

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, DC
April 14-15, 2005**

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
APRIL 14-15, 2005

1. Report on Judicial Conference session and chair's introductory remarks
 - A. Judicial Conference approved proposed new Rule 5.1
 - B. Supreme Court approved proposed amendments to Rules 6, 27, and 45 and proposed amendments to Admiralty Rules B and C
 - C. Minutes of January 13-14, 2005, Standing Rules Committee meeting
 - D. Enactment of Class Action Fairness Act
2. **ACTION** – Approving minutes of October 28-29, 2004, Committee meeting
3. **ACTION** – Approving proposed new Admiralty Rule G and proposed amendments to Rule 14 and Admiralty Rules A, C, and E, consolidating forfeiture provisions, and transmitting them to Standing Rules Committee
4. **ACTION** – Approving proposed amendments to Rule 50 and transmitting them to Standing Rules Committee
5. **ACTION** – Approving proposed amendments to Rules 16, 26, 33, 34, 37, and 45, and proposed revision of Form 35 and transmitting them to Standing Rules Committee
 - A. Introduction
 - B. Early attention to electronic discovery (Rules 26(a), 16, 26(f), and Form 35)
 - C. Application of Rules 33 and 34 to electronic discovery
 - D. Belated privilege assertion (Rule 26(b)(5))
 - E. Problem of information that is not reasonably accessible (Rule 26(b)(2))
 - F. Sanctions and a limited “safe harbor” (Rule 37(f))
 - G. Summary of public comments and statements at hearings
6. Multi-Committee proposals
 - A. **ACTION** – Approving proposed amendments to Rule 5 and transmitting them to Standing Rules Committee
 - B. **ACTION** – Approving publication of proposed new Rule 5.2, dealing with privacy and security concerns arising from electronic case filing
7. Future Projects
 - A. Review of rules provisions involving time counting
 - B. Indicative rulings: new Rule 62.1
 - C. Polling the jury: Rule 48
 - D. Depositions as interrogatories: Rule 30(b)(6)

Agenda
Advisory Committee on Civil Rules
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8. Next meeting in San Francisco, California, on October 27-28, 2005 (Public hearings on proposed style revision scheduled for October 26, 2005, in San Francisco; November 18, 2005, in Chicago; and December 2, 2005, in Washington, D.C.)

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Peter D. Keisler *	DOJ	Washington, DC	----	Open
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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

**PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
March 15, 2005**

All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

At its March 15, 2005 session, the Judicial Conference:

Elected to the Board of the Federal Judicial Center, each for a term of four years, Magistrate Judge Karen Klein of the District of North Dakota to succeed Magistrate Judge Robert B. Collings, and Bankruptcy Judge Steve Raslavich of the Eastern District of Pennsylvania to succeed Chief Bankruptcy Judge Robert F. Hershner, Jr.

Executive Committee

Approved a resolution in recognition of the substantial contributions made by Chief Judge John G. Heyburn II, whose term of service as chair of the Committee on the Budget ended in December 2004.

Insofar as the funding of circuit judicial conferences is concerned, agreed to:

(a) encourage the circuits to look to alternative funding sources for non-travel-related expenses to the extent advisable and permissible, including non-appropriated funds (such as attorney admission fees if the bar participates in a conference) and (b) authorize use of appropriated funds for non-travel-related expenses only in alternate years. This action does not affect any circuit judicial conference for which binding commitments have already been made.

Approved the following resolution on judicial security:

Committee on Judicial Resources

Authorized the Administrative Office to transmit to Congress a request for an additional nine permanent and three temporary judgeships in the courts of appeals, and in the district courts, an additional 44 permanent and 12 temporary judgeships, conversion to permanent status of three existing temporary judgeships, and the extension of one existing temporary judgeship for an additional five years.

With regard to the hiring of new probation and pretrial services officers, adopted the following resolution:

Courts in a position to hire new probation and pretrial services officers are strongly encouraged to consider hiring highly qualified and well-trained officers from those federal courts that are forced to make involuntary reductions in staff.

Committee on the Administration of the Magistrate Judges System

Agreed to make technical and clarifying amendments to the Regulations of the Judicial Conference of the United States Establishing Standards and Procedures for the Recall of United States Magistrate Judges (the ad hoc recall regulations) and the Regulations of the Judicial Conference of the United States Governing the Extended Service Recall of Retired United States Magistrate Judges (the extended service recall regulations).

Approved recommendations regarding specific magistrate judge positions.

