

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

Topics covered

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

Overall

Rule 16(b)

Rule 26(b)(2) -- generally

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

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

Rule 26(b)(2) -- costs

Rule 26(b)(5)(B)

Rule 26(f) -- preservation

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

Rule 26(f) -- agreement regarding privileged information

Rule 33(d)

Rule 34(a)

Rule 34(b)

Rule 37(f) -- overall

Rule 37(f) -- routine operation

Rule 37(f) -- steps to preserve

Rule 37(f) -- standard of culpability

Rule 37(f) -- effect of preservation order

Rule 45

Overall

San Francisco

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

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

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

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

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

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

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

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

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

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

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

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

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

Dallas

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 16(b)

San Francisco

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

Washington

Jonathan Redgrave (04-CV-048): The explicit inclusion of electronic discovery in Rule 16 is appropriate. See Sedona Principle No. 3. Discussion of privilege issues at this point is also appropriate. I suggest expanding the rule to:

adoption of the parties' agreements regarding assertions of privilege

Under the current rules, it is possible for parties to reach agreements regarding categories of documents that need not be produced or indexed on a privilege log. But the Note should be revised so it does not begin with the "quick peek" agreement, for that will be very rare. I think that the first item should be "inadvertent production" agreements, and that reference to use of third party neutrals would be desirable.

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

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

Comments

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

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

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

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

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

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

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

Rule 26(b)(2) -- generally

San Francisco

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

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

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

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

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

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

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

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

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

Dallas

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

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

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): This proposal is unnecessary and reverses the concept of full discovery, meanwhile giving inadequate clarity to the standard. Dilatory tactics during discovery are a major problem, and sanctions are rarely granted to deal with this problem. These changes will make these problems worse, because the defendant need not seek protection from the court but only take the position that electronically stored information is not reasonably accessible. Plaintiff then has the burden to move for production. It is probable that it is easier and cheaper to retrieve electronically stored information than hard copies. Many of the companies I deal with contend that noting they have is reasonably accessible unless it is already in the public domain.

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

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

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

San Francisco

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

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

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

Dallas

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

San Francisco

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A party need not provide discovery of relevant electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of such relevant ~~the~~ information for good cause and may specify terms and conditions for such discovery.

Dallas

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

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

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

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Michael Ryan (testimony and 04-CV-083): There is a two-tier actuality to my approach, in that I don't want to be inundated with information and imagine often that the "active" data is the most important. But I'm not sure whether there is a good way to describe the difference. I've repeatedly found, however, that defendants say that they don't access databases that contain information I need. But in depositions, I then find that there is an active, living, breathing universe of information. I heard Sedona Principle 8 this morning, and it sounded like a good definition. There are two tiers of information. That's clearly the case. But by adopting this rule you would create an incentive to say that information is not accessible. That will prompt more motions. And there is some issue of accessibility for many things. Most databases, for instance, require some effort to make them usable by anyone. An offline database would be second tier, by my definition, but I don't think it would be "inaccessible."

Keith Altman (testimony and 04-CV-079): I think the concept in the rule is too subjective. If necessary, I think one can break electronically stored information into two broad categories based on how the information is stored. One category is "sequential access" information, like backup tapes. In reality, it is very rare that information from backup tapes is produced. In all the litigations I've been involved in, information was restored off of backup tapes only once. The second category is "random access" information sources. These kinds of media allow information to be retrieved virtually instantly from any location. I am hard pressed to describe information on random access media as inaccessible. Here, there is a major problem with abuse of the concept. Does it depend on whether the specific person knows how to retrieve the information? Without this rule, parties routinely object to production of information when they deem it burdensome to produce the information. So this is already going on, and judges can evaluate the issues already. But there are wild overestimates of the amount of time it will take to access information. I think that data on random access media should always be deemed accessible.

Rudy Kleysteuber (testimony and 04-CV-049): In the relatively near future, the words "backup tape" will sound as antiquated as "mimeograph" sounds today. Storage and search capacities will probably make quantities of data that we would regard as unthinkable today quite manageable tomorrow. The goal Google has with its new email program is that there is no need to organize data at all; everything will be accessible for ever using smart search techniques. But if the words used serve certain interests, you will enshrine the status quo. This is too easy a term to grab onto and put data off limits.

Michael Heidler (testimony and 04-CV-057): The "reasonably accessible" standard is necessary because, unlike paper documents, electronic data must be restored, and the technologies on which that depends can become obsolete. Restoring older data could cost a small organization a crippling amount of money. As an estimate, the cost of restoring a medium size project would be from \$40,000 to \$90,000. Software obsolescence would add considerably to the cost. But ultimately this is a question of cost.

Joseph Masters (testimony and 04-CV-063): I believe that deleted data is harder to access than others have said. That's because files are often spread across on chunks all across the hard drive. The deletion removes the identification of those chunks from the table, and various chunks can be overwritten. As time goes by, parts are lost, and the task of finding them

is considerable, particularly if the first chunk is overwritten. The first chunk probably points the way to the second one, etc., but if you don't have the first you have a problem.

David Tannenbaum (testimony and 04-CV-047): The rule should take account of responding parties' ex ante decisions and requesting parties' willingness to bear costs. The "reasonably accessible" standard relies too heavily on the parties' assessment and report of the costs. The courts should take account of advances in technology that parties have chosen not to adopt, perhaps to keep the data inaccessible for litigation purposes. One solution would be to require the responding party to make a showing why it did not choose a more accessible system. Perhaps that would be accomplished by requiring that responding parties show that "the information is not reasonably accessible using currently available methods of technology." At the same time, when the costs are unavoidably substantial, the rule should give the requesting party the option to pay some or all of those costs to get the information.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: In the paper world, it was very rare to require retrieval of material from the dumpster or a landfill. But with the Outlook email program things work differently. For a while, the user can retrieve "deleted" email with the help of an IT professional. We believe that an appropriate description for that which is reasonably accessible is "in active use for the day-to-day operation" of a party's business. To the extent that effort and expense are important to deciding whether something is reasonably accessible, it would be desirable for the Note to address the cost of locating, retrieving, restoring, reviewing and producing the information. In addition, backup tapes should be specifically mentioned as a type of data that should generally be considered not reasonably accessible. Other forms of data similarly become increasingly inaccessible with the passage of time. Data may be stored in "fragments" located at various points on the hard drive. Various fragments may be overwritten while others remain; for a substantial price it is possible to restore some of these pieces. Similarly, encrypted data should be deemed inaccessible even though it can sometimes be accessed by sophisticated and expensive means. The Note says that a party may not claim that information is inaccessible if it has accessed the information. Although a party that regularly accesses specific "inaccessible" information for use in litigation should not be able to use this rule to avoid discovery of that information, there are many situations in which this observation would work mischief. For example, the fact that a backup tape has been accessed to restore data on a server that failed should not bear on whether the party who used the backup tape for its intended purpose can rely on the rule to resist initial discovery of that data from that source. "There is a major difference between using a backup tape for disaster recovery proposes to restore an entire server, and looking for a specific document."

Allen Black (04-CV-011): I suggest adding two sentences along the following lines at the end of the first full paragraph of the Committee Note to Rule 26(b)(2):

On the other hand, information may be reasonably accessible even though a party does not use the information on a regular basis, or even at all, in the ordinary course of its business. If the information can be retrieved without extraordinary or heroic effort, it is reasonably accessible.

This is necessary for balance, as the several preceding sentences have focused on what information is not reasonably accessible. I also applaud the perspicacious and savvy comment on page 13: "But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information." Don't let anyone talk you into taking that out. There is

something wrong, however, with the logic of the second paragraph of the Note to 26(b)(2), because it confuses the volume of information involved with whether certain information is accessible. Those are different topics; volume is dealt with in current Rule 26(b)(2), and accessibility is the focus of the proposed amendment. If the goal is to say that the volume of reasonably accessible information is so staggering that the court should consider cost-bearing in regard to that discovery, this should be said clearly. Finally, I think that the quotation from the Manual on p. 14 about production of word-processing files and all associated metadata being more expensive should be deleted. I doubt that this assertion is accurate. Indeed, production with associated metadata would be less expensive than production without it, for creating the metadata-free item requires additional effort.

Clifford Rieders (04-CV-017): The phraseology of the rule will create a barrier in almost every case and impose a burden of motions practice on the party seeking the data. The "reasonably accessible" nomenclature is extremely vague, and parties upon whom requests are served will routinely indicate that the information sought is not accessible. The self-executing nature of the rules, which was the goal of the 1938 drafters, will be eroded and the parties put at loggerheads.

James Rooks (04-CV-019) (attaching article from Trial Magazine): In the electronic data age, the concept of inaccessibility is absurd. Searches of electronic information can be conducted at lightning speed once the proper media and search program are identified. There are degrees of accessibility, but true inaccessibility occurs only when a business has gone to special lengths to encrypt or hide its data to avoid detection and accountability for bad deeds. Requiring the requesting party to obtain the information through an extra hearing before an already-overburdened federal judge is oppressive and flies in the face of Rule 1.

Dennis Gerl (04-CV-030): The term "not reasonably accessible" makes no sense to me because searches of electronic information can be conducted very quickly. Where a company has gone to lengths to encrypt or hide its data, or where data has been overwritten by ongoing business operations, it is still relatively easy and quick for a computer expert to make a copy of the data. Opposing parties should be allowed to copy this data so that it can be analyzed without affecting a party's ongoing business.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We are concerned that the Note statement that accessibility may look to whether a party "routinely accesses or uses the information" may cause confusion in conjunction with the provision in proposed Rule 37(f) regarding "routine" computer operations. "Routine" is otherwise undefined. For example, backup tapes may be "routinely" accessed in connection with disaster recovery efforts, but that should not mean that they would be "reasonably accessible" for purposes of Rule 26(b)(2). Additionally, the fact that a party accessed backup media in order to demonstrate the difficulty of doing so should not show that they are reasonably accessible. Similarly, the fact that a source of information was accessed once in the past should not mean that it is "reasonably accessible" for all discovery purposes thereafter. Regarding deleted data, it is important for the Note to take account of the very limited circumstances in which courts have authorized access to a party's hard disk for forensic purposes. Courts have been very cautious about such access, and the Note should cite some of this caselaw (at pp. 12-13 of the comment).

ABA Section of Litigation (04-CV-062): Further explanation of what "reasonably accessible" means would be appropriate. It should mean active data and information stored in a manner that anticipates future business use and efficient searching and retrieval. It should not include disaster recovery backup tapes that are not indexed or regularly accessed by the responding party. Nor should it include legacy data or data that have been deleted.

Gregory Joseph (04-CV-066): The standard does not seem to differ in substance from existing 26(b)(2)(iii). Access to backup tapes is a concern for large corporations, particularly those that are routinely subject to product liability suits. These are the parties who have been funding lobbyists at Advisory Committee meetings since at least the mid-90s, when I served on the Evidence Rules Committee. There is nothing wrong with lobbying, but the problems are different for other defendants. Similar problems should be addressed the same, however. In all cases, the issue is really one of undue burden. However the information is stored -- electronically or in hard copy -- a company with 50 or 100 offices will have a large burden in gathering all of it. The "reasonably accessible" standard in the proposal does not address this problem. I think that the "reasonably accessible" standard an express part of Rule 26(b)(2)(iii) and that the two-tiered approach should be expanded to all discovery.

Dwight Davis, Jameson Carroll & Cheri Grosvenor, LLP (04-CV-107): We believe that the determination whether information is reasonably accessible should be made expressly subject to the factors in Rule 26(b)(2)(iii). Otherwise, production of reasonably accessible data without any inclusion of these considerations could still lead to a burdensome, costly production with very limited probative value.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): "Not reasonably accessible" should be defined as unduly burdensome and costly to retrieve or produce. And the party asserting this excuse from responding to discovery should be required to submit a declaration under penalty of perjury so establishing, and providing sufficient detail to permit the court to determine whether the claim is justified. The party seeking discovery should be able to depose the deponent to test the conclusion.

Federal Magistrate Judges Ass'n (04-CV-127): The term "reasonably accessible" is not adequately defined, creating a great potential for confusion. The Note says that the term's meaning may depend on a variety of circumstances, and provides some useful examples of information that "ordinarily" would be deemed inaccessible. But the Note also indicates that if the responding party routinely accesses or uses this information, it would be accessible. At the same time, it says that it may be accessible even though the party does not often access it. In any event, one salient fact trumps these "guidelines" if the information was actually accessed, then it is reasonably accessible.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP suggests revising the sentence in the Note on p. 13 regarding whether a party has actually accessed information (and suggesting that makes it presumptively accessible) be clarified. Presumably this is intended to apply to a situation in which a party accessed the information in response to a discovery request, and it should not be read to mean that any past access requires providing discovery. For example, accessing disaster-recovery data if there is a disaster should not make it presumptively accessible for responding to discovery.

Gary Epperley (American Airlines) (04-CV-177): American recommends that the Note include Sedona Principle 8: "Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweigh the cost, burden, and disruption of retrieving and processing the data from such sources." It feels that the "good cause" standard is not sufficient for overcoming objections to production of such data. Requiring a party to show "substantial need" would be preferable.

American Petroleum Institute (04-CV-178): API believes that the term used in the current proposal is adequate and consistent with other rules that generally rely on an element of reasonableness. It also provides needed flexibility. But it would be helpful to link the term in

the Note with the idea of "active" systems that is stored in anticipation of future use in a manner that permits efficient retrieval. API suggests that the Note more clearly emphasize that metadata normally is not considered reasonably accessible.

Assoc. of the Bar of N.Y. (04-CV-179): The Note places too much emphasis on a party's ability to access the data, and not enough on the cost and burden of doing so. The current Note assumes that the cost of "accessing" "active" data would always be less than the cost of accessing "disaster recovery" copies. Although that may often be true, it is not invariably so. That would depend on the technologies and the volumes of data involved. It can take as little as a few hours to restore e-mail boxes from a Microsoft Exchange backup tape, but it could take days of programming and testing to extract relevant information from a live database server. In addition, active data that is "routinely accessed" may be so voluminous that, as a whole, it cannot be said to be reasonable to collect and search it. Moreover, looking to whether information is "routinely accessed" may be even less useful in the future, given changed technologies. For example, some companies are moving their "disaster recovery" information to large Storage Area Networks, which can be accessed in the same manner as a live server. We believe that the primary determinant of whether electronic information is "reasonably accessible" should be the relative cost of (1) accessing the data in question, and (2) arranging it into a form in which it can meaningfully be reviewed and produced. Cost is the common denominator that will serve as a more objective test of what is reasonably accessible, as opposed to the distinctions highlighted by the Note, which are dependent on the differences in the parties' network architecture and on changing technologies.

Katherine Greenzang (Assurant) (04-CV-180): We suggest that reasonably accessible be limited to information accessed within the daily and routine operations of the business. It would be helpful if the description included certain types of data that are typically involved in the daily and routine operations of the business. The definition should also specifically exclude certain information and storage devices such as backup tapes, encrypted data and deleted and fragmented data.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): The term "reasonably accessible" is not adequately defined. The rule does not define the term at all, and the Note provides insufficient guidance, although there is some. It seems to invoke cost and burden as the bottom line concern, but is not clear on whether these concerns should be evaluated in light of other things, such as the issues at stake in the litigation. The uncertainty is compounded by the issue of good cause for production of such data. How should that determination be done in comparison to the determination called for by 26(b)(2)(iii) or 26(c)? The good cause analysis uses terms like those in (b)(2)(iii). If they are the same, why have the new rule provision? If they are different, what is meant here? The Note does not appear to define good cause, so the question is not clearly answered. And it appears that the good cause determination involves consideration of the burden to the responding party. Who has the burden of persuasion with regard to that? It seems that the initial burden on accessibility rests on the producing party, but that the good cause analysis also turns on burden so that in a sense it becomes part of the burden of the requesting party. That may be unfair. The quotation from the Manual for Complex Litigation about the difficulty of producing metadata conveys an incorrect impression that this sort of information is inaccessible or extremely burdensome to produce. Finally, the last phrase of the proposed rule -- "and may specify terms and conditions for such discovery -- is redundant, as even the Note acknowledges.

Federal Bar Council (04-CV-191): To the extent that the "reasonably accessible" standard is substantially similar to the undue burden standard contained in present 26(b)(2), it must be considered whether this new standard may result in unnecessary confusion. But the

Note explains the concept using terms that are commonly associated with objections based on "undue burden" or "expense." The focus on "accessibility" may subordinate the merits of objections for burden or expense. The Note does not address the problem faced by a party presented with a request for voluminous but accessible electronically stored information. In such a circumstances, it is unclear whether the responding party can stand on its objection based on burden. Why should a requesting party have to show good cause to get the inaccessible material but not to obtain accessible material that may require great burden and expense to compile? The proposed two-tier approach is not demonstrably different from the existing approach to hard-copy discovery. The case law is developing standards for solving this problem without the need for a different rule-based provision. Before a new standard is introduced into this area, more guidance is needed on what factors should be considered in determining what is "reasonably accessible."

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The Note should be revised to provide a fuller explanation of the term "not reasonably accessible" by giving more examples, including but not limited to metadata, embedded data, fragmented data, backup files, cached data, and dynamic databases. Also, the Note should specifically reference the balancing test of Rule 26(b)(2) that is the underlying purpose for the amendment, whether or not information falls within a particular category of storage medium or system. As noted in the Sedona Principles, the primary source of discovery should be active information.

Edward Wolfe (General Motors) (04-CV-197): This proposal should create an important framework for national standards. The proposal reflects accepted practice which has worked well in more traditional discovery contexts. It is important to emphasize, however, that even accessible electronically stored information may be too burdensome to review and produce. The Note is not presently clear on this point.

Peter Keisler (Dep't of Justice) (04-CV-203): The Department points out that there may be some difficulties defining the term "reasonably accessible" by reference to the producing party's practices on accessing the information. The statement on p. 55 that information that a party has accessed is therefore reasonably accessible, regardless of the purpose for that access in the past, is overly broad. Some might be prompted to launch discovery to find out whether certain sources had even been accessed to try to defeat a contention that certain sources were "solely for disaster recovery." The better way to put it would be "the frequency and circumstances under which the producing party accesses the requested information are important factors in determining 'reasonable' accessibility." The Department does not read the Note regarding such things as legacy data, backup tapes, etc. as creating "categories" of information that are deemed not to be reasonably accessible, nor should the Note be interpreted as creating such categories. Instead, the focus of the Note should be on determining the ease or difficulty, and the associated costs and burdens, of the retrieval of requested information. For example, the Antitrust Division has often negotiated agreements with companies on retrieval from backup tapes of information the Division needed.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The rule could give guidance on whether deleted data, archived data, embedded data, or legacy data is included in the definition. Although recovering such data may sometimes be inconvenient, it may not necessarily be "inaccessible." Without further guidance, parties may try to exclude documents that go to the very heart of a dispute. In addition, it would be helpful to expand on what constitutes "good cause," such as the necessity of the data, the availability of the data from other sources, and the ability of the parties to bear the production costs.

Wachovia Corp. (04-CV-214): The term is indefinite and could create inconsistent standard among federal courts. It could also be interpreted to require such a rigorous standard (e.g., requiring the production of any extant data that can be extracted regardless of expense) as to be little improvement over the current situation.

Metro-North Railroad (04-CV-216): Metro-North believes that the definition should be information "routinely accessed or used by the party itself, and easily located and retrieved." Whether information is reasonably accessible should be determined by the steps needed to make it usable. In addition, courts should evaluate the frequency with which the electronically stored information has been accessed in the past when deciding whether it is reasonably accessible.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We believe that further explanation of the concept is neither necessary nor advisable. What is reasonably accessible will likely be an issue of dispute, but it should be resolved on a case-specific basis. Moreover, with the rapid rate of technology change, a current explication of the term could become outdated in the near future. For these reasons, the Committee recommends that no definition of reasonably accessible be provided in the Note.

New York City Transit (04-CV-221): Reasonably accessible may vary from one organization to another or even with respect to entities within an organization.

Ashish Prasad (04-CV-225): It is imperative that the Note be revised to provide a clearer, though not necessarily more detailed, explanation. In regard to discovery, it should mean "reasonably accessible for discovery in litigation," not "reasonably accessible in the course of business operation." This distinction is important because many types of electronically stored information are routinely accessed as active data, yet would require an unreasonable and burdensome amount of time and expense in order to be identified, preserved, collected, reviewed and produced in litigation. This situation is particularly important with regard to dynamic databases. A business's proprietary database may contain many categories of information, but only certain categories may be searchable, because the database was created to perform specific functions. Of course, the converse may also be true: certain information may not be routinely accessed in the course of business, but may nonetheless be reasonably accessible.

Marshon Robinson (04-CV-226): The problem with this rule is specificity. Any rule in this area would have to be very clear on what is considered accessible and what is not. The reason is the velocity of technological change. What is cutting today is obsolete tomorrow. The judicial system does not have time to keep up with all these changes in technology. Judges would have to base their decisions on what is or is not accessible. This could vary widely. This rule change really leaves everything as it is now, completely in the hands of judges. If this is the Committee's goal, perhaps it should just leave well enough alone and not make a rule. If it does make a change, it would be better to make the rule depend on the nature of the data. There are significant differences between deleted data, legacy data, and backup data. With this in mind, trying to make a blanket rule for all of them is very difficult. By addressing them individually, the Committee can give judges and litigants a clearer view. With legacy data, time frame is the most important criterion. A rule could make data over a few years old inaccessible unless it has been used. With backup data, restoration can be expensive. But there is a wide range of options for backing up data, including some that will not result in high costs. A similar case can be made about legacy data. The choices a party makes affect how hard it is to use these data. Deleted data is far different, and it may or may not still be on the computer.

Joe Hollingsworth and Marc Mayerson (04-CV-233): The demarcation of material to be produced based on whether it is reasonably accessible is a good start. This standard may not

prove workable in practice, but it is a reasonable effort to strike a balance between the needs for production and the burden of identifying and producing the information. Nonetheless, it would be desirable to explain in the Note that metadata, embedded data, fragmented data, cached data, echoed copies, and similar electronic detritus are not considered to be the "document" itself that has to be produced. In the ordinary case, the modest informational value of this material is outweighed by the difficulty of trying to produce it.

Texas Employment Lawyers Ass'n (04-CV-238): The lack of definitional substance to the term "not reasonably accessible" is troubling. Although in some cases certain legacy and backup data may not be reasonably accessible, most of it usually will be. Backup data is usually easily retrievable and accessed using today's systems. In employment cases, information on a terminated employee is placed in an electronic file that is not routinely accessed but is easily accessible. Is this "reasonably accessible" under the proposed rule? Often, the only information in employment cases is in electronic form; companies don't usually keep paper versions. Although these image files are archived and stored offsite, that should not make the information not reasonably accessible. The concept of accessibility in the electronic context is too amorphous, and therefore subject to mischievous manipulation. Although responding parties will not ultimately be able to justify their contention that information of this sort is not reasonably accessible, they will be able to delay the case and impose costs on the other side using this rule. If the hard copy has been imaged, does that mean that it becomes less accessible? Perhaps this proposal would even impede access to conventional paper documents.

Connecticut Bar Ass'n (04-CV-250): We do not think that "reasonably accessible" is adequately defined. Although the commentary refers to cost, we think that more attention should be paid to the costs of electronic discovery. Although parties could define reasonably accessible in their 26(f) reports, we felt that this would not be achieved in cases where counsel could not get along.

James Sturdevant (04-CV-253): The term "not reasonably accessible" should be changed to "unduly burdensome and costly." That is in accord with existing law that a party must produce information unless doing so would be unduly burdensome or costly. And the party claiming this protection should have to submit detailed declarations establishing that the information is not accessible, and the declarants should be subject to deposition on these topics.

Rule 26(b)(2) -- costs

San Francisco

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: The rule should contain a presumption that costs should be shared if discovery of inaccessible information is ordered. The presumption could be overcome by a showing based on the facts and circumstances of the given case. This would avoid use of "weapons of mass discovery." Texas already has such a rule, and California does too, as shown by a recent case. See *Toshiba Am. Elect. Components, Inc. v. Superior Court*, 2004 WL 2757873 (Cal.Ct.App., Dec. 3, 2004).

Kathryn Burkett Dickson (California Employment Lawyers Ass'n) (oral and written testimony): The cost issue can sink a meritorious employment discrimination claim.

Michael Brown: Currently the cost of producing reasonably accessible data is high. The rules should take that on more directly by creating a rebuttable presumption that it should be shared. That would prompt parties seeking discovery to narrow their requests. In pharmaceutical cases, plaintiffs always ask for back-up tapes. But Brown is not aware of any case in which useful information was actually found on a back-up tape.

Joan Feldman (testimony and 04-CV-037): I have seen a range of responses to this issue over the past decade. In many cases, producing parties solicit bids from internal and external service providers, and in many cases they submit the highest dollar bids to the requesting party. The requesting party should have some say in the manner of data restoration; sampling techniques should be applied to minimize the costs of production of relevant information.

Thomas Allman (testimony and 04-CV-007): The preference for cost-shifting should be more clearly articulated. The proposed method for ordering production of inaccessible information does not adequately deter unreasonable requests for information that has no substantial importance. This problem is true even of some cases in which both sides have considerable electronically stored information. The Note should articulate a preference for allocating costs.

Jeffrey Judd: Ideally, the E-discovery rules would create a presumption that the propounding party would pay for E-discovery and production costs in order to encourage litigants to focus their discovery demands, and to make reasonable decisions about whether to seek production of certain categories of information.

