery, if any; and
4. other proposed orders with respect to discovery.

Any objections or additions to the items contained in the request shall be served and filed no later than ten days after service of the request.

Following the discovery conference, the court shall enter an order fixing the issues; establishing a plan and schedule of discovery; setting limitations upon discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

The court may impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement. Upon a showing of good cause, any order entered pursuant to this subdivision may be altered or amended.

(d) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending, or in the case of a deposition the court that issued a subpoena therefor, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the discovery not be had;
- (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition after being sealed to be opened only by order of the court;

- (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court;
- (9) the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, oppression or undue burden or expense, including provision for payment of expenses attendant upon such deposition or other discovery device by the party seeking same.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37(a)(4) applies to the award of expenses incurred in relation to the motion.

(e) **Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(f) **Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (A) the identity and location of persons (i) having knowledge of discoverable matters, or (ii) who may be called as witnesses at the trial, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if that party obtains information upon the basis of which (A) the party knows that the response was incorrect when made, or (B) the party knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

[Amended effective March 1, 1989; March 13, 1991; April 13, 2000. Amended effective May 29, 2003 to add Rule 26(5) addressing discovery of electronic data.]

#### **Advisory Committee Historical Note**

[Advisory Committee Historical Notes are not changed by this order]

### **Comment**

With two important exceptions MRCP 26 is identical to Miss. Code Ann. § 13- 1-266 (1972); subdivision 26(b)(1) narrows the scope of permissible discovery, although it does permit the discovery of the identity and location of persons who may be called as witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.

Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case -- the language of Miss. Code Ann. § 13-1-226(b) (1972) -- rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues," rather than from the more sweeping term "subject matter."

Rule 26(b) was amended effective May 29, 2003, adding subsection (5) to make specific provision for discovery of data and information existing in electronic and magnetic form. Recognizing that special problems may exist in the retrieval of such data, the rule limits the duty to that of production of electronic and magnetic data to that which is reasonably available to the responding party in its ordinary course of business. Further, if extraordinary steps are required to retrieve and produce the information, the court may require the requesting party to pay the expense of those steps, in addition to costs which may be assessed under Rule 26(d)(9). The production of data compilations which are subject to production under Rule 34 is also subject to the limitations of Rule 26(b)(5).

Rule 26(c) establishes a discovery conference convened on the court's own motion or at the request of any party. This conference is a corollary to the limitation on the scope of discovery dictated by Rule 26(b)(1). Whether the conference is convened on the court's own motion or upon a litigant's certified request, the court has control over the time of its convening and the scope of its reach.

Rule 26(c) provides the procedure for early judicial control but continues to impose principal responsibility upon the litigating bar for the preparation of a case. In the great majority of cases, opposing counsel should be able, without judicial intervention, to formulate an appropriate plan and schedule of discovery in relation to issues readily defined by agreement. In those instances, however, where it would facilitate the discovery process, the court may hold a discovery conference on its own motion or upon the request of either party.

The discovery conference will produce an order defining: (a) a "plan" in which the types and subjects of discovery are set forth, e. g., oral depositions of A, B and C; production of contracts and any letters, correspondence or memoranda explaining or modifying them, etc.; (b) a "schedule" for discovery which specifies the time and place for discovery events, e. g., the dates and places for the taking of depositions of A, B and C, or the time within which documents are to be produced, and (c) such "limitations" as might otherwise be employed in protective orders, e. g., the documents of C shall be disclosed only to B's lawyers.

The rule also provides for "allocation of expenses." This provision would permit courts, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

An early accord or order on discovery may require later modification. Rule 26(c) allows such amendments freely. Again, cooperation among counsel should be the rule rather than the exception.

[Comment amended effective March 1, 1989; April 13, 2000. Comment amended effective May 29, 2003.]

**APPENDIX "6"**

**MANUAL FOR COMPLEX LITIGATION  
(4<sup>th</sup> edition) § 11.446**

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Counsel and the judge must agree on a computer service provider to administer the depository, although technologies such as CD-ROM and the Internet reduce the need for physical storage facilities, inspection, and copying. Most discovery material can be produced by the parties to the depository in computer-readable form. For the remaining paper documents, the court may direct that some or all be “imaged” or scanned and made available either on disks or on-line (special provision for the retention of originals, if they carry independent legal significance, may be necessary).<sup>167</sup>

#### 11.445 Evidentiary Foundation for Documents

The production of documents, either in the traditional manner or in a document depository, will not necessarily provide the foundation for admission of those documents into evidence at trial or for use in a motion for summary judgment. In managing documents, the court should therefore also take into account the need for effective and efficient procedures to establish the foundation for admission, which can be accomplished by stipulation, requests for admission, interrogatories, or depositions (particularly Rule 31 depositions on written questions).<sup>168</sup> While admissions are only binding on the party making them, authenticity (as opposed to admissibility) may be established by the testimony of any person having personal knowledge that the proffered item is what the proponent claims it to be.<sup>169</sup> This is particularly true when discovery involves computerized data (see section 11.446) that must be retrieved from computer systems or storage media, imaged, converted to a common format, or handled by a third-party expert or court-appointed neutral in the process of production. The judge should advise parties to agree on handling because admissibility will depend on the efficacy of these procedures.

#### 11.446 Discovery of Computerized Data

Computerized data have become commonplace in litigation. The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data meas-

167. For more on this technology, see *Effective Use of Courtroom Technology*, *supra* note 85 at 97–98.

168. See Fed. R. Civ. P. 36.

169. See *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 285 (3d Cir. 1983), *rev'd on other grounds sub. nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

ured in terabytes, or 1,000,000 megabytes; each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

Digital or electronic information can be stored in any of the following: mainframe computers, network servers, personal computers, hand-held devices, automobiles, or household appliances; or it can be accessible via the Internet, from private networks, or from third parties. Any discovery plan must address issues relating to such information, including the search for it and its location, retrieval, form of production, inspection, preservation, and use at trial.

For the most part, such data will reflect information generated and maintained in the ordinary course of business. As such, discovery of relevant and nonprivileged data is routine and within the commonly understood scope of Rules 26 and 34. Other data are generated and stored as a byproduct of the various information technologies commonly employed by parties in the ordinary course of business, but not routinely retrieved and used for business purposes. Such data include the following:

- *Metadata, or “information about information.”* This includes the information embedded in a routine computer file reflecting the file creation date, when it was last accessed or edited, by whom, and sometimes previous versions or editorial changes. This information is not apparent on a screen or in a normal printout of the file, and it is often generated and maintained without the knowledge of the file user.
- *System data, or information generated and maintained by the computer itself.* The computer records a variety of routine transactions and functions, including password access requests, the creation or deletion of files and directories, maintenance functions, and access to and from other computers, printers, or communication devices.
- *Backup data, generally stored off-line on tapes or disks.* Backup data are created and maintained for short-term disaster recovery, not for retrieving particular files, databases, or programs. These tapes or disks must be restored to the system from which they were recorded, or to a similar hardware and software environment, before any data can be accessed.
- *Files purposely deleted by a computer user.* Deleted files are seldom actually deleted from the computer hard drive. The operating system renames and marks them for eventual overwriting, should that particular space on the computer hard drive be needed. The files are recoverable only with expert intervention.
- *Residual data that exist in bits and pieces throughout a computer hard drive.* Analogous to the data on crumpled newspapers used to pack

shipping boxes, these data are also recoverable with expert intervention.

Each of these categories of computer data may contain information within the scope of discovery. The above categories are listed by order of potential relevance and in ascending order of cost and burden to recover and produce. The judge should encourage the parties to discuss the scope of proposed computer-based discovery early in the case, particularly any discovery of data beyond that available to the responding parties in the ordinary course of business. The requesting parties should identify the information they require as narrowly and precisely as possible, and the responding parties should be forthcoming and explicit in identifying what data are available from what sources, to allow formulation of a realistic computer-based discovery plan. Rule 26(b)(2)(iii) allows the court to limit or modify the extent of otherwise allowable discovery if the burdens outweigh the likely benefit—the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems. Additionally, some computerized data may have been compiled in anticipation of or for use in the litigation and may therefore be entitled to protection as trial preparation materials.

There are several reasons to encourage parties to produce and exchange data in electronic form:

- discovery requests may themselves be transmitted in computer-accessible form—interrogatories served on computer disks, for example, could then be answered using the same disk, avoiding the need to retype them;
- production of computer data on disks, CD-ROMs, or by file transfers significantly reduces the costs of copying, transport, storage, and management—protocols may be established by the parties to facilitate the handling of documents from initial production to use in depositions and pretrial procedures to presentation at trial;
- computerized data are far more easily searched, located, and organized than paper data; and
- computerized data may form the contents for a common document depository (see section 11.444).

The goal is to maximize these potential advantages while minimizing the potential problems of incompatibility among various computer systems, programs, and data, and minimizing problems with intrusiveness, data integrity, and information overload.

Below are some of the relevant issues to be considered in reaching an optimal balance.

*Form of production.* Rule 34 provides for the production, inspection, and copying of computerized data, i.e., “data compilations from which informa-

tion can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.” Rule 33(d) permits parties to answer interrogatories by making business records available for inspection and copying, including “compilations,” where “the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served.”

Conventional “warehouse” productions of paper documents often were costly and time-consuming, but the burdens and expense were kept in check by the time and resources available to the requesting parties to review and photocopy the documents. In a computerized environment, the relative burdens and expense shift dramatically to the responding party. The cost of searching and copying electronic data is insignificant. Meanwhile, the tremendously increased volume of computer data and a lack of fully developed electronic records-management procedures have driven up the cost of locating, organizing, and screening data for relevance and privilege prior to production. Allowing requesting parties access to the responding parties’ computer systems to conduct their own searches, which is in one sense analogous to the conventional warehouse paper production, would compromise legally recognized privileges, trade secrets, and often the personal privacy of employees and customers.