Committee on Rules of Practice and Procedure

Approved proposed new Civil Rule 5.1 and conforming amendments to Civil Rule 24(c) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Bankruptcy Rules 2002, 9001, and 9036 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Committee on Security and Facilities

With regard to controlling rent costs:

- a. Extended, for an additional year to March 2006, its one-year moratorium on non-prospectus space requests, except requests for courtrooms, chambers, lease renewals, official parking, and recovery from natural disasters or terrorist attacks; and



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For Immediate Release
Office of the Press Secretary
February 18, 2005

Statement on S. 5, the "Class Action Fairness Act of 2005"

On Friday, February 18, 2005, the President signed into law:

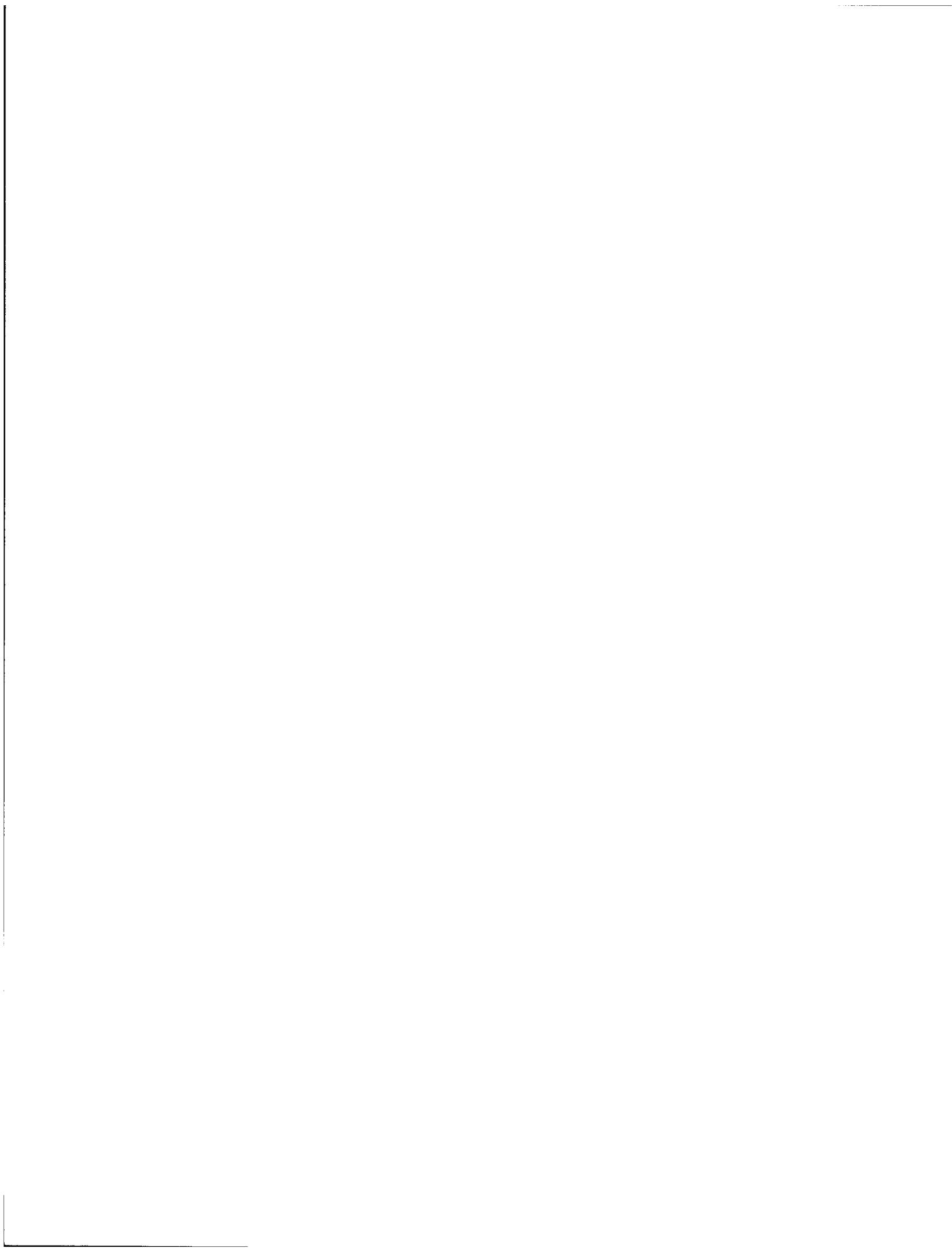
S. 5, the "Class Action Fairness Act of 2005," which creates a "bill of rights" for plaintiff members of a class action and expands Federal court jurisdiction over class actions filed in State courts.