Jocelyn Larkin (The Impact Fund): "To take into account their lack of information about electronic sources, plaintiffs will frame discovery requests broadly. There are few things that haunt a plaintiff's lawyer quite like the fear that the key piece of evidence in a case never gets produced because you didn't ask for it -- or ask for it in just the right way."

Frank Hunger: I suggest language to the effect that after the court rules that good cause has been shown for production of inaccessible information (which the court has found to be inaccessible), there should arise a presumption that the requesting party will pay the actual cost incurred by the responding party in making the information available. This presumption could be overcome by clear and convincing evidence that it would be unjust to require such payment. Requiring such payment as an initial matter will result in a narrowing of the request to what is truly relevant and needed. It will reduce requests for unnecessary information, and will militate against prompting settlements to avoid the costs of this sort of discovery. To the extent the information so obtained is actually useful in the litigation, provision should be made in Rule 54

and/or 28 U.S.C. § 1920 for recovery of this expense at the end of the case by the discovering party if it prevails.

Dallas

Gregory Lederer: When these issues come up, my position has been "You have to pay." This has been very useful in getting discovery focused and what really matters. Cost-bearing should be presumed to be correct whenever inaccessible information is involved.

Darren Sumerville (testimony and 04-CV-089): For decades, the assumption has been that the responding party should bear the costs involved in producing the information. Decades of precedent exist on the general issue of cost-shifting. There is no reason to add to that (or vary it) with the proposed amendment.

David Fish (testimony and 04-CV-021): The proposal is contrary to years of jurisprudence that has established a presumption that the responding party must bear the cost of response. If a company is involved in litigation, it has an obligation to make its documents accessible to the extent they are relevant or likely to lead to admissible evidence.

Stephen Morrison: There should be a specific reference in the rule to cost-sharing. The Texas experience shows that it works. Both the plaintiff and the defendant bar say that it has helped. Right now, both Texas and California say that cost bearing is presumed. They are major players, and the litigation world seems to continue to function there. If the rule does not say this, there is in effect an invitation to go for everything.

John Martin (DRI) (testimony and 04-CV-055): The balance struck in Texas should be adopted nationally. It requires that the court make the party seeking discovery pay the cost of any extraordinary steps required to retrieve and produce the information. The current proposal here does not go far enough. Taking the Texas approach will prompt litigants to moderate what would otherwise be unreasonably discovery demands.

Laura Lewis Owens: The current Note is not sufficient on this subject. The Texas approach works. There should be a presumption of cost-shifting.

Jeffrey Cody: Cost-shifting is important and should be mandatory. The Texas rule shows that this is true. The experience under that rule is a success, as proved by the fact that there is only one reported case under the rule.

Washington

Sanford Svetcov & Henry Rosen: The quoted costs of restoring backup tapes vary widely -- perhaps as much as 100 to 1. On a frequent basis we are willing to share costs, but only with some control over who is doing the restoration.

Darnley Stewart: We would accept the cost-bearing approach of Zubulake I. That's a very fair rule.

Jonathan Redgrave (04-CV-048): The Note should make a more express reference to cost allocation. See Sedona Principle No. 13.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should specifically reference cost allocation, and should include a presumption of cost shifting. Large

companies face exorbitant costs in searching for such information. A cost-shifting presumption would help reduce those costs.

Michael Nelson (testimony and 04-CV-005): The rules should presume that if discovery is ordered of inaccessible information the party seeking the discovery should pay.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): There should be a presumption that the party seeking access to inaccessible information should pay the cost of that access. It has never happened that CIGNA had to restore inaccessible data for a case, although it has seemed as if it might be possible in a couple of cases.

Dabney Carr (testimony and 04-CV-003): The rule should require cost sharing when there is production of inaccessible information.

Paul Lewis & Carole Longendyke (testimony and 04-CV-082): We have found that the cost of accessing "inaccessible" information is far lower than those unfamiliar with the process may realize. Current technology is fast, reliable, thorough, and cost-effective. For example, many machines are configured to recover "discarded" information even after the recycle bin has been emptied. Moreover, imaging of hard disks is not intrusive, and has the capacity for privilege exclusion to prevent the copying of certain sensitive data.

Alfred Cortese (testimony and 04-CV-054): The rule should include specific reference to cost allocation. Allocation of costs is a most effective deterrent against overbroad, marginally relevant discovery and is not a bar that will prevent litigants from obtaining all the information they need. I propose adding after the "terms and conditions" phrase further language that would create a presumption of cost sharing for the extraordinary costs of storage, retrieval, review, and production of electronically stored information that is not reasonably accessible. The Note should explain that the presumption can be overcome by a clear and convincing demonstration of relevance and need.

Keith Altman (testimony and 04-CV-079): I find it disturbing that there is a trend toward permitting producing parties to seek cost shifting. With paper documents, the producing party had to pay these sorts of costs. There should not be a different expectation with electronically stored information. This information is generally far easier to collect and review. Courts can assess the cost of producing this information as they have done with paper.

Comments

Thomas Burt (V.P., Microsoft Corp.) testimony and 04-CV-001: The rule should impose a presumption of cost-shifting that can be overcome by a clear and convincing demonstration of relevance and need. This will serve as an effective deterrent against overbroad, marginally relevant E-discovery. It is justified by the substantial burden of reviewing and producing relevant information even from accessible sources.

J. Walter Sinclair (04-CV-004): I would strongly recommend something more similar to the Texas approach, or mandatory cost shifting. The court could still decide not to shift costs, but the burden would be on the party seeking discovery to justify deviating from the norm. In my firm's experience, our clients have incurred tremendous expense due to this sort of discovery. In one case, the cost of discovery has exceeded \$1,000,000 and we are just beginning our discovery efforts. The allocation of costs would be the most effective deterrent against overbroad, marginally relevant discovery.

Philadelphia Bar Association (04-CV-031): We considered whether the factors articulated in *Zubulake v. UBS Warburg LLC* and *Rowe Entertainment, Inc v. William Morris Agency* and similar cases should be codified or enumerated in the Note. We ultimately decided that such factors are better left to the courts and that the citation of some of those cases in the Note was sufficient. We also considered whether these factors should be applied not only to the cost-shifting analysis but also to the threshold inquiry whether the request for further electronic discovery should be permitted at all. We also rejected that option on the ground that the existing language in Rule 26(b)(2) is adequate to incorporate those factors. In the ninth paragraph of the proposed Note, however, it would be preferable to number the examples to avoid the interpretation that "the importance of that information, and the burdens and costs of production" might be interpreted as independent examples:

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

ABA Section of Litigation (04-CV-062): The Rule and the Note do not give adequate attention to when cost shifting should be imposed. Recent cases have addressed these questions, but more elaboration may be appropriate in the Note.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The rule should contain an express presumption of cost sharing when information is not reasonably accessible.

Gary Epperley (American Airlines) (04-CV-177): We urge that the Committee adopt the approach in the Texas rule. Mandatory cost shifting would be the most effective deterrent against overbroad discovery requests.

American Petroleum Institute (04-CV-178): API favors sharing of costs whenever the court orders that there be discovery of information that is not reasonably accessible. By definition, the effort to obtain the information in these instances is considerable, and the party insisting on it should bear some of the cost. This is already the rule in New York, Texas, and California.

Katherine Greenzang (Assurant) (04-CV-180): The costs of electronic discovery call for a rule that will prompt the party seeking discovery to tailor its requests properly.

William Herr (Dow) (04-CV-195): A cost-shifting provision should be built into the rule to prevent abusive use of discovery. The Texas approach seems a fair way of doing this.

Wachovia Corp. (04-CV-214): Unless there is a presumption that costs will be shifted, this will not sufficiently deter overbroad and burdensome requests.

Metro-North Railroad (04-CV-216): There should be a presumption of cost bearing.

New York City Transit (04-CV-221): Cost-shifting is essential, absent extraordinary circumstances, e.g., a showing of malicious destruction of records.

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): When discovery of inaccessible information is ordered, the requesting party should have to pay the resulting costs unless extraordinary circumstances make that unjust.

Rule 26(b)(5)(B)

San Francisco

Greg McCurdy, Esq. (Microsoft): Microsoft will focus its privilege review on what went to the legal department, or otherwise is identifiable as potentially of concern. This is a small fraction of the total information called for in discovery. But for that review, technology won't eliminate the need for old-fashioned page-by-page examination. "We won't let it go out the door without looking at it."

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): The impetus behind this proposal is understandable, but it goes too far. Producing voluminous quantities of electronically stored information in a timely fashion may impair the ability of counsel to review the material for privilege. But the proposal would require the receiving party to immediately return, sequester, or destroy the material claimed to be privileged with respect to information produced inadvertently or on purpose. The receiving party should be able to go to the court to get a ruling on whether the privilege claim is justified. In addition, the rule does not specify the period of time during which the producing party must exercise this "claw-back" right, stating only that it must be in a "reasonable period." These provisions will multiply the number of discovery hearings for years to come.

Thomas Allman (testimony and 04-CV-007): Adding a requirement that the party that received the information certify that it has complied with its obligations to destroy, etc., would be cumbersome and would unnecessarily complicate the rule.

Gerson Smoger (testimony and 04-CV-046): There is no need for this addition to the rules. The concerns it addresses have long been readily handled by courts under the circumstances of individual cases. Courts understand the burdens of production, and they don't need institutionalized case law generated by interpretations of the new rules' standards which would likely be out of date within months of being reported.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): Do not make this change. Attorneys will read the new rule as protecting them against waiver, but it does not. In addition, the "reasonable period" issue is likely to provoke litigation. This is unnecessary. In California, the rules require me to make sure that I'm not producing privileged information.

Charles Ragan: I favor requiring that the attorney certify compliance with the rule. I have had the experience at trial of facing an argument by one lawyer in a firm that was clearly based on such information after another lawyer in the firm assured us that the documents were returned and that no further use of the information would be made. This is required by our state rules. If certification of destruction or sequestration were made, there would be a heightened awareness and attention paid to the issue. that would prompt greater diligence and minimize the risk of the sort of thing we confronted.

Dallas

James Wren (testimony and written statement): In many cases, the production of material can be facilitated by a claw back provision, there must be reasonable limits on how long the privilege can be asserted after production. If there is no definite end point provided in the rule, many problems can result. Discovery information is routinely shared among experts and

other attorneys, and reclaiming that information months after production becomes truly problematic. Late assertion of privilege can also disrupt trial preparation. I suggest something like the following:

When a party produces information without intending to waive a claim of privilege it may, within 10 days after learning of the disclosure of privileged material (and in any event not later than 90 days after original production) or within such other time as may be established by court order or agreement of the parties, notify any party that received the information of its claim of privilege

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): This proposal will encourage sloppy initial production and gamesmanship. NACA is not aware of any basis for concluding that privilege review is costly or delays discovery. The true reasons for delay are that plaintiffs have to spend a great deal of time getting defendants to produce what they are clearly obligated to produce. This proposal therefore addresses a very rare problem with a "solution" that will create a frequent problem. Defendants will always review every document and make every possible objection to production. This proposal will therefore not reduce the review time. Moreover, it seems to make a substantive rule change in altering the rules of privilege. I've given privileged stuff back when it was mistakenly produced, but this will just promote sloppy review. Defendants will bring it up when I use documents on a motion for summary judgment or at trial. I know of no instance in which mistaken production has caused a real problem for the producing party that would warrant a rule such as this one. Usually there is a protective order that provides for inadvertent production. That's the only part of the protective order we don't have to argue about. I have only once gotten documents sooner through such an arrangement.

Darren Sumerville (testimony and 04-CV-089): The proposal is disadvantageous. It is unclear whether this rule, despite its explicit caveat, effects a substantive change in privilege law, thus running afoul of 28 U.S.C. § 2074(b). Moreover, it is unclear that this amendment would remove the troublesome problem to which it is directed. The cost of privilege review is difficult to segregate from review for responsiveness, which will still be necessary. And the searchability of electronic records might very well make privilege review of electronically stored information easier than a parallel review of hard copy materials. The follow-on litigation that would attend the proposed amendment would likely defeat any advantages in efficiency otherwise inherent in "quick peek" arrangements. Third party issues are easy to envision, as are disputes about what is a "reasonable" time to demand return of a document.

Daniel Regard (testimony and 04-CV-044): I am in favor of this amendment. One reason is the volume of material that is now involved in discovery. The second is that some of this information is very difficult to locate and review. The ability for a small group of highly knowledgeable individuals to review a production is gone in many of our larger cases. The pressure to handle the increasing volumes must have a safety-release valve. This amendment can provide that valve. Further consideration should be given to the fact that some electronic information may be easily discernable (such as the contents of an e-mail) while other information may be examined only with great difficulty or using specialized tools. Not all types of embedded information in various spreadsheet and document files are documented.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): This rule oversteps the Committee's authority. Although allowing the receiving party to take the question of privilege or

waiver to the court would be an improvement, it would not remedy all my concerns with this rule. ATLA is not familiar with successful use of claw-back agreements.

Kelly Kuchta (testimony and 04-CV-081): Even with the best technology, given the volume of information involved in discovery of electronically stored information it is impossible to assure that no privileged material will slip through.

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We think that the obligation of the receiving party not to use the material pending a ruling should be in the rule, not just the Note. It's really important to have that out there where people will see it. We are a bit worried that the obligation to destroy or sequester will be hard to implement with electronically stored information. Saying in the rule that the recipient can't use the information seems a good addition to us. We regard it as implicit that either party can seek a ruling by the court on the propriety of the privilege claim. The "reasonable time" limit seems suitable because these issues are very fact-driven.

Darnley Stewart: Since I've been a plaintiff's lawyer, I've never agreed to a document return arrangement. There is a well-developed body of law on this issue, and one factor is whether there is a public interest in the matter. And sometimes the documents I get are real bombshells. These have helped resolve cases.

Jonathan Redgrave (04-CV-048): This rule is an appropriate and advisable rule. Without guidance from the rule, a patchwork of negotiated and standing protective orders have sprouted. I do not believe this rule will lead to additional motions practice. There is no reason to believe a uniform procedural standard will encourage parties to be less careful in guarding privileged information. Allowing the receiving party to challenge the privilege claim would be desirable. Certification should not be required. Indeed, given the characteristics of electronically stored information, it may be impossible so to certify.

Anthony Tarricone (testimony and 04-CV-091): I have never agreed to a claw-back arrangement. It has only been raised a couple of times with me, and I've refused to go along.

Dennis Kiker (testimony and 04-CV-077): The Note should discuss the need for uniform waiver of privilege law. Inadvertent disclosure is not merely a possibility in an electronic production of any size -- it is a virtual certainty. In some jurisdictions, any disclosure of privileged information waives the privilege. This prospect should strike fear in the heart of every practitioner. The problem is exacerbated by the frequency of "sharing" orders that allow parties to share documents with other parties in other jurisdictions. Although the Committee cannot change the law of any jurisdiction, it should at least acknowledge this issue in the Note, perhaps even suggesting the need for uniform treatment of this issue among the federal courts.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): A huge majority of our respondents thought that inadvertent production of privileged electronically stored information should be addressed.

Michael Nelson (testimony and 04-CV-005): The rule should incorporate uniform standards to determine the circumstances under which the inadvertent production of privileged material will constitute waiver of the privilege.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): Given the massive volumes of electronically stored information that are now turned over in litigation, there is bound to be

inadvertent production of privileged information. The receiving party should have to certify that such materials have been returned and all copies destroyed. The "reasonable time" should be measured from when the party learns of the mistaken production, not from when the production occurs.

Brain Leddin (testimony and 04-CV-029): I represent products liability defendants, and I have been involved in large-scale production of electronically stored information. I can tell you that the effort to identify privileged material is much greater than with hard copies. There is not only a very large volume, but also a high degree of informality. People use multiple e-mail addresses, and communications happen in more media than before. In my experience, the claw-back agreement has worked well. The "reasonable time" to give notice is going to depend on the circumstances. Allowing the receiving party to take the issue to the court would be fine. There should be reasonable efforts to obtain return of the material if it has been disseminated, but at some point the dissemination is so broad that the document is beyond effective return.

M. James Daley (testimony and 04-CV-053): This provision is very balanced and provides part of the predictability that should be sought in rule changes.

Alfred Cortese (testimony and 04-CV-054): Some say that the rules should be further revised to require consideration of all relevant circumstances in determining whether the waiver of a privilege is fair, together with a more detailed explanation in the Note of the factors most courts apply in determining those issues. But such an approach might test the limits of the rulemaking power. Because it is so easy to circulate materials, once obtained, certification of compliance with the requirement to return or sequester should probably be required.

Craig Ball (testimony and 04-CV-112): The toothpaste won't go back in the tube once the information has been used in a deposition or shared with others. Moreover, the term "return, sequester, or destroy" simply won't work with electronically stored information. You cannot return the information, and it lingers on the metadata, commingled with other deleted data if you try to "destroy" it. Perhaps it would work if the rule said "a party must take reasonable steps to return, destroy, or sequester the specified information and any reasonably accessible copies."

Michael Ryan (testimony and 04-CV-083): I would welcome a claw-back process if I thought it were achievable and realistic. But this provision is unnecessary and should be left to the parties. The rule change will not accelerate discovery or offer any real gains to the courts or the requesting parties. In my experience, producing parties guard carefully the production of privileged documents, to the point of line-by-line, document-by-document reviews. The need for this change is nonexistent. To permit this sort of demand for return of all copies will lead to chaos. The requesting party cannot even seek court review of the propriety of the claim that the document is privileged. Even if that were possible, the public safety issues that sometimes arise (particularly in the settlement context) make this rule dubious.

Comments

Thomas Burt (V.P., Microsoft Corp.) testimony and 04-CV-001: Microsoft supports this proposal. In addition, the rule should require that the party that receives the notice certify that it has complied with its responsibilities under the rule. This requirement is not burdensome, and is warranted in light of the ease with which the party could otherwise continue to use or circulate the privileged material.

J. Walter Sinclair (04-CV-004): The party who receives a notice that privileged material has been produced should be required to certify that it has complied with the obligation to sequester or destroy all copies. It is essential that inadvertent production be protected in light of the tremendous amount of information that can be sought through discovery.

Clifford Rieders (04-CV-017): The rule provides no opportunity to claim that the privilege assertion is frivolous, inappropriate, or otherwise wrong. The rule then inexplicably states that the producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it. What does this mean? The privilege should be claimed at the time this information is produced or it is waived. If the rule are intending to set up some sort of procedure for an unintentional disclosure of privileged material, then the burden certainly should be on the party who made the error when it produced the information to begin with. To create this new procedure, particularly one fraught with uncertainty, does not address whatever problem currently exists.

James Rooks (04-CV-019) (attaching article from Trial Magazine): This rule would authorize late declarations of privilege made when the producing party believes that the requesting party has found a way to use the items in question. At the drop of a notice, the defendant can impose on the plaintiff lawyer the duty to locate and destroy or "sequester" all copies of the material that she may have sent to others. It is hard to imagine a real problem that this change would solve. It would lead to more motions to compel production since that's the only recourse left to the plaintiff. It would create a new substantive right with regard to privileged material. The rulemakers' authority to do that will inevitably be challenged. Constitutional challenges might also be anticipated, as the proposed amendment would in effect preempt state substantive law that directs waiver for production.

Marilyn Heiken (04-CV-024): This would allow a party to make a late claim of privilege if it believes an opposing party may find a use for the documents. Where the plaintiff has already provided the information to experts or other attorneys, plaintiff would have to locate the material she sent to others and request that it be returned. The amendment invites secondary litigation.

Philadelphia Bar Association (04-CV-031): We endorse the amendment as currently drafted. We believe, however, that it would be preferable to require that a party that receives a notice under this rule must certify compliance with it. That would avoid uncertainty and potential litigation regarding the status of whatever privileged information was produced. The certification could be made in any reasonable form of written communication to make it clear that a formal court filing is not required.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support the proposed change to provide a procedure for handling privileged information that is inadvertently disclosed. We think that the rule should include a statement of the obligation not to use, disclose or disseminate information once notified that it has been inadvertently produced and is privileged. We do not think that a requirement for certification of destruction or sequestration is necessary. We would like to see more explanation in the Note of the sequestration option. Presently, the obligation of the party who receives the notice is stated only in the Note, not the rule, and we think it should be in the rule. (Note: The proposed rule does say "After being notified, a party must promptly return, sequester, or destroy the specified information and any copies.") Although it is not stated, we assume that the party who received the information may use it in a motion seeking resolution of the privilege claim, although any filing should probably be under seal. Attorneys have an ethical obligation in New York not to use privileged information they received by mistake, so a certification requirement adds no significant deterrent

value. In addition, some versions of the information may be in storage media that would make confident certification difficult.

ABA Section of Litigation (04-CV-062): We agree with the procedure provided in this proposal, but see three questions. First, what is a "reasonable time"? That should probably refer to a reasonable time from when the party learns, or reasonably should have learned, that the production has been made, rather than from the actual production, which seems to be what is suggested in the proposal. Second, there is a question whether the Note or the Rule should provide more guidance on the factors to be used to resolve the question whether there has been a waiver. Third, there is the question of certification by the party given the notice that it has complied. We believe there should be some requirement of acknowledgement by that party, but that a certification should not be required. The responding party's mistake should not lead to imposing a burden on the requesting party.

Gregory Joseph (04-CV-066): This proposal is sound but not optimal. It bars the party who got the information from presenting it to the court for decision, and from arguing from the document's contents in urging that it's not actually privileged at all. The requesting party should be allowed to present the document to the court promptly after the request is made if it contests the claim that the document is privileged.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): We oppose this proposal. The rule intrudes on substantive law in jurisdictions that do not recognize an inadvertent production exception to the waiver doctrine. In any event, careful responding parties make a thorough review before production. Finally, the "reasonable" time standard will become a tool for delay. These proposals are particularly onerous with regard to electronically stored information because, once a database is produced, the requesting party will make and distribute multiple copies to co-counsel, investigators and paralegals. Copies may also be placed in witness files, investigative files, and evidence files. If the responding party is allowed to assert privilege many months after production, but burden on the requesting party of finding and deleting or returning copies is not only unduly onerous, it presents the responding party with a tool for distraction. If the Committee goes forward with this proposal, it should adopt a fixed time period -- no more than 30 days -- for assertion of the privilege after production.

Duncan Lott (04-CV-085): This proposal flies in the face of existing State law that declares the privilege nonexistent once disclosure is made. This would require return and/or destruction of liability establishing material that attorneys forward to cooperative programs that provide information to other litigants that may not have been produced by the corporate defendant in other litigation. I have been a victim of this very conduct.

Alan Morrison (04-CV-086): State law is (in cases governed by state law on the merits) the governing law regarding privileges. But the federal courts have a valid interest in facilitating discovery they supervise, and that may outweigh a state's interest in having its privilege law apply in full force in all federal-court cases. It seems that there are actually very few (if any) instances in which inadvertent production results in revelation of a document that is important evidence in a case. All of this suggests that the problems are not sufficiently pressing to warrant this difficult fix, particularly as it may be challenged as beyond the rulemaking power. Moreover, the concept of timely notification is difficult to grasp and apply. The producing party is not likely to review the material after production until some action by the other side calls its attention to something. By then, it may be precisely the items that do matter in the case that are the focus of the right that the rule creates. Moreover, the rule does not specifically forbid the party who got the information from "using" it in the litigation. Suppose the information is that producing counsel is worried that a certain witness will be ineffective on the stand. How does

one sequester or destroy that insight? There is, in short, no reason to have a rule provision on interim use of such materials before the court rules. I note also that there is no obligation on the party who got the material to alert the other side to the possible mistake. This is a wise omission, for including it could lead to motions to enforce the "duty."

Scott Lucas (04-CV-098): This proposal is inherently inefficient, and encourages sloppy discovery practices. At the same time, it penalizes litigants who are proactively preparing their cases (e.g., those who have already provided the documents to experts when the retrieval request is received).

Michelle Smith (04-CV-099): This amendment invites secondary litigation, and imposes a burden on a party that has already provided the information to experts or other attorneys.

Edward Bassett (04-CV-110) (attaching article from Massachusetts Bar Association Section Review Journal): History is replete with situations in which parties have inadvertently turned over materials that led to improved safety. This change would seek to undo that history. The proposal is unworkable. As some judges have observed, once documents are viewed by third parties there is little that anyone can do about the waiver that results.

Brian King (04-CV-123): This rule would cause more disputes between defendants and plaintiffs. At present, such problems are usually resolved in an amicable manner. But under the proposed change, there would be additional hearings. Moreover, this may preempt state law on privilege.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA questions the need to adopt a general rule of inadvertent waiver. The Note suggests that the motivation is the cost of reviewing voluminous material before production. But that concern is addressed in Rules 26(f) and 16(b), regarding agreement to inspection without a prior review. This rule would operate after production. As the Note recognizes, the courts have developed methods of dealing with this situation, and there is not an adequate explanation of the need for rules to deal with the problem. There is no reason to discourage parties from conducting a careful privilege review before production in any but the exceptional case. Should the rule nevertheless remain in the package, the FMJA suggests that a specific time limitation be placed on asserting the proposed right to take back a document. The rule should make clear that the producing party cannot wait to act on a claim of privilege until, for example, the receiving party has relied on the information in formulating or refining its claims or defenses, or has used the information against the producing party. The FMJA suggests the addition of a specific time limitation, such as a 30-day deadline with court extensions allowed by court approval upon a showing of good cause.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We object to this proposal. It would create a sweeping change in the law of privilege by creating a presumption that a party can unilaterally retract production simply by stating that it did not intend to waive a privilege. As the law now stands, disclosure waives a claim of privilege. This rule would turn that principle on its head.