Evolving procedures use document-management technologies to minimize cost and exposure and, with time, parties and technology will likely continue to become more and more sophisticated. The judge should encourage the parties to discuss the issues of production forms early in litigation, preferably prior to any production, to avoid the waste and duplication of producing the same data in different formats. The relatively inexpensive production of computer-readable images may suffice for the vast majority of requested data. Dynamic data may need to be produced in native format, or in a modified format in which the integrity of the data can be maintained while the data can be manipulated for analysis. If raw data are produced, appropriate applications, file structures, manuals, and other tools necessary for the proper translation and use of the data must be provided. Files (such as E-mail) for which metadata is essential to the understanding of the primary data should be identified and produced in an appropriate format. There may even be rare instances in which paper printouts (hard copy) are appropriate. No one form of production will be appropriate for all types of data in all cases.<sup>170</sup>

The court should consider how to minimize and allocate the costs of production. Narrowing the overall scope of electronic discovery is the most effec-

170. See *Effective Use of Courtroom Technology*, *supra* note 85, at 61–97; see also *supra* section 11.421.

tive method of reducing costs. Early agreement between the parties regarding the forms of production will help eliminate waste and duplication. More expensive forms of production, such as production of word-processing files with all associated metadata or production of data in a specified nonstandard format, should be conditioned upon a showing of need or sharing of expenses.<sup>171</sup>

*Search and retrieval.* Computer-stored data and other information responsive to a production request will not necessarily be in an appropriately labeled file. Broad database searches may be necessary, requiring safeguards against exposing confidential or irrelevant data to the opponent's scrutiny. A responding party's screening of vast quantities of unorganized computer data for privilege prior to production can be particularly onerous in those jurisdictions in which inadvertent production of privileged data may constitute a waiver of privilege as to a particular item of information, items related to the relevant issue, or the entire data collection. Fear of the consequences of inadvertent waiver may add cost and delay to the discovery process for all parties. Thus, judges often encourage counsel to stipulate at the outset of discovery to a "nonwaiver" agreement, which they can adopt as a case-management order. Such agreements protect responding parties from the most dire consequences of inadvertent waiver by allowing them to "take back" inadvertently produced privileged materials if discovered within a reasonable period, perhaps thirty days from production.

Some data may be maintained in compilations that are themselves entitled to trade-secret protection or that reflect attorney work product (e.g., data compiled for studies and tabulations) for use at trial or as a basis for expert opinions. Generally, claims of trade-secret or work-product privilege for computer data should be treated the same as similar claims for conventional data. The difference is that discovery respondents may be able to produce computer-data compilations containing confidential or privileged data, structures, or relationships in such a fashion as to suppress or eliminate the confidential or privileged data. For example, a computerized litigation support database containing the thoughts and impressions of counsel may be modified to reveal only "ordinary" attorney work product. Production of such ordinary work product would still be subject to the showings of substantial need and undue hardship under Rule 26(b)(3), as well as possible sharing of costs. If both parties plan to use litigation support databases to prepare their cases, encourage them to share the expense of preparing "ordinary" work product, such as document indexes, to which each party can add privileged data for their own

171. See *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998) (affirming a trial court order that the parties bear half the cost of copying 210,000 pages of E-mails as a "reasonable resolution of [the] problem" and "far from an abuse of discretion").

trial preparation use. Such arrangements often facilitate the production of large databases of imaged documents and are necessary for the establishment of a document depository.

*Use at trial.* In general, the Federal Rules of Evidence apply to computerized data as they do to other types of evidence.<sup>172</sup> Computerized data, however, raise unique issues concerning accuracy and authenticity. Accuracy may be impaired by incomplete data entry, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The integrity of data may also be compromised in the course of discovery by improper search and retrieval techniques, data conversion, or mishandling. The proponent of computerized evidence has the burden of laying a proper foundation by establishing its accuracy.

The judge should therefore consider the accuracy and reliability of computerized evidence, including any necessary discovery during pretrial proceedings, so that challenges to the evidence are not made for the first time at trial. When the data are voluminous, verification and correction of all items may not be feasible. In such cases, verification may be made of a sample of the data. Instead of correcting the errors detected in the sample—which might lead to the erroneous representation that the compilation is free from error—evidence may be offered (or stipulations made), by way of extrapolation from the sample, of the effect of the observed errors on the entire compilation. Alternatively, it may be feasible to use statistical methods to determine the probability and range of error.

*Computer experts.* The complexity and rapidly changing character of technology for the management of computerized materials may make it appropriate for the judge to seek the assistance of a special master or neutral expert, or call on the parties to provide the judge with expert assistance, in the form of briefings on the relevant technological issues.

#### 11.447 Discovery from Nonparties

Under Federal Rule of Civil Procedure 34(c), a nonparty may be compelled to produce and allow copying of documents and other tangibles or submit to an inspection by service of a subpoena under Rule 45; the producing person need not be deposed or even appear personally.<sup>173</sup> A party seeking such production has a duty to take reasonable steps to avoid imposing undue bur-

172. See Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 43 N.Y.L. Sch. L. Rev. 875 (1999–2000).

173. Fed. R. Civ. P. 45(c)(2)(A). Despite the absence of a deposition, notice must be given to other parties. Fed. R. Civ. P. 45(b)(1).

**APPENDIX "7"**

**MANUAL FOR COMPLEX LITIGATION  
(4<sup>th</sup> edition) FORM 40.25**

## 40.25 Preservation of Documents, Data, and Tangible Things

[Caption]

### Interim Order Regarding Preservation

[The primary purpose of this order is to have the parties meet and confer to develop their own preservation plan. If the court determines that such a conference is unnecessary or undesirable, paragraph 3, Duty to Preserve, may be modified to serve as a stand-alone preservation order.]

#### 1. Order to Meet and Confer

To further the just, speedy, and economical management of discovery, the parties are ORDERED to meet and confer as soon as practicable, no later than 30 days after the date of this order, to develop a plan for the preservation of documents, data, and tangible things reasonably anticipated to be subject to discovery in this action. The parties may conduct this conference as part of the Rule 26(f) conference if it is scheduled to take place within 30 days of the date of this order. The resulting preservation plan may be submitted to this Court as a proposed order under Rule 16(e).

#### 2. Subjects for Consideration

The parties should attempt to reach agreement on all issues regarding the preservation of documents, data, and tangible things. These issues include, but are not necessarily limited to:

- (a) the extent of the preservation obligation, identifying the types of material to be preserved, the subject matter, time frame, the authors and addressees, and key words to be used in identifying responsive materials;
- (b) the identification of persons responsible for carrying out preservation obligations on behalf of each party;
- (c) the form and method of providing notice of the duty to preserve to persons identified as custodians of documents, data, and tangible things;
- (d) mechanisms for monitoring, certifying, or auditing custodian compliance with preservation obligations;
- (e) whether preservation will require suspending or modifying any routine business processes or procedures, with special attention to document-management programs and the recycling of computer data storage media;
- (f) the methods to preserve any volatile but potentially discoverable material, such as voicemail, active data in databases, or electronic messages;
- (g) the anticipated costs of preservation and ways to reduce or share these costs; and

- (h) a mechanism to review and modify the preservation obligation as discovery proceeds, eliminating or adding particular categories of documents, data, and tangible things.

### 3. Duty to Preserve

- (a) Until the parties reach agreement on a preservation plan, all parties and their counsel are reminded of their duty to preserve evidence that may be relevant to this action. The duty extends to documents, data, and tangible things in the possession, custody and control of the parties to this action, and any employees, agents, contractors, carriers, bailees, or other nonparties who possess materials reasonably anticipated to be subject to discovery in this action. Counsel is under an obligation to exercise reasonable efforts to identify and notify such nonparties, including employees of corporate or institutional parties.
- (b) “Documents, data, and tangible things” is to be interpreted broadly to include writings; records; files; correspondence; reports; memoranda; calendars; diaries; minutes; electronic messages; voicemail; E-mail; telephone message records or logs; computer and network activity logs; hard drives; backup data; removable computer storage media such as tapes, disks, and cards; printouts; document image files; Web pages; databases; spreadsheets; software; books; ledgers; journals; orders; invoices; bills; vouchers; checks; statements; worksheets; summaries; compilations; computations; charts; diagrams; graphic presentations; drawings; films; charts; digital or chemical process photographs; video, phonographic, tape, or digital recordings or transcripts thereof; drafts; jottings; and notes. Information that serves to identify, locate, or link such material, such as file inventories, file folders, indices, and metadata, is also included in this definition.
- (c) “Preservation” is to be interpreted broadly to accomplish the goal of maintaining the integrity of all documents, data, and tangible things reasonably anticipated to be subject to discovery under Fed. R. Civ. P. 26, 45, and 56(e) in this action. Preservation includes taking reasonable steps to prevent the partial or full destruction, alteration, testing, deletion, shredding, incineration, wiping, relocation, migration, theft, or mutation of such material, as well as negligent or intentional handling that would make material incomplete or inaccessible.
- (d) If the business practices of any party involve the routine destruction, recycling, relocation, or mutation of such materials, the party must, to the extent practicable for the pendency of this order, either
  - (1) halt such business processes;
  - (2) sequester or remove such material from the business process; or
  - (3) arrange for the preservation of complete and accurate duplicates or copies of such material, suitable for later discovery if requested.

- (e) Before the conference to develop a preservation plan, a party may apply to the court for further instructions regarding the duty to preserve specific categories of documents, data, or tangible things. A party may seek permission to resume routine business processes relating to the storage or destruction of specific categories of documents, data, or tangible things, upon a showing of undue cost, burden, or overbreadth.

#### 4. Procedure in the Event No Agreement Is Reached

If, after conferring to develop a preservation plan, counsel do not reach agreement on the subjects listed under paragraph 2 of this order or on other material aspects of preservation, the parties are to submit to the court within three days of the conference a statement of the unresolved issues together with each party's proposal for their resolution of the issues. In framing an order regarding the preservation of documents, data, and tangible things, the court will consider those statements as well as any statements made in any applications under paragraph 3(e) of this order.

Entered this \_\_\_\_ day of \_\_\_\_, 20\_\_

\_\_\_\_\_  
United States District Court Judge

**APPENDIX "8"**

**AMERICAN BAR ASSOCIATION  
HOUSE OF DELEGATES**

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**DRAFT AMENDMENTS TO  
CIVIL DISCOVERY STANDARDS**

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To: Members of the Bench, Bar and Academia

From: Gregory P. Joseph and Barry F. McNeil  
Co-Chairs, Task Force on Electronic Discovery  
ABA Section of Litigation

Re: **Electronic Discovery Standards — Draft Amendments to ABA Civil  
Discovery Standards**

Date: November 17, 2003

In August of 1999, the American Bar Association House of Delegates adopted Civil Discovery Standards to address practical aspects of the discovery process that are not covered by state or federal rules of procedure. Two of the Standards (Nos. 29 and 30) addressed Electronic Discovery.

In the four years since the adoption of the Civil Discovery Standards, the issues surrounding Electronic Discovery have exploded. In light of these developments, Patricia Lee Refo, the Chair of the Section of Litigation, appointed a Task Force to reexamine the Standards insofar as they pertain to Electronic Discovery. The members of the Task Force include lawyers from large firms and small, plaintiffs' and defense counsel, inhouse and outside lawyers, a state Supreme Court justice, and technical experts.