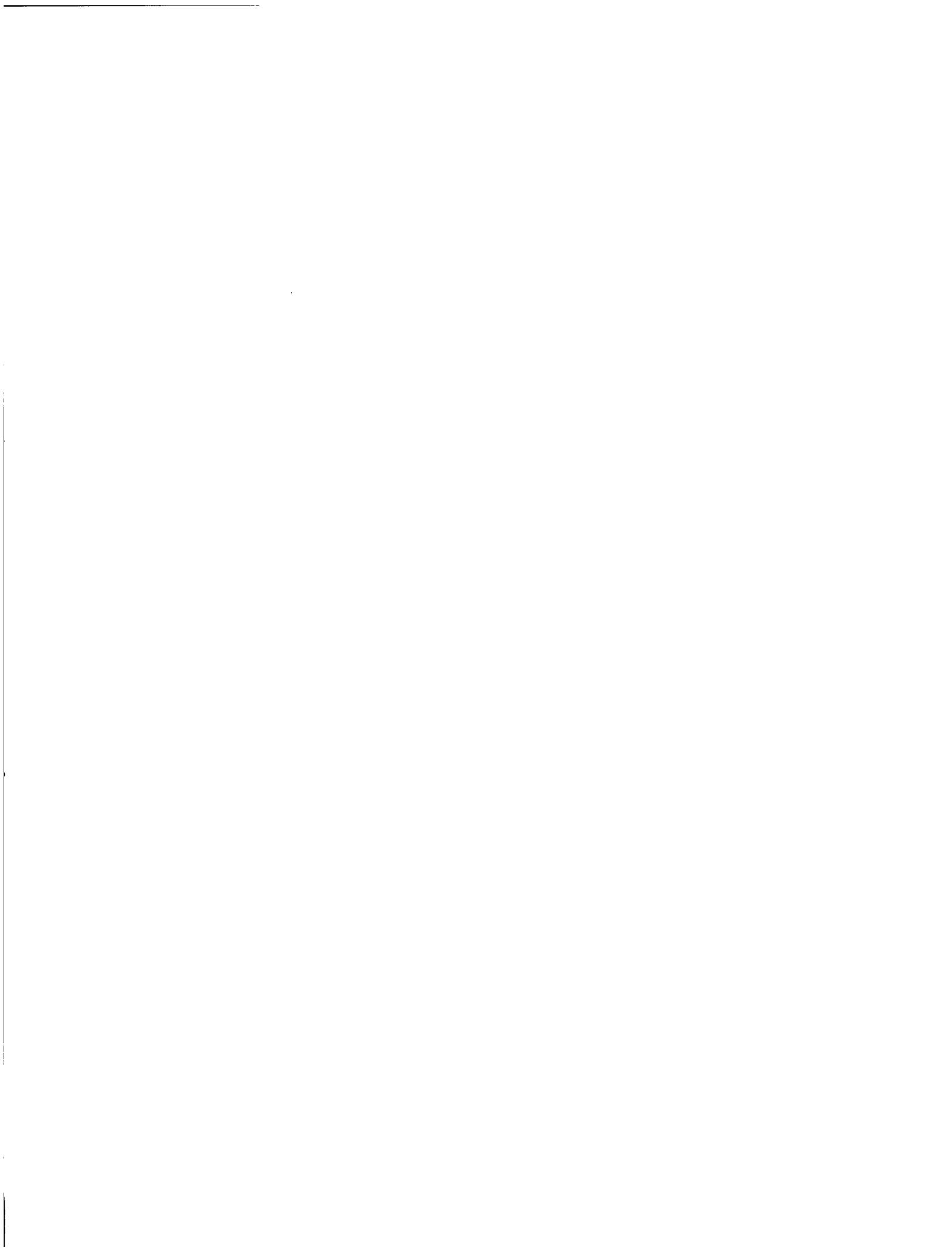
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 13-14, 2005
San Francisco, California
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 13 and 14, 2005. The following members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L. Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Member David M. Bernick was unable to participate in the meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Samuel A. Alito, Jr., Chair
 - Professor Patrick J. Schiltz, Reporter
- Advisory Committee on Bankruptcy Rules —
 - Judge A. Thomas Small for Thomas S. Zilly, Chair
 - Professor Jeffrey W. Morris, Reporter
- Advisory Committee on Civil Rules —
 - Judge Lee H. Rosenthal, Chair
 - Professor Edward H. Cooper, Reporter
- Advisory Committee on Criminal Rules —
 - Judge Susan C. Bucklew, Chair
 - Professor David A. Schlueter, Reporter
 - Professor Sara Sun Beale, Consultant
- Advisory Committee on Evidence Rules —
 - Judge Jerry E. Smith, Chair
 - Professor Daniel J. Capra, Reporter

Patrick F. McCartan, former member of the committee, and John S. Davis, Associate Deputy Attorney General, also participated in the meeting. Associate Deputy Attorney General Christopher A. Wray made a presentation on behalf of the Department of Justice on the second day of the meeting. Attorneys Elizabeth J. Cabraser and Melvyn R. Goldman participated in a panel discussion on the second day. Professor R. Joseph Kimble participated by telephone in the committee's discussion of the report of the Advisory Committee on Civil Rules.