Donna Bader (04-CV-130): This would place the burden on the party seeking the information to prove that there was a waiver, and would create a need for additional court hearings.

Timothy Cogan (04-CV-136): This proposal is contrary to fundamental notions of waiver of privilege and undercuts efforts to narrow the issues in dispute in litigation.

Floyd Ivey (04-CV-154): Adding the power to demand return or destruction to the existing methods of dealing with this problem is not warranted, and is an unreasonably expense to impose on the party not at fault.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee generally supports this proposal. Some members were concerned that the amendment might prompt strategic assertions of privilege, and noted that California law itself calls for a finding of an "intent to disclose" in order to support a finding of waiver. See *State Compensation Ins. Fund v. WPS, Inc.*, 70 Cal.App.4th 644, 652-54 (1999). The Committee believes that the rule proposal properly addresses the important policies underlying the attorney-client privilege. It recommends, however, that the rule require that notice be in writing in order to minimize disputes about whether a party actually provided notice. The Committee also supports requiring the party who is notified to certify compliance with the requirements of the rule.

Gary Epperley (American Airlines) (04-CV-177): American supports the effort to provide a uniform procedure for asserting privilege after production of documents or electronic information. We believe that the receiving party should be required to certify that the material has been sequestered or destroyed.

Assoc. of the Bar of N.Y. (04-CV-179): This proposal does not address the more fundamental question of third-party waiver, and it could not under 28 U.S.C. § 2074(b). In some jurisdictions, claw back agreements don't affect the right of third parties to argue waiver. Recognizing the limitations of the amendments, the Association still supports them, and their application to all forms of discoverable material. It does suggest one change -- that the recipient be allowed to submit the document to the court under seal for a ruling on whether the claimed privilege applies.

Marion Walker (04-CV-181): This amendment is imperative in light of the enormous amount of national litigation and the broad disparity in state rules regarding waiver of privilege. The requirement of a certification that the material has been destroyed or sequestered is likewise essential to provide the full measure of protection.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): We support the proposed amendment. The proposed amendment would create a more effective and immediate remedy for a party who has mistakenly produced privileged information than exists under current 9th Circuit law. But the prohibition on dissemination of the information appears only in the Note and not in the rule. It should be in the rule. The Note should state that it is not intended to preempt any existing obligations to return such information. In California there is such an ethical obligation.

Federal Bar Council (04-CV-191): We believe that the receiving party should have to certify compliance if the material is not returned. This would eliminate any confusion or uncertainty as to the steps taken by the party in sequestering the information. This would be particularly important with electronically stored information because some of it may be difficult to separate from non-privileged information. Regarding form, the Council recommends a simple, plain-language certification, which could be in the form of a letter.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): We support this change because of the magnitude of even a relatively limited production of electronically stored information. Requiring a producing party to perform a detailed and thorough review of this data in order to avoid an inadvertent waiver is often impracticable and, at minimum, can impose a substantial burden and expense.

Henry Courtney (04-CV-193): I oppose the change. It would allow defendants to retrieve evidence they claim is "privileged," and would mean that there would be little evidence that could be accumulated to force manufacturers to make necessary safety improvements in their products.

William Herr (Dow) (04-CV-195): There are serious problems with using this approach in pattern litigation where the concept of inadvertent waiver is not recognized. In such instances, the inadvertent waiver in one case will let such privileged information "out of the bag" forever. This rule will do little, if anything, to facilitate privilege review cost savings for parties involved in such cases.

Peter Keisler (Dep't of Justice) (04-CV-203): This procedure may be of considerable benefit to litigants, who have legitimate concerns that they will produce masses of electronically stored information without a fully adequate opportunity to review the information for privilege. The rule should permit the receiving party to submit the specified information to the court under seal and in camera for a ruling on privilege. The Note should say that the copies that must be returned are limited to copies made from the produced information; if the receiving party has also obtained copies of the information from another source, that should not be affected by this rule. Finally, the rule should cover work product information as well as privileged information.

Clinton Krislov (04-CV-206): The claw back procedure is an excellent idea, and should be applied to hard copy as well as electronic materials. Honest mistakes by lawyers should not harm their clients' cases. But it is important to recognize as well that it is easy, in a server search, to tag all communications to or from inside or outside counsel.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We support this amendment because of the ease of inadvertently producing privileged electronically stored information. We also agree that the request should be reasonably prompt.

Wachovia Corp. (04-CV-214): The intent behind that proposal is a good one. But the amendment provides little protection. The requirement that the party give notice within a reasonable time means that it will usually not provide protection. And the rule says nothing about the receiving party's obligation if it finds such privileged material. Should it notify the producing party? The rule should be changed to require notice within a reasonable time of when the producing party "first learns" of the mistake, and should place an obligation on receiving parties to notify producing parties whenever they find that there is privileged material.

Metro-North Railroad (04-CV-216): Metro-North supports the proposed amendment.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We believe that the receiving party should provide a written confirmation of compliance with the destruction provision, but that no "certification" should be required.

City of New York Law Department (04-CV-220): The Law Department supports this amendment, which essentially codifies existing law.

New York City Transit (04-CV-221): We support this proposal, but would also recommend that the rule require that privileged material must be returned and that the receiving party must certify that it has destroyed any and all copies of the material.

J.W. Phebus (04-CV-224): This rule would be subject to abuse. If the party that got the document has formulated the case on the basis of the documents, this retrieval right could upset

all that preparation. If there is to be such a right, it should be required that it be exercised promptly.

Alex Scheingloss (04-CV-230): This proposal is absolutely preposterous. We are going to be rewarding sloppy lawyering. Doesn't a party who sends out documents have an obligation to look at them first? Why should we penalize the innocent party?

Securities Industry Assoc. (04-CV-231): We support this proposal. But because this addresses inadvertent production comprehensively, we see no reason to retain 26(f)(4). We recommend its deletion. But if it remains, we feel that the Note to that rule should make clear that it is not intended to restrict a party's ability to assert its privilege if no agreement is reached. It should also be made clear there that there is no requirement that privilege issues be discussed.

Lisa de Soto (Gen. Counsel, Social Security Admin.) (04-CV-232): The rules should make clear that courts will be very unwilling to find a party has waived or forfeited the privilege. The rule should say that inadvertent production does not waive the privilege.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): We will sometimes agree to claw back arrangements to speed up discovery. But this change would unfairly favor the producing party. There is no adverse consequence under the rule for shoddy or careless review because it offers an automatic claw back. This open-ended approach will promote laxity, prejudice the party with the burden of proof, and lead to further motion practice.

Heller, White, Ehrman & McAuliffe (04-CV-246): Although harmless on its face, this will generate substantial resistance and debate and fail its ascribed purpose. It will add, not subtract, time and expense associated with the discovery process. It does not change the way parties do a privilege review. Moreover, it creates a risk that courts will impose discovery deadlines that don't allow sufficient time for that review. There will also be more court hearings regarding privilege issues. Moreover, the amendment creates more questions than it provides answers. What is a reasonable time? What form of notice is sufficient? How are disputes over returning the information to be resolved? How can attorneys handle conflicts between the rule and ethics provisions that require them to use all disclosed information? Arguably, this creates a new substantive right.

Zwerling, Schachter & Zwerling (04-CV-247): The search capabilities in computer programs today render privilege reviews faster, easier, and more accurate than manual review of rooms full of boxes. Moreover, for the rule to work, the party must re-review the documents after production. That is not reasonable.

Rule 26(f) -- preservation

San Francisco

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): The proposal for early discussion of a preservation agreement is highly desirable.

Michael Brown: The reference to preservation in Rule 26(f) should be removed. It will encourage plaintiffs to seek preservation orders too often.

Joan Feldman (testimony and 04-CV-037): Preservation has to be discussed ASAP. To discuss the subject, the producing party must have an understanding of client technology. The language in the current proposal is too general.

Thomas Allman (testimony and 04-CV-007): He would not put this into the rule. in 75% of the cases, it's not a problem.

Jeffrey Judd: The emphasis on preserving discoverable information misses the mark. Instead, the effort should be made early to attempt to obtain some agreement as to the universe of "documents" that is reasonably likely to contain discoverable information, and to begin to define any issues that are likely to arise in connection with the preservation of electronic information. A substantial body of common law has in recent years evolved that defines a litigant's obligations to preserve electronic documents, and a strong argument can be made that such preservation obligations are a matter of substantive law and thus inappropriate for treatment by rule.

Jocelyn Larkin (The Impact Fund): It has been our practice for more than ten years to raise the matter of preservation of documents with opposing counsel within days of filing a complaint, by forwarding a proposed Stipulation and Order addressing these issues. This gives us a chance to notify defendant of the kinds of documents and data we believe will be relevant and open up negotiations, which is useful to both sides. We do not usually say that recycling of backup tapes must stop. Sometimes there is resistance, and having the provision in the rule will serve the purpose of eliminating once and for all arguments that there is no authority for addressing such issues or entry of a preservation order.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): Putting preservation into the rule places undue emphasis on the topic.

Dallas

Anne Kershaw (testimony and Feb. 15 survey results, 04-CV-036): From her experience, the delay until the 26(f) conference is a major disadvantage from the perspective of corporate defendants because they may feel that they have to suspend ordinary recycling of backup tapes and the like during that time. Getting to the conference sooner would be desirable. Her Feb. survey results of corporate clients show that some are experienced with blanket pre-discovery preservation orders. Two companies characterized them as routine. One cited a federal court preservation order issued sua sponte that stated "Each party shall preserve all documents and other records potentially relevant to the subject matter of this litigation."

Washington

Jeffrey Greenbaum (ABA Section of Litigation): I'm concerned about routine entry of broad preservation orders. We should not have broad preservation orders. And they surely should not be entered ex parte. Right now, plaintiff counsel seem routinely to send very broad demands for preservation of information at the inception of litigation. Although the rule says preservation should be discussed, it says nothing about what should happen if the parties don't agree. But there should be no obligation to preserve inaccessible information without a court order. There is an obligation to have a litigation hold, but that should not normally extend to inaccessible data.

Michael Nelson (testimony and 04-CV-005): The proposed amendment to Rule 26(f) may be interpreted as implying an obligation to enter into preservation orders at the outset of the case. But in many cases the common-law of spoliation provides ample protection for the parties. To avoid this result, the rule should be changed to say the parties must "discuss any issues relating to disclosure or discovery of electronically stored information."

Brain Leddin (testimony and 04-CV-029): I believe that the rule should require the parties to address this issue before any documents are produced.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): This conference is the place to work out preservation issues. That is much better than having people go in for broad preservation orders. A tailored arrangement after the conference is the way to go.

Theodore Van Itallie (Johnson & Johnson) (04-CV-096): We believe that it's a good idea to have discussion of preservation early in the litigation. The problem with broad orders is where there is no understanding at the outset of the actual dynamics of preservation. We feel we can convey what the practicalities are. We have our headquarters in New Jersey, and we have a local rule there that mandates this sort of discussion.

Alfred Cortese (testimony and 04-CV-054): These amendments seek to implement the very desirable impact that early discussion should have on increasingly abusive sanctions practice. But I think that the Committee should consider changing the provision at lines 64-65 as follows:

. . .to discuss any issues relating to disclosure or discovery of electronically stored preserving discoverable information . . .

The suggestion that parties discuss preservation issues could be moved to the Note. Retaining the provision in the rule could unduly focus on the preservation question in all cases. Discussion of preservation of discoverable information should occur only in appropriate cases. Otherwise, unnecessary or overly broad preservation orders are likely. The Note should also emphasize that care should be taken in crafting and issuing preservation orders. On further reflection, however (see testimony p. 52), it seems that this is the elephant in the room, and it ought to be out on the table. We'd still prefer that it be in the Note. Getting a sensible early order could be a good thing. We are concerned about the drive-by preservation order.

Craig Ball (testimony and 04-CV-112): The way to deal with preservation is to discuss it at the outset and allow a party unsatisfied with that resolution to go to court and seek judicial resolution.

Cheri Grosvenor: The question of preservation of inaccessible information is something that it is helpful to address at an initial conference. That will be a way to get the problem before

the court if there is going to be a problem. I think that it is a good idea to have preservation in the rule as a topic to be addressed. It makes both sides aware of the circumstances.

Michael Ryan (testimony and 04-CV-083): I advocate negotiating a preservation protocol early in the case. There are very efficient ways to deal with this problem if there are rational parties on both sides.

Keith Altman (testimony and 04-CV-079): I believe that it is necessary to get a very strong preservation order signed at the same time the complaint is filed. Electronic information is very fragile. It can be destroyed inadvertently in quantities that could not be destroyed inadvertently in paper. I believe that such an order should direct that (1) all relevant information should be saved; (2) all routine records recycling should be stopped; and (3) everyone that is involved should be told to comply with both the above directives. It is clear that compliance with such an order can be very difficult for the party subjected to it, which is one of the purposes of the order, but the main purpose is to maintain the information. The problem currently is that there is a delay at the start of the case before this is attended to. In drug cases, where a drug is taken off the market, it is urgent to get the e-mails that are sent around the time it is withdrawn. If preservation doesn't start until six months later things are much more difficult. I recommend that depositions of information management people occur as soon as possible. My retention policy is that I have kept every e-mail I've ever sent or received.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft is concerned that this provision comes close to the limits of rulemaking authority. The rules may address discovery and disclosure, but not preservation. In addition, the language could encourage the entry of unnecessary preservation orders. If the language remains, it is crucial that the Note contain language that emphasizes that it is intended to encourage consideration of preservation early, and not to prompt requests for preservation orders.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support this proposed amendment. The many cases in which parties have been sanctioned for failing to preserve electronically stored information doubtless include situations in which the problems might have been avoided if the parties had discussed issues of preservation at the outset.

ABA Section of Litigation (04-CV-062): The Note does not provide clear enough guidance about how to resolve questions if the parties do not reach agreement on the appropriate steps for preservation. Recent caselaw on sanctions for failure to preserve information has led to posturing by parties to set up later claims of spoliation. For example, some counsel seem to have adopted a policy of sending the other side a letter early in the action placing opposing counsel "on notice" that electronically stored information would be sought and asserting that an adverse party has an obligation to discontinue all data destruction and backup tape recycling policies. We are not asking the Committee to define the scope of the parties' preservation obligations. The Note could, however, cross-reference what may be required to be disclosed or produced in the first instance (that which is "reasonably accessible"), and clearly state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause. The Note could also indicate that preservation orders should not be routinely included in Rule 16 orders. Discovery in the first instance is managed by the parties, and ordinarily the court should defer action until there is a better feel for the issues. As discussed elsewhere in the Notes, the availability of particular documents on a party's active computer system may obviate the need to preserve backup data. The Note should discourage ex parte preservation orders.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): Preservation should begin immediately upon notice of the suit. To deal with the built-in delay in suits governed by PSLRA, for example, Congress directed preservation from the time a party received "actual notice of the allegations contained in the complaint." See 15 U.S.C. § 78u-4(b)(3)(C). From that time, the defendant must preserve information as if it were subject to a continuing discovery request. Due to the importance of preservation, it is critical that all parties confer about it immediately after suit is filed, and not later than 21 days after service of the complaint. Such a practice will result in less motion practice. But defendants often delay such conferences until the last minute. As the rule is currently drafted, therefore, there would likely be a delay of months before the conference occurred. Given the risk that backup tapes would be overwritten or active data archived, much of the value of the proposed change would by then be lost.

Stephen Herman (04-CV-103): It has been our experience that early discussions with opposing counsel and active superintendence by the court are important in avoiding spoliation issues and other preservation problems.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We recommend that the rule be changed to call for discussion "relating to preserving documents and electronically stored information relevant to the subject matter of the litigation." This suggestion (1) makes clear that presentation of electronically stored information is to be separately discussed, and (2) clarifies the ambiguities of the meaning of "discoverable."

Gary Epperley (American Airlines) (04-CV-177): American has no objection to this rule provision, but suggests that the Note should caution that parties should take special care in negotiating the scope and extent of any stipulated preservation orders to avoid any misunderstandings later in the case.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): We are concerned that the provision in the rule will stimulate the entry of unnecessary or overly broad preservation orders. We suggest that the Note clearly state that when entered, preservation orders generally should be directed to preserving reasonably accessible information and should be carefully tailored to the specific matters in dispute. We also suggest that the Note state that a party has no obligation to preserve electronically stored information that is not reasonably accessible unless a court so orders for good cause.

Guidance Software (04-CV-198): The assumption of comments about the disruptive effect of cessation of functions that erase or overwrite data is that cessation is the only option. But there are other options -- such as a system-wide keyword search -- and technology is still developing.

Peter Keisler (Dep't of Justice) (04-CV-203): The Department suggests that the sentence "Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted." on p. 61 should be moved so that it precedes the Note's citation on p. 60 to the Manual for Complex Litigation.

Metro-North Railroad (04-CV-216): Metro-North supports requiring parties to discuss preservation of information.

Securities Industry Assoc. (04-CV-231): Rules 16 and 26(f) should be clarified to ensure that they do not result in entry of overly broad or vague preservation orders. One risk is that a preservation order could conflict with the preservation requirements of the PSLRA. It should be

made clear that parties have no obligation to preserve inaccessible information unless so ordered by a court.

James Sturdevant (04-CV-253): I recommend that the rule be changed to "relating to preserving documents and electronically stored information relevant to the subject matter of the litigation." This would make clear that electronically stored information should be separately discussed.

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

San Francisco

Greg McCurdy, Esq. (Microsoft): Discussion will work well if both sides have considerable amounts of electronically stored information.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): CELA supports the changes to Rule 16 and 26(f) requiring parties to address issues of preservation and production of electronically stored information at the earliest possible stage. The rule should make clear that the party maintaining such information should provide enough basic information about the relevant electronic systems it maintains to help in framing discovery and to reduce or narrow the need for Rule 30(b)(6) depositions of multiple employees familiar with these systems. Such depositions present unnecessary challenges to plaintiffs, in part because the number of people involved in electronic systems has multiplied in recent years. In addition, the limitation in Rule 30 to ten depositions without stipulation or court order inhibits such discovery. Perhaps the Note could mention this problem. The problem here more generally is in Rule 26(d), not Rule 26(f), because we usually can get defense counsel to participate only on the 89th day.

Joan Feldman (testimony and 04-CV-037): I heartily endorse this amendment, and offer the following additions:

(iv) any issues relating to the nature and volume of material to be produced including data sources, data types, data and time frames, and stipulations as to what constitutes duplicate or "near duplicate" data;

(v) use of a mutually agreed upon glossary of terms to be used throughout the discovery process.

In addition, the discussion of format at this point is important. The format of documents is critical. A native format Word document will often have embedded comments from counsel. There is no way to review all the active information, much less this embedded information. You have to narrow the search.

Gerson Smoger (testimony and 04-CV-046): I support the proposed amendments to Rules 16 and 26(f) regarding planning for E-discovery. These technical questions are readily resolved in litigation through informal means. Technical assistants to both parties routinely resolve the host of small issues that inevitably arise about how to collect, read and interpret data. This is the efficient way to address these issues.

Jocelyn Larkin (The Impact Fund): We commend the Committee for proposing to require the parties to address issues of preservation and production at the earliest possible time. Our success with "tech-to-tech" telephonic planning sessions at the beginning of cases prompts us to urge that this sort of exchange be included in the Note. The information gap for plaintiffs with regard to electronically stored information is often greater than with regard to hard-copy information. Even present employees (who may be plaintiffs in such cases) often have no idea what information systems apply in other parts of the company. Early discussion of the form for production would be welcome. But the presumption seems to be that the defendant will provide information about what kind of electronically stored information it possesses and maintains. In my experience, defendants don't often do that, preferring to force me to take costly and time-consuming 30(b)(6) depositions. We call this the "that's for me to know and you to find out"

approach. There should be some informal disclosure about the information systems. The Rule or the Note should say so.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): It is helpful to require the parties to meet and confer about preservation of information and any issues that may arise in regard to discovery of electronically stored information.

Charles Ragan: Requiring discussion of these issues is an excellent first step toward dealing with the burden of discovery of this sort. Indeed, one should consider borrowing the admonition of Rule 45(c)(1) that an attorney serving a subpoena thereby certifies that she has attempted to avoid undue burden or expense. The exchange in the Rule 26(f) conference can provide a basis for good faith limitation of discovery along those lines, and the Note might say so. In recent years, e-discovery seems to have become a game of "gotcha," and that is undesirable.

Dallas

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): 26(f) meetings are not useful. It is like pulling teeth to get defendants to pay attention to them or to their discovery obligations. The Texas rules on required disclosures are more honored in the breach.

Gregory Lederer: The meet and confer session is essential. It give the clients a chance to address the problems of E-discovery. The rule should be made more expansive.

Darren Sumerville (testimony and 04-CV-089): There is nothing inherently wrong about the changes suggested for Rule 26(f). But like the changes to Rules 26(b)(2) and 37(f), these changes are unnecessary. Savvy litigants already present such issues in Rule 26(f) conferences. Given the growing attention to the issue engendered by this review and comment process, it will be difficult to avoid confronting electronic discovery issues in future cases. Of the proposals being made, however, these are the ones that are most palatable. The rule would be strengthened if it required the defendant to provide detailed information about its information systems at the 26(f) conference. At least, add to the detail of what should be resolved at that session.

David Fish: The problem is that defendants do not take these meetings seriously. The lawyers are not prepared to discuss electronically stored information at these meetings. The only way that discussion can be productive is for the participants to be knowledgeable and to ask the right questions.

Michael Pope (testimony and 04-CV-065): Usually the party with the most electronically stored information is pressing for an early conference. The problem is not in cases in which both sides have considerable amounts of this information. It is the one-way cases that cause problems.

James Michalowicz (testimony and 04-CV-072): Addressing key issues early in the process reduces the risk that there will be breakdowns later. This is consistent with the early case assessment process that many companies use for litigation. I believe that a map for these would be the seven-step process that I have found useful: (1) define the scope of the request; (2) identify custodians and locations where records and information reside; (3) preserve potentially responsive materials; (4) collect responsive materials; (5) convert and index materials in order to begin reviewing them; (6) review materials for responsiveness and privilege; and (7) produce materials. One option that should be considered is development of an online repository of electronically stored information produced in the case.

Washington

Kelly Kuchta (testimony and 04-CV-081): My experience is that having a single person for each party who is responsible for the E-discovery aspects of the case is desirable. Ultimately, these people should know their systems and be accountable to the court.

Sanford Svetcov & Henry Rosen: The party conference is the way to address problems with discovery of electronically stored information, not the accessibility rule. We think that the meeting should occur within 21 days of the filing of the complaint. We have found that in securities cases the conference does not happen soon enough. This deadline could be relaxed if there were not going to be E-discovery in the case. Presently, we send out a letter immediately asking the other side to identify what steps it is taking to preserve electronically stored information. The uniform response is that they are complying with their obligations. Then we don't find out for a year and a half what they're really doing. And what they do varies a lot.

Darnley Stewart: I would strengthen the rule to mandate consideration of additional topics, such as preserving data from alteration, the anticipated scope, cost, and time required for production of data that one side says is inaccessible, and other topics. It's crucial to get to these topics early. Waiting until the request for discovery is made is waiting too long. I also think that, as in the District of New Jersey, counsel should be required to investigate their clients' systems before the meeting. This could avoid the need for 30(b)(6) depositions. A Special Master might often be involved at this stage.

Dennis Kiker (testimony and 04-CV-077): I'm a big advocate of the meet and confer. That's a big part of my job as national discovery counsel.

Jeffrey Greenbaum (ABA Section of Litigation): It's a good idea to discuss these issues early. I am concerned about what should happen if the parties don't agree on a form of production.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3 Meet and confer sessions are happening. It seems that some of the usual gamesmanship is not so prevalent in these sessions. Over 80% of our respondents who discussed electronically stored information were able to either agree without any assistance of the court or with some assistance of the court. Only some 17% needed court intervention.

Pamela Coukos (testimony and 04-CV 020): The potential burdens of E-discovery are best addressed when the parties work cooperatively. The proposed changes to Rule 16 and Rule 26(f) that require the parties to address these issues up front are likely to save time and resources. Requiring consideration of form of production and preservation up front should reduce conflicts later on. It is also important for counsel to be informed about the client's information systems. With knowledge of that sort, I can target my discovery to the kind of information the defendant maintains. Although an early 30(b)(6) deposition is one way to obtain this information, I find that less formal means work better.

George Socha (testimony and 04-CV-094): In the Note at the top of the second page, there is a reference to "form" and "format." It would be better to make those plural. In general, I think that it is very important to have people talk about form from the outset to avoid problems later on.

Dabney Carr (testimony and 04-CV-003): I think that the rule should provide for discussion in a broader way -- "to discuss any issues relating to disclosure or discovery of electronically stored information."

Ariana Tadler (testimony and 04-CV-076): I applaud the directive that the parties address electronic discovery early in the case. This educational element is critical in this era of technological innovation and communication. Highlighting this sort of information in the rules in the actual wording the rules helps to educate lawyers who, in the past, might not have considered or pursued this kind of discovery. The conference can be used to exchange information on the types of information available from the parties, the forms in which that information is maintained, how one can access the information, and the potential cost burden to access and produce it. This sort of discussion can lead to basic protocols on such things as recycling of backup tapes.