Enclosed is a copy of the public-comment draft of the Task Force's proposed amendments to the Civil Discovery Standards. We are soliciting comments from distinguished judges, lawyers and academics from around the country. A summary of the amendments follows:

**Existing Standard 29 — Preserving and Producing Electronic Information.** Existing Standard 29 has been modified in three ways. First, it has been stripped of language suggesting that it was taking a position as to substantive legal doctrines (the Standards were not intended to replace existing rules or statutes but rather to complement them). Second, a checklist of sources of electronic data and discovery has been added as an aid to practitioners and judges. Third, the factors for the court to consider in determining whether to order production, or to allocate costs, has been expanded.

**Existing Standard 30 — Using Technology to Facilitate Discovery.**

Existing Standard 30 has been modified in two ways — first, to clarify that subdivision (a) applies to production in electronic form of discovery materials not stored electronically, and, second, to convert what was previously an option into a presumption that written discovery requests or responses should be provided to opponents unless the parties have agreed otherwise.

**New Standard 31 — Effective Use of Discovery Conferences.**

Draft Standard 31 focuses on effective use of discovery conferences to deal with electronic discovery issues. Draft Standard 31(a) specifies several categories of electronic discovery related matters that the parties should confer about at an initial discovery conference. Draft Standard 31(b) identifies additional issues for the parties to discuss at “meet-and-confer” conferences when they are focusing on specific discovery demands and objections.

**New Standard 32 — Attorney-Client Privilege and Attorney Work**

**Product.** Draft Civil Discovery Standard 32 deals with privilege and work product concerns. It applies in the common situation in which electronic data must be extracted for production by an IT expert not employed by the producing party. It suggests three alternate routes to ameliorate waiver concerns, and recommends procedures to implement them.

**New Standard 33 — Technological Advances.**

Draft Standard 33 recognizes that there are emerging new technologies that may not be electronically based. It provides that, to the extent that information is stored other than electronically (or in hard copy), it is intended that Standards 29-32 may be consulted with respect to discovery of such information, with appropriate modifications for differences in storage media.

The Task Force welcomes public comment on these proposed amendments to the ABA Civil Discovery Standards. It is the goal of the Section of Litigation to bring them to the House of Delegates, in final form, for approval in August 2004. Your observations are welcome.

Please forward any comments to either of the Co-Chairs or to any member of the Task Force (please feel free to use email).

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**CIVIL DISCOVERY STANDARDS\***

**AUGUST 1999**

[NOVEMBER 2003 DRAFT AMENDMENTS TO  
ELECTRONIC DISCOVERY STANDARDS]

\*The Standards, which appear in bold face type, were adopted as ABA policy in August 1999.

#### IV. DOCUMENT PRODUCTION

**10. The Preservation of Documents.** When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents and of the possible consequences of failing to do so.

[This Standard is unchanged but is referenced in Standard 29(a)(i), *infra*.]

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. ~~A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.~~

ii. Electronic data as to which a duty to preserve may exist — and the platforms on which, and places where, such data may be found — include:

a. Databases;

b. Networks;

c. Computer systems, including legacy systems;

d. Servers;

e. Archives;

f. Back up or disaster recovery systems;

g. Tapes, discs, drives, cartridges and other storage media;

h. Laptops;

i. Personal computers;

j. Internet data; and

k. Personal digital assistants.

[Former Standard 29(a)(ii) has been renumbered 29(b)(i)]

iii. Electronic data as to which a duty to preserve may exist include data that have been deleted but can be restored.

~~iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been~~

~~deleted or discarded in the regular course of business but may not have been completely erased from computer memory.~~

b. Discovery of Electronic Information.

~~i. Unless otherwise stated in a request Document requests should clearly state whether electronic data is sought. In the absence of such clarity, a request for "documents" should ordinarily be construed as also asking for information contained or stored in an electronic medium or format, unless otherwise stated in a request. [Formerly, Standard 29(a)(ii)]~~

~~iii. A party may ask should consider asking for the production of electronic information in hard copy, in electronic form or in both forms. A party may should also consider asking for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate (a) whether and when electronic mail was sent or opened by its recipient(s) or (b) whether and when information was created and/or edited. A party should also may consider requesting the software necessary to retrieve, read or interpret electronic information. A party who produces information in electronic form ordinarily need not also produce hard copy to the extent that the information in both forms is identical.~~

~~iiii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, or to allocate the costs of such discovery, the court should consider such factors as (a) the burden and expense of the discovery, considering among other factors the total cost of production compared to the amount in controversy; (b) the need for the discovery, including the benefit to the requesting party and the availability of the information from other sources; (c) the complexity of the case and the importance of the issues; (d) the need to protect the attorney-client privilege or attorney work product privilege; (e) the need to protect trade secrets, proprietary, or confidential information; (f) whether the information or the software needed to access it is proprietary or constitutes confidential business information; (f)(g) the breadth of the discovery request; and (g)(h) whether efforts have been made to confine initial production to tranches or subsets of potentially responsive data; (i) whether the requesting party has offered to pay some or all of the discovery expenses; (j) the relative ability of each party to control costs and its incentive to do so; and (k) the resources of each party as compared to the total cost of production, (l) whether responding to the request would impose the burden~~

or expense of acquiring or creating software to retrieve potentially responsive electronic data or otherwise require the responding party to render inaccessible electronic information accessible, where the responding party would not do so in the ordinary course of its day-to-day use of the information, (n) whether the responding party stores electronic information in a way that makes it more costly or burdensome to access the information than is reasonably warranted by legitimate personal, business, or other non-litigation related reasons, (o) whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable. In complex cases and/or ones cases involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues.

- iii. ~~The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.~~
- iv. ~~Where the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:~~
  - ~~(a) whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;~~
  - ~~(b) the relative expense and burden on each side of producing it;~~
  - ~~(c) the relative benefit to the parties of producing it; and~~
  - ~~(d) whether the responding party has any special or customized system for storing or retrieving the information.~~
- iv.v. The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.

**30. Using Technology to Facilitate Discovery.**

- a. In appropriate cases, the parties may agree or the court may direct that some or all discovery materials that have not been stored in electronic form should nonetheless be produced, at least in the first instance, in an electronic format and how the expenses of doing so will be allocated among the parties.**
- b. ~~Upon request, a~~A party serving written discovery requests or responses should provide the other party or parties with a ~~diskette or other~~ an electronic version of the requests or responses unless the parties have previously agreed that no electronic version is required.**

**31. Discovery Conferences.**

- a. At the initial discovery conference, the parties should confer about any electronic discovery that they anticipate requesting from one another, including:**
- i. The subject matter of such discovery.**
  - ii. The time period with respect to which such discovery may be sought.**
  - iii. Identification or description of the party-affiliated persons, entities or groups from whom such discovery may be sought.**
  - iv. Identification or description of those persons currently or formerly affiliated with the prospective responding party who are knowledgeable of the information systems, technology and software necessary to access potentially responsive data.**
  - v. The potentially responsive data that exist, including the platforms on which, and places where, such data may be found, including:**
    - a. Databases;**
    - b. Networks;**
    - c. Computer systems, including legacy systems;**
    - d. Servers;**
    - e. Archives;**
    - f. Back up or disaster recovery systems;**
    - g. Tapes, discs, drives, cartridges and other storage media;**
    - h. Laptops;**
    - i. Personal computers;**
    - j. Internet data; and k. Personal digital assistants.**
  - vi. The accessibility of the potentially responsive data, including discussion of software that may be necessary to obtain access.**
  - vii. Whether potentially responsive data exist in searchable form.**

- viii. Whether potentially responsive electronic data will be requested and produced in electronic form or in hard copy.
  - ix. Data retention policies applicable to potentially responsive data.
  - x. Preservation of potentially responsive data, specifically addressing preservation of data generated subsequent to the filing of the claim.
  - xi. The use of key terms or other selection criteria to search potentially responsive data for discoverable information, in lieu of production.
  - xii. The identity of unaffiliated information technology consultants whom the litigants agree are capable of independently extracting, searching or otherwise exploiting potentially responsive data.
  - xiii. Stipulating to the entry of a court order providing that production to other parties, or review by a mutually-agreed independent information technology consultant, of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection.
- b. At any discovery conference that concerns particular requests for electronic discovery, in addition to conferring about the topics set forth in subsection (a), the parties should consider stipulating to the entry of a court order providing for:
- i. The initial production of tranches or subsets of potentially responsive data to allow the parties to evaluate the likely benefit of production of additional data, without prejudice to the requesting party's right to insist later on more complete production.
  - ii. The use of specified key terms or other selection criteria to search some or all of the potentially responsive data for discoverable information, in lieu of production.
  - iii. The appointment of a mutually-agreed, independent information technology consultant pursuant to Standard 32(a) to:
    - A. Extract defined categories of potentially responsive data from specified sources, or

**B. Search or otherwise exploit potentially responsive data in accordance with specific, mutually-agreed parameters.**

**32. Attorney-Client Privilege and Attorney Work Product. To ameliorate attorney-client privilege and work product concerns attendant to the production of electronic data, the parties should consider stipulating to the entry of a court order:**

- a. Appointing a mutually-agreed, independent information technology consultant as a special master, referee, or other officer or agent of the court such that extraction and review of privileged or otherwise protected electronic data will not effect a waiver of privilege or other legal protection attaching to the data.**
- b. Providing that production to other parties of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data.**
- c. Providing that extraction and review by a mutually-agreed independent information technology consultant of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work product protection attaching to the data.**
- d. Setting forth a procedure for the review of the potentially responsive data extracted under subdivision (a), (b), or (c). The order should specify that adherence to the procedure precludes any waiver of privilege or work product protection attaching to the data. The order may contemplate, at the producing party's option:**
  - i. Initial review by the producing party for attorney-client privilege or attorney work product protection, with production of the unprivileged and unprotected data to follow, accompanied with a privilege log, or**
  - ii. Initial review by the requesting party, followed by:**
    - A. Production to the producing party of all data deemed relevant by the requesting party, followed by**
    - B. A review by the producing party for attorney-client privilege or attorney work product protection.**

**The court's order should contemplate resort to the court for resolution of disputes concerning the privileged or protected nature of particular electronic data.**

- e. Prior to receiving any data, any mutually-agreed independent information technology consultant should be required provide the court and the parties with an affidavit confirming that the consultant**

will keep no copy of any data provided to it and will not disclose any data provided other than pursuant to the court's order or parties' agreement. At the conclusion of its engagement, the consultant should be required confirm under oath that it has acted, and will continue to act, in accordance with its initial affidavit.

f. If the initial review is conducted by the requesting party in accordance with subsection (d)(ii), the requesting party should provide the court and the producing party an affidavit stating that the requesting party will keep no copy of data deemed by the producing party to be privileged or work product, subject to final resolution of any dispute by the court, and will not use or reveal the substance of any such data unless permitted to do so by the court.