INTRODUCTORY REMARKS

Judge Levi reported with regret that the term of committee member Patrick McCartan had expired. He noted that Mr. McCartan had made many major contributions to the work of the committee over the course of the past six years, and he presented him with a framed certificate of appreciation signed by the Chief Justice. Mr. McCartan expressed his appreciation for the honor, and he emphasized that serving on the committee had been one of the highlights and great privileges of his professional career.

Judge Levi welcomed and introduced Mr. Kester as a new member of the Standing Committee and Professor Beale as the next reporter to the Advisory Committee on Criminal Rules. He added that the Standing Committee would honor Professor Schlueter at its next meeting for his long and distinguished service as reporter to the criminal rules committee over the past 17 years.

Judge Levi noted with particular sadness the recent death of Judge H. Brent McKnight, whom he praised as an outstanding member of the Advisory Committee on Civil Rules and a wonderful human being. He pointed out that Judge McKnight had been responsible for heading the committee's efforts in producing new Admiralty Rule G, which brings together in one place the key procedures governing civil forfeiture actions.

Judge Levi also reported that John Rabiej had recently been honored by election to membership in the American Law Institute.

He noted that the major team effort to restyle the civil rules for public comment was nearing an end, and a complete package of restyled rules would soon be ready for publication. He described the contributions of the many participants as incredible, and he said that special thanks were due to the members of the Style Subcommittee (Judge Murtha, Dean Kane, and Judge Thrash), the chair of the Advisory Committee on Civil Rules (Judge Rosenthal), the chairs of the two subcommittees of the civil rules committee (Judges Kelly and Russell), the committee reporters and consultants (Professors Kimble, Cooper, Marcus, and Rowe and Mr. Spaniol), and the staff (Messrs. McCabe, Rabiej, and Deyling).

Judge Levi reported that two important decisions had helped to assure the success of the project. First, he said, the committee had decided to avoid making any substantive changes in the rules and to use a high standard to make sure that changes affect only style, and not substance. Second, he noted, it had been agreed that the Style Subcommittee would have the final word on matters of pure style, but the civil rules committee would have the final word as to whether a particular change is substantive or affects substance. He pointed out that some members of the bar may be concerned when they see changes in familiar language, but, he emphasized, the advisory committee believes that no changes have been made to the substance of the rules. He predicted that the reformatting,

reorganization, modernization, and sheer readability of the rules will be a very pleasant surprise for users.

Judge Levi reported that the Judicial Conference at its September 2004 session had approved all the recommendations of the committee without discussion. He also briefly described some of the proposed amendments that had been published for comment in August 2004, noting that they will be presented to the committee for final approval at its next meeting. He reported that the Advisory Committee on Civil Rules had just conducted the first of three public hearings on the proposed electronic discovery rules amendments and pointed out that there had been a huge amount of public interest.

Judge Levi also mentioned two potential future projects under consideration by the advisory committees. The first would address the way that time is described in the different federal rules. It would take a broad look at all the various time provisions to make sure that they are realistic and internally consistent. The second potential project would address certain overlaps and conflicts between the civil rules and the evidence rules.

Judge Levi reported that the civil and evidence advisory committees had reviewed the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. ___, 124 S.Ct. 2531 (2004), invalidating a state court sentence because it had violated the defendant's Sixth Amendment right to jury trial in that aggravating factors enhancing the defendant's sentence had been found by the court, and not found by a jury or admitted by the defendant. He said that the advisory committees had been considering the need to amend the federal rules if the Supreme Court were to invalidate the federal sentencing system and to require fact-finding by juries.

On January 12, 2005 — the day before the committee meeting — the Supreme Court issued its decision in *United States v. Booker and United States v. Fanfan*, ___ U.S. ___, 125 S. Ct. 738 (2005). Copies were provided to the members, and they offered their initial personal reactions to the opinions. They agreed that the Court had retained the federal sentencing guidelines in place, but had made them advisory in nature, rather than mandatory. Judge Levi noted that the result was very satisfactory to the judiciary and mirrored the proposed recommendations of a special five-judge *Blakely/Booker/Fanfan* working group, comprised of the chair and two members of the Criminal Law Committee, himself, and Judge Robert Hinkle of the evidence rules committee.