Craig Ball (testimony and 04-CV-112): I heartily endorse the effort to provide for discussion of E-discovery issues in meet and confer sessions.

Michael Ryan (testimony and 04-CV-083): I'm a strong advocate of this conference. When you get the technological people around the table, you eliminate the lawyers' plausible deniability, and 99% of the problems that people are talking about get solved. This requirement will simplify the courts' work, reduce expenditure by the parties, and survive the test of time whatever the technological changes of the future. Right now, there is far too much time wasted and money and court time spent on discovery of electronically stored information. The requirement that the parties engage in a meaningful conference on this subject is an essential advance. This is the way to handle two-tier -- have the parties work out a sequence of information retrieval in the conference.

Keith Altman (testimony and 04-CV-079): Up to this point, there have been too few opportunities to have meaningful dialogue in preparation for complex discovery. Far too often, parties make unilateral decisions about production of electronically stored information. In particular, production in a form that is not useful should lead to adverse consequences.

Steven Shepard (testimony and 04-CV-058): From my experience, the one sure and best way to understand a complicated computer system is to talk directly to the technical expert who runs it. Therefore, counsel should be required to identify that person and confer with him or her before the 26(f) meeting. The ideal solution would be for the tech experts for the two sides to meet face-to-face, in the presence of a neutral moderator, with a confidentiality agreement and blanket immunity from waiving privilege, to talk candidly about the types of computer systems used, and the steps needed to preserve, search, and reproduce the needed information.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft supports the idea that issues relating to electronic discovery should be discussed early in the discovery process. It is important that the accompanying Note say that the issues to be discussed depend on the particulars of the case. The Note's references to gaining familiarity with the party's computer systems should be limited to those that are relevant to the case. There should be no implication that the entirety of a party's computer systems should be under inquiry.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support this proposed amendment. Discussion about storage, preservation and retrieval of electronically stored

information should ease the way for this form of discovery, perhaps by facilitating the fashioning of specific discovery requests targeting particular sources of electronically stored information. In most current cases, this discovery has not become a subject of dispute. In at least some cases, forcing parties to confront these issues at the outset may have the effect of creating disputes. Nonetheless, the prevention of avoidable problems that might otherwise arise later is a far more important consideration.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): The requirement that the parties discuss issues related to production of electronically stored information is beneficial.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We applaud the Committee's requirement that the initial discovery conference include a discussion regarding the disclosure of electronically stored information. We suggest adding another mandatory topic of discussion: "the types of electronically stored information available, and the costs of producing that information."

Assoc. of the Bar of N.Y. (04-CV-179): The Association agrees on the need to urge the court and parties to address E-discovery issues at the earliest possible point. But this can be accomplished quite simply through the adoption of proposed 16(b)(5).

Marion Walker (04-CV-181): The general idea of early planning is good, but often it will be frustrated because the plaintiff lawyer has not given enough thought to what to seek in the case, and the defendant lawyer has not had sufficient time to become familiar with the client's computer systems. For this reason, it is important that any provision in the court's order be flexible enough to deal with future developments. Judges too often insist too vigorously on adhering to the schedule initially set forth.

Jeffrey Bannon (04-CV-182): I applaud the proposed changes to Rules 16 and 26(f), which will better focus the courts and the litigants on electronic discovery.

M. John Carson & Gregory Wood (04-CV-189): Although it is probably appropriate for the Federal Rules to describe these matters broadly, additional detail would be useful. (The authors describe six items to discuss regarding discovery of electronically stored information and three regarding preservation of electronically stored information -- see pp. 2-3 of their submission.)

Peter Keisler (Dep't of Justice) (04-CV-203): The Department supports the principle that the parties must discuss the possibility of electronic discovery issues.

Kristin Nimsgar and Michele Lange (Kroll Ontrack) (04-CV-209): We commend the proposal to prompt early discussion of issues relating to electronically stored information.

Eric Somers (Lexington Law Group) (04-CV-211): These changes create a structure for parties and the court to give attention to issues of discovery of electronically stored information at the outset. This is more efficient than adopting either 26(b)(2) or 37(f) amendments.

Wachovia Corp. (04-CV-214): These amendments will have a salutary effect. The proposed rule is appropriate as drafted.

New York City Transit (04-CV-221): Discussion of this form of discovery should be limited to extraordinary cases. Before ordering discovery of electronically stored information, a

court should look review a corporate party's record retention schedule to determine if "business records" are stored only in electronic form. NYCT's record retention schedule requires, for example, that e-mail that would otherwise constitute a "business record" must be retained in hard copy.

Chavez & Gertler (04-CV-222): If the amendment to Rule 26(b)(2) goes forward, the committee should direct here that there be discussion of "the types of electronically stored information available, and the cost of producing that information."

Zwerling, Schachter & Zwerling (04-CV-247): All parties should now expect some electronic discovery. Accordingly the rule should require discussion of these issues in all cases.

James Sturdevant (04-CV-253): I endorse the requirement that the conference include a discussion of discovery of electronically stored information. The discussion should include "the types of electronic information available, and the cost of producing that information."

Rule 26(f) -- agreement regarding privileged information

San Francisco

Thomas Allman (testimony and 04-CV-007): The rule should not be more general regarding the subject matter of the court order regarding production of privileged information. The proposal reflects concepts embodied in Sedona Principle 10 and is consistent with ABA Civil Discovery Standard 32.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): How useful is such an agreement if it is not clearly enforceable? This rule might encourage courts to adopt standing rules regarding privilege waiver that might not only be unenforceable but not helpful. I fear that the other side will use my refusal to agree against me if I don't agree. This is only one of many topics the parties might discuss during their Rule 26(f) conference, and should not be highlighted this way.

Charles Ragan: The assumption of the discussion seems to be that if the parties can agree to production without waiver that would be helpful. But unless the court can protect against waiver assertions by third parties, this could be a tenuous protection.

Washington

Todd Smith (testimony and 04-CV-012) ((President, ATLA): Although we oppose the Rule 26(b)(5)(B) proposal, we have no problem with parties making a claw-back agreement. It's control by that rule, not by an agreement, that troubles us.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): We found that when people talked about privilege waiver in advance, they were likely to be able to have an amicable solution to the problem. But when it came up in the middle of a case without prior discussion, there was less likelihood of agreement at that point.

Michael Ryan (testimony and 04-CV-083): I commend the Committee on this idea. I've tried to negotiate such agreements, but have not succeeded very often. I find that there is still a document by document, line by line review, with all the time that takes.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft is concerned that the proposal may increase the pressure for premature production of possibly privileged information. Therefore, we would favor removing altogether this reference to protection of privilege. If the language is retained, the Note should make it clear that the provisions are meant to encourage discussion, but not intended in any way to influence parties to turn over material without first reviewing for privilege. Finally, to the extent that proposed 26(b)(5)(B) is adopted, this provision seems redundant and unnecessary.

Clifford Rieders (04-CV-017): This proposal creates another topic for the parties to dispute, although it is couched in terms of an agreement. The burden of solving the problem should rest on the party that is the source of the problem -- the one that produces privileged material. Absent some known difficulty in this area, the provision should be removed.

Philadelphia Bar Association (04-CV-031): We endorse most of the proposed changes to Rule 26(f), except the provision regarding preservation of privilege claims via agreement. We disagree with the inclusion of proposed 26(f)(4). The provision may lull parties into a false sense of security with respect to production of privileged information under a "quick peek" and "claw back" arrangement. The law is unsettled about whether orders preserving privilege work to bind third parties. In addition, the order may prove to be too restrictive at a later date and under other rule amendments.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The Section supports the requirement that the parties discuss protection of privileged information at their conference. In our view, these provisions implicitly, but correctly, endorse the position that inadvertent production, particularly in a case with voluminous information, should not automatically be considered a waiver. Privilege review is time-consuming and expensive.

ABA Section of Litigation (04-CV-062): The risks of inadvertent production of privileged information are greater with electronically stored information. It therefore makes sense to include the parties' voluntary agreements on this subject in the Rule 16 order. But it is not clear whether such an agreement would affect the claim of waiver by a third party who seeks the documents in another proceeding. The existence of a court order blessing the parties' agreement may give them some additional protection. The Note should, however, make clear that even if embodied in a court order, the parties' non-waiver agreement may not protect them from claims of waiver by third parties. Although we support efforts to further protect parties willing to experiment with novel approaches to privilege review, we do not support any suggestion that courts may properly encourage parties to adopt such agreements when the full effects of such agreements are so unclear.

Peter Riley (04-CV-064): I am opposed to this proposal. In a recent products liability case, I have no doubt that, had this provision been in place, the corporate defense would have created further discovery disputes. Without it, defendant was aggressive in assertion of privilege. If it had been able to designate documents already produced as privileged, defendant could have interfered more aggressively with plaintiff's preparation.

Hon. Ronald Hedges (D.N.J.) (04-CV-169): This proposal raises a number of questions with regard to the agreed order aspect: Why should a nonparty who has not agreed to a nonwaiver agreement be bound by the order? Is the idea that the standard of waiver should be changed to require the consideration of an order? Can that be done as a matter of "procedure"? How could this be applied in diversity cases in light of Evidence Rule 501? If the order is to have such an effect, should the Committee not include some specifics about what the order should contain?

Assoc. of the Bar of N.Y. (04-CV-179): This does not address (and cannot address) the binding effect on third parties of any such claw back agreements. In some jurisdictions, they are not honored. But nevertheless, the Association supports the proposal.

Marion Walker (04-CV-181): This provision seems to contradict 26(b)(5)(B). The latter is a much better method for handling the privilege waiver issue since the likelihood that the parties at the conference stage of case will resolve the issue of privilege is small. This pessimism is particularly justified in multiparty fraud cases. The cost of privilege review is a club by which plaintiffs bludgeon defendants into settlement.

Federal Bar Council (04-CV-191): The Council supports use of these agreements and believes that such procedures may help to curtail the costs of discovery. But it is important to

note that the law on whether such an agreement is effective is different in different jurisdictions. The Note should notify parties of possibly different interpretations in different courts.

J. Wylie Donald (04-CV-194): The Note commentary that "the time required for the privilege review can substantially delay access for the party seeking discovery" (p. 19) should be discarded. At the same time that the rules are giving support to discovery regarding ten times as much material, they are also saying that it takes too long to review all of that material for privilege. This should not be in the rules.

Metro-North Railroad (04-CV-216): Metro-North supports discussion of protecting privileged information during discovery, but opposes requiring the parties to discuss this issue.

City of New York Law Department (04-CV-220): This amendment should not be adopted because it would encourage some judges to coerce litigants to enter agreements requiring them to produce privileged documents subject to such agreements without sufficient time to do a proper review.

Ashish Prasad (04-CV-225): The Note should emphasize that a party's failure to enter into an agreement regarding inadvertent production should have no effect on whether an inadvertent production constitutes a waiver of the privilege.

Rule 33(d)

San Francisco

Charles Ragan: Simply allowing access to the electronic records may very rarely be a desirable option. Many databases are customized for individual clients, and contain proprietary information and many fields of information that would not be relevant. Technology provides a solution: Relevant information from databases can be extracted to other formats (e.g., elements of an Oracle database can be exported to an Excel spreadsheet), which would seem perfectly adequate to accomplish the goal of the rule change. I have no specific language to suggest, but think that a modification of the rule change would be in order to accommodate this sort of possibility.

Dallas

David Fish (testimony and 04-CV-021): This amendment is not objectionable, but it is unnecessary.

Washington

Jonathan Redgrave (04-CV-048): I endorse the rule, but suggest think that the Note overstates the obligation of the producing party when it says that it must enable the receiving party to use the data as readily as the responding party. All the rule says is that the burden must be equal. It would be better to say that "[t]he key question is whether such support enables the interrogating party to use the electronically stored information to derive or ascertain the answer as readily as the responding party." It might be good to make clear in the Note that this rule does not invite routine computer system inspections.

Michael Nelson (testimony and 04-CV-005): The proposed language might be construed as requiring that the requesting party be provided with direct access to a proprietary database. But such access is rarely, if ever, required. The Note should clarify that the requesting parties ordinarily do not have such a right of access.

M. James Daley (testimony and 04-CV-053): I endorse this change. But I am sensitive of the risk of a "slippery slope" to motions to inspect computer systems. The Note should be reconsidered to make the point that this should not often happen.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft's view is that Rule 33(d) already adequately covers electronically stored information, and that no addition or change is required. If a change goes forward, however, the Note should say only that the electronically stored information should be provided in the format in which it is maintained in the ordinary course of business, in a format mutually agreed upon, or in a "reasonably usable" format.

Jack Horsley (04-CV-014): I note in the material speaking to Rule 33 there are incorporated in substance some of my suggestions previously submitted although I know many others no doubt submitted similar suggestions.

Philadelphia Bar Association (04-CV-031): We endorse the proposed expansion of the definition of "business records" to include electronically stored information.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): The Section supports the changes to 33(d). The Note makes clear that if the responding party chooses to utilize this option it must ensure that the other side is able to use the information. There is no reason the rule should not be updated to reflect the current reality that business records are electronically stored and that answers to interrogatories may be derived from electronically stored information.

Gregory Joseph (04-CV-066): This proposal is sound.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment. The primary concern was that providing an adversary access to electronically stored information may be more complex than providing access to hard-copy business records. Thus, special considerations may need to be taken into account to ensure that the propounding party's burden of deriving the answer is actually "substantially the same" The proposed Note recognizes this issue by saying that the responding party may have to provide some combination of technical support, information on application software or other assistance. The Committee believes that the Note provides sufficient guidance.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The Note inappropriately suggests direct access to confidential proprietary databases. We believe that the statement in the Note that a party who wishes to answer an interrogatory in this manner may be required to provide "access to the pertinent computer system" should be deleted.

Metro-North Railroad (04-CV-216): Metro-North supports the amendment.

Ashish Prasad (04-CV-225): The Note seems to suggest that allowing the requesting party direct access to the responding party's computer system would be a routine event. The Note should make it absolutely clear that it does not mandate direct access as an alternative to answering an interrogatory, but production of copies of the electronically stored information, consistent with the provisions of Rule 34 regarding form of production, suffices.

Rule 34(a)

San Francisco

Thomas Allman (testimony and 04-CV-007): There is no need to specify in the rule that electronically stored information must be provided in response to a Rule 34 request. The Note could indicate a general understanding that, in the absence of a statement that electronically stored information is not sought, it is necessarily included. Electronically stored information is a good locution, but maybe it should be set up as a subset of "documents." Greg Joseph's comments on this point are persuasive. The term is not likely to become obsolete.

Kenneth Conour: A database is an example of something that exists as electronically stored information but cannot be considered a "document" in any meaningful way. It can provide information in response to queries or directions in "documentary" form, but the database itself cannot be provided. But perhaps it can be treated in the rule as a subset of "documents." His clients do not allow outsiders access to the database. Indeed, for pharmaceutical clients federal law forbids access to some of the private information on the database.

Henry Noyes (testimony and 04-CV-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): No change is needed here. "Data compilations" are already included in the definition of "document." Courts have already interpreted this rule to include all sorts of electronically stored information. There is no need for this change, and similar provisions exist in other rules.

Charles Ragan: The "data compilation" language was added in 1970, when computers were still substantially driven by punch cards. Not to acknowledge the revolution in information technology we have witnessed in the last ten to twenty years is to blind oneself to reality. I would fortify the Note language that Rule 34 responses should address both electronically stored information and "documents" by adding to the Note, at the end of the first paragraph concerning subdivision (a): ", and, absent such a distinction, the response should address both 'documents' and electronically stored information."

Dallas

Darren Sumerville (testimony and 04-CV-089): The pragmatic need for this amendment is dubious. Practitioners have long treated electronically stored information as a type of document, particularly given Rule 34's explicit reference to "data compilations." Any explicit line-drawing in this area raises the specter of confused and confusing two-track document requests, differing standards for electronic records and paper records, and other definitional quibbles. A superior approach would be to take an inclusive approach and simply define "documents" to include "electronically stored information."

David Fish (testimony and 04-CV-021): This change is not needed. No lawyer worthy of carrying a bar card could contend now that electronically stored information is not discoverable.

Daniel Regard (testimony and 04-CV-044): At least today, it seems correct to say that a database cannot reasonably be conceived as a "document." A database may create thousands of tables on a transitory basis to respond to specific queries. It is hard to see how this can be treated as a "document" that is subject to production, as opposed to a system that can be used to generate specified information which in turn can be produced.

James Michalowicz (testimony and 04-CV-072): Production of native files is a problem. There is a need for an indexing system, which may be difficult with this material.

Washington

Kelly Kuchta (testimony and 04-CV-081): The change to allow the requesting party to specify the form of production is positive. But the proliferation of databases, which do not convert into an adequate searchable format, and the redaction of native files will make this a continuing issue.

Jonathan Redgrave (04-CV-048): I believe that the Amer. Coll. of Trial Lawyers' suggestion that the phrase to use would be "tangible information" has many advantages. That is a very expansive and versatile term that will survive the test of time. I strongly believe that electronically stored information should be recognized as a co-equal form of information. Although the courts have been able to adapt the term "document" to fit a host of situations, those uses have strained the term, and it is appropriate to have a separate term. I also suggest that the rule itself say that a request for "documents" includes electronically stored information.

Dennis Kiker (testimony and 04-CV-077): I agree very strongly with the distinction between "documents" and "electronically stored information." The traditional definition of "document," or even the most expansive definition embodied in the current rules, does not adequately cover current and emerging forms of electronically stored information.

Pamela Coukos (testimony and 04-CV 020): In general, I agree with those who say that it is unnecessary to create two categories of information -- documents and electronically stored information. This structure creates potential for confusion. If the change is made, please keep the comment in the Note that a request for "documents" applies to electronically stored information as well.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The rule should not say that the requesting party may "specify" the form, but that it can "request" the form. The ultimate decision on which form to use should be up to the producing party.

David Romine (testimony and 04-CV-080): There is no reason to create a distinction between "electronically stored information" and "documents." Courts and parties have been treating electronically stored information as documents with no problem.

George Socha (testimony and 04-CV-094): It is not clear what is meant by "images," as added to the rule. Is this intended to address image files (JPEG, GIF, TIFF, PDF, etc.) used by parties in the normal course of their activities? Or is it intended to address image files created by or for attorneys for the parties during litigation. A clarification would be useful. If the latter is what is meant, this seems to open up a whole new area of dispute that I believe has not been contemplated as part of the rule-making process.

M. James Daley (testimony and 04-CV-053): I agree with expressly identifying electronically stored information in Rule 34. I would not use "tangible information" instead.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We are concerned that there might be a controversy down the road from the adoption of the term electronically stored information. For example, instant messenger communications are not "stored" at the end of a session. Is that meant to be included. In hopes that it is not, we suggest that the Note make clear that it is not. There is no business need to store such messages after a

session is completed, and we do not think there should be a litigation obligation to reconfigure systems so that these are retained.

Steven Shepard (testimony and 04-CV-058): The Committee has wisely decided to adopt an expansive definitions of "electronically stored information." I suggest broadening this term even further, by using "electronically stored data" instead. The use of the term "information" implies knowledge, created by a human user of the computer, and is likely to be underinclusive. Lots of discoverable information is created by the computer itself. At least, it would be desirable to include a broader definition in the Note, perhaps with something like the following: "The term 'electronically stored information' shall be construed broadly, so as to include data automatically generated by an electronic device."

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft agrees with using the phrase "electronically stored information" in Rule 34 to introduce the concept, rather than attempting to introduce it as a definition in Rule 26. The addition of this phrase is important because the definition of "document" under Rule 34 has long lagged reality when it comes to electronically stored information. Not only is the phrase more accurate than "data," but it also provides both the guidance and flexibility to deal with the new technology that enters the market constantly. "We believe that this shift in thinking will help alleviate the struggles faced by courts and parties in deciding what constitutes a document and how to address issues regarding 'embedded data,' 'metadata' and 'native formats.'" The currently proposed wording in the Note at page 28 correctly and adequately clarifies that, despite the newly introduced concept, requests for production of "documents" should be understood to include electronically stored information. It is important that the rule refers only to "stored" information, because much that might be stored is not. For example, all phone calls could be recorded, but they usually are not. Many new devices such as PDAs have the capacity to record and to store information, but unless the user chooses to store the information it is not within the meaning of the new phrase in the rule. This is as it should be. Thus, although email is generally stored and subject to the rule, instant messaging is not. Like a phone call, the instant messaging session is over when the text window is closed.

Philadelphia Bar Association (04-CV-031): We disagree with the proposed amendment that would provide that electronically stored information is not a type of "document." This structure might require parties to make separate or specific requests for the production of electronically stored information as opposed to "documents." Rather than solving a problem, it could cause confusion and increase the number of discovery disputes. In addition, this could cause parties to treat electronically stored information and other documents differently with regard to preservation and other matters. We find the Note confusing on this subject. On one hand, it acknowledges that the change would separate electronically stored information and "document," but it also says that a request for production of "documents" should be understood to include electronically stored information. For these reasons, it would be better to define "documents" to include electronically stored information:

Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, test or sample any designated documents (including but not limited to electronically stored information, writings, drawings

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): It should not be controversial to update the rule to use the term electronically stored information. As a practical matter, courts have been treating electronically stored information as discoverable Rule 34 or decades. Nonetheless, the current language is clearly out of step with this reality; as the Note observes, it is a stretch to include all electronically stored information within "documents." Even the phrase "data compilations" seems arcane because it is not a term used in referring to the most common subjects of discovery. Indeed, just how far the discovery of electronically stored information extends has been the subject of debate. Given the ongoing development of technology, it was wise to avoid a closed list. The question about whether the Note should state that a party responding to a Rule 34 request should include electronically stored information addresses an issue that should not cause a problem. The topic should have been discussed at the Rule 26(f) conference, and that should remove any ambiguity by the time Rule 34 requests are made. Moreover, all the requesting party need do is point out that its requests cover all information discoverable under Rule 34 to solve the problem. Under the circumstances, it is probably reasonable for a responding party to assume that if the requesting party has not asked for electronically stored information in either a Rule 16 or a Rule 26 conference or in the Rule 34 request, it is not interested in that information. Accordingly, the Note should not say that "a Rule 34 request for production of 'documents' should be understood to include electronically stored information." The addition here (and in Rule 45) of a right to test or sample is a good idea, and may be of particular importance with electronically stored information.

ABA Section of Litigation (04-CV-062): We support the broad flexibility of the term "electronically stored information." But we do not support putting that term in the heading of Rule 34 or using it as a concept separate from "document." The term "document" is broad enough to include electronically stored information. Many attorneys' definition of "document" in their Rule 34 requests includes electronically stored information. The proposed change would require them to modify their document requests to ask for production of both "documents" and "electronically stored information." This is not worthwhile, and there should not be a suggestion that electronically stored information need not be provided unless specifically requested.

Gregory Joseph (04-CV-066): Life for practicing lawyers, district and magistrate judges would be enhanced dramatically if "electronically stored information" were made a subset of "document," rather than something expressly distinct from a "document."

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): We agree with the ABA that there is no need to amend Rule 34 to separately define documents and electronically stored information. The current rule is sufficient.

Alan Morrison (04-CV-086): It is correct to see that the term "document" does not suitably cover electronic information. Although a rule change to deal with that would not be justified, as part of a larger package it is sensible. There is a perfectly good term that should be used rather than electronically stored information, however -- "record." Unless something is recorded, it cannot be used in litigation. The term "record" would include anything a party might sensibly want through discovery. Using this term would bring the rules into line with the Freedom of Information Act, the Federal Records Act, and the Presidential Records Act.

Stephen Herman (04-CV-103): I commend the Committee on this proposal. Although the decisions have been fairly uniform regarding the discoverability of electronic data as a "document," the express recognition that electronically stored information falls squarely within Rule 34 will likely eliminate the needless back-and-forth that occurs with respect to this threshold issue in some cases.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Although the adoption of the concept of electronically stored information in many rules makes sense, it may do mischief as used here because it treats this as different from documents. We see no need to treat it as a category of information unto itself. We agree that arcane words such as "phonorecords" should be removed from the rule, but the emphasis on "electronically stored information" uses today's jargon to create tomorrow's arcanity. There is already great buzz that the next generation of computing will be based not on silicon but upon biometrics. We believe that the emphasis in the rule should be on the production of information, no matter how maintained. So we suggest that Rule 34(a) might be amended to read:

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test or sample any designated information which exists in tangible form or is stored in some medium capable of retrieval in tangible form no matter how maintained, including but not limited to writings, drawings, graphs, charts, photographs, sound recordings, data compilations . . .

Our committee is not unanimous on this language or any other language because we've found it difficult to arrive at simple language to convey a simple thought. The idea is that Rule 34 is intended to provide discovery of information which already exists in some way retrievable in tangible form. Other rules address other types of information. Rule 30 permits retrieval of information stored in the human mind, and Rule 33 requires creation of information to respond to written questions.

Chicago Bar Ass'n (04-CV-167): Electronically stored information should not be defined separately from the term "documents." The CBA feels that the current definition of documents is sufficiently broad and flexible to make the addition of a new concept for "electronically stored information" unnecessary. Up to now, the term "documents" has sufficed to address types of electronic information that did not exist when the rules were written. The creation of this new category may have unintended consequences.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment.