**33. Technological Advances. To the extent that information may be contained or stored in a data compilation in a form other than electronic or paper, it is intended that Standards 29-32 may be consulted with respect to discovery of such information, with appropriate modifications for the difference in storage medium.**

**APPENDIX "9"**

**ANNOTATED CASE LAW  
AND FURTHER READING**

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# Annotated Case Law and Further Reading

(updated January 15, 2004)

## I. Annotated Case Law

### A. Data Preservation and Spoliation

*Danis v. USN Communications*, 53 Fed. R. Serv. 3d 828 (N. D. Ill. 2000). The failure to take reasonable steps to preserve data at the outset of discovery resulted in a personal fine levied against the defendant's CEO.

*GTFM v. Wal-Mart Stores*, 49 Fed. Rules Serv. 3d 219 (S.D. N.Y. 2000). Defendant counsel provided inaccurate information to the plaintiffs about computer records early in discovery, and discoverable computer records were later destroyed. The court ordered defendant to pay attorney's fees and costs expended to litigate the sanction motion and recover the data.

*Keir v. UnumProvident*, 2003 WL 21997747 (S.D.N.Y. Aug. 22, 2003). In an ERISA class action suit, the parties agreed to a data preservation order after several conferences. The order was very narrowly drawn and concentrated on preserving six days of email records which were contained on the defendant's backup tapes and hard drives. However, the defendant's upper management did not communicate the order to its IT staff for nearly two weeks and most of its data management functions had been outsourced to IBM, which failed to implement the required preservation. While the court found that the defendant's failure to preserve was unintentional, it criticized the defendant's poor compliance with the preservation order. The court recommended that further action be taken to determine the feasibility of retrieving the lost data and the extent of prejudice to the plaintiffs in order for the court to fashion a remedy.

*Landmark Legal Foundation v. Environmental Protection Agency*, 2003 WL 21715678 (D. D.C.) ("Landmark II," Memorandum Opinion and Order dated July 24, 2003). In a civil suit stemming from a FOIA request, the court issued a preliminary injunction ordering that the EPA refrain from "transporting, removing, or in any way tampering with information responsive" to the Plaintiff's FOIA request. Subsequently, the hard drives of several EPA officials were reformatted, backup tapes were erased and reused, and individual emails were deleted. The Plaintiff filed a motion for contempt. The court held that under the strict standards of Rule 65, the order was clear and the data destroyed went "to the heart" of the plaintiff's claims. The EPA was found in contempt and ordered to pay attorney's fees and costs, but the court declined to hold several individuals and the United States Attorney's Office in contempt as well. *Cf.*, *Landmark I*, under "Records Management" at C.

*Lewy v. Remington Arms*, 836 F. 2d 1104 (8th Cir. 1988). In a product liability suit alleging defective design of rifles, documents concerning past consumer complaints relevant to the suit were destroyed. The trial court issued an instruction that the jury could infer that the destroyed documents would have provided evidence against Remington (a "spoliation instruction"). Remington appealed, claiming that the document destruction was routine, pursuant to the company's three-year records retention schedule. The appeals court remanded the case back to the trial court for a determination of whether a three-year records retention schedule was reasonable, and whether suspension of the schedule when the lawsuit was filed should have been required, whether or not the schedule was reasonable in the ordinary course of business.

*Linnen v. A.H. Robins*, 10 Mass L. Rptr. 189 (Mass. Sup. Ct., 1999). Counsel failed to adequately investigate their client's computer records and holdings, and thereby failed to preserve relevant computer records. In the face of repeated representations before the court that no relevant records existed, a spoliation inference would be a reasonable sanction.

*McGuire v. Acufex Microsurgical*, 175 F.R.D. 149 (D. Mass. 1997). In an employment case, the human resources director edited a word-processed report of an internal investigation after a state administrative complaint was filed but before suit was filed in federal court. While this action could be considered destruction or alteration of discoverable evidence, it was within the director's authority to do so and not misconduct, and no harm occurred, given that an unedited version of the document was produced from another computer source. However, the facts surrounding the editing would be admissible.

*Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, et. al.* 212 F.R.D. 178 (S.D. N.Y. 2003). Contrary to counsel's representations, the defendant had failed to conduct a reasonable investigation to response to discovery requests, failed to prevent the destruction of documents, failed to adequately instruct the person in charge of document collection, and shortly before a scheduled on-site inspection, had allowed computers subject to discovery to be replaced with new computers. The court found that the defendant's behavior constituted a "combination of outrages" and ordered judgment against the defendant with attorneys' fees.

*New York National Organization for Women v. Cuomo*, 1998 WL 395320 (S.D. N.Y.). Counsel have a duty to advise their client to take reasonable steps to preserve records subject to discovery.

*In Re Prudential Insurance Company of America Sales Practice Litigation*, 169 F.R.D. 598 (D. N.J. 1997). In a major class action suit alleging deceptive sales practices by insurance agents, the defendant agreed to suspend its usual records retention schedule for sales literature nationwide. Each field office had a detailed records management handbook which was updated often in the usual course of

business, but the order to suspend destruction of sales literature was communicated by bulk email, routinely ignored by the field agents. This and the defendant's pattern of failure to prevent unauthorized document destruction warranted \$1 million fine and court-ordered measures to enforce the document preservation order.

*Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F. 3d 99 (2d Cir. 2002). Remanding the trial court's denial of a spoliation inference, the Second Circuit holds that the trial judge has the discretion to consider "purposeful sluggishness," resulting in denial of access to email that may include discoverable data, as equivalent to spoliation for Rule 37 purposes. Conduct need not be willful and need not result in the physical destruction of the evidence to be sanctionable.

*Strasser v. Yalamanchi*, 783 So.2d 1087 (Fla Ct. App. 2001) ("Strasser II"). While delaying discovery to obtain a protective order, the respondent claimed the hard drive was damaged and had to be disposed of, circumstances which the court found suspicious enough to allow a spoliation question to go to the jury. *Cf.*, *Strasser I*, under "Scope of Electronic Discovery" at B.

*Thompson v. United States*, 2003 WL 22963931 (D. Md.) (Memorandum and Order dated December 12, 2003). In a suit against the Department of Housing and Urban Development, the court entered an order under Rule 37(b)(2) precluding the United States from calling certain witnesses until they either answered certain outstanding requests for the production of email or demonstrated to the court's satisfaction that responsive email did not exist. Later, after the deadline set by the court and on the eve of trial, the United States produced approximately 80,000 responsive emails. The court acknowledged that electronic discovery carries burdens that may trigger Rule 26(b)(2) balancing, when the burdens alleged are supported by facts. But when no such facts are presented, sanctions for failure to respond to discovery requests are appropriate. In determining whether evidence preclusion is an appropriate sanction, the court applied a five-part test:

1. surprise to the party against whom the evidence would be entered
2. ability of that party to cure the surprise
3. extent of possible disruption to the trial
4. importance of the evidence
5. explanation for failure to produce the evidence in discovery.

Applying these factors, the court ordered that the United States be precluded from entering any of the email into evidence and that United States attorneys be forbidden from using any of the email in preparing witnesses. The plaintiffs would be allowed to use the emails as evidence if they so chose, and were invited to move for costs and attorney's fees necessitated by last-minute review of the emails for trial. In addition, if evidence from the trial regarding the non-production of these emails justified it, the plaintiffs were invited to move for contempt of court against the United States.

*Trigon Insurance v. United States*, 204 F.R.D. 277 (E.D. Va., 2001). In a corporate taxpayer suit against the United States, the United States hired a litigation support firm, which in turn hired experts to act as consultants and testifying experts. The litigation support firm had a policy under which all email communications with experts and draft reports were destroyed. The court held that under the facts of this case, those communications and drafts would have been discoverable, and the United States was responsible for its litigation support firm's intentional spoliation. Adverse inferences regarding the content of the destroyed electronic documents were appropriate.

*Wiginton, et al. v. CB Richard Ellis, Inc.*, 2003 WL 22439865 (N.D. Ill.). In a putative class action alleging sexual harassment, plaintiff counsel sent a detailed, four-page letter to the defendant's general counsel, requesting the defendant to halt all destruction of potential paper and electronic evidence. Several months later the parties agreed to a joint data preservation order which was endorsed by the court. However, prior to the entry of the order, the defendant followed its routine document management program, which resulted in the destruction of some email backup tapes and employee hard drives, including that of the plaintiff's former supervisor. The plaintiff filed a motion for a sanctions for spoliation and a blanket data preservation order going forward. The magistrate judge held that the plaintiff's initial letter did not, in itself, trigger any duty to preserve evidence or even a duty to respond, but served to inform the defendant of the possible scope of preservation necessary, which was beyond the action taken by the general counsel at the time. The judge heard evidence on the nature and extent of the defendant's IT system and the cost of routine backups, and took note of the fact that backups were designed for disaster recovery purposes only. However, the judge held that simple assertions of burden and cost do not excuse "complete failure to perform any search" and constitute "willful blindness." Therefore, the judge found that the defendant "wilfully and intentionally" violated the duty to preserve evidence. Turning to sanctions, the judge did not find the requisite degree of bad faith or fault to support a sanction of default. On the lesser possible sanction of a spoliation inference, the recommended that the motion be denied without prejudice, pending further investigation of the extent and nature of the data loss.

*William T. Thompson Company v. General Nutrition*, 593 F. Supp. 1443 (C. D. Cal. 1984). The court entered default against the defendant for destroying computer records subject to discovery.

B. Scope of Electronic Discovery

*Byers, et al. v. Illinois State Police, et al.*, 53 Fed. R. Serv. 3d 740 (N.D. Ill. 2002). Plaintiffs in a sex discrimination case requested discovery of email backup tapes going back eight years. Citing *Rowe Entertainment and McPeck*, among other cases, the court narrowed the request and ordered the plaintiff to assume the cost of restoring the data, including obtaining the necessary software license.

*Anti-Monopoly v. Hasbro*, 1995 WL 649934 (S.D. N.Y.). "It is black letter law that computerized data is discoverable."