Professor Capra pointed out that he had served as the reporter for the special working group and had conducted research for it. He noted that his review of all district-court decisions following *Blakely* had revealed that federal district judges were in fact continuing to adhere to the federal guidelines, had imposed sentences within the prescribed ranges of the guidelines in about 90% of the cases, and were carefully

explaining their reasons for departures. He added that research had shown that appellate review had worked effectively in those state-court systems that use advisory sentencing guidelines. He concluded that the advisory-guidelines system left by *Booker/Fanfan* would be workable, but he questioned whether Congress would leave it in place for the long run.

Professor Capra noted that, in light of *Booker/Fanfan*, there was no need to change FED. R. EVID. 1101 to make the evidence rules applicable in sentencing, or to make other changes in the evidence rules generally. Judge Bucklew said that the Advisory Committee on Criminal Rules would consider the need for changes in the criminal rules at its next meeting, but it did not appear at first glance that major changes would be needed. Judge Levi added that the Criminal Law Committee would take the lead for the Judicial Conference in developing substantive positions and legislative options.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 17-18, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Judicial Conference at its September 2004 session had approved the committee's proposed victim allocution amendments to FED. R. CRIM. P. 32 (sentencing and judgment). He noted, though, that the committee had been aware of pending legislation that would provide a broader array of rights to victims than the proposed rule. As soon as the legislation was enacted, he said, the amendments were withdrawn by pre-arrangement. Mr. Rabiej noted that it is the responsibility of the Department of Justice under the legislation to alert victims as to the times and places of various court proceedings. He added that the Advisory Committee on Criminal Rules was examining the legislation to determine whether any other changes were needed in the criminal rules.

Judge Levi pointed out that the legislation contains an extraordinary appellate provision under which victims may seek mandamus on an expedited basis to enforce their rights and receive a determination by a single appellate judge within 72 hours. It was pointed out by the participants that the provision is inconsistent with existing statutes and rules. Mr. Rabiej said that Congressional staff had been alerted to the deficiencies of the provision, but they had not corrected them.

Mr. Rabiej reported that legislation enacted in the wake of 9/11 had amended FED. R. CRIM. P. 6 directly to permit grand jury information to be shared with foreign officials. But, he said, the statutory provision had been superseded by the restyled body of criminal rules. He explained that the Administrative Office had advised Congressional staff of the supersession problem and had drafted an amendment to correct it. But, he said, the language actually used by Congressional staff was not fully consistent with the restyled rules.

Mr. Rabiej reported that legislation had passed the House of Representatives in the last Congress that would amend FED. R. CIV. P. 11 (pleas) to require a court to impose sanctions for every violation of the rule. The bill, however, died because the Senate did not act on it. He noted, moreover, that similar legislation had been introduced in the last several Congresses and had been opposed by the judiciary. He added that the legislation was likely to be reintroduced again in the 109th Congress, and the committee had asked the Federal Judicial Center to conduct a new, follow-up survey of federal judges on the operation of the current rule.

Mr. Rabiej reported that legislation had been introduced to amend FED. R. CRIM. P. 11 to require a judge to make specific findings that a sentence imposed pursuant to a plea agreement reflects the “seriousness of the actual offense behavior.” He said that the Administrative Office had written to the House Judiciary Committee opposing the provision, and it had been deleted during a mark-up session.

Mr. Rabiej noted that the Sunshine in Litigation Act of 2003, among other things, would regulate confidentiality provisions in settlement agreements. He reported that the Federal Judicial Center had conducted an exhaustive study of all sealed settlement cases in the federal courts and had concluded that sealed settlements are rare and do not present a problem. He said that the Center’s report had been sent to Senator Kohl, sponsor of the legislation.

Mr. Rabiej reported on a technical problem with the portion of the federal rules website that allows the public to submit comments or request a hearing directly through the website. He noted that the system had worked well in the past, but for some reason it stopped receiving comments and requests in late 2004. As a result, he said, a notice had been placed on the site informing the public of the defect and extending the comment period.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects undertaken by the Federal Judicial Center. (Agenda Item 4)

He reported briefly on research requested by the Advisory Committee on Appellate Rules. He described the Center's work in evaluating the possible impact of permitting citation of unpublished appellate opinions in the courts of appeals under proposed FED. R. APP. P. 32.1. He noted that the Center was conducting both a study of actual cases and a survey of judges and attorneys.