Assoc. of the Bar of N.Y. (04-CV-179): Although the Association agrees that it is appropriate to include electronic information expressly within the scope of discoverable information, it does not believe that there is a good reason to establish it as a separate category. Moreover, there could be confusion about some information that could fall into both categories.

Marion Walker (04-CV-181): Expanding discovery to include electronically stored information is a bad idea. Current Rule 34 is sufficiently broad to include electronically stored documents. The proposal to add electronically stored information suggests that this is something beyond data compilations. It would be better simply to keep the current definition. The fact that a computer will create metadata should not lead to a requirement to produce the metadata about every document.

M. John Carson & Gregory Wood (04-CV-189): Providing electronically stored information without also disclosing the way in which the information was obtained would seem to encourage overly narrow interpretations of requests. Disclosure of the mechanism by which the information was derived should be appropriate and would eliminate the need for follow-up discovery. This could be done by the following language:

Each response to a discovery request that includes electronically stored information should include a statement identifying the electronic media searched; the selection criteria; the methodology incorporated; and the technologies (including the identify of software) utilized.

Clinton Krislov (04-CV-206): The evolving notion of "documents" was broad and flexible, and electronically stored information should be included within this definition rather than as a separate category. Carving that out encourages the practice of shell game obstruction.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): This proposal modernizes the definition of discoverable material, but could be clarified. "Images" should be defined to clarify whether it includes only document images (such as tiff images) or also includes "mirror images," which are exact copies. If mirror images are included, that may magnify the burden on responding parties. In addition, the rule does not state whether metadata is included. We suggest including it in the text of the rule. In litigation, a document is incomplete without this information.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We find the statement that requests for "documents" should be interpreted usually to include electronically stored information to be ambiguous. The rule should clearly provide either that (1) all requests include electronically stored information or that (2) requests do not include electronically stored information unless they specifically say so. We recommend the former. This could be done by including electronically stored information in the parenthetical rather than as a separate category outside the parenthetical.

New York City Transit (04-CV-221): Discovery of electronically stored information should be deemed the exception rather than the rule. When it is required, a party should be required to produce only that which is specifically requested.

Marshon Robinson (04-CV-226): The distinction between documents and electronically stored information is a good thing because it means that requesting parties would have to frame their discovery requests to ask for documents, electronically stored information, or both.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): We like the addition of the right to test and sample in this rule. That will be particularly important if the change to Rule 26(b)(2) is made because it will provide a device for testing the other side's claims of inaccessibility.

Texas Employment Lawyers Ass'n (04-CV-238): Our membership is uneasy with the very concept of electronically stored information. Is some electronic information not stored? Does "stored" equate with archived? How is this different from electronically "maintained" information? What is the purpose of the word "stored"?

Prof. Ettie Ward (04-CV-240): The clarification that documents and electronically stored information can be tested and sampled is helpful. But it is unnecessary to distinguish between documents and electronically stored information. And the new configuration does not clarify which is which. For example, how is electronically stored information different from "data or data compilations in any medium"? Creating a distinction between documents and electronically stored information will only breed confusion.

Zwerling, Schachter & Zwerling (04-CV-247): The addition of the right to test and sample may foreclose the need for expensive and time-consuming motion practice. It will enable a party to test the other side's claim that certain information is not reasonably accessible.

Rule 34(b)

San Francisco

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): In employment discrimination litigation, once defendants do finally produce data, they often produce it in hard-copy form. This is inherently unfair and unreasonable. Defendants have the data in a form which can be automatically searched, and calculations and analyses can readily be made. To re-key or re-input the data from hard copy is very costly and time-consuming. Generally, the producing party will have the ability to produce the information in a number of formats, some of which will be easier for the receiving party to use. The proposed rule reasonably allows the producing party to object to the requested form. The proposal that, if no form is specified, the material should be produced in its ordinarily maintained form or an electronically searchable form, is also reasonable. But it would be desirable instead to direct that the form be "reasonably usable [to the receiving party]".

Joan Feldman (testimony and 04-CV-037): The format of documents is critical. A native format Word document will often have embedded comments from counsel. There is no way to review all the active information, much less this embedded information. You have to narrow the search.

Thomas Allman (testimony and 04-CV-007): The default rule on production in the absence of a designation of desired form should be changed to focus more on the burdens and ease of production than on the similarity to former practice. The early discussion under Rule 26(f) should allow for better self-regulation, and if a default form is needed it should be to produce in a "useable" form. The rule should allow the requesting party to designate the form requested and allow the producing party to object and explain the basis for its preference. In addition, the Note should be changed to refer to electronic information systems, rather than a singular system, because most have many.

Jocelyn Larkin (The Impact Fund): Allowing the plaintiffs to specify the form for electronically stored information is a welcome addition. There is nothing more wasteful and aggravating than when an employer, with a simple Excel database, prints out the database in hard copy form and produces, leaving me to re-input the data by hand so it can be analyzed electronically.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): Regarding form of production, he would require production in every form in which it is maintained by the producing party, subject to the working of the meet-and-confer process.

Charles Ragan: Producing in native format as the norm presents important problems. In the first place, there is no reason to assume that it is always best to produce in electronic rather than hard copy form. Beyond that, the difficulties of conducting privilege review and other oversight of embedded data make native format production dubious. Therefore, "production in the form in which it is ordinarily maintained" may create problems. But the only alternative is an electronic version, even though hard copy might actually work better. At least .pdf should suffice. I would change Rule 34(b)(i) to say that the default provision is to "produce the information in a form reasonable to the circumstances." The same change should be considered for Rule 45(d)(1)(C).

Dallas

Peter Sloan: The reference to electronically stored information might be better if it were to "digitally stored information." Much information is not stored electronically, but it is all stored digitally. The goal should be to have rules that endure, and emphasizing electronic storage may undercut that goal. If "digitally stored information" is not used, he does not have a second choice.

Anne Kershaw (Feb. survey results, 04-CV-036): Survey participants generally reported difficulties in producing information "as ordinarily maintained." And they said that "electronically searchable" is much too limiting. One respondent said his company would like to produce his documents on a website, creating a single document database for all parties. Doing this would be more difficult under the new rule. And there was concern that the default form of production could undermine the discussion of this topic at the Rule 26(f) conference, owing to possible gamesmanship.

David Fish (testimony and 04-CV-021): The provision that allows the requesting party to specify the form of production is useful. Common practice has been to print out the documents rather than producing the information in electronic form. This is better.

Washington

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): This proposal should be modified. The rule might be said to create a presumption in favor of the requesting party's favored form of production. For a company like PM USA, which must produce the same information in many cases, it is critical not to give any one plaintiff carte blanche to choose the form of production. Giving opposing parties the choice of the form of production would lead to impossible results in such litigation. Moreover, the seeming inclination toward production in native format is undesirable. Information in that form cannot be numbered or marked confidential. Redacting is not possible with native format documents. And native format documents are easier to modify. And this form of production is rarely needed. The authorization for the requesting party to set the form should be removed from the rule. Instead, the rule should simply direct the responding party to produce the information in a form that is "reasonably useful." A default form of production can suitably be included in the rules. But there should be room for something like what my company has done in repetitive products liability litigation -- create a plaintiffs-only website and refer plaintiffs to that site. The documents on that site are already in a certain format, and allowing plaintiffs to select their own favorites would create havoc.

Jonathan Redgrave (04-CV-048): I endorse the presumptions and procedures of proposed 34(b), except that the responding party should have the right to designate the form of production without being limited to those listed in the default. Many defendants involved in multiple cases across jurisdictions will need to identify a single form for production of the same information in multiple actions.

Dennis Kiker (testimony and 04-CV-077): The default form of disclosure if the requesting party has not specified a form will create problems and drive up the cost of litigation. Neither of these forms is necessarily the best format in which to produce electronically stored information. In addition, prescribing these forms makes it difficult for companies to protect proprietary business information. Many companies maintain information in formats that cannot readily be adapted to production under this rule. A proprietary relational database permits information about a specific product to be extracted and exported to a flat file for import into a

spreadsheet or another database program. But the resulting report is far less useful than the report as formatted by the proprietary system. Under the proposed rule, my client would be required either to produce the entire proprietary database, together with all software required to extract and review data, or produce the electronically searchable, but much less useful flat file. The hard-copy printout, which is actually the most useful form of production, would not be allowed. True, the parties can agree to another format, but sometimes they are not sensible about that. Producing in all formats would raise serious issues of disclosure of proprietary information. Ordinarily, the parties will agree that confidential business information will be produced subject to restrictions, and it is marked confidential before production. That is easy to do with paper, or with TIFF or PDF documents. But proposed Rule 34(b)(ii) complicates matters by limiting the formats allowed. I understand that it is virtually impossible to create a confidentiality designation for electronically stored information in "native" formats. Converting to TIFF or PDF causes potentially significant costs for document conversion. And if this is done by OCR, there are likely to be errors. Although the rules surely must accommodate the changes that will result from the technologies of the future, they also need to be adapted to the technology of today. I would therefore suggest rewriting Rule 34(b)(ii) as follows:

(ii) if a request for electronically stored information does not specify the form of production, a responding party must, if practicable, produce the information in a form in which it is usually maintained, or in an electronically searchable form. However, in appropriate circumstances, the information may be produced in an alternative form, including hard copy. The party need only produce such information in one form.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): Our survey indicates that paper is still the most common form of production. But some 30% of respondents said that they had produced electronically stored information in native format. And 39% used TIFF.

Pamela Coukos (testimony and 04-CV 020): The default format requirement is helpful. In addition to specifying the default format, however, the rule should also specify that production of electronically stored information be in "complete, readable and useable" form. The fact something is electronically searchable does not mean that the other side will be able to read or work with it. There should be an obligation on the part of the producing party, particularly where format is unspecified, to provide information necessary to read and understand the material.

Michael Nelson (testimony and 04-CV-005): The default form of production provision places unnecessary limitations on the form of production by precluding parties from producing data in a form that is reasonably usable but is not searchable (such as graphic or audio files). The rule should only require that production be in a "reasonably usable form."

George Socha (testimony and 04-CV-094): The Note should not imply that all electronically stored information should be produced in the same form. There are times when multiple forms would be more appropriate. The Note would benefit from addition of something like the following after the paragraph ending "Advance communication about the form that will be used for production might avoid that difficulty":

A party may be asked to produce a range of types of electronically stored information, so that a single production might include word processing documents, email messages, electronic spreadsheets, complete databases and subsets of other databases. Requiring that such diverse ranges of electronically stored information all be produced in one single form may reduce meaningful access to the information while at the same time increasing

the costs of producing and working with the information. The amendment therefore permits the requesting party to choose different forms of production for different types of electronically stored information and provides the same option for the producing party.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The proposed rule suggests a preference for native format. But the dynamic nature of that format produces real problems, such as the inability to "Bates stamp" the materials being produced. The rule should simply require the parties to discuss form of production at an early stage. The directive to produce in searchable format should be changed to "usable" format. Some information, such as graphic or audio data, can't be made searchable. In addition, it should be made perfectly clear that there is no intention to allow a party to obtain direct access to the opposing party's systems.

Dabney Carr (testimony and 04-CV-003): It would be better for the default to be "reasonably usable form." that is more familiar to lawyers and judges. It also allows greater latitude to tailor the form of production to the needs of a particular case.

M. James Daley (testimony and 04-CV-053): I disagree with the form of production language. As drafted, it does not allow the responding party to choose the form of production, even where the request is silent on the issue.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): In the default provision for form of production, we see difficulties. The word "form" seems to be used in two ways. References to the form in which electronically stored information is maintained seems to preclude the movement of such information from the location where it is maintained to another location. That might be unworkable if it meant that we could not move information from dozens of personal computers to a central location. The Note should clarify that no such restriction is intended. The second "form" is similarly burdensome if it means that materials must be converted into a searchable form if not already in such a form. The rule should say that a party need not make electronically stored information any more searchable than it already is.

Alfred Cortese (testimony and 04-CV-054): The production option under Rule 34(b)(ii) should be analogous to the existing option to produce in a "reasonably usable form." This better reflects the requirement that the requesting party receive information in a format that is useful to that party, without mandating specific formats. This would also accommodate the large number of parties that still prefer producing hard copy. This approach would also be in accord with the generally accepted view that "direct access" to a party's proprietary data should be quite rare. The default format provision could have the unfortunate consequence of mandating production in "native format." "Electronically searchable form" seems to mandate software required to search TIFF or PDF images. There already are formats that are not meaningfully electronically searchable (e.g., mpg, jpg, wave) and more may be on the way. For these, the only option would be to produce in the form in which it is ordinarily maintained, i.e., native format. If "reasonably usable" were substituted the nonsearchable files could be produced and would be useful.

Craig Ball (testimony and 04-CV-112): I believe that "form(s)" should be substituted for "form." Often there is no single form that will work for all the information. In the same vein, the language "The party need only produce such information in one form" should also be reconsidered.

Keith Altman (testimony and 04-CV-079): We break electronically stored information into three categories, and produce differently for each. (1) Images: These can generally be produced as images. (2) Word processing documents: These should be produced in image format and simple text format. The image is to be used as evidence. The text is to be searched.

(3) Complex documents: These are handled like word processing documents. Redactions can be done on the original electronic version before conversion to images.

Michael Heidler (testimony and 04-CV-057): The rule should require that requests specify at least one data format. Otherwise the responding party can unreasonably burden the requesting party by supplying data in a cumbersome format.

Joseph Masters (testimony and 04-CV-063): The rule would allow companies to produce ASCII text files instead of Microsoft Word files to avoid production of metadata. I am not clear why the producing party is limited to a single format for production. That would encourage companies to keep data in strange formats that cannot easily be read. Both the "electronically searchable" term and the "ordinarily maintained" formulation produce ambiguities and difficulties. The cost of software to use the company's usual format may be very large. And electronically searchable could include the "sort of searchable" scenario, in which might prove to be virtually useless to the requesting party. I propose the following changed language:

(ii) if a request for electronically stored information does not specify the form of production, a responding party must produce the information in a form in which it is ordinarily maintained, or in an electronically searchable common file format. The party need only produce such information in one format as long as that format is readable by the requesting party.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft believes that "a reasonably usable form" is preferable to "an electronically searchable form" in Rule 34(b)(ii). The alternative language avoid making any unwarranted assumptions regarding the appropriate format for electronically stored information. It is not clear what exactly is meant by "electronically searchable." Much electronically stored information is not truly searchable in a manner that would be of much use to parties in discovery. There are already file types such as .gif, .jpg, .wav, .mpg, and many more may emerge. Whether these would be considered searchable is debatable. At the same time, the rule should not privilege or favor any specific format of production, and particular the rules should not favor production in native format. The format for production is always the subject of legitimate discussion between the parties. We believe that the current wording favors production in native format, and that this slant is undesirable. In many cases, production in native format can greatly add to the production burden on the producing party. There is, for example, the need for additional review and an increased risk of producing privileged material. In addition, there is presently no way to number such materials, and data integrity is a major concern because many types of documents can be easily altered. Protective order designations pose problems like those with numbering of produced materials. Finally, there is no good way to use the ordinary native format file in a deposition. It is therefore very important for the Note to make it clear that there is no preference for any particular format.

Allen Black (04-CV-011): In the Note to 34(b), I think it would be helpful to include some examples of the forms of production we are talking about. Many users of the rules will not know about "native format," "metadata," "embedded data," "pdf files," or the like. Just mentioning some of them in the Note will prompt thinking users to find out what they mean.

Philadelphia Bar Association (04-CV-031): We have formed no consensus with respect to these changes. The proposal is consistent with current practice by placing emphasis on the

parties' ability to agree on a form of production, and recognition that the court may ultimately determine this issue. But some maintain that information should be produced in the form in which it is ordinarily maintained only if that form is readable by the requesting party. This concern arises from the possibility that certain electronically stored information may only be readable if viewed with proprietary software, or obsolete hardware. Others believe that it is already implicit in the rules that a production that cannot be read is not an adequate response to a discovery request. The Note should state, as does the Note to Rule 33, that "satisfying these provisions . . . may require the responding party to provide some combination of technical support, information on application software, access to the pertinent computer system or other assistance. The key question is whether such support enables the [requesting] party to use the electronically stored information as readily as the responding party." The two Notes should be consistent.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): We support the proposal, but recommend that the Note provide greater guidance regarding production in native format or in an electronically searchable form. Given that the form of production has become a frequent source of controversy, it makes sense to establish some procedure for the issue to be raised and resolved in discovery. The procedure proposed is flexible and reasonable. But production in the format in which files are maintained suggests native electronic files. Such files raise concerns about spoliation, disclosure of privileged or confidential information, redacting privileged information, the impossibility of numbering the files for identification purposes and accessibility. The alternative default offered -- an electronically searchable form -- is not clear because the extent of "searchability" is uncertain. To convert native files to static but searchable images requires very substantial technology, time and money (see pp. 21-22 of the submission). The Section believes that the Note should not designate any specific technology, but should provide more guidance about the level of functionality contemplated. Additional specific concerns exist (see id. at pp. 22-24). These include whether e-mail attachments must be searchable, whether all forms of metadata must be searchable, how spreadsheets should be handled, how encryption or password protection should be addressed, and the appropriate way of dealing with databases. The concern is that the overall statement that such items should be "searchable" is not sufficient, and will lead to a patchwork of judicial constructions. But the rule clearly cannot speak to all the hundreds of formats that currently exist, much less anticipate developments of the future. We agree that, in theory, producing a searchable form is a viable form of production.

ABA Section of Litigation (04-CV-062): We believe that the proposal to provide the responding party with several choices is sound. But the Committee's approach raises several issues. First, the rule provides the responding party with two choices only if a form is not specified by the requesting party. We believe that responding party should always have this choice in the first instance, consistent with current practice, and that the burden should be on the opposing party to show why the form chosen by the producing party is not adequate. Second, the two most controversial issues are whether responding parties should be required to produce in native format and whether metadata and embedded data should be produced. Such information is easily altered. Moreover, it is not necessarily true that metadata will be important with any frequency. Production of embedded data possibly showing prior drafts and other information compounds the difficulties. Although we believe that a party should be allowed to ask for this information, the default should exclude it and the requesting party should be required to show that it is needed and why. The option of producing in electronically searchable form would probably lead to a common practice or default in which documents are produced in that way. But some types of electronic documents may not be electronically searchable, such as .jpg or .mpg files.

Gregory Joseph (04-CV-066): The proposal is sound, but there is no reason to limit the requesting party to electronically stored information. It is common for document requests to specify an electronic production format for hard copies.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): The proposal allowing production of electronically stored information as "ordinarily maintained" may be helpful, but permitting the responding party instead to produce in a form that is "electronically searchable" will lead to delay and diversion. This option will permit evasion and will foster satellite litigation. The data may not be as easily searched in the format produced as in the form in which originally kept. In a recent case, this sort of problem resulted in two rounds of motions. By providing options other than those already in the rule, the proposed amendments will produce distracting, costly litigation.

David Shub (04-CV-068): The rule should specify that information must be produced in "a reasonable electronically searchable form." This would give the party who got the information grounds to dispute certain formats for production, such as an undifferentiated data dump. These may be electronically searchable, but may also present data in an incomprehensible form.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): We recommend that the rule provide that "if a request for electronically stored information does not specify the form of production, a responding party must produce tne information . . . in an electronically searchable form."

Steve Waldman (04-CV-143): Parties should be required to submit or e-mail all discovery requests and responses in "doc" or "wpd" format, so that parties can incorporate those requests and responses into further pleadings without scanning them. When they are submitted in "pdf" format it builds additional work into the process of responding.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee supports this amendment.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP favors a default form of production like "in a reasonably usable form." The more general formulation is appropriate in light of changing technology and technology limitations. Not all electronically stored information is searchable in a usable sense. Some data, such as proprietary or highly technical databases, cannot practically be produced as ordinarily maintained.

Gary Epperley (American Airlines) (04-CV-177): We suggest that the default form of production be in a "reasonably usable form." That is the standard contained in existing Rule 34, and would allow the parties greater flexibility.

Assoc. of the Bar of N.Y. (04-CV-179): The default rule could prove problematic. On the one hand, converting large amounts of electronic information into .tiff or .pdf files could be extremely costly. On the other hand, receiving a large dump of native electronic files could be useless to the requesting party absent significant expenditure of time and money to convert it into a usable form. A better solution would be to permit the responding party to indicate the form of production it proposes to use, permitting the party who sought the information to object, leading to a consultation between the parties on what form to use, which the court could resolve if needed.

Marion Walker (04-CV-181): The proposed amendment allowing designation of the form in which information is to be produced is appropriate. But my experience has been that plaintiffs usually request both electronic and hard copy form.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): The option under 34(b)(ii) should be to produce electronically stored information in a "reasonably usable form." Directing that production be in the "ordinarily maintained" form or an "electronically searchable" form could be interpreted to mandate production in native format or to require accompanying specialized software.

William Herr (Dow) (04-CV-195): These changes will impose new burdens on producing parties to the extent that they require the company to make searchable environments available, independent of the company's information infrastructure(s). The cost of doing this should be presumptively shifted.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The rule could clarify definitions pertaining to the default production option. We think that it should be explained that "ordinarily maintained" does not mean exclusively in native format. It could be construed to mean merely producing data electronically, in which case the responding party could potentially produce in an electronic format that might be virtually unusable by the demanding party.

Wachovia Corp. (04-CV-214): We believe that the right of the requesting party to designate the form for production is unwise since this party has the least knowledge about the nature of the electronic data. Instead, the rule should simply specify that the producing party has the obligation to produce data in a "reasonably usable form." The rule should also be revised to make sure that it is not interpreted to require the conversion of hard copy material into electronically stored information. We recommend: "This rule shall not be construed to require a producing party to convert hard copy documents into electronically searchable form." Finally, the Note should confirm that the producing party does not have an obligation to provide software or hardware necessary to review the electronically stored information it produces. The burden should rest on the requesting party to pay for such equipment.

Metro-North Railroad (04-CV-216): Metro-North believes that unless the requesting party specifically asks for electronically stored information, there should be no burden to search for it.

Ashish Prasad (04-CV-225): The default mode of production is deeply flawed. The form in which it is ordinarily maintained has clear meaning for many types of electronically stored information, but not for others, such as databases. For many types of databases, replication would require re-creating not only the individual data elements and tables of the database, but the underlying database environment and computer platform. And an electronically searchable form is meaningless for some sorts of electronically stored information, such as pictures or graphics files. I agree with the recommendation of Microsoft (04-CV-001) that production should be in "a reasonably usable format."

Joe Hollingsworth and Marc Mayerson (04-CV-233): The rules should permit production in electronic format but make clear that "native" format is not required. It should be sufficient to produce the document in image form rather than native format. Production in native format, and the attendant need to review embedded data, would magnify costs.

Zwerling, Schachter & Zwerling (04-CV-247): This proposal's provision of a right for the responding party to object to the form of production requested by the requesting party, or to

choose the form if none is designated, returns discovery to a game of chance. It may defeat the very purpose of requesting discovery in electronic form if the responding party can choose the form, or unilaterally refuse to produce in electronic form. In addition, any hint that metadata are not reasonably accessible should not be entertained. Metadata are essential. The paper analogue is the routing slip, and that could not be held back from discovery.

Connecticut Bar Ass'n (04-CV-250): Since the parties can plan about the form of production under 26(f), we think that the requesting party should bear the cost of using a format other than the one agreed upon. We suggest the following:

Whenever a requesting party seeks electronically stored information in a form other than that in which it is maintained or, if the information is sought from a party, than that form in which the parties agreed to in their Rule 26(f) report, the requesting party shall bear the additional costs of that alternative form of production and shall seek prior court permission for such request [subpoena], which permission shall be freely granted for a reasonable form of production.

Rule 37(f) -- overall

San Francisco

Michael Brown: E-discovery is a sanctions trap. Therefore, the rule should introduce a higher level of culpability by requiring that deletion of information be willful to justify sanctions.

Thomas Allman (testimony and 04-CV-007, as supplemented on Jan. 19): It is unreasonable to expect parties to sequester every remotely relevant piece of discoverable electronically stored information in advance of litigation. Yet some unreported sanctions decisions seem to imply that this should be done and that failure to do so is intentional spoliation. This promotes repeated and unwarranted requests for sanctions. Preservation in anticipation of litigation is not an absolute value; the ordinary operation of electronic information systems produces -- and discards -- information on a regular basis. All that should be required are "reasonable steps" to preserve information. I strongly support a safe harbor. I believe that this safe harbor should focus on a party's good faith operation of its systems and that sanctions should not be imposed in the absence of a finding of willful deletion of information, as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information that is deleted or lost as a result of the routine operation in good faith of the party's electronic information systems unless the party willfully violated an order issued in the action requiring the preservation of that information.

Although I understand why the Committee might be inclined to require that the party demonstrate that it met its preservation obligations in this case, I believe that the "good faith" approach is preferable and would identify those instances in which a party acted to avoid its obligations. This would help avoid confusion in applying litigation holds and would not overstep the limitations on the Committee's power. Finally, adoption of a safe harbor rule would reinforce the movement toward reasonable and responsible records retention policies that has resulted from increased awareness of the importance of these issues.

Jeffrey Judd: I have observed over the past six or seven years that litigation adversaries have with greater frequency adopted the tactic of litigating about the adequacy of a client's production, as it can be an effective means of increasing litigation exposure and thereby inflating the settlement value of a case. Allegations questioning the adequacy of a client's efforts to identify and preserve potentially responsive electronically stored information have become a litigation weapon of choice.