*Fennell v. First Step Designs*, 83 F. 2d 526 (1st Cir. 1996). Discovery of computer hard drive not justified by mere supposition that relevant evidence might be found.

In re *Ford Motor Company*, 2003 WL 22171712 (11<sup>th</sup> Cir. 2003). In a design defect suit against Ford Motor Company, the district court granted the plaintiff's motion to compel direct access to Ford's extensive dealer and customer contact databases without a hearing and before Ford had responded to the motion. Granting a writ of mandamus to vacate the district court's discovery order, the Court of Appeals held that Fed. R. Civ. P. 34(a) allows the requesting party to inspect and copy data "resulting from the respondent's translation of data into reasonably useable form." This allows the respondent to search its records to produce the requested information, but does not normally allow the requesting party to perform the search itself. Absent any finding by the district court that Ford had failed to comply with the original discovery request, any discussion of Ford's objections to the requested discovery, and any protocols or limits on the scope of the search, the appeals court found that the district court had abused its discretion.

*McPeek v. Ashcroft*, 202 F.R.D. 31 (D. D.C., 2001). Retrieval of specific records from computer backup tapes is not within the ordinary and foreseeable course of business, but the restoration of a small sample of the backup tapes will be ordered to determine whether the backup tapes contain relevant discoverable information not available from any other source.

*McPeek v. Ashcroft*, 212 F.R.D. 33 (D. D.C. 2003) ("McPeek II") Following up on a previous ruling in the same case, Magistrate Judge Facciola held that after ordering "sampling" of a large collection of backup tapes, the resulting data did not support further discovery of any but one of the tapes. The opinion includes a detailed description of the sampling methods used to reach the conclusion.

*Medical Billing Consultants, Inc. v. Intelligent Medical Objects, Inc.*, 2003 WL 1809465 (N. D. Ill.) (Memorandum Opinion and Order dated April 4, 2003). In a copyright and trade secret appropriation case, the defendants moved to allow on-site inspection of the plaintiff's computers. The court held that absent any showing that the plaintiff's disclosures and responses to prior requests were inadequate or that more evidence is likely to be discovered, the request would be denied as unduly burdensome.

*Stallings-Daniel v. Northern Trust Company*, 52 Fed. R. Serv. 3d 1406 (N.D. Ill. 2002). In line with *Fennell v. First Step Designs*, the court denied the plaintiff's motion for wide-ranging discovery of the defendant's email system, based solely

on the allegation that the defendant had mishandled email production in a previous, unrelated case.

*Strasser v. Yalamanchi*, 669 So.2d 1142 (Fla Ct. App. 1996) (“Strasser I”). Access to a computer hard drive for the purposes of discovery will be denied when the requesting party cannot demonstrate the likelihood of retrieving purged information and cannot show that access is the least intrusive manner to acquire information. *Cf.*, *Strasser II*, under “Data Preservation and Spoliation” at A.

*Wright v. AmSouth Bancorporation*, 320 F. 3d. 1198 (11th Cir. 2003). In a very brief opinion, the 11th Circuit held that the trial court did not abuse its discretion when it held that the plaintiff’s request for discovery of “computer diskette or tape copy of all word processing files created, modified and/or accessed by, or on behalf” of five employees of the defendant over a two and one-half year period was not reasonably related to the plaintiff’s age discrimination claims, overly broad, and unduly burdensome.

#### C. Records Management

*In re Cheyenne Software Securities Litigation*, 1997 WL 714891 (E.D. N.Y.). Routine recycling of computer storage media must be halted during discovery, when that is the most reasonable means of preserving data available.

*Heveafil Sdn. Bhd. v. United States*, 2003 WL 1466193 (Fed. Cir.) (**slip opinion not to be cited as authority**) The Federal Circuit affirmed the judgment of the U.S. Court of International Trade in refusing to admit into evidence computerized business records which, in the trial court’s view, were “at best, an unauthenticated duplicate of a database which may have been generated in the ordinary course of business.” The Circuit explained that the manufacturer “did not produce evidence explaining how the copy was made, such as an affidavit by an employee with pertinent knowledge verifying the accuracy of the database,” and that key source documentation was not retained.

*Kozłowski v. Sears, Roebuck*, 73 F.R.D. 73 (D. Mass. 1976). In the days before computers, Sears, Roebuck recorded all customer complaints about products on index cards, which were organized by the name of the complainant with no cross-indexing, making it almost impossible to search across the vast collection for complaints about the same or similar products. When Sears was sued for selling children's pajamas made from highly flammable fabric, it argued that discovery of all complaints about flammable pajamas would be unduly burdensome, and therefore should not be allowed. The court held that Sears' was under an obligation to answer the discovery request, stating that "to allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules."

*Landmark Legal Foundation v. Environmental Protection Agency*, 2003 WL 21715677 (D.D.C.) ("Landmark I," Memorandum Opinion dated July 24, 2003). After news articles appeared nationally claiming that the Environmental Protection Agency (EPA) was trying to push through regulations before the Bush administration took office, the plaintiffs filed a FOIA request seeking records about the EPA's rulemaking activities in the months before January 20, 2001. Dissatisfied with the response to the FOIA request, the plaintiffs filed suit. In particular, the plaintiff's claimed that the EPA violated FOIA by not maintaining agency email in a central file in "readily reproducible" form. The court disagreed, holding that the EPA practice of printing out email and filing it in various files by subject matter was a reasonable practice and did not violate FOIA. In addition, the court held that the EPA's search for responsive documents was reasonable and adequate, and that the plaintiff cannot require a particular search methodology in its FOIA request. Finally, the plaintiff complained that the EPA had destroyed documents subject to its FOIA request. The court held that while this was troubling, FOIA is not a records management statute, and the document destruction issue would have to be dealt with as a separate matter. *Cf.*, *Landmark II*, under "Data Preservation and Spoliation" at A.

*Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57 (2003). In a contract dispute filed by a marine dredging contractor against the US Army Corps of Engineers, the plaintiff moved to compel production of backup tapes and for permission to make a bitstream image of contracting officer's hard drive, based on admissions by the Corps that it did not search hard drives or backup tapes to answer previous discovery requests, and by the contracting officer that he routinely deleted emails before and after suit was filed. The plaintiff also requested that, as a sanction for spoliation, the Corps be ordered to pay costs associated with recovery of deleted emails from the backup tapes and hard drive. The Corps countered that spoliation could not be found where the Corps followed its records management program, did not act in bad faith, and where there was no showing that evidence relevant and material to the defendant's case had been destroyed. The court found that the Corps' records management program was inconsistent with its obligations to preserve evidence when litigation is reasonably anticipated, which in this case was two years before suit was filed. The Corps was ordered to produce the backup tapes at its own expense and to allow creation of the bitstream image of then hard drive.

*Public Citizen v. Carlin*, 184 F. 2d 900 (D.C. Cir. 1999). In promulgating the records management schedule known as GRS 20, the National Archivist determined that federal agency email could be migrated to archival media, and once migrated, original messages left in native format on desktop computers and network servers need not be preserved. The Archivist's migration plan preserved the content of the records and all necessary information from which the provenance of the records could be determined, although the archival media selected (in this case, paper) did not allow for easy searching and sorting. The district court held that GRS 20 violated the Records Disposal Act, 44 USC Section 3303a(d) (see *Public Citizen v.*

Carlin, 2 F. Supp. 2d 18 (D. D.C. 1998)). On appeal, the circuit court reversed, noting that the plaintiff had confused form with substance, and holding that the Archivist can reasonably "permit agencies to maintain their recordkeeping systems in the form most appropriate to the business of the agency."

D. Form of Production

In re *Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437 (D. N.J., 2002). Early in the litigation, the parties had agreed to paper production and a per-page price for photocopying. However, the defendant did not disclose that the documents had been scanned, were being "blown back" in paper form at a cost below that of photocopying, and were available in electronic form for considerably less money. The court held the parties to the agreement to produce paper, but at the lower cost of the "blow backs," and ordered that the electronic versions also be produced, at the nominal cost of duplicating compact disks. The court rejected the defendant's argument that the plaintiff contribute to the cost of scanning the documents, as that action was taken unilaterally by the defendant, who didn't inform the plaintiff, for its own purposes. Finally, the court lamented that the parties did not take the "meet and confer" obligations of Fed. R. Civ. Pro. 26(f) seriously in light of electronic discovery.

In re *Honeywell International, Inc. Securities Litigation*, 2003 WL 22722961 (S.D. N.Y.). In a putative securities class action, the plaintiffs served a subpoena on non-party PriceWaterhouseCoopers (PWC), the defendant's auditor. PWC produced 63,500 pages of financial workpapers in hardcopy form. The plaintiff moved to compel the production in electronic form, claiming that the data as produced were in neither business record order nor labeled to correspond to the categories of the requested, as required by Rule 34. PWC opposed the motion to compel, stating that it had produced the requested data and provided an index to assist the plaintiffs in determining how the information was organized. In addition, production of the information in electronic form would require PWC to either provide the plaintiffs its proprietary software to access the information or spend more than \$30,000 to convert the data into non-proprietary format, which the plaintiffs should pay. The court acknowledged that PWC had produced paper versions of the documents requested, but that PWC had only provided "hieroglyphic indices that render the workpapers essentially incomprehensible." PWC would be required to produce the data in electronic form, and could avoid the \$30,000 expense by also producing the proprietary software to access the data. The plaintiffs were not competitors and a confidentiality order was already in place, so PWC's trade secret interests were adequately protected.

*McNally Tunneling v. City of Evanston*, 2001 WL 1568879 (N.D. Ill.). Authority is split on whether a party is entitled to discovery in electronic form as well as paper form, citing *Williams v. Owens-Illinois*, 665 F. 2d 918 (9<sup>th</sup> Cir. 1982) denying a request for computerized data to supplement paper production; and *Anti-Monopoly* (above at Section B), holding that a party is entitled to both hard copy

and computerized data. In this case, the defendant's request for computer files to supplement the plaintiff's paper production is not supported by any demonstration of need.

E. Use of Experts

*Gates Rubber v. Bando Chemical Industries*, 167 F.R.D. 90 (D. Colo. 1996). When allowed direct access to the respondent's computer system for the purposes of discovery, the requesting party's unqualified computer discovery expert destroyed 7-8% of discoverable records and compromised the evidential integrity of the rest.

*Playboy v. Terri Welles*, 60 F. Supp. 2d 1050 (S.D. Cal. 1999). To protect privilege, confidentiality, and the integrity of the evidence, the court will appoint a qualified neutral expert to conduct discovery of the defendant's computer hard drive.