Judge Alito noted that the study was quite sophisticated and was aimed at ascertaining whether a policy that permits citation of unpublished opinions increases the time of judges and leads to a decrease in the number of precedential opinions. He also pointed out that the Administrative Office was conducting a statistical survey of median disposition times and any other pertinent events that might show workload impact, such as the number of cases decided by summary decisions. Up to this point, he said, there was no sign that there had been any changes in disposition times or in the number of summary dispositions in the circuits permitting citation of unpublished opinions.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachment of December 13, 2004. (Agenda Item 5)

Judge Alito reported that the advisory committee was not seeking approval of any amendments. But, he said, it was continuing to consider various proposed amendments to the appellate rules that would eventually be presented to the Standing Committee as a package, rather than in piecemeal fashion.

Informational Items

FED. R. APP. P. 4(a)(1)(B) and FED. R. APP. P. 40(a)(1)

He noted that the advisory committee at its last meeting had approved amendments to FED. R. APP. P. 4(a)(1)(B) (appeal of right — when taken) and FED. R. APP. P. 40(a)(1) (petition for panel rehearing). They would make it clear that the additional time the government is given to file an appeal or a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued either in an individual capacity or an official capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. He explained that additional time is given the Department of Justice to accommodate its internal review procedures.

FED. R. APP. P. 28 and 32

Judge Alito reported that complaints had been received from the bar regarding the many variations among local circuit rules as to requirements for briefs. As a result, he said, the advisory committee had asked the Federal Judicial Center to conduct a comprehensive study of local briefing requirements. He noted that the Center's report was excellent, and it documented that there is a great deal of local rulemaking in this area and considerable diversity in practice among the circuits.

The report, he said, showed that some of the local-rule requirements contradict FED. R. APP. P. 28 (briefs). But, he observed, achieving complete uniformity would be very difficult, particularly since the circuits feel very strongly about their local rules on this topic. He added, though, that the advisory committee would try to promote more uniformity by proposing some discrete changes in Rule 28 from time to time, by encouraging improvements in local rules, and by trying to make it easier for lawyers to ascertain the local requirements.

Professor Schiltz pointed out that the local briefing requirements are scattered among local rules, internal operating procedures, manuals, and other sources. He said that the advisory committee would pursue getting these various materials posted on the Internet, and it would try to pinpoint certain changes for potential inclusion in the national rules.

One member complained that local rule requirements for briefs appear to be proliferating, change frequently, are generally confusing, and can be a snare for attorneys. Other participants added that many of the variations are not justified, and some urged the rules committees to be more active in promoting national uniformity. Others pointed out, however, that the Rules Enabling Act specifically authorizes local rulemaking, and it is no simple task to determine whether a particular local provision is actually in conflict with the national rules.

Professor Coquillette pointed out that the 1988 amendments to the Rules Enabling Act vested oversight of local appellate court rules in the Judicial Conference and gave it authority to abrogate local circuit court rules that conflict with the national rules. He suggested that the Advisory Committee on Appellate Rules might be asked to take another look at whether, as a matter of policy, it would be appropriate to preempt local rulemaking by the individual courts of appeals in certain, specific areas, while leaving other areas open to local procedural variations.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of December 1, 2004. (Agenda Item 6)

Amendments for Publication

FED. R. BANKR. P. 1014

Judge Small reported that the advisory committee had approved for publication in August 2005 a proposed amendment to FED. R. BANKR. P. 1014 (dismissal and change of venue) recommended by the joint Venue Subcommittee of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The problem, he said, is that large cases are often filed in the wrong district. The proposed amendment would explicitly allow a court on its own motion to initiate a change of venue. He pointed out that most bankruptcy judges believe that they have that authority now, but some do not. Professor Morris added that the committee note to the proposed amendment attempts to make it clear that the rule does not grant any new authority to a court, but merely recognizes existing authority and provides a requirement for notice and a hearing.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. BANKR. P. 3007

Judge Small reported that the last sentence of current FED. R. BANKR. P. 3007(a) (objections to claims) states that if an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it "becomes" an adversary proceeding. He pointed out that there are serious problems with this language, including problems of issue preclusion. He said that the proposed amendment would eliminate the problematic sentence and make it clear in a new subdivision (b) that a party asking for relief of the type that requires an adversary proceeding must actually file an adversary proceeding. The party could no longer simply include the demand for relief in its objection to claim.

Professor Morris pointed out that an adversary proceeding generally asks for positive relief, unlike an objection to a claim. In addition, he said, an adversary proceeding requires the filing of a complaint and service of a summons, but an objection to claim does not. Finally, he observed, a court can always consolidate matters for processing.