Gerson Smoger (testimony and 04-CV-046): This provision is unnecessary. Sanctions are never imposed without a noticed motion and hearing in which the party's conduct are fully examined, and the imposition of sanctions is very rare. District courts are fully able to evaluate whether sanctions are appropriate in a particular case without new rules. No special exemption is necessary for electronically stored information. Adopting one sends the message that destruction of this information is per se permissible.

Jocelyn Larkin (The Impact Fund): The "safe harbor" is unnecessary and inconsistent with the goal of ensuring that relevant evidence is produced. Sanctions are never imposed without a noticed motion and hearing, allowing full exploration of the party's conduct. District courts are in the best position to evaluate -- in a particular case -- whether sanctions are

necessary based on the individual facts. No special exemption is needed for electronically stored information and adding this one sends the wrong message. In employment cases, it is also inconsistent with the substantive obligations employers have to maintain payroll and personnel data, apart from any common law obligation that results from the prospect of litigation.

David Dukes (testimony and 04-CV-034): I support the creation of a safe harbor, but urge the adoption of the alternate language with a higher standard of culpability.

Henry Noyes (testimony and 04-Cv-050, including copy of article at 71 Tenn.L.Rev. 585 (2004)): The solution should be to require a "snapshot" on the day the party becomes aware of the possible claim. A new Rule 26(b)(6) should be added, providing as follows:

(6) Preservation Obligations. When a party reasonably should know that evidence may be relevant to anticipated litigation, that party must preserve those documents and tangible things that are discoverable pursuant to Rule 26(b)(1) and reasonably accessible. Upon notice of commencement of an action, a party shall preserve a single day's full set of inaccessible materials that it stores for disaster recovery or otherwise maintains only as backup data. A party need not preserve materials beyond those described unless the court so orders for good cause.

There is presently no rule provision that explicitly addresses a party's obligation to preserve discoverable information. This provision would indicate when the obligation arises and what it requires. This proposal applies to all sorts of information, not just electronically stored information. There should also be some possibility of pre-suit discovery. The point is that the snapshot does not freeze the business.

Dallas

James Wren (testimony and written statement): The combination of the safe harbor with the presumed non-discoverability of inaccessible information invites abuse. A party that has taken steps to make data inaccessible via encryption, archiving, etc., and thereafter anticipates future litigation, may be encouraged to discard this information without running the risk of sanctions. Having good faith limits on a party's adoption of an automatic destruction policy would be desirable. Although the Note says that there are instances in which a party must preserve inaccessible information, that one sentence is simply not sufficient to thwart the potential for abuse. The sentence says this preservation need only occur if the data is "not otherwise available," but that contingency factor weakens any protection the sentence otherwise would provide. The inaccessibility of data should not be a justification for providing safe harbor protection for its loss. It is true that spoliation doctrine coming from other sources such as state law is not directly subject to a Federal Rule, but such a rule will likely influence that doctrine.

Anne Kershaw (survey results 04-CV-036): The survey was of large corporate clients. A number reported very broad pre-discovery preservation orders. One reported a case in federal court in which the judge sua sponte entered a very broad preservation order, and the company was later sanctioned for employee error, even though none of the errors were willful, negligent, or even had a substantively significant effect. The company has since suspended all system email deletions had 56 servers housing all its email, 40 of which Microsoft has classified as "un-maintainable." It estimates that compliance with this preservation order has cost it \$10 million since 2002. Another company reports it spends \$2 million per month in tape and people costs alone to comply with a blanket hold.

Paul Bland (TLPJ) (testimony and prepared statement): This proposal will encourage corporations to regularly destroy electronically stored information at short intervals. It is hard to say how the rule would play out with spoliation law if it were adopted. But probably the rule will prompt plaintiffs to seek a preservation order in every case to guard against the spoliation the rule invites. Heretofore, we would be content with a letter notifying the defendant about what it should preserve. Now we will be uneasy about whether the letter is reliable due to the rule. A particular problem in consumer lawsuits is preservation of databases; otherwise the company won't have any record when the lawsuit ends which consumers were overcharged, because the dynamic database would be changed as new customers signed up and old ones dropped out. There is no widespread tyranny of federal courts via sanctions orders that this rule is needed to correct. Litigation is driving what companies preserve and try to discard.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): It is almost always cheaper and easier to store e-documents than paper ones, and it will always be cheaper to maintain them. In addition, companies that use electronically stored information are careful to store backup versions of the data. This is cheap and easy. This proposal would rewrite the laws relating to spoliation so long as electronically stored information is lost due to the ordinary operation of a party's electronic information system. Some companies already have document retention plans that seem intended to destroy potentially-damaging documents before suits are filed, and this proposal would make that the standard practice. It would be foolish for any company to retain any e-document any longer than was necessary. Since it will be rare that a party will be asked to produce e-documents less than a year after the event, it will be easy to insulate against discovery. At present spoliation law put defendants at some risk, and this rule will put that at risk.

Darren Sumerville (testimony and 04-CV-089): Although limited in impact to actions already commenced, the amendment would directly affect the pre-litigation behavior of all but the clumsiest of defendants. The safe harbor provision gives a strong incentive to retool electronic information systems to quickly and comprehensively delete or overwrite data. Corporate defendants, in particular, would establish the type of "routine" policy that will simultaneously insulate information destruction from sanctions and eliminate a rich source of data that could one day prove incriminating. Together with the proposed change to Rule 26(b)(2), this change will prompt a broad reconfiguring of corporate information systems to frustrate discovery. That flies in the face of the purposes identified in Rule 1.

David Fish (testimony and 04-CV-021): This change would give a stamp of approval to document destruction policies. There is nothing inherently wrong with a company having a document retention policy, but if a new rule like this is adopted companies will respond by encouraging destruction. It is critical not to tell companies in advance that there will not be sanctions. A litigation hold is essential. The way to do it is to sit down with the other side and specify terms for identifying the materials that must be preserved.

John Martin (DRI) (testimony and 04-CV-055): Companies should not be required to continually and indefinitely retain all electronic information produced in the routine operation of their computer systems. The safe harbor should protect companies that abide by their own routine records retention policies. I would favor protecting a company unless its loss of information violated a court order.

Daniel Regard (testimony and 04-CV-044): I am in favor of a safe harbor. I would caution the Committee to look beyond the relatively well-understood paradigm of emails and user files to consider the more complex environment of database systems. Identifying all the aspects of a complex system that are responsive takes a significant investment of time and effort.

Even as this process is ongoing, automatic processes often are deleting information. The ability of most companies to turn off deletion processes in such systems is limited at best, impossible at worst. Large systems, although capable of being copied (sometimes) as a single "snapshot," may limit restoration of that snapshot. There may be data on the system, such as temporary or transitional tables, that were never intended to be retained for any measurable duration of time. Changing these schedules may be difficult, and restoring the resulting data streams impossible. Against this background, reasonable action by trained engineers should suffice to guard against sanctions.

Michael Pope (testimony and 04-CV-065): The concept is sound. Parties need to be reassured that they will not be sanctioned if they conduct themselves reasonably. This is particularly important with electronically stored information because there are so many employees who can create, alter, or delete this information that no CEO or general counsel, much less outside counsel, can effectively control all their actions. Absent an intentional violation of an order or agreement of the parties, reasonable behavior is all that should be required.

Laura Lewis Owens: As things are now, lawyers and clients who act in good faith cannot sleep at night for fear that they have not contained electronically stored information in a way that guards against serious sanctions.

James Michalowicz (testimony and 04-CV-072): The rule has merit in that it supports a company's reasonable records and information practices and makes a distinction between reasonable practices and spoliation. This proposed amendment can be effective if companies operate a records and information program which includes the life cycle process with a records preservation protocol. This would recognize that there is a routine life cycle of company records. That cycle can be impacted by "life changing" events such as litigation, investigations, mergers, audits, and physical disasters. A company has a responsibility to manage the life cycle of records with a view to the business value of the records, and the needs of the sorts of events mentioned above. A company should not be required to keep information that does not have a business value, does not meet a regulatory requirement, and is not needed as evidentiary material.

Washington

Todd Smith (testimony and 04-CV-012) (President, ATLA): Adopting this rule will prompt companies to speed up their "routine" deletion of records. (An exhibit to the testimony reproduces exchanges by e-mail among information professionals about speeding up their automatic deletion of e-mails.) Our information shows that people are deleting information to avoid its availability in litigation, and that these rules would promote that activity.

Kelly Kuchta (testimony and 04-CV-081): The safe harbor proposal is a noble one. But I fear that it provides a substantial opportunity for abuse because it suggests that no extra steps are required to preserve data. I have found that sanctions are most often imposed for failure to do something, rather than for acting proactively and responsibly. Therefore, I recommend that the proposed changes be withdrawn.

Jonathan Redgrave (04-CV-048): I endorse the concept of a safe harbor. The distinctive features of electronically stored information make it appropriate. But the protections should be expressed in terms of the sorts of sanctions precluded rather than saying sanctions "under these rules" are forbidden. Moreover, the rule as drafted does not provide much of a safe harbor at all. It will leave large organizations in a state of great uncertainty. All that need be said is that there

is a presumption that loss of information in the ordinary operation of the computer system should not subject a party to serious sanctions absent a reason to know that it should be preserved.

Anthony Tarricone (testimony and 04-CV-091): This rule would alter substantive rights by creating a de facto preservation standard. Saying that the duty to preserve only arises after the party knew that the information would be discoverable in the action relaxes the requirements of common-law preservation considerably. In addition, forbidding sanctions when a party loses data due to the routine operation of a system contravenes the reasonableness standard that applies in most jurisdictions.

George Paul (ABA Section of Science & Technology Law) (including preliminary survey results on survey of corporate counsel with 3.3% response rate): Our survey indicates that spoliation sanctions are not coming up that often. Very, very few respondents said that they had sanctions requested against them. Over 90% said it had never happened to them, and less than one percent had been sanctioned. But almost all said they thought that taking action about sanctions was a good idea.

Pamela Coukos (testimony and 04-CV 020): This rule is not necessary for the scenario it is designed to address, and creates a risk of sweeping under the rule a variety of other scenarios that it was not designed for. Clearly, the common practice of recycling backup tapes should not under ordinary circumstances give rise to sanctions. I cannot imagine a federal judge imposing sanctions for that. The current law is therefore more than sufficient to address these issues. And creating this rule will encourage end runs around preservation obligations. The Rule 26(f) discussion is the way to go, not this rule.

Dabney Carr (testimony and 04-CV-003): Currently, it is very difficult to provide clients with advice on what they should preserve. A safe harbor provision addresses that problem, and is important because more information is now produced in discovery than ever before. Most litigants preserve more than enough information through their litigation hold procedures.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): We strongly support the creation of the safe harbor. this would be a way to ensure that records retention and documents discovery systems fulfill the purposes of the Rules. Those who say that corporations would design systems to put information beyond discovery don't know how corporations work. The people who run corporations want to do what the corporation does for a business. When the legal department suggests changing that routine for a legal reason, there is almost always a negative reception. It is simply inconceivable that a corporation would take information that it needs to run its business and convert it to a format that renders it unusable. Right now, businesses are being urged by their legal departments to adopt inefficient records retention systems for litigation reasons.

M. James Daley (testimony and 04-CV-053): This is not a true harbor, and it is not very safe. But it would improve the status quo.

Alfred Cortese (testimony and 04-CV-054): There is a real need for the safe harbor. The logic behind it is that the cost and disruption of interrupting the regular operation of a computer systems are not justified when there exist other means such as an effective litigation hold to preserve needed information.

David Romine (testimony and 04-CV-080): Creating a safe harbor for failure to produce relevant, discoverable information would create the wrong incentives. The failure to respond to

legitimate discovery requests is a more serious systemic problem than the cost of responding to requests for discovery that call for electronically stored information.

Michael Ryan (testimony and 04-CV-083): The rule change will encourage companies to adopt stringent and expedited routine destruction policies. Coupled with the unilateral decision what is "not reasonably accessible" under Rule 26(b)(2), it will result in the very real prospect of motion practice for months under that rule combined with loss of data caused by this rule.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The safe harbor should provide that companies do not need to suspend their normal operation of business unless there is a preservation order. Large companies cannot save all information. Companies should not be required to stop recycling of backup tapes.

William Butterfield (testimony and 04-CV-075): This rule appears to abrogate well-established legal authority requiring parties to retain discoverable information before suit is filed, and to create a loophole for destruction of material even after suit is filed. Moreover, recent developments in technology indicate that backup storage will no longer be a serious problem. The rule will also prompt an increase in the number of requests for preservation orders.

Craig Ball (testimony and 04-CV-112): This merely codifies the principle of "the dog ate my homework." We don't need this rule; judges can discern when sanctions are needed. If the rule is not abandoned, it should be changed to refer to "information sought in discovery" as well as "discoverable information." The fact that the information was sought in discovery should, by itself, be sufficient to require its preservation. And if you think about it, there is no disaster recovery reason for keeping backup tapes very long. What we have essentially are companies that are asking to be saved from the consequences of their own ineptitude in terms of what they retain. The reality is that information lasts in active data until somebody decides to "delete" it, and that's when backup tapes become important. When that happens, we need to make sure it doesn't disappear from the backup media also. There is no functional business reason to keep backup up tapes from six months ago. You wouldn't want to bring your systems back up as they were six months ago.

Rudy Kleysteuber (testimony and 04-CV-049): This rule is misleading and flawed. At least, it should distinguish between deletion and erasure. A computer system won't delete data without having been programmed to do so. It's not the computer's idea. At least, the rule should distinguish between deletion and erasure, a distinction that is based on intent. Deletion is intentional action to mark a file no longer needed. That doesn't actually affect the file at all; it's still exactly where it was. the same thing happens with backup tapes. Some person decides how long tapes should be kept, and then they are "deleted." The rule could be rewritten as follows:

. . . a court may not impose sanctions under these rules on the party for failing to provide such information if:

- (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
- (2) the failure resulted from the unintended erasure of already-deleted data consistent with normal use of the electronic information system.

Furthermore, the practice of recycling backup tapes should not be sued to justify this rule. Just because expensive tapes are currently in use for this purpose does not mean that things will not change.

Michael Heidler (testimony and 04-CV-057): My experience is that computer systems do not delete data. They may hide it, but they archive and retain it. Adding this rule will protect only the owner of a poorly-designed system that deletes useful data.

David Tannenbaum (testimony and 04-CV-047): This rule provides incentives to routinely destroy data. The Note's reference to the "nature" of the party's system promotes selection of systems with a nature that defeats access to information. Although the Note also cautions against system arrangements that are designed to remove litigation data, it will be hard for judges to spot this sort of activity.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The safe harbor is a reasonable effort to permit the automatic processes that are at the heart of large modern IT systems to keep operating without threat of sanction so long as the party takes reasonable steps to comply with its discovery obligations.

J. Walter Sinclair (04-CV-004): It is essential that we identify appropriate litigation hold practices and provide a reasonable safe harbor. The lack of clarity on this issue presently is causing my clients to ask me to tell them when they have to preserve what, and it is impossible to know the true boundaries of that requirement under the various court decisions on this issue. The focus of preservation should be on reasonably accessible information, not backup tapes and other disaster recovery material. The cost of putting a hold on the systematic business destruction practice, or the reuse of backup tapes, can be astronomical. Without some showing of extraordinary need, my clients should not be forced to incur this expense. I would allow sanctions only if the loss of data was reckless or intentional and violated an order requiring preservation.

James Rooks (04-CV-019) (attaching article from Trial Magazine): This change will green-light destruction of information that would establish liability. Giving companies a safe harbor when they destroy information through the "routine" operation of their document retention systems will invite them to set up "routine" data purges at short intervals. It is bad business practice to purge recent records, and the cheapest thing to do with a computer is to add storage capacity.

Herbert Ogden (04-CV-023): The rule unreasonably distinguishes between electronic records and all others. Since electronic records take up much less space than paper records, there is no point in requiring people to keep the latter but letting them discard the former. the proposed addition could be made to read better by putting all the conditions in one place:

A court may impose sanctions under these rules when a party fails to preserve electronically stored information if (1) the party violates an order in the action requiring it to preserve information, (2) the party fails to take reasonable steps to preserve the information after it knew or should have known that the information was discoverable in the action, or (3) the failure resulted from the loss of information because the party's electronic information system was not operated in a routine fashion.

Marilyn Heiken (04-CV-024): The proposed amendment would allow the routine destruction of information that would establish liability. Companies would set up "routine" data purges at short intervals. With modern computer systems, vast amounts of information can be stored indefinitely and searched quickly. this is both bad policy and technologically unjustified.

Dennis Gerl (04-CV-030): If a party knows, or should know, that important electronically stored information needs to be saved, then this data can be copied quickly and cheaply. Businesses often routinely do this through the use of backup disks. If the party does not do this, then the loss of the data due to "routine" operation of the party's electronic information should not be a defense to sanctions. A compromise rule would prohibit the court from sanctioning a party that destroys electronically stored information if (1) the party took reasonable steps to preserve it; and (2) the loss resulted from routine operation of the party's electronic information system before the party knew or should have known that such electronically stored data needed to be saved. This would still not directly address the issue of companies that "routinely" purge their system over short intervals of time to eliminate important data.

Philadelphia Bar Association (04-CV-031): We disagree with the proposed amendment. The current rules and caselaw regarding spoliation adequately address any issues that may arise regarding failure to preserve electronically stored information. In addition, the use of the phrase "should have known" is confusing and unclear.

Steven Flexman (04-CV-035): If this rule is adopted, we will see an immediate effort to change to data storage systems that do frequent purges of e-mail. Shouldn't the rule be designed to preserve evidence instead of destroying it?

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): Although there is some concern that a safe harbor will encourage parties not to preserve information, the Section endorses the safe harbor proposed by the majority and embodied in the text (not the footnote). It may help to identify sanctionable, culpable conduct by providing an objective standard against which the loss, alteration or destruction of electronically stored information may be measured.

ABA Section of Litigation (04-CV-062): We agree that the concept of a safe harbor is warranted by the unique issues of spoliation of electronically stored information. We are concerned, however, that the proposed safe harbor does not provide enough protection. The proposal has been criticized for permitting sanctions to be imposed for simple negligence, and the safe harbor does not apply if the party failed to preserve information as required by a court order.

Peter Riley (04-CV-064): This is entirely ill advised. Had such a rule been in place during a recent products case I handled, I'm certain defendants would have utilized it to greatly impede additional discovery, knowing that they could hide behind the safe harbor provisions.

Gregory Joseph (04-CV-066): The concept of a safe harbor is sound, but this one does not work. It affords a safe harbor only from sanctions under the rules, but does not appear to apply to any conduct that would be subject to sanction under the rules. It lacks a preservation standard, but the rules should articulate one -- reasonableness -- and then expand the safe harbor to cover anyone who took reasonable measures to preserve information that was lost.

Lerach, Coughlin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): This proposal will produce increased motion practice and will encourage the destruction of relevant data. In our experience, the parties will meet soon after service of the complaint in securities fraud litigation in an effort to confirm that adequate preservation efforts have been undertaken. Although plaintiffs may send a letter demanding complete preservation of defendants' information systems, and defendants generally refuse to specifically identify their preservation efforts, the process allows the parties to informally address discovery concerns. But under the proposed rule, plaintiffs will be compelled to move for a preservation order in every case.

Plaintiff will have to move to preserve, and also to prove that any destruction that occurs was not routine -- a nearly impossible task. There is no justification for such burden shifts, which serve to create an ethical escape hatch for responding parties. Unless defendants are required to specify their preservation efforts at the outset, careful plaintiffs will always have to assume that relevant data will be destroyed, and that the only way to prevent such destruction is to move immediately for a preservation order. This is particularly true in cases governed by the PSLRA. This prospect is particularly troubling in conjunction with proposed changes to Rule 26(b)(2) that would put "inaccessible" information beyond initial discovery responses. If that provision is adopted, older and archived data will often not be produced until after a party has reviewed production including "accessible" information. And this data is most likely to be overwritten due to the routine operation of the computer system. The costs of preserving electronically stored information have been dramatically reduced due to technological changes. The cost for backup tapes has dropped as much as 85% in the past five years, to less than \$100 each. Increasingly inexpensive storage devices also allow a party to quickly and cheaply "mirror image" servers and hard drives. The right way to deal with preservation is through Rule 26(f), not through this rule.

David Shub (04-CV-068): I am concerned about the effectiveness of this proposal. It limits the safe harbor to sanctions under the rules, but there is no limitation on the court's inherent authority to sanction a party, so the protection is severely diminished. But it is likely that no rule language would effectively curtail the court's inherent authority. Under the rules, however, Rule 37 sanctions are only available when a party violated an order in the action, and that seems to be an exception to the rule. If the rule does provide protection, why is that limited to actions taken by the object of the sanctions motion after the suit was filed? Rule 27 allows discovery before the suit is filed. Why shouldn't Rule 37(f) apply in regard to that period of time?

Duncan Lott (04-CV-085): I object to exempting defendants from sanctions when they destroy electronic files through their routine document retention system as this would give corporations an incentive to routinely purge their data at very short intervals.

Alan Morrison (04-CV-086): Once a motion has been made to preserve, specifying the records that cannot be routinely destroyed, there is no need for a safe harbor since the party should act to prevent destruction until the court rules. But proponents of the safe harbor want total safety until there is either a specific request or a court order. Whatever powers the Rules Enabling Act confers on the rulemakers, it does not authorize regulation of pre-litigation conduct. So the earliest any rule-based immunity can apply is when the suit is filed. It is true that, once the suit is filed, the defendant may have some difficulty determining exactly what it is about since complaints are often written broadly. Proposed 37(f) does not appear to provide a workable solution to these and other problems. It doesn't help defendants very much because the safe harbor begins only when they receive the required notice. But then the key word is "discoverable," which is very difficult to interpret and apply in this context with limited information available. And it's odd to forbid all sanctions, not just very severe ones. Having heard both sides of this debate, I think that it will be impossible to write detailed rules in this area. The better approach is to direct district judges to exercise their discretion in these situations based on all the circumstances, and make it clear that the most severe sanctions should be used only in the most egregious cases. A new Note to Rule 37 would not suffice, but I don't have rule language in hand that would do the job.

Scott Lucas (04-CV-098): This proposal invites wrongdoers to establish document retention policies that will hide their wrongdoing. Given the ease and low cost of storing electronic data, this proposal unnecessarily invites abuse.

Michelle Smith (04-CV-099): this proposal would not only allow but would encourage routine destruction of evidence that would establish liability. Parties will set up "routine" data purges at short intervals. This is both extremely bad policy and technologically unjustified. Vast amounts of data can be stored indefinitely and searched quickly.

Richard Broussard (04-CV-100): This change invites corporations to destroy otherwise useful information before a court can have an opportunity to determine the importance of the data.

Gary Berne (04-CV-101): This provision would make destruction of electronically stored information more likely. This evidence is among the easiest and cheapest to preserve, and our rules should never countenance more destruction of evidence. There is no similar protection for destruction of hard copy evidence.

Mica Notz (04-CV-102): You might as well give every defendant corporation out there permission to destroy all evidence at any time pertaining to any matter. What if Enron had gotten this protection? "I am sickened inside to think that our legal system would even consider placing such a rule into effect." The fact remains that six months of electronic communications could easily be stored on a backup hard drive that costs under \$300 in the average business.

Stephen Herman (04-CV-103): I am troubled that such a rule will inevitably have an effect on substantive rights. On its face, it is limited to "sanctions under these Rules," but parties would undoubtedly cite the Rule, if adopted, for the proposition that no affirmative duty to preserve evidence arises until an action is filed. Some courts will agree. But in many jurisdictions there is a requirement to preserve before a suit is filed. Moreover, it will prompt the destruction of information and, in conjunction with the Rule 26(b)(2) proposal, will lead to routine destruction of a large amount of information.

Hon. Michael Baylson (04-CV-106): I think this is a sensible proposal. The Note might be expanded to discuss the difficult practicalities facing a large corporation in maintaining backup tapes. Very often a corporation with a large collection of backup tapes has no idea that it may be facing litigation on a specific topic about which there is some material on those tapes.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Our committee had great difficulty trying to come to a consensus about this, and ultimately we urge that your Committee take a further hard look at the proposal. We offer some thoughts. We unanimously recognize the validity of the concerns behind the proposal and support the principle of a safe harbor. But some of us believe that the current proposal is illusory because it only protects things that would not be sanctioned anyway. Those who see the proposal as illusory think that the rules should articulate a standard for preservation. The discovery rules are about production of information, but Rule 37(f) is not about that and instead is focused solely on preservation. It would enhance the rules if they included a standard for preservation and for production. As to both, we believe that it should be reasonableness. This rule should not be limited to electronically stored information. As drafted, it would seem to permit sanctions for any loss of information not caused by routine operation of a computer system, and we see no reason for keeping that possibility open. With the focus on the routine operation of computer systems, the proposed rule could encourage parties to adjust those operations to accelerate deletion of information.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): Because sanctions are rarely granted, and only after a hearing, we do not believe that this rule is needed. If it is adopted, we recommend that it be modified to require that the party take reasonable steps to preserve information "after it knew or should have known the information was relevant to the

subject matter of the action." The phrase "relevant to the subject matter" is clearer than the word "discoverable," particularly with the proposed addition of the "not reasonably accessible" exemption from discovery.