*Simon Properties v. MySimon*, 194 F.R.D. 639 (S.D. Ind. 2000). The court adapts the *Playboy* approach to a trademark infringement case involving the hard drives of several employees of the defendant. The Supplemental Entry following the Order details the protocol for the expert to follow.

*Northwest Airlines v. Local 2000 Teamsters*, 00-CV-8 (D. Minn. 2000), discussed in Michael J. McCarthy, *Data Raid: In Airline's Suit, PC Becomes Legal Pawn, Raising Privacy Issues*, Wall Street Journal, May 24, 2000 at A1. In an unreported case, the court adapts the *Playboy* approach, but discovers that the time, costs, and intrusiveness are all greater than originally assumed.

*Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al.*, 51 Fed. R. Serv. 3d 1106; *aff'd*. 53 Fed. R. Serv. 3d 296 (S.D. N.Y. 2002). In allowing the requesting party direct access to the respondent's computer files, the court adopts a protocol in which the requesting party's expert recovers files and the requesting party's attorney reviews them for relevance BEFORE the responding party reviews them for privilege. *See also, Rowe Entertainment*, under "Costs and Cost Allocation" at F.

F. Costs and Cost Allocation

In re *Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 634 (E.D. Mich. 1989). The cost of producing data to the requesting party in a specific format for the purposes of litigation will be borne by the requesting party.

In re *Brand Name Prescription Drugs Litigation*, 1995 WL 360526 (N.D. Ill. 1995). When a defendant chooses a computer-based business system, the cost of retrieving information is an ordinary and foreseeable risk.

*Computer Associates International, Inc. v. Quest Software, Inc.*, 2003 WL 21277129 (N.D. Ill. 2003). Plaintiffs in a software copyright and trade secret infringement case requested that the defendants image the hard drives of six key employees. After the imaging, the defendant spent between \$28,000 and \$40,000 to remove privileged emails from the backups and create a privilege log. The defendants then filed a motion to require the plaintiffs to pay these preparation costs. The court reviewed the eight Rowe factors, and determined that none of them favored cost shifting, analogizing these preparation costs to costs for attorney review.

*Medtronic Sofamor Danek, Inc. v. Gary Karlin Michelson, M.D., et al.* 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn.). In an intellectual property case involving spinal fusion medical technology, the defendant sought discovery of information from 996 computer backup tapes and 300 megabytes of data on desktop computers of the plaintiff's employees. The plaintiff objected that the proposed discovery would be unduly costly and burdensome. The court agreed, and applied the eight Rowe factors with painstaking factual detail to determine that the defendant should shoulder most of the costs of the proposed discovery. The court then ordered an equally detailed protocol for the parties to follow in conducting discovery of the backup tapes and hard drives. Finally, the court rejected as unwarranted the defendant's request that a special master be appointed under Fed. R. Civ. P. 53, and instead ordered the parties to agree on a neutral computer expert to supervise discovery under the protocol.

*Murphy Oil USA v. Fluor Daniel*, 52 Fed. R. Serv. 3d 168 (E.D. La. 2002). Following Rowe, the court offers the defendant two options for proceeding with discovery of email from the computer hard drives and allocating costs. Under one option, the defendant may forego prior review of email recovered at the plaintiff's expense. Under the second option, the defendant may review, at its own cost, all documents relevant documents recovered by the expert before production to the plaintiff.

*OpenTV v. Liberate Technologies*, N.D. Cal. No. C 02-0655 (Order Re Discovery dated November 18, 2003). In an intellectual property infringement suit, the magistrate judge ruled that a portion of the costs of producing relevant computer source code should be shifted from the responding party to the requesting party. The plaintiff had requested production of some 100 additional versions of source code for software products being developed by the defendant. The defendant objected, stating that locating and duplicating the requested source code would be unduly burdensome and would yield only marginally relevant results. Instead, the defendant offered to make its complete source code database available at its facilities, along with a complete index to the database and a software engineer to provide technical assistance. The plaintiff rejected the offer, arguing that it essentially shifted production costs to plaintiff, the requesting party. The court agreed that the offer effectively shifted costs, yet because extracting the source code would take the defendant between 125 and 150 hours of work, the court

found that the requested electronic data was inaccessible for purposes of discovery and that cost-shifting would be appropriate. Applying the *Zubulake* factors, the court determined that the costs for extraction should be split evenly although the cost of duplication should be borne solely by the defendant.

*Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978). The cost of creating eight new computer programs to identify potential class members from responding party's computer data can reasonably be shifted to the requesting party, when the need for access to the specific data requested is not foreseeable in the normal course of business.

*Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al.*, 205 F.R.D. 421 (S.D. N.Y., 1106). In a class action against talent agencies alleging racial discrimination in bookings, the plaintiff class requested email from the defendants' backup media. The four defendants objected, citing the high costs estimated by electronic discovery consultants to restore the backup media to accessible form and the legal costs associated with screening for relevance and privilege. Balancing eight factors derived from the case law, the plaintiffs were required to pay for the recovery and production of the defendants' extensive email backups, except for the cost of screening for relevance and privilege. The eight "Rowe factors" are:

1. The specificity of the discovery request.
2. The likelihood of discovering material data.
3. The availability of that data from other sources.
4. The purposes for which the responding party maintains that data.
5. The relative benefits to the parties of obtaining that data.
6. The total costs associated with production.
7. The relative ability and incentive for each party to control its own costs.
8. The resources available to each party.

*Xpedior Credit Trust v. Credit Suisse First Boston (USA)*, 2003 WL 22283835 (S.D.N.Y.). A corporation brought putative class action against an investment banking house alleging breach of contract in an Initial Public Offering (IPO), and sought discovery of electronic data from two decommissioned computer systems. The defendant moved for a protective order shifting the costs of restoring the computer systems to access the data. Applying the seven-part test enunciated in *Zubulake I* (below), Judge Shira Scheindlin found that the plaintiff's request was narrowly tailored, the information was not available from any other source, and the cost of the proposed restoration (\$400,000), while high, was not extraordinary in light of the total monetary stake. She also noted that the plaintiff was a bankrupt corporation with no assets and the defendant was an international firm with assets of over \$5 billion. The final factors—ability to minimize costs, public interest in the issues at stake, and the usefulness of the information to both parties, were neutral. Therefore, although the information requested was inaccessible without incurring costs, there was no justification to shift those costs to the requesting party.

*Zubulake v. UBS Warburg LLC, et al.*, 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y.) ("Zubulake I," Opinion and Order dated May 13, 2003). In a sex discrimination suit against a financial services company, the plaintiff requested email beyond the approximately 100 pages produced by the defendants. She presented substantial evidence that more responsive email existed, most likely on backup tapes and optical storage media created and maintained to meet SEC records retention requirements. The defendants objected to producing email from these sources, which they estimated would cost \$175,000 exclusive of attorney review time. The district judge held that the plaintiff's request was clearly relevant to her claims, but both parties raised the question of who would pay for the discovery and urged the court to apply the *Rowe* factors. The court held that for data kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes. Further, requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases. Finally, in conducting the cost-shifting analysis, the court rejected the *Rowe* factors and substituted a seven-factor test. The "Zubulake factors" are, in order of importance or weight:

1. The extent to which the request is tailored to discover relevant data.
2. The availability of that data from other sources.
3. The total cost of production, relative to the amount in controversy.
4. The total cost of production, relative to the resources available to each party.
5. The relative ability and incentive for each party to control its own costs.
6. The importance of the issues at stake in the litigation.
7. The relative benefits to the parties in obtaining that data.

*Zubulake v. UBS Warburg LLC, et al.*, 2003 U.S. Dist. LEXIS 12643 (S.D.N.Y.) ("Zubulake III," Opinion and Order dated July 24, 2003). Following the May 13, 2003 Order and Opinion above, the defendants restored and reviewed five backup tapes selected by the plaintiff at a cost slightly over \$19,000. 600 email messages were deemed to be responsive to the plaintiff's discovery request. The defendant estimated that the cost for production of the entire 77-tape collection would be \$165,954.67 for restoration and \$107,694.72 for review. Analyzing each of the seven factors announced by the court in the previous decision, the court determined that the balance tipped slightly against cost shifting, and that requiring the defendant to bear 75% of the costs would be fair. However, the court determined that none of the costs for attorney review of the data, once it had been made accessible, should be borne by the requesting party.

#### G. Privacy and Privilege

*In re Currency Conversion Fee Antitrust Litigation*, MDL 1409, 2003 WL 22389169 (S.D. N.Y.). The "functional equivalent" exception to the corporate

attorney-client privilege, under which the privilege is maintained even though the communications are disclosed to a third party, if that third party is the "functional equivalent" of a corporate employee, does not apply to otherwise privileged documents processed by an outsourced computer data processing firm.

*Fraser v. Nationwide Mutual Insurance Co.*, 2003 WL 22904302 (3d Cir.). In a wrongful discharge suit, the 3d Circuit Court of Appeals upheld the district court's ruling that an employer's search for emails of an employee found on the workplace computer network did not violate the Electronic Communications Privacy Act (ECPA), 18 USC 2510 *et seq.* Title I of the ECPA prohibits "interceptions," which are universally defined as occurring during transmission, not if the message has reached its destination and is being stored. Title II of the ECPA prohibits "seizure" of stored emails, but exempts actions taken by the "person or entity providing the wire or electronic communications service," in this case, the employer.

*United States v. Rigas*, 2003 WL 22203721 (S.D.N.Y. Sept. 22, 2003). In a criminal case involving executives of the Adelphia Communication Corporation, the government issued grand jury subpoenas to Adelphia, pursuant to which Adelphia created 26 bitstream images of employee hard drives. The imaged hard drives were installed on a secure, limited access computer in the offices of the AUSA, where they were reviewed by a paralegal employed by the AUSA. Defense counsel was then allowed to access and copy the imaged hard drives. Three weeks later, during defense counsel's review of the imaged hard drives, it was discovered that a chronology and some other files created by the AUSA paralegal had been included on the imaged hard drive. Defense counsel immediately notified the AUSA, but declined a request to return the work product, and instead tendered the files to the Court pending a resolution of their status. The court held that the "middle road" approach would be taken on the issue of whether this inadvertent production constituted waiver of the work product protection. The court concluded that given the reasonableness of the precautions and security measures taken by the AUSA, the tremendous volume of information on the 26 imaged hard drives, the small volume of work product material inadvertently produced, and the prompt action taken by the AUSA upon discovery of the inadvertent production, a finding that work product protection had been waived would be unfair.