The committee without objection approved the proposed amendment for publication by voice vote.

Amendment for Final Approval

FED. R. BANKR. P. 7007.1

Judge Small reported that the proposed amendment to FED. R. BANKR. P. 7007.1 (corporate ownership statement) would correct an oversight in the rule. The rule, which took effect on December 1, 2003, currently states that a party must file the required corporate ownership statement with its “first pleading.” But, he said, the rule does not go far enough. The time for filing the statement should be when the party files its first paper in a case — whether or not it is a “pleading.” Accordingly, the proposed revised language would be broadened to specify that the statement must be filed with a party’s “first appearance, pleading, motion, response, or other request addressed to the court.”

Judge Small pointed out that the advisory committee was asking the Standing Committee to approve the change without publication because it is a technical amendment comporting with the original intention of the drafters of the rule. Professor Morris added that the proposed amendment would make the rule almost identical to the counterpart provision in the civil rules, FED. R. CIV. P. 7.1.

Judge Levi pointed out that the proposed amendment did not require immediate implementation, and he suggested that it might be better to provide an opportunity for the public to comment on it. The committee concurred.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

FED. R. BANKR. P. 2002(g), 9001(9), and 9036

Judge Small reported that several proposed amendments to the bankruptcy rules had been published in August 2004, with a comment deadline of February 15, 2005. He noted that three of the amendments could have positive budget effects for the courts and should be processed on an expedited basis. He pointed out that the proposals had been studied at length, were not controversial, and had received no public comments following publication.

Judge Small explained that the proposed amendment to FED. R. BANKR. P. 2002(g) (addressing notices) would permit a creditor to make arrangements with a “notice

provider” to receive all its court notices, either electronically or by mail, at an address specified by the creditor. Proposed FED. R. BANKR. P. 9001(9) (definitions) would define a “notice provider” as any entity approved by the Administrative Office to give notice to creditors. FED. R. BANKR. P. 9036 (notice by electronic transmission), as amended, would eliminate the requirement that the sender of an electronic notice obtain confirmation that the notice has been received. He pointed out that many Internet providers do not provide for confirmation of receipt. Thus, many entities are unable to take advantage of electronic noticing. The revised rule, he said, would encourage creditors to sign up for centralized noticing, particularly electronic noticing. In addition to the benefits accruing to creditors themselves, the change would save considerable mailing and administrative expenses for the courts.

He said that the proposed amendments would be expedited by having the Advisory Committee on Bankruptcy Rules vote on them by e-mail ballot right after the end of the public comment period. The Standing Committee in turn would poll its members by e-mail in time to present the amendments to the Judicial Conference at its March 2005 meeting. If the Conference approves them, the amendments would be transmitted immediately to the Supreme Court, which could act on them by May 1, 2005. The rules could then take effect by operation of law on December 1, 2005 — one year sooner than usual.

One member expressed some concern about the problem of a creditor not receiving a notice, and he asked the advisory committee to consider adding a provision to the rule at a later date that would address the issue.

FED. R. BANKR. P. 4002(b)

Judge Small reported that the advisory committee had published proposed amendments to FED. R. BANKR. P. 4002(b) (duties of the debtor) that would require the debtor to bring certain documents to the § 341 meeting of creditors. He said that the advisory committee would present the amendments for final approval at the June 2005 Standing Committee meeting.

Judge Small explained that the Executive Office for United States Trustees had initiated the proposal. In its proposal, the Executive Office would have required the debtor to bring a great many documents to the § 341 meeting. But, he pointed out, the recommendation had attracted substantial opposition from consumer bankruptcy attorneys, and more than 80 negative comments had been received by the advisory committee before the matter was even on its formal agenda.

He noted that a special subcommittee had been appointed to review the proposal, and it had conducted a conference with interested parties and made recommendations to the full committee. The full advisory committee then studied the proposal and approved a shortened list of required documents for the debtor to bring to the meeting, *i.e.*, picture identification, a pay stub or other evidence of current income, the most recent federal income tax return, and statements of depository and investment accounts.

He added that the committee had received a detailed comment from a bankruptcy judge who recommended expanding the list of documents. He noted that the judge had asked to testify at the hearing, but withdrew his request and stood on his written statement when informed that the hearing had been cancelled for lack of other witnesses.

Finally, Judge Small reported that the advisory committee would consider additional rules proposals from the Venue Subcommittee, and it would seek permission to publish them at the June 2005 Standing Committee meeting.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of December 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. CIV. P. 5.1 and 24(c)

Judge Rosenthal reported that the advisory committee was recommending final approval of proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute). She noted that the rule had been published in August 2003, and it had attracted little comment and no criticism. The advisory committee, she said, further polished the rule at its last meeting, and the revisions made since publication did not require republication.