Brian King (04-CV-123): This would create real problems because unscrupulous parties would destroy evidence and then claim that the loss resulted from routine operation of their electronic information systems. But my clients are not going to have information lost because of "routine" operation of their systems. This will benefit unscrupulous parties.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA opposes this proposal. It recommends that there be no special safe harbor for electronically stored information. The current Rule 37 procedures are adequate to deal with the problem. The narrowness of the harbor provided means that it would only apply in situations in which there would not be sanctions in any event. Moreover, the litigation hold specified in proposed 37(f)(1) is related to the provisions of new 26(b)(2), and the scenario contemplated in 37(f) could be addressed in a Note to that rule. Finally, the language creates as many questions as it answers. The terms "reasonable steps to preserve the information," "knew or should have known the information was discoverable," and "routine operation of the party's electronic information system" all invite disputes over their meaning. It makes more sense to use case law to develop suitable responses to these problems.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We object to this proposal, which inappropriately minimizes the possibility of sanctions where parties destroy electronically stored information. It would give incentives to create routine procedures to destroy electronically stored information.

Donna Bader (04-CV-130): This change would encourage parties to destroy files routinely using their document retention policies, arranging that these purges occur at very short intervals.

Caryn Groedel (04-CV-131): I strongly oppose this proposal. Under the current rules, spoliation sanctions deter destruction of information. The amendment would encourage companies to set up systems that routinely purge data at very short intervals. This change would be fatal to many civil rights claims.

James Buarnieri (04-CV-144): This rule would prompt companies to adopt procedures that would eliminate the ability of plaintiffs to obtain relevant information. They would purge information at very short intervals. But the cost of storage of this material is very low, so that this rule has no justification.

Mark Buchanan (04-CV-146): I represent employment discrimination plaintiffs. I fear that 37(f) would create a gaping hole in regulations requiring employers to retain information about treatment of employees who have alleged discrimination.

Bruce Elfin (04-CV-166): This will encourage companies to purge data routinely at very short intervals, a change that will be fatal to many employment and civil rights claims.

Chicago Bar Ass'n (04-CV-167): This proposal focuses on a problem that does not exist. Existing case law already protects innocents from sanctions for the truly inadvertent and unavoidable destruction of documents. Moreover, there could be adverse consequences. As one of our members put it, the safe harbor is akin to encouraging the breeding of dogs to eat homework assignments.

Hon. Ronald Hedges (D.N.J.): (04-CV-169): The proposed amendment is fatally underinclusive for two reasons. First, it says nothing about retention of information before the suit is filed. Second, it is limited to sanctions under the rules. Moreover, the proposal will interact with 26(b)(2) to encourage corporate entities to shift information from being accessible to inaccessible. How can this be guarded against? Do the proposals provide any incentives to counteract these tendencies? I would expect that parties will routinely seek preservation orders to protect themselves against the effects of the new rule provision.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The rules should contain a safe harbor to avoid use of E-discovery as a tactical weapon.

Gary Epperley (American Airlines) (04-CV-177): For American to have to shut down all its computers every time it is served with a complaint would be crippling. Provided a party has taken reasonable steps to preserve reasonably accessible information, it should be protected against sanctions.

American Petroleum Institute (04-CV-178): API favors this proposal. It dovetails with proposed 26(b)(2), since information not reasonably accessible under that rule would not be considered discoverable under this rule absent a court order requiring discovery for good cause. This proposal resolves the conflict between the necessity to continue operating computer systems that routinely overwrite, alter or delete data and the risk that such routine operations might result in onerous sanctions for spoliation.

Assoc. of the Bar of N.Y. (04-CV-179): The Association believes that the safe harbor proposal is ill conceived. There is no reason to believe that courts and litigants are not equipped to deal with issues of spoliation. It does believe that a substantial argument can be made in support of an amendment to the rules that (1) provides an express textual basis for sanctions in the preservation context for all forms of discovery; (2) clarifies when the duty to preserve is triggered, and (3) sets forth the appropriate standard of care for production and preservation. But the proposal does none of these things. Nor is the proposal well-suited to provide a meaningful safe harbor, as noted by Gregory Joseph. The Association agrees with his comment (04-CV-066). The amendment is inexplicably limited to sanctions "under these rules," and then only where no court-imposed preservation order has been violated. Because the rules do not provide an express basis for sanctioning for absent a violation of a discovery order, as a practical matter the proposed rule provides no safe harbor at all. The Association believes that any meaningful safe harbor must be part and parcel of a single rule that provides the standard for preservation and sanctions in the spoliation context. If there is to be such a rule, it should not be limited to failures to produce electronically stored information, or to losses of information resulting from the routine operation of a party's electronic information systems. The focus of this rule would prompt parties to speed up routine deletion of information.

Steve Berman (04-CV-183): It is clear that the rule would forbid sanctions for destruction of information deemed inaccessible by the defendant. Backup tapes, for example, could routinely be recycled or discarded because the Note to 26(b)(2) says they are not reasonably accessible. This would contradict legal precedent requiring the preservation of all relevant evidence from the time the party has notice of the possibility of a claim.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): Our committee was unable to reach agreement on this proposal and neither supports nor opposes it. We do suggest, however, that if it goes forward it would be improved with attention to two matters. First, we believe that there should be a statement that the rule does nothing to vitiate a party's common-law duties to preserve evidence. We also suggest that it might be wise to provide that negligence

is sufficient for lesser sanctions, but that a heightened standard should be employed for more severe sanctions, such as case termination, striking pleadings, issue sanctions, evidence sanctions, or establishing facts.

Stephen Chow (04-CV-190): The language "discoverable in" should be replaced with "material to" in proposed Rule 37(f)(1) of the draft rule. The concept of knowledge of discoverability is too narrow a standard for the litigation hold. The discoverability of information is based on relevance, which is measured in both materiality and absence of undue burden. The focus of the safe harbor should be on the materiality of the information.

Federal Bar Council (04-CV-191): We strongly support the safe harbor rule, but have some specific recommendations.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A safe harbor provision is integral to redressing the current problem of over-preservation. Presently, the uncertainty regarding what actions can be taken without fear of sanctions has compelled many to unnecessarily err on the side of extreme caution, resulting in excessive burden and expense. Sanctions should be imposed only for violation of a court order requiring preservation of specific information. We think the amendment should read as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation in good faith of the party's electronic information system unless the party intentionally or recklessly [willfully] violated an order issued in the action requiring the preservation of specified information.

This sort of approach would reduce the problems created by the "Sanctions Tort" practice without reducing the ability to produce discoverable information.

William Herr (Dow) (04-CV-195): We support this change, but believe that it should make the standard higher than negligence. The complexity of company systems means that entirely innocent losses of information are almost bound to occur. Absent bad intent, these should not lead to sanctions. And stopping all automatic discard systems will prove very difficult.

Edward Wolfe (General Motors) (04-CV-197): We support this change. But it would be very helpful for the Note to clarify that usually accessible information will suffice, and that this point affects preservation obligations. We support the basic principle that sanctions for non-production of information should be limited to those instances where a producing party has acted contrary to its obligations under the rules or the terms of a specific preservation order. Under Rule 26(b)(2), the obligation to produce inaccessible information will not exist without a court order, which should be specific with regard to the source of that information. The Committee could emphasize this point by modifying the introductory clause to say it refers to an order that requires a party to "preserve specified electronically stored information." We support the general proposition that preservation obligations should not be explicitly included in the rules. But all parties will benefit from a common understanding that reasonableness guides such obligations.

Guidance Software (04-CV-198): The proposal uses the right standard in 37(f)(1), but the interplay between that rule and 37(f)(2) should be considered further. The Note suggests that routine operations that lead to loss of data may often continue. Suppose a party had a system that could not be operated without those effects. Would having such a system be beneficial for

the party in obtaining the protection of 37(f)? There should not be a rule that will impede the development of better systems. A better rule would require litigants to have up-to-date systems to qualify for the protection of the rules.

Eileen Inglesby-Houghton (04-CV-199): I think that the rule should also protect a party against sanctions for failure to produce electronically stored information unless the party violated an order requiring it to do so if it took reasonable measures to search for information within the scope of the discovery request, but the search did not identify the information. Different standards are needed for discovery of electronically stored information than hard copies because there are different methods of searching for this information. Using a keyword method for searching electronically stored information, for example, will not catch all responsive information that would come from a page-by-page review of hard copy versions of the information. In addition, the Note should go into more detail on what the party knows when responding to the discovery. In addition, it is worth noting that parties don't know what electronically stored information their employees have.

C. Richard Reese (04-CV-200): 26(b)(2) would seem to exempt "inaccessible" information from any need to preserve under 37(f)(1). The Note should say that the word "discoverable" is not meant to import whether the information is reasonably accessible. In addition, it seems to make no sense to say that the party must take reasonable steps to preserve information since the assumption is that the information was not preserved. Doesn't that fact mean that the steps were not reasonable?

Patrick Keegan (04-CV-205): This rule potentially abrogates well-established legal authority requiring parties to retain discoverable information prior to the filing of a complaint where there is reason to believe that it will be relevant to litigation. It also creates incentives for responding parties to destroy relevant electronically stored information with impunity. And new backup media technology eliminates many of the concerns expressed by corporations about the volume and expense of maintaining backup tapes.

Peter Kraus (04-CV-207): This will lead to the routine destruction of crucial evidence because it provides defendants an incentive to destroy evidence.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We think that the rule should consider conduct that violates a reasonable preservation letter to be outside the safe harbor. Otherwise lawyers will seek orders more frequently, and lead to unnecessary court involvement.

Eric Somers (Lexington Law Group) (04-CV-211): This would allow parties to bypass their obligation to implement a litigation hold. Moreover, the protection applies only to conduct that probably would not be sanctioned anyway.

Wachovia Corp. (04-CV-214): This proposal is well intended, but the exception carved out for preservation orders will swallow the rule. In many actions, a court will likely create a broad discovery order, especially in light of the changes to Rules 16 and 26, that will require the parties to preserve all discoverable information. So the safe harbor will be inapplicable in most actions. A better approach would be:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information systems, unless the party intentionally or recklessly violated

an order issued in the action requiring the preservation of specified electronically stored information.

Metro-North Railroad (04-CV-216): Metro-North supports the safe harbor provision.

Prof. Arthur Miller (04-CV-219): Much of the burden and expense currently associated with electronic discovery results from the perceived duty to preserve virtually all electronically stored information that might be pertinent to what are often very complex cases involving the conduct of people over a number of years. That obligation cannot be applied without some attention to the cost and burden that result. Therefore, I recognize the need for an amendment that protects a party from sanctions under Rule 37 for information lost in the normal and good faith operation of computer systems.

City of New York Law Department (04-CV-220): The Law Department supports this amendment. But the "harbor" it provides is too narrow. The City of New York has hundreds of thousands of employees, many with direct access to some form of electronically stored information. The City should not be subject to sanctions for the acts of a low level employee who may negligently delete electronically stored information despite reasonable efforts by City attorneys and management personnel. We encourage a higher threshold.

Marshon Robinson (04-CV-226): This proposal simply will not work. What are reasonable steps? How does a party know that something is discoverable or needed for litigation? Judges will have to guess when a party knew something.

Alex Scheingloss (04-CV-230): If this rule is adopted, the document retention time will be as long as the tapes on Mission Impossible. It's hard for me to believe that serious fair minded and intelligent people are coming up with these ideas.

Securities Industry Assoc. (04-CV-231): We applaud this rule. Our only suggestion is that the safe harbor should not be withheld solely because a party violated a court's preservation order. If the violation occurred despite conscientious efforts to comply, it should not be a basis for sanctions. At least, the exclusion should only apply to orders that were specifically directed to the information in question.

Joe Hollingsworth and Marc Mayerson (04-CV-233): The creation of a safe harbor follows naturally from an appreciation of the limitations of computer technology for accomplishing what discovery asks of it. No "bad action" of the custodian of records can be inferred from the simple fact that data has been lost. This is a particular problem with "live" databases, which are contiguously updated. No prior version of the database is preserved by its very nature. The Note should make this clear.

Bernstein, Litowitz, Berger & Grossmann (04-CV-236): Corporate attorneys advise their clients to employ company-wide destruction policies and technologies that regularly purge electronically stored information. Unless defendants are obligated to take necessary steps at the commencement of litigation to suspend such routine procedures, critical evidence will be lost. Existing Rule 37 is sufficient to protect against unwarranted imposition of sanctions. Now the rule would tell a defendant that it can wait until it concludes that information is "discoverable" before taking steps to preserve it.

Richard Renner (04-CV-237): The change would absolve defense counsel of liability for sanctions if they have taken "reasonable steps" to preserve electronically stored information. Upon adoption of this rule, recalcitrant employers will no longer have any incentive to cooperate

in resolving discovery issues. They will face no sanction if they go to the mat, just to see how the judge would rule.

Texas Employment Lawyers Ass'n (04-CV-238): This change would encourage deliberate destruction and purging of electronically stored information. Current law adequately addresses these problems.

Trial Lawyers for Public Justice (04-CV-239): This rule would encourage companies to use systems that routinely destroy electronically stored information at short intervals. There is no reason to think it would solve a problem, the federal courts are not now imposing sanctions inappropriately. There is already a problem with major corporations destroying evidence. This will make it worse. To guard against this possibility, plaintiffs will now seek preservation orders in every case.

Connecticut Bar Ass'n (04-CV-250): We think that the trigger is not well defined. We suggest the following changes:

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

(i) the party took reasonable steps to preserve the information after it filed a Complaint or was served with a Complaint; and

(ii) the failure resulted from loss of the information because of the routine operation of the party's electronic information system or mistake.

James Sturdevant (04-CV-253): I recommend that Rule 37(f)(1) be modified to read: "(1) the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of the action."

Rule 37(f) -- routine operation

San Francisco

Greg McCurdy, Esq. (Microsoft): Adoption of Rule 37(f) should not create an incentive to speed up or broaden erasure of information. There are other legal requirements to preserve such information. It would be "insane beyond belief" for a company to curtail retention required by other statutes because of the addition of this rule.

Kathryn Burkett Dickson (California Employment Lawyers Ass'n): CELA opposes the safe harbor rule. We are concerned that it will simply encourage companies to accelerate their "purging programs" that delete important sources of data. The current system, which encompasses concepts of spoliation that may lead to adverse jury instructions is preferable because it will lead corporations to act more cautiously. Relevant evidence should not wind up in shredders or "Evidence Eliminator" programs that are claimed to be simply a part of the company's routine deletion programs.

Gerson Smoger: This rule will encourage people to set things up in a way that removes more information from what can be discovered. Sanctions are rare, and this rule is not a solution to an important problem.

Kenneth Conour: Dynamic databases change every day. There is no way for them to do what they are supposed to do and remain static. That is an example of routine operation of a computer system. But how does one deal with preservation in such circumstances?

Dallas

James Wren (testimony and written statement): Creating a safe harbor for "routine operation" blesses the destruction of data simply on the basis that it is routine without regard to the existence of a business or technological justification for the routine. This is an invitation for companies to set up "routine" data purges at short intervals, without regard to the legitimacy of the justification for the purges. There are legitimate reasons for such purges, but illegitimate ones as well. At a minimum, the routine operation should have been in place before the party suspected it might be the subject of litigation.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): The Note should provide more guidance on what is routine operation. There are really two factors that go into that determination. First would be the capabilities of the system, and second would be the policies that the party adopted in relation to the system.

Michael Nelson (testimony and 04-CV-005): The proposed rule could be interpreted to require that parties sometimes preserve inaccessible information. It should be clarified that there is no such obligation.

David McDermott (President, ARMA Int'l) (testimony and 04-CV-041): Destruction of records is acceptable, providing that it is conducted according to policies and procedures that have been established, based on the organization's operational, legal and regulatory, financial and historical needs. The policies and procedures must include a procedure for stopping destruction when records are relevant to reasonably anticipated or ongoing litigation or

investigation. Such procedures should include electronically stored information. We recommend that the following text be incorporated into the rules or the Note somewhere:

For corporate entities and any party subject to statutory or regulatory retention requirements, a party will be expected to provide a copy of its formal records retention policies and procedures or otherwise articulate its record retention practices in the absence of a written policy. Records subject to a party's records retention policies and procedures, whether formal or informal, will be assumed to be reasonably accessible and a party's failure to follow its practices and procedures will not relieve the party from the requirements of discovery.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: The phrase "routine operation" is somewhat open-ended, which is generally a good approach. Microsoft favors a clear statement that the rule should be understood to include a party's good faith operation of its disaster recovery systems -- including the regular rotation of tapes to recycle them. But it is important as well to recognize that these issues go far beyond routine recycling of backup tapes. Today companies must find better ways to manage the huge volumes of email generated every day. Filters may delete as much as 85% to 90% of incoming Internet email as spam. Preserving this material would be a huge and pointless effort. There is an arms race between the filtering software and the spammers who try to circumvent it." It is conceivable that spam filters could block relevant information and delete it. Nonetheless, this automatic deletion serves a vital business purpose and should not give rise to spoliation arguments. Companies also limit the size of employees' email boxes to avoid the potentially large costs of retention of all email. The usual approach is to remove all email after a reasonable time period such as 30 or 60 days. It is also worth noting that some routine operation is not automatic; it requires people to recycle backup tapes and the like. The Note should make it clear that routine operations include those that are not entirely automatic.

Clifford Rieders (04-CV-017): The meaning of "routine operation" is difficult to decipher, and it creates an exception wide enough to swallow the general rule. It would be difficult, if not impossible, to litigate whether loss of information has occurred because of "routine operation" of the party's electronic information system. Further, information, as a matter of logic, does not become lost through "routine operation." If anything, "routine operation" should result in the proper accumulation and distribution of data rather than the loss thereof. At the very least, the court ought not to be denied the power to sanction absent wording that is clear and understandable.

Herbert Ogden (04-CV-023): At the very least, the rule should require that the "routine operation" have been in place before the party suspected it might be sued.

Gregory Joseph (04-CV-066): The safe harbor should not be limited to information lost due to the routine operation of the system. There are many other legitimate reasons why information may be lost (such as a tsunami). As it is, the draft encourages parties to adjust their retention systems to accelerate deletion of information. The safe harbor should apply to all kinds of information, not just electronically stored information.

David Shub (04-CV-068): This term is ambiguous and difficult to interpret without the Note. Rather than explain the meaning of the term in the Note, it would be better to add language to the rule itself, so that the rule would read something like: "routine operation of the party's electronic information system, including any way in which a specific piece of

electronically stored information disappears without any conscious human direction to destroy that specific information."

Assoc. of the Bar of N.Y. (04-CV-179): The proposal focuses on the wrong thing. By focusing on the party's routine operations, it would encourage parties to speed up automatic deletion, but would not apply in situations that truly deserve it, such as the loss of data due to September 11. Moreover, the focus should not be on the routine operations, but whether the party satisfies the requisite standard of care, notwithstanding whether it was destroyed due to routine computer operations. The relevant issue for spoliation is and should remain the degree of the party's culpability, not the precise manner in which the loss occurred. Finally, the Note should clarify that manual steps may be included within the definition of routine computer operations. For example, an organization's computer system may be programmed to move e-mails from a live server to backup tapes after a specified period, and the backup tapes may be scheduled for destruction or recycling. Such activity is common, and may involve manual intervention by an individual working for the organization. There is little reason to distinguish it because it involves action by a human being.

Federal Bar Council (04-CV-191): The concept of routine operation may need further consideration. Providing a safe harbor of "routine" operations of electronic information systems may discourage organizations from upgrading their technology systems during the pendency of litigation, notwithstanding their legitimate business needs. We believe that the rule should allow a company the opportunity to demonstrate that new techniques were motivated by a legitimate business reason unrelated to litigation.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The Note could state whether routine operation applies exclusively to functions that require human intervention, such as backup tape recycling, or whether it also applies to technology operations not requiring human intervention such as spam filtering, automatic email archiving and deletion, the routine booting of a computer, or data written to a hard drive.

Chavez & Gertler (04-CV-222): Rule 37(f)(1) should be amended to read:

the party took reasonable steps to preserve the information after it knew or should have known the information was relevant to the subject matter of an action or reasonably anticipated litigation.

Ashish Prasad (04-CV-225): The Note should make clear that the kinds of routine loss of electronic data that are covered by the rule are not limited to the types of features described in the Note, but also include more subtle ways that data can be lost, such as through the overwriting of dynamic database records. For example, a party could preserve a "snapshot" of a database even though it does not make a new snapshot every time the database updates a single record.

Zwerling, Schachter & Zwerling (04-CV-247): The rule assumes that nonroutine operation of computers can be or should be altered. There is a difference between setting defaults to delete or archive e-mail after a certain date, and defragging a desktop to allow it to run more efficiently. By treating all "routine" operations as identical and unalterable, the rule renders otherwise relevant information not reasonably accessible within (b)(2).

Rule 37(f) -- steps to preserve

San Francisco

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: The rule should say that backup tapes can be recycled unless a court specifically orders otherwise. Otherwise, the value of the safe harbor is unduly lessened. The costs of retaining backup tapes can be millions of dollars. The value of retaining them is almost always zero. In those rare cases in which retention is warranted, it should be sought and directed by order, not by rule. In any event, there is a common law duty to preserve, so the rule is unnecessary on that score. The problem is that under Rule 26(b)(2) the court may order discovery of inaccessible information in some cases, so it is unclear how the party is to approach the provisions of Rule 37(f). Should the party anticipate there may be good cause to retrieve information, and therefore that it has to retain the backup tapes? "The combined effect of these two proposed rules [26(b)(2) and 37(f)] puts companies in a quandary." The Sedona Principles recognize that there are great difficulties in preserving backup tapes. Intel would prefer a rule that said "Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other electronic data systems unless the court so orders for good cause." We strongly urge the Committee to include such a provision in the rules, either in Rule 26(b) or in another rule.

Joan Feldman (testimony and 04-CV-037): The danger inherent in the proposed language is that in many cases, what a party "should have known" about discoverable electronically stored information may be too loosely interpreted. For example, critical, responsive evidence stored in a database may be routinely purged by ongoing programmatic routines. This rule change would be optimal if tied to a mandatory Rule 26(f) conference requiring full disclosure of systems, data stores, and well as stipulations regarding scope. Recycling of backup tapes should sometimes be stopped, for example. They are done by server, and it may be clear early on that a given server is likely to contain key information. That server's backup tapes should be saved.

Thomas Allman (testimony and 04-CV-007, as supplemented on Jan. 19): He advises people that they have to be able to suspend automatic deletion policies. But the rules themselves should not address preservation. A company must consider any special circumstances which might trigger a need to take extraordinary steps to suspend operation of those systems. For example, Guideline Five of the Sedona Guidelines lists various "best practice" triggers for suspension which should be considered. However, reference to a duty to act in "good faith" might better convey the broad obligation of a party to act rather than mere reference to what it "should" have known.

Kenneth Conour: Dynamic databases change every day. There is no way for them to do what they are supposed to do and remain static. That is an example of routine operation of a computer system. But how does one deal with preservation in such circumstances?

Charles Ragan: I agree with Allman that the problem of preserving inaccessible information is a source of great angst among clients. The same concerns apply to preservation of dynamic databases.

Dallas

James Wren (testimony and written statement): The sanctions issues should be connected with a party's knowledge that electronically stored information should be preserved. When a party knows, or should know, that important electronically stored information needs to be saved due to potential litigation, there should be no encouragement to continue with

destruction. The issue of sanctions should be connected to the reasonableness of a party's actions in light of what is known about the need for preservation, not whether destruction is "routine."

Peter Sloan: Preservation is "the elephant in the room." In his practice, he finds that he does not know what to tell his clients about this issue. He advises clients to have data deleted at specific durations, an on a specific day, not a rolling date. Thus, at any given time it could be 59 days before the next deletion date or one day before it when notice of a suit comes in. Regarding the need for backup tapes, his general experience is that three to ten days is sufficient to keep them, although in some instances it may make sense to keep them as long as 30 days. He hopes that clients will actively pursue preservation of active data from notice of possible claims. In particular, e-mail used for purposes of notifying employees of company decisions should be retained. He is worried about what he calls the "serial preservation dilemma" that results for some larger clients if they can never discard anything.

Charles Beach (Exxon Corp.): Our backup tapes will continue to run. You can't stop all of these. It is not likely to be true that one can pinpoint one or two and keep them to retain information about a given event or decision. It is seldom true at the company that a decision involves only those who use a given server, and probably one can't know where to stop. This will come out in the 26(f) conference; we will let everyone know that the backup tapes are still running. The hypothetical worst case -- the critical documents that are lost due to automatic deletion -- simply does not happen with any frequency. One should not make rules for the worst case scenario. This ignores the vast quantity of active data that is available. Despite some efforts to reduce the quantity of such data, people at Exxon have large amounts of it. Even he has data going back years. So long as there is a business reason for deleting data, the rules should not interfere with that.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): Companies take the position that they don't believe anything is discoverable, so a "litigation hold" that looks to what they should recognize to be discoverable is going to require nothing of them. They will delete information even though there is a pending discovery request for it.

Darren Summerville (testimony and 04-CV-089): It is not expected that the defendant will produce genuinely inaccessible material initially in response to a discovery request. But from that time they are obligated to retain all relevant information, whether or not accessible. Usually there's information about what's on backup media, so this does not mean the company must keep everything for ever.