*United States v. Stewart*, 2003 WL 22384751 (S.D.N.Y.). A year before her indictment on charges related to securities fraud, but after the investigation had been made public, Martha Stewart prepared a detailed email relating her side of the facts and sent it to her attorney. The next day she accessed the email and forwarded it to her daughter, without alteration. Later, attorneys for Martha Stewart Living Omnimedia (MSLO) produced documents and computer files in response to a grand jury subpoena. Both emails appeared on MSLO's privilege log, however only the email to the attorney was removed from the actual production. An AUSA attorney later found the copy sent to the daughter. Ms. Stewart objected to MSLO's production of the email on the basis that it was privileged. The court

held that the email to the attorney would have been privileged as attorney-client communication, but that the privilege was waived by Ms. Stewart when she forwarded the email to her daughter. However, the court found that the work product protections offered by Fed. R. Civ. P. 26(b)(3) and Fed. R. Cr. P. 16(b) are broader than the attorney-client communication privilege, and that sharing factual work product with a family member did not waive that protection.

*United States Fidelity & Guaranty Co. v. Braspetro Oil Services Co.*, 63 Fed. R. Serv. 3d 60, 2002 WL 15652 (S.D. N.Y.). In a surety action, the defendants provided their testifying experts with more than 50 CD-ROM disks containing 1.1 million documents, including many attorney-client communications and work product documents. The plaintiffs claimed that by providing the experts with unfettered access to the entire litigation support database, the defendants had waived any privileges and were required to produce the database under Fed. R. Civ. P. 26(a)(2), as material “considered” by the experts. The court acknowledged that while the scope of what is “considered” by an expert is unclear in the case law, the burden is on the party resisting discovery to clearly identify for the court the material which the expert did not “consider” out of the mass provided. Finding that the defendant provided no such guidance, the court held that the entire litigation support database was discoverable, as well as the index and OCR-created text files used by the experts in searching the database.

New York State Bar Association, Committee on Professional Ethics, Opinion 749 (December 14, 2001), found at [http://www.nysba.org/Content/NavigationMenu/Attorney\\_Resources/Ethics\\_Opinions/Committee\\_on\\_Professional\\_Ethics\\_Opinion\\_749.htm](http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Ethics_Opinions/Committee_on_Professional_Ethics_Opinion_749.htm).

The receipt by an attorney of an electronic file does not constitute permission to open and read the metadata or imbedded data that file might contain. Opening and viewing such data is presumptively unauthorized and unethical. Similarly, placing a tracer “bug” in an email to track the distribution and modification of the message after it has left the attorney’s computer system is unethical. For a short analysis of this ethics opinion and useful links to background technical information, see David Hricik, *The Transmission and Receipt of Invisible Confidential Information*, E-Ethics, October 2003, found at <http://www.hricik.com/eethics/2.3.html>.

H. Rule 37 sanctions (see also, “Spoliation,” above at A.)

*Kucala Enterprises, Ltd. v. Auto Wax Company, Inc.*, 2003 WL 21230605 (N. D. Ill.) (Report and Recommendation dated May 27, 2003). In a patent infringement case, the defendant repeatedly requested documents from the plaintiff, including business records and correspondence from the plaintiff’s computer system. After three motions to compel production, the defendant was allowed access to the plaintiff’s computer to conduct an inspection. The computer forensics expert conducting the inspection discovered that the plaintiff had used a commercially available disk wiping software, “Evidence Eliminator,” to “clean” approximately

3,000 files three days before the inspection, and another 12,000 on the night before the inspection between the hours of midnight and 4 a.m. Based on the totality of the circumstances, the Magistrate Judge found that the spoliation was intentional and recommended to the trial judge that the plaintiff's case be dismissed with prejudice, and that the plaintiff pay the defendant's attorneys fees and costs from the time the Evidence Eliminator was first used. On *de novo* review, the district court judge rejected the recommendation to dismiss the plaintiff's case with prejudice, favoring adjudication of the claims and counterclaims, but upheld the recommendation that the plaintiff bear attorneys fees and costs. *Kucala Enterprises, Ltd. v. Auto Wax Company*, 2003 WL 22433095 (N.D. Ill.) (Rulings on Objections dated October 27, 2003).

*Procter & Gamble Co. v. Haugen*, 2003 WL 22080734 (D. Utah) (Order dated Aug. 19, 2003). Procter & Gamble ("P&G") sued several independent distributors of rival Amway products, claiming unfair trade practices for allegedly distributing email associating P&G with Satanism. P&G immediately informed the defendants of their duty to preserve computer evidence crucial to the case, but neglected to impose a similar duty upon itself, resulting in the destruction of email records of five key P&G employees. Without citing Rule 37, the court granted the defendant's motion to dismiss the case on three grounds, each of which the court stated were sufficient alone to grant dismissal. The three grounds were (1) that the plaintiff failed to preserve evidence it knew was "critical" to the case, (2) the plaintiff's actions rendered an effective defense "basically impossible," and (3) the plaintiff destroyed the very evidence it would need to support its proposed expert testimony on damages, rendering the testimony inadmissible on *Daubert* grounds. In a previous decision, the trial court sanctioned the plaintiff \$10,000--\$2,000 for each of the five key employees whose files had been destroyed. *Procter & Gamble Co. v. Haugen*, 179 F.R.D. 622 (D. Utah 1998), *rev'd on other grounds*, 222 F.3d 1262 (10th Cir. 2000).

*Sheppard v. River Valley Fitness One*, 50 Fed. R. Serv. 3d 1278 (D. N.H. 2001). Defendant attorney's failure to produce requested computer records, attributed to lack of diligence as opposed to intentional obstruction of discovery, warranted a fine of \$500 and a testimonial preclusion order.

*Stevenson, et al. v. Union Pacific Railroad Co.*, 2003 WL 23104550 (8<sup>th</sup> Cir.). In a negligence action arising out of a railroad crossing collision, the trial court granted the plaintiffs partial summary judgment and imposed the sanction of adverse inference jury instructions on the defendant for destruction of recorded voice communications between the train crew and dispatchers, and destruction of track maintenance records both before and after commencement of litigation. On appeal, the circuit court looked at the circumstances of each allegation of spoliation and applied the test of *Lewy v. Remington Arms*. It held that the trial court did not abuse its discretion in imposing the adverse jury instruction sanction for destruction of the tape recordings, as the tape recordings were clearly relevant to reasonably anticipated litigation, there were no alternative records, and there was

evidence that such recordings had been preserved in other litigation. Likewise, the destruction of track maintenance records after litigation commenced warranted the sanction. However, the routine destruction of track maintenance records pursuant to a records management policy prior to litigation did not give rise to a presumption of bad faith to justify the adverse jury instruction. And on remand, the trial court was instructed to allow the defendant to present evidence challenging the rebuttable presumption that an adverse jury instruction creates.

*Theofel v. Farey Jones*, 2003 WL 22020268 (9<sup>th</sup> Cir.). In a commercial lawsuit, the defendant issued a subpoena to the plaintiff's Internet Service Provider (ISP) requesting "all copies of e-mail sent or received by anyone" at the plaintiff, with no limitations of time or scope. The ISP, which was unrepresented by counsel, complied, producing many privileged and irrelevant messages. The plaintiff moved to have the subpoena quashed and for sanctions for discovery abuse, which the Magistrate Judge granted. Individual employees of the plaintiff also filed civil suits against the defendant under the Stored Communications Act, Wiretap Act, and Computer Fraud and Abuse Act, which the district court dismissed. The appellate court reversed the dismissal of the claims under the Stored Communications Act and Computer Fraud and Abuse Act, stating that the subpoena, although purporting to be a valid request under Fed. R. Civ. P. 45, so "transparently and egregiously" violated that standards of Rule 45 that the "defendants acted in bad faith and with gross negligence in drafting and deploying it," negating any argument that the ISP knowingly consented to the request. By remanding the statutory claims to the district court, the appellate court left open the possibility of civil penalties against the defendant.

*Tulip Computers International B.V. v. Dell Computer Corporation*, 52 Fed. R. Serv. 3d 1420 (D. Del 2002). In a patent infringement case, defendant Dell failed several times to answer discovery requests, provide any reasonable explanations for its failures, or provide any witnesses who could answer questions about its records management systems, paper or computerized. In apparent frustration, the court granted the plaintiff's request for direct access to the respondent's records warehouse and computer data.

*Zubulake v. UBS Warburg LLC, et al.*, 2003 U.S. Dist. LEXIS 18771 (S.D.N.Y.) ("Zubulake IV," Opinion and Order dated October 22, 2003). [For factual background, see "Zubulake I" and "Zubulake III" under "Costs and Cost Allocation" above at F.] After restoring backup tapes to locate missing emails, the defendant found that certain relevant tapes were missing. The plaintiff moved for sanctions, including a spoliation inference. The court found that (a) a duty to preserve the missing tapes existing, (b) that the defendant was negligent and possibly reckless in failing to preserve the tapes, but (c) the plaintiff failed to demonstrate a reasonable likelihood that the missing tapes contained evidence that would have been relevant to the lawsuit. Had the plaintiff shown either that the defendant had acted with malicious intent or that the missing tapes actually held evidence that would have been damaging, a spoliation inference would have been appropriate.

In the absence of either of those elements, the appropriate sanction would be limited to awarding the costs of additional depositions taken pursuant to this discovery.

## **II. Further Reading**

### **A. Current Awareness**

<<http://www.kenwithers.com/>>

This web site is maintained by Ken Withers of the Federal Judicial Center, but is unofficial. It contains articles on electronic discovery, sets of PowerPoint slides and text from judicial education and bar association seminars on electronic discovery, and additional resources.

<<http://CaliforniaDiscovery.findlaw.com>>

This web site is maintained by retired California State Court Commissioner Richard Best of San Francisco, but is unofficial. It contains an exhaustive outline of electronic discovery issues.

<<http://arkfeld.blogs.com/ede>>

This blog is updated every few days with current case law and news developments in the field of electronic discovery and evidence. It is maintained by Arizona attorney Michael R. Arkfeld, author of *Electronic Discovery and Evidence* (Law Partner Publishing, 2003).

### *Digital Discovery and E-Evidence*

This is a monthly publication of Pike & Fischer, a division of BNA. It reports on recent cases and contains analysis by experts. \$649.00/year. Subscription information and sample articles may be found at <<http://www.pf.com/digitaldisc.asp>>.