David Fish (testimony and 04-CV-021): I believe that once you believe there will be litigation you have to maintain the information. The thing to do is to undertake a search right away then to identify what needs to be preserved. At that time, for example, "deleted" e-mails are accessible in Microsoft Outlook. But if nothing is done to preserve them, they probably won't be accessible later.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): Arneson stated that his experience (representing plaintiffs) was that counsel on the other side would instruct that pertinent material be saved. A litigation hold is the right way to go. But there are problems in implementing such a hold on occasion. Cohen confirmed that the litigation hold is the right idea, but also that the reason big companies and big law firms get into trouble is that it is very hard to implement one.

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): Since the early 1990s, PM USA has in essence been operating under a continuous "litigation hold" on a number of topics.

Jeffrey Greenbaum (ABA Section of Litigation): The rule should recognize that there's no obligation to preserve inaccessible data as part of a litigation hold. We will always be judged by 20/20 hindsight, at a time when things look very different than they do at the beginning of the case.

Damon Hacker & Donald Wochna (Vestige, Ltd.) (04-CV-093): We routinely assist attorneys in finding the stuff that ought to be preserved.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): The safe harbor is important, and it ought to recognize that only accessible information should need to be preserved. The widely recognized best practices are that only discoverable information need be retained, and that does not include inaccessible information. The rule should make it clear that there is no requirement to retain inaccessible information.

David McDermott (ARMA, Int'l) (testimony and 04-CV-041): Good records management calls for putting a litigation hold in place when notice of litigation arrives. That involves conferring with the legal department and identifying the people who are likely to be involved, and the subjects of concern, and then stopping destruction of information on that basis, not keeping everything.

Lawrence La Sala (Assoc. of Corp. Counsel) (testimony and 04-CV-095): Regarding inaccessible information, it is a judgment call whether to preserve. I would understand that it is a risk that I will be sanctioned if I don't retain that material. That is a judgment I have to make.

David McDermott (President, ARMA Int'l) (testimony and 04-CV-041): A company's policies and procedures regarding information management must include a procedure for stopping destruction when records are relevant to reasonably anticipated or ongoing litigation or investigation. Such procedures should include electronically stored information.

Dabney Carr (testimony and 04-CV-003): The rule can be improved with an explicit recognition that there is no requirement to preserve inaccessible information.

Alfred Cortese (testimony and 04-CV-054): The Note to 26(b)(2) or 37(f) should be clarified to confirm that electronically stored information that is not reasonably accessible need not be preserved absent a voluntary agreement of the parties or a specific court order. If proposed 26(f) continues to mandate discussion of preservation, any party who fails to obtain an agreed order or seek a preservation order should be deemed to waive any objection when, in good faith, the producing party does not preserve inaccessible information. Existing language in the Note describing the effect of the two-tier system could be amended to clarify this principle by specific reference to the relationship between two-tier and safe harbor. One way to do that would be to expand on statements in the safe harbor Note explaining that wholesale suspension of the ordinary operation of computer systems is rarely warranted. The people I represent at the Chambers of Commerce realize that they have to include inaccessible information within a litigation hold. They can't take the risk of not doing that. (p. 56) But this would apply when the party is aware that there is unique information in the inaccessible source. But you can't obviate the preservation requirement just by declaring something inaccessible. Given the multiplicity of systems, the obligation to preserve can't apply unless there is a basis for thinking that

information is uniquely available in the inaccessible sources. That insight might never occur to a company.

Keith Altman (testimony and 04-CV-079): It seems to me that 37(c)(1) means the same thing as current preservation rules -- the party must take reasonable steps to preserve. I think this requires suspension of recycling of backup tapes. That means that once a tape is used, it may never be reused, and a replacement tape must be purchased. The net result of this is to force a party to expend huge amounts of money. This is a major source of complaints from opposing parties. After litigation has started, the company recycles backup tapes at its peril, as the safe harbor does not protect it then. I think that the current rules do not help with the preservation problem. I've told companies to keep the tapes they now have and instruct employees on the preservation obligations on a going forward basis. Once this is done, the company can restart recycling with a new set of tapes. Although companies with automatic deletion programs tell people to retain copies of important items, there is great variation in the extent to which employees do that. I believe that people are trying, but they are not fully delivering. And it's usually not hard, in an era of e-mail, to send a message to the whole company about what needs to be done. In all of the litigations I've been in, I've never tried to get information off of backup tapes.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Routine operations that involve the automatic deletion of email and other unneeded items are consistent with a reasonable retention policy. For example, if a company learns of a potential lawsuit, it may instruct 20 employees who deal with the subject matter of the anticipated suit to preserve all relevant documents. When the complaint is served, its more specific allegations may indicate that additional materials should be retained, but during the time between the initial notice of the possible suit and the service of the complaint, the ordinary practices would have continued with regard to these employees.

ABA Section of Litigation (04-CV-062): More guidance is needed for parties seeking to comply with their obligations. The standard will always be applied using 20/20 hindsight. More of a bright line should be established. This could be accomplished by adopting the same two-tiered structure discussed above that protects a party that has taken "reasonable steps to preserve reasonably accessible electronically stored information after it knew or should have known the information was discoverable in the action." By the same token, if a party obtained a court order requiring the production of electronically stored information that was not reasonably accessible, to invoke the safe harbor the party would need to establish that it took reasonable steps to preserve that information after the issuance of the order.

Katherine Greenzang (Assurant) (04-CV-180): We ask the Committee to consider providing express guidance in the rules about what it considers to be a reasonable length of time for a company to recycle electronic information pursuant to an electronic records retention policy. We think that a 45 day period would be appropriate.

Kristin Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): The Note could offer some examples of what constitutes a reasonable preservation effort. For example, that might require suspending automated document destruction policies, notifying opponents or third parties of the need to preserve data, or developing a "preservation response team" to develop a plan for responding to litigation.

Rule 37(f) -- standard of culpability

San Francisco

David Dukes (testimony and 04-CV-034): I support the creation of a safe harbor, but urge the adoption of the alternate language with a higher standard of culpability.

Charles Ragan: Based on consideration of the proposals, I would favor the higher culpability standard. My conclusion is driven by my experience advising clients. Whatever merit the negligence standard may have a matter of legal theory, the Rules are designed to govern the practice of law in federal courts, and only the higher standard will have a meaningful effect in the courts. Otherwise, the trend toward "gotcha" satellite litigation will continue despite the rule change.

Dallas

Anne Kershaw: The negligence standard provides no safe harbor at all, particularly with regard to the death penalty sanction. If the Note made it clear that litigation-ending sanctions should ordinarily not be entered in the absence of willful or reckless conduct, that would be helpful. The company should also get "brownie points" for having a sensible retention policy and following it. Companies can develop systems to preserve information. For example, she has heard of a company shows system has a pop-up window that includes a question about whether a document should be preserved for possible use in litigation.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): The standard should be negligence. Don't give defendants more reason to be sloppy. Negligence is not a low standard. Anything more relaxed says it's o.k. to be negligent.

Stephen Morrison: For the death penalty sanction, there should be a showing of willful or reckless conduct. There should be proportionality for sanctions. Adverse inferences should be regarded as death penalty sanctions for these purposes.

Laura Lewis Owens: Almost anything can be alleged to be negligent. The standard needs to be higher.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We favor the text approach, not the footnote. We feel that it is a more objective rule, and does not call for analysis of the state of mind of the person who should have retained the information.

Jonathan Redgrave (04-CV-048): The footnote version is a better formulation of a narrow safe harbor. This would not preclude the evaluation of reasonable and good faith preservation efforts under established law, but it does provide a presumptive level of protection. I would replace "intentionally or recklessly" with "willfully." This includes a concept of conscious conduct that is important.

Jeffrey Greenbaum (ABA Section of Litigation): The standard of culpability should be linked to the degree of sanctions. To retake a deposition or something like that would be justified by negligent loss of information, but for an adverse inference or striking of a defense or a claim, there would have to be more, something like willfulness.

Michael Nelson (testimony and 04-CV-005): The rule goes beyond the majority of jurisdictions that have limited the imposition of an adverse inference sanction to cases in which the loss of evidence was the result of intentional or bad faith conduct. I propose the following:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of the information.

Alfred Cortese (testimony and 04-CV-054): A high degree of culpability should be required. In my view, an "intentional or reckless" standard is required because of the extremely narrow scope of the proposed safe harbor and the better protection it would provide against abusive sanctions practices, the uncertainties created by dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable information. Best of all, it should key to a court order, as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information.

Michael Ryan (testimony and 04-CV-083): The lack of a culpability measurement eliminates the ability of the requesting party to inquire into the motivation of the producing party in adopting routine destruction policies that may encourage expedited destruction of information. But that is the basis of current spoliation law. The footnote brings the rule more into line with current law.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should require a high degree of culpability if before sanctions are imposed. State Farm therefore supports the version of the rule in the footnote on p. 13 of the proposals.

Dabney Carr (testimony and 04-CV-003): The footnote language better addresses preservation of disaster-recovery materials. the "knew or should have known" standard is subject to abuse. For example, under the current approach a party can abrogate the safe harbor simply by notifying the other side that it believes that disaster recovery tapes are discoverable in the action.

M. James Daley (testimony and 04-CV-053): I agree with those who favor inserting the concept of willfulness into the rule as a limitation on sanctions. That would be better than the footnote version's "intentionally and recklessly." It would also be desirable to have the Note emphasize that consideration of a company's standards for retention should be a significant factor in evaluating whether it acted properly.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We believe that a showing of mere negligence should not be sufficient to overcome the safe harbor. It will always be possible to show that more care could have been taken to preserve information. The rule should require that the entity actually know, or be so close to knowing as to be reckless, that discoverable data is being lost. Any other approach would be paralyzing for large data producers.

Alfred Cortese (testimony and 04-CV-054): The more I look at it, the more I prefer the footnote alternative.

Commentary

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft believes that the current standard of negligence is too narrow, and that the alternative version in the footnote is preferable. Litigants strive every day to take all reasonable steps to comply with their discovery obligations. Parties seeking discovery know that they can gain an advantage by claiming that these obligations have not been satisfied. Even the threat of spoliation sanctions can have a substantial effect on discovery. The various deterrents -- including criminal sanctions -- "have the undivided attention of corporate America and its counselors." All those who hope to rely on the safe harbor intend to act reasonably, but mere negligence should not automatically make them ineligible for its protection. Responding parties that operate their businesses in a reasonable fashion should not be sanctioned because a requesting party later thinks that it was unreasonable that additional preservation steps were not taken. If the footnote version of the rule is adopted, it should also be made clear that the deletion of material that is done automatically by a computer system is in some sense intentional. Some person had to set the system to make the deletions. What should be emphasized is that the safe harbor applies unless a party intended to dispose of known potentially responsive documents that it was specifically ordered to maintain or disposed of materials in reckless disregard of such an obligation. Finally, it should be made clear that the fact the safe harbor does not apply is not itself a reason for imposition of sanctions.

Allen Black (04-CV-011): I favor the rule as drafted, with the negligence threshold. Recklessness is too high. However, it might be good to add a sentence in the Note to say that the court should consider the degree of culpability in deciding whether to impose a sanction, and its severity.

Philadelphia Bar Association (04-CV-031): We disagree with the Rule 37(f) proposal overall, but particularly with the footnoted recklessness standard. As a matter of public policy, a party should not be given a license to be negligent.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): By a divided vote, we endorse the standard in the text. The proposal in the footnote contains a gap between the routine operation of an electronic information system (within the safe harbor) and a reckless or intentional failure to preserve information (outside the safe harbor). The text's proposal clearly places actions in the gap outside the safe harbor, as they should be, although the question of culpability could certainly bear on the sanction imposed. The evolution of the sanction issue in the Zubulake case (see pp. 29-30) is an example of this sort of approach. The text's negligence standard is desirable as well because it is objective, and can be tied to the routine operation of the party's computer systems and any policies the entity has adopted for the preservation of information. The footnote uses a subjective standard, which may require greater collateral inquiry into actions of the entity that could be hindered by invocations of the attorney-client privilege. Moreover, the recklessness standard may encourage greater disregard for an entity's obligation to preserve electronically stored information.

ABA Section of Litigation (04-CV-062): The debate about the level of culpability could be resolved by specifying the remedies that courts could impose for each type of conduct. Corporations are alarmed over the prospect that severe sanctions, such as a devastating adverse inference, could be imposed as a result of merely negligent loss of data. A negligent loss of electronically stored information may well justify a search of backup tapes that would otherwise not be required, but it should not ordinarily be a ground for an adverse inference. The Note should specify the range of sanctions available for violations occurring due to negligence, and those available for violations due to intentional and willful spoliation.

Stephen Herman (04-CV-103): The footnote standard of recklessness is contrary to the substantive law of many jurisdictions. Adopting it would also undermine the primary purpose of Rule 37, to focus on effective management of the litigation rather than trial and punishment of discovery malefactors. That philosophy gives judges broad discretion, but this proposal takes that discretion away.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee believes that the idea of a safe harbor is sound. It concluded that the proper standard is negligence, as in the main proposal. The alternative standard set out in the footnote would unduly restrict the court's discretion. Whether a court chooses to impose -- or not to impose -- sanctions on a party who fails to take reasonably steps to preserve electronically stored information in a timely manner should be the court's decision to make.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP supports the standard in the footnote on p. 33. It also urges consideration of Sedona Principle 14, which provides that sanctions are appropriate only if there is a showing of a reasonable probability that the loss of the information materially prejudiced the party.

Gary Epperley (American Airlines) (04-CV-177): We support the footnoted version of the rule. But it could be interpreted to permit sanctions for loss of information that is not reasonably accessible. To avoid that, we suggest rewording the rule as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring the preservation of specified information.

American Petroleum Institute (04-CV-178): API favors limiting sanctions to failure to preserve information specified in a court order. As presently written, the proposed rule might permit sanctions for loss of information that is not reasonably accessible, even where there is not applicable court order, if the responding party somehow should have known that it would be discoverable. But how would a party know that inaccessible information is discoverable absent a court order? Proposed 26(b)(2) presumes that inaccessible information is not discoverable absent a finding of good cause. It supports the footnoted version, with its emphasis on a showing of willfulness or intentional destruction. Overall, it proposes that the rule be rewritten as follows:

A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party's electronic information system unless the party intentionally or recklessly violated an order issued in the action requiring preservation of specified information.

Katherine Greenzang (Assurant) (04-CV-180): It is strong medicine to take a company out of the safe harbor just because an employee in a remote location unknowingly or unwittingly deletes electronic information despite a litigation hold. We urge use of a willfulness or recklessness standard. Indeed, the Committee should consider requiring a showing of malice before sanctions are imposed.

Marion Walker (04-CV-181): The standard should be higher than negligence. Millions of people operate computers and do so without a full comprehension of how the equipment works. It is not feasible for each user to have a full course in the internal computer operations

and, as systems become more complicated, it will happen that data will be lost. A party should not be held accountable for such losses.

Steve Berman (04-CV-183): The footnote version would contradict existing precedent which allows sanctions for negligent spoliation.

M. John Carson & Gregory Wood (04-CV-189): The text option places a "perfection" standard into the rule, which unduly narrows the safe harbor. But the footnote alternative opens the door too wide, allowing a safe harbor for all but intentional or reckless loss of data. A middle ground that would expand the safe harbor of the text option to include failure that resulted from the unintentional loss of data whether as a result of the routine operation of the information system or otherwise including human action, would seem to strike a better balance.

Federal Bar Council (04-CV-191): It seems difficult to imagine situations that would lead to sanctions under the current rules that would not also be subject to sanctions were the safe harbor adopted. For the new provision to have actual impact, therefore, it may be necessary for the Committee to be more aggressive. We think that the idea behind the safe harbor is correct -- electronic information systems are complex and dynamic, and automatic deletions features are necessary in order to have systems that are efficient. It would be desirable for the Note to specify that negligence should not lightly be found in this complicated and evolving area if a party has made a good faith effort to preserve potentially relevant information. The Note should also explain that the assessment of the reasonableness of a party's behavior should take account of the complexity of the case and the factual issues it raises. Alternatively, the Committee might want to consider using a culpability standard closer to the one in the footnote. Whether the Committee approaches the problem in one manner or the other, it is likely that both plaintiffs and defendants will benefit. Indeed, a small corporate or individual plaintiff may have fewer means than a large corporation to ensure that automatic deletion mechanisms are disengaged, and may therefore derive greater benefit from adopting our suggestions.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A high degree of culpability should be required to preclude eligibility for the very narrow safe harbor. The "intentional or reckless" standard is required because of the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable electronically stored information.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We recommend that text version, not the footnote version. Absent an affirmative obligation to preserve discoverable electronically stored information, routine deletion operations can unintentionally destroy relevant information.

New York City Transit (04-CV-221): Mere negligence should not be sufficient to take a party out of the safe harbor.

Ashish Prasad (04-CV-225): Responding parties should not be subject to open-ended risk of sanctions for post-hoc judgments on the reasonableness of their behavior. Instead, the safe harbor should protect the good faith actions or parties who lose electronically stored information. This would be better than the standards in the principal rule proposal in the text or in the alternative one in the footnote.

Marshon Robinson (04-CV-226): The footnote rule is a much better rule because it gives a clearer indication of what is necessary to be inside the safe harbor. Rule 26 could be amended

to require that a party request a litigation hold along with discovery requests. That would give both the parties and the judge a clear starting point on what data should be retained.

Heller, White, Ehrman & McAuliffe (04-CV-246): The negligence standard raises risks for large corporate defendants. It would be prohibitively expensive to assure that everyone in offices around the world puts a litigation hold on the document retention policies in those offices. "[I]t would be expensive and burdensome for large corporations with multiple offices to follow up and police each of the offices to assure that each will fulfill its preservation obligation obligations." The rule will therefore impose a significant burden in terms of executive time and also entail significant increases in expenses for large corporations to comply with the standard.

Rule 37(f) -- effect of preservation order

San Francisco

Greg McCurdy (Microsoft Corp.): Preservation orders are often overbroad. Although a specific order can be helpful in identifying exactly what has to be preserved, many orders are not. There is no need to mention orders in the rule, because courts can always sanction for violation of their orders.

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: General preservation orders have become commonplace in litigation, and they should not suffice to rob a party of the protections of the safe harbor. Only an order that specifically requires that disaster recovery systems be suspended should qualify if the issue is loss of information on one of those systems.

Michael Brown: There are too many general preservation orders. Accordingly, the protection should apply even if one of those is violated, unless the violation was willful.

Dallas

Anne Kershaw: Blanket preservation orders are very costly. We need to educate the judiciary about this reality. It takes 90 days until the 26(f) conference, and a company that has to stop recycling for that period of time incurs a large cost.

Paul Bland (TLPJ) (testimony and prepared statement): He has never seen a "blanket" preservation order, if that means to keep everything. In a consumer class action, it might require preservation of "all information about consumers charged the challenged fee in 2002."

Washington

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): Preservation now costs his company over \$5 million per year. There is a risk that this rule will prompt more preservation orders. It should be made clear that preservation orders are for the extraordinary, not the ordinary case.

Jonathan Redgrave (04-CV-048): The rule should require that any order that triggers sanctions be for preservation of this specific type of information and be particularized. This will provide guidance for the parties and the courts.

George Socha (testimony and 04-CV-094): The Note contains the following sentence: "Should such information be lost even though a party took 'reasonable steps' to comply with the order, the court may impose sanctions." This sentence seems designed to discourage parties from entering into preservation orders. It also suggests that parties may be required to take "unreasonable" steps once a preservation order is in place.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): With this provision, the safe harbor is not a harbor at all. In one case, a federal judge imposed such a broad order on us that we had a choice between violating it and shutting down. It should be made clear that while preservation agreements are desirable preservation orders are not.

M. James Daley (testimony and 04-CV-053): Rule 37 should mandate that only a specific order will take a party out of the safe harbor.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): Broad preservation orders should not trump the safe harbor. We agree that "stop everything" orders should not be entered, and believe that such an order should not trump the safe harbor. Instead, only an order entered after a Rule 26(f) conference should qualify, and only one carefully tailored to suit the needs of the case. Otherwise, there will be a proliferation of requests for broad orders and of "gotcha" litigation. But we have been successful in getting broad orders revised, and there seems to be a growing recognition that such orders are inappropriate for large organizations like ours.

Alfred Cortese (testimony and 04-CV-054): The rule should say that a preservation order should not abrogate the safe harbor unless it is directed to "specified information." The order should be tailored to the case.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: There is no need to except cases in which a court order has been violated. Violations can always be punished. An order may be vague and direct only that a party preserve all relevant documents, essentially the same as the common law duty to preserve, but such an order could neuter the protections of the safe harbor. If a party has reason to fear loss of a particular type of data, then it can request an order addressing that specific problem. Faced with a specific order, the responding party knows what it needs to do. But a vague order does not provide such notice. Particularly in light of our preference for the intentional/reckless standard in the footnote, this order provision seems to us to take away much of the good work done by the new rule. If violation of an order remains as a qualification of that protection, it is important to clarify that the order has that effect if it is "to preserve *specified* information." This clarification is important because some courts tend to enter somewhat vague preservation orders that include broad wording.

Stephen Herman (04-CV-103): In our experience, limiting this provision to an order "in the action" is undesirable. Frequently parties rely on an order issued in previous, companion, or other related cases. If a party is already under a court order to preserve evidence in more than one case, that should be sufficient.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): A question exists about what sort of court order will vitiate the safe harbor. A general order requiring the parties to preserve all relevant documents apparently does nothing more than memorialize the common-law obligation. It may be advisable to clarify the Note to say that the sort of order that affects the existence of the safe harbor is one that imposes an obligation to preserve specified electronic evidence or a specified category of substantive evidence that the party has reason to know is contained in electronic files that are subject to routine destruction.

Federal Bar Council (04-CV-191): We believe that it would be desirable to provide clarification as to what kind of orders are a basis for exclusion from the safe harbor. Blanket preservation orders that are entered at the outset of a case do not address specific alleged discovery issues. If such orders are sufficient to remove parties from the protection of the safe harbor, then one of the automatic first steps during litigation will be obtaining such an order. We believe that such blanket preservation orders should therefore not be a basis for invoking this exclusion from the safe harbor.

New York City Transit (04-CV-221): A preservation order that is wide in scope but short on detail serves no useful purpose. All such an order does is place large and complex entities at the risk of contempt.

Ed Amdahl (Starbucks Coffee Co.) (04-Cv-241): Complying with a broad preservation order would be very burdensome for Starbucks. For it to retain all its backup tapes would require it to store, rather than recycle, backup tapes that would cost in excess of \$3.5 million per year. This number will probably rise as the business expands. Already, it uses many different types of electronic systems in different facilities around the world. Accessing all of these is a major chore. To recover them would require Starbucks to declare a disaster situation and activate our third-party service provider to restore data. Against this background, it is clear that blanket preservation orders would impose extreme burdens on Starbucks.

Rule 45

Washington

Jonathan Redgrave (04-CV-048): The form of production language should allow the responding party to choose a form of production without limiting it to the listed alternatives. Rule 45 should also be revised to specify that the court may allow discovery of inaccessible information for good cause and "specify terms and conditions for such discovery." I think the Note should specifically reference cost shifting.

M. James Daley (testimony and 04-CV-053): Empirically, we know that nonparty discovery is on the rise. But the responding party here should be able to select the form of production. In addition, a more direct reference to cost shifting should be added.

Michael Heidler (testimony and 04-CV-057): The rule should require that the subpoena specify a form for production.

Comments

Clifford Rieders (04-CV-017): Rule 45(d)(1)(C) would place complete power to obstruct discovery in the hands of the party producing information during litigation. The burden is then shifted to the party seeking production to demonstrate something it is ill-equipped to demonstrate -- whether the information is "reasonably accessible." This should be removed. Similarly, Rule 45(d)(2)(B) should not create a right to pull back privileged material that has been produced.

Philadelphia Bar Association (04-CV-031): In conformity with our other positions, we recommend revising the proposed amendments to Rule 45(a)(2)(C) and (c)(2)(A) to treat electronically stored information as a type of document, not as a separate category of information.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): The committee supports the concept of providing protection for nonparties from inadvertent waiver of privilege, but we question whether that provision is valid under 28 U.S.C. § 2074. In addition, we question the inclusion here of the right to demand electronically stored information in certain specified forms. With party discovery under Rule 34(b), we can understand that, but for nonparties it seems to us that they should be allowed to choose the least burdensome method.

Federal Magistrate Judges Ass'n (04-CV-127): Regarding the provision paralleling the proposed Rule 26(b)(2) change, it is not clear why the last phrase of the proposed amendment to Rule 26(b)(2) was omitted from Rule 45(d)(1)(C). We feel that it should be omitted in both places, but it should be the same in both places.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee reacts to the Rule 45 proposals in the ways that it reacted to the analogous proposals for Rules 26-37. It notes, however, that owing to the burdens that can be imposed on nonparties, the Note should state, as proposed, that "the protective provisions of Rule 45(c) should be enforced with vigilance when such demands are made."

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): Rule 45(c)(2)(A) should be changed by taking out the word "designated." Ultimately the goal of the

rules should be to convey that the term "documents" universally includes electronically stored information.

Michael Patrick (04-CV-223): The revisions do not deal with the privacy issues that arise with third party discovery of electronically stored information. A number of cases I have handled involved requests for information on personal computers. Request that seek to examine the hard drives of these computers are becoming more common. In these situations, simply copying the hard drive will reproduce highly sensitive information that is on the drive.