### Electronic discovery and computer forensics vendor sites

Of the scores of electronic discovery and computer forensics firms currently doing business in North America, a handful have developed useful educational web sites to keep their current and prospective clients up-to-date on the law. These sites feature state and federal case law dealing with electronic discovery, computer forensics, and electronic evidence; "white papers" and links to leading law review articles; and sample forms for practitioners. Three good examples are:

#### Applied Discovery

<http://www.applieddiscovery.com/lawLibrary/default.asp>

Computer Forensics, Inc.

[http://www.forensics.com/html/resource\\_center.html](http://www.forensics.com/html/resource_center.html)

Kroll-Ontrack

<http://www.krollontrack.com/LawLibrary/>

## B. Handbooks and Treatises

Arkfeld, Michael R., *Electronic Discovery and Evidence* (Law Partner Publishing, 2003)

“Th[is 454-page looseleaf] book addresses every aspect of this process including electronic information storage, outside expert assistance, the inherent benefits of electronic formats, as well as the laws and procedures for admitting evidence in your case.” Updated annually in print and daily on a web site, one-year access to which is included in the price of the book. For more information, see [http://www.arkfeld.com/elec\\_summary2.htm](http://www.arkfeld.com/elec_summary2.htm).

Cohen, Adam I. and David J. Lender, *Electronic Discovery: Law and Practice* (Aspen Publishers, 2004).

A complete, well-researched guide to electronic discovery in civil litigation, both theoretical and practical, with plenty of references to relevant statutes, rules, case law, and secondary authority.

Feldman, Joan E., *Essentials of Electronic Discovery: Finding and Using Cyber Evidence* (Glasser LegalWorks, 2003).

A well organized and easy-to-read compilation of Ms. Feldman’s many contributions to the electronic discovery Continuing Legal Education circuit, with a large appendix of useful forms, checklists, and sample documents. The printed book is accompanied by a CD-ROM for copying and pasting forms into litigation documents.

The Sedona Conference, *The Sedona Principles: Best Practices, Recommendation & Principles for Addressing Electronic Document Production* (2003)

The Sedona Principles is the work product of a top level think tank of litigators, corporate general counsel, academics, and jurists, designed to establish a set of working groundrules or assumptions for the conduct of electronic discovery, particular for complex civil litigation. The book will be updated in March 2004 and is available as a free download from The Sedona Conference at [http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html).

C. Recent Articles

Lisa Arent, Robert D. Brownstone and William A. Fenwick, *E-Discovery: Preserving, Requesting & Producing Electronic Information*, 19 Santa Clara Computer and High Technology Law Journal 131 (2002).

A thorough review of current case law dealing with data preservation and the scope of electronic discovery, with valuable practice tips for lawyers and advice for clients.

Mary Kay Brown and Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 Pa. B. A. Q. 1 (2003).

An introduction to the fundamental technical issues, relevant rules, and case law governing electronic discovery, presented in an easy-to-follow question-and-answer format. Perfect for the novice practitioner or nervous in-house counsel. A condensed version has been published by the American Bar Association Section of Litigation in *Litigation*, Volume 30, No. 1 (Fall 2003) at 24.

Robert F. Carangelo and Gina M. Graham, *Passing the Buck: Cost-Shifting in Electronic Discovery*, 50 The Federal Lawyer (November/December 2003) at 35.

A discussion of the *Rowe* and *Zubulake* cases and their position in electronic discovery litigation, and in upcoming discussions of amendments to the Federal Rules of Civil Procedure.

Barbara A. Caulfield and Zuzana Svihra, *Electronic Discovery Issues for 2002: Requiring the Losing Party to Pay for the Costs of Digital Discovery*, <<http://www.kenwithers.com/articles/>> (2001).

In this paper from the 2001 Sedona Conference on Complex Litigation, the authors argue that an English-style cost shifting rule, under which the prevailing party in litigation recovers discovery costs, may curb the perceived abuses and "economic waste" associated with electronic discovery.

Geoff Howard and Hadi Razzaq, *Electronic Discovery Cost Allocation: Why Requesting Parties May Increasingly Find Themselves Rowe-ing Upstream to Fund Electronic Fishing Expeditions*, ABA Computer and Internet Litigation Journal (May 24, 2002).

This paper explores the differences between conventional and electronic discovery, focusing on costs, and dissects the *Rowe Entertainment* case to support an argument that federal courts will increasingly shift electronic discovery costs to requesting parties.

Richard L. Marcus, *Confronting the Future: Coping With Discovery of Electronic Material*, 64 *Law & Contemp. Probs.* 253 (Spring/Summer 2001).

Prof. Marcus, the reporter for the Discovery Subcommittee of the Civil Rules Advisory Committee, summarizes the problem of electronic discovery as it has been presented to the Subcommittee and presents a list of the various amendment ideas that have surfaced in the literature and from the discussions.

Michael Marron, *Discoverability of "Deleted" E-Mail: Time for a Closer Examination*, 25 *Seattle U. L. Rev.* 895 (2002).

"[T]his Comment will argue that the discovery rules presently require disclosure of an unacceptable amount of information. In particular, public policy concerns such as communication efficiency, individual privacy, and free speech should outweigh the rights of a litigant to access deleted e-mail correspondence without some showing of particular relevance or need."

Carey Sirota Meyer and Kari L. Wraspir, *E-Discovery: Preparing Clients For (and Protecting Them Against) Discovery the Electronic Age*, 26 *William Mitchell Law Review* 939 (2000).

An introductory-level, somewhat superficial review of electronic discovery. While this article contains no deep analysis or new revelations, it may serve as background material to instruct clients, especially in-house counsel, who are not aware of their electronic discovery obligations.

Marnie H. Pulver, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 *Cardozo L. Rev.* 1379 (2000).

"An economic analysis of relevant case law illustrates the inefficiency of modern discovery rules as applied to EMD [electronic media discovery]. Modern discovery practice often leads to misallocated funds and wasted human capita. The misallocated resources stem from an externalized discovery practice. Efficient allocation can be achieved only when the costs and benefits of EMD are internalized." In other words, the author proposes that all electronic discovery costs be borne by the requesting party.

Jonathan M. Redgrave and Ted S. Hiser, *Fishing in the Ocean: A Critical Examination of Discovery in the Electronic Age*, <<http://www.kenwithers.com/articles/>>(2001).

In this paper from the 2001 Sedona Conference on Complex Litigation, the authors explore the explosive growth of the "paperless" business environment, review the history of judicial concern about "fishing expeditions," apply these historic concerns to electronic discovery, and argue for a flexible judicial approach the question of scope.

Jonathan M. Redgrave and Erica J. Bachman, *Ripples on the Shores of Zubulake: Practice Considerations from Recent Electronic Discovery Decisions*, 50 *The Federal Lawyer* (November/December 2003) at 31.

Ten reasons why practitioners should read the *Zubulake* and *Rowe* decisions closely and plan their electronic discovery accordingly.

Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 *Duke L. J.* 561 (2001), <<http://www.law.duke.edu/journals/dlj/dljtoc51n2.htm>>.

Prof. Redish argues that electronic discovery is unique and demands a different set of rules and procedures than conventional, paper-based discovery to prevent undue costs, burden, and intrusion.

Mark D. Robins, *Evidence at the Electronic Frontier: Introducing E-Mail at Trial in Commercial Litigation*, 29 *Rutgers Computer and Technology Law Journal* 219 (2003).

The unstated but obvious point to this exhaustive review of the evidential issues involving email is that if you don't pay attention the foundations during discovery, the email may either fail to get into evidence when it should be admitted, or fail to be excluded when it shouldn't be admitted. Many words to the wise.

Hon. James M. Rosenbaum, *In Defense of the DELETE Key*, 3 *Green Bag 2d* 393 (2000); *In Defense of the Hard Drive*, 4 *Green Bag 2d* 169 (2001).

In a pair of short, provocative articles, a federal district court judge and member of the Judicial Conference of the United States expresses his concern that far-reaching computer-based discovery may violate privacy and stifle creative thought. In the first article, he proposes a 'statute of limitations' on the recovery of stale, deleted files. In the second, he proposes a 'cyber time-out,' a notice period for employees, during which their computer files are sequestered, before employers may investigate them. This would allow the employer and employee to negotiate the scope and conditions of the investigation, preventing de facto general searches.

Samuel A. Thumma and Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 *Santa Clara Computer and High Tech. L. J.* 1 (1999).

An interesting and entertaining survey of the evolving role of email as either evidence or subject matter in both civil and criminal cases from the early 1980's through June, 1999. Of particular interest is extensive use of email to establish elements of various commercial actions, such as jurisdiction, statute of limitations, and notice.

Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 *B. C. L. Rev.* 327 (2000).

A federal district court judge takes a close look at the technology, current rules, and case law surrounding computer-based discovery, and proposed two amendments to Rule 34. One change would clarify the scope of document discovery, replacing the 1970 language (“other data compilations from which information can be obtained”) with more modern language (“electronically-stored information”). A new paragraph added to Rule 34 would establish a presumption that discovery of computer data would be subject to a protective order and establish a presumption that costs for producing data in print form, as opposed to electronic media, would be borne by the requesting party.

Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Retaining, Destroying and Producing E-Data*, New York Law Journal, (Part One) May 8, 2002, at 1; (Part Two) May 9, 2002, at 1.

Judge Scheindlin returns to the topic of electronic discovery in this two-part article, this time focusing on obligations related to the retention and destruction of electronically-stored information and business records, as well as the production of such data in civil litigation. She reviews several important recent cases in which poor electronic records management practices and failures during the discovery process resulted in sanctions against defendants, including *Linnen*, *GTFM*, and *Danis*. She concludes that a written electronic records management policy, a thorough understanding of a client’s actual compliance with that policy, and early disclosure are key elements to successful discovery for both sides.

*The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*,

<[http://www.thesedonaconference.org/publications\\_html](http://www.thesedonaconference.org/publications_html)> (March 2003).

This is the initial product of a think tank representing the best and brightest of the private defense bar, in-house corporate counsel, and defense-oriented technical consultants. As a working document, the authors invite observations, comments, and criticism.

*Point/Counterpoint: Should the Federal Rules of Civil Procedure be Amended to Accommodate Electronic Discovery?* <<http://www.kenwithers.com/articles/>> (2001).

Computer-based discovery presents new and unique challenges for judges, lawyers, and parties in civil litigation. But does it demand amendments to the Federal Rules of Civil Procedure? two very different points of view are presented: “Yes” says Tom Allman, General Counsel of BASF Corporation. “No” say the New York State Bar Association's Commercial and Federal Litigation Section, Committee on Federal Procedure.