She explained that both 28 U.S.C. § 2403 and FED. R. CIV. P. 24(c) (intervention) require a court to certify to the Attorney General of the United States, or the attorney general of a state, when the constitutionality of a federal or state statute affecting the public interest is drawn into question and the pertinent government is not a party to the proceeding. But, she pointed out, the requirement has often been ignored, largely because court employees are simply unaware of it.

She said that the proposed new rule had been initiated by the Department of Justice, which had recommended two principal rule changes. First, the Department

suggested that the existing certification requirement be moved from Rule 24(c) and placed in a new Rule 5.1, immediately following FED. R. CIV. P. 5 (service) to emphasize its importance. Second, the notice to the attorney general should be strengthened by adding to the requirement of court certification a new requirement that the party who challenges the constitutionality of a statute also notify the appropriate attorney general.

She noted that some concern had been expressed in the advisory committee over the new notice requirement placed on parties challenging a statute. But, she added, the Department of Justice had convinced the committee that notice by the court alone has been insufficient to protect the government's interests. Moreover, experience in the several states imposing the same notice requirement has shown that no undue burdens are placed on the challenging party.

Judge Rosenthal pointed out that, as published, the rule would have required the court to set a time not less than 60 days for the government to intervene. Following the comment period, though, the advisory committee modified the provision to state that unless the court sets a later time, the attorney general may intervene within 60 days after notice is filed or the court certifies the challenge, whichever is earlier. The court, moreover, may extend the time on its own motion.

In addition, the committee moved language up from the committee note to the text of the rule to make it clear that before the time to intervene expires, the court may reject the constitutional challenge, but it may not enter a final judgment holding the statute unconstitutional. Thus, the court can reject unsound challenges quickly, grant interlocutory relief, continue pretrial activities, and conduct other proceedings to avoid delay.

Judge Rosenthal explained that the rule also provides for service on the attorney general by certified or registered mail or by electronic notice to an address designated by the attorney general. She said that no such addresses are currently in place, but they would likely be established by the Department of Justice in the near future. Finally, she pointed out, the rule clarifies that if a party fails to give notice, it does not forfeit a challenge to a constitutional right.

One member noted that the new rule is broader than the statute and the current rule, which govern challenges only to statutes "affecting the public interest." Judge Rosenthal replied that the advisory committee had deliberately broadened the scope of the reporting requirement to make sure that notice is given in every case in which a challenge is made to a statute. She noted that the expansion tracked the language of the counterpart provision in the appellate rules, FED. R. APP. P. 44.

One member expressed concern that the rule did not provide for a sanction against a party who fails to notify the attorney general. It was pointed out, though, that judges have adequate authority under the rules to deal with non-compliance. In addition, it was noted that a party challenging the constitutionality of a statute cannot effectively obtain the relief requested until the government enters the case. Another member expressed concern as to the internal consistency of the language of the proposed rule and asked the advisory committee to take another look at it before it is published.

Judge Small added that the new rule had implications for the bankruptcy rules because the current FED. R. CIV. P. 24 is incorporated in adversary proceedings by virtue of FED. R. BANKR. P. 7024. He said that the bankruptcy advisory committee would consider the matter at its next meeting and make appropriate recommendations to the Standing Committee in June 2005.

The committee approved the proposed new rule and proposed amendment for final approval by voice vote with two objections.

Proposed Style Revisions for Publication

Judge Rosenthal reported that the advisory committee was recommending that Rule 23 and Rules 64-86 be added to the list of restyled rules previously approved for publication by the Standing Committee. She explained that the advisory committee had made a number of further style changes in the rules previously approved for publication, consistent with the directions of the Standing Committee to continue polishing the document and to pick up minor errors and inconsistencies.

She added that three more non-controversial “style-substance” amendments would be included as part of the publication package, along with the “style-substance” amendments previously approved for publication by the Standing Committee. She pointed out that the package would also include a memorandum prepared by Professor Kimble explaining the key style conventions adopted by the committee. That document would give readers an appropriate context by which to judge the revisions.

Accordingly, she asked the Standing Committee to approve the entire package of restyled civil rules for publication, subject to final review for typographical errors, formatting, cross-references, and the like. She suggested that if members had any additional suggestions, they would be considered by the advisory committee during the public comment period.

Judge Rosenthal reported that the committee would schedule public hearings before the end of the comment period. She added that Professor Cooper had written an

excellent law review article on the style project that deserved attention — *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761 (Oct. 2004)

The committee without objection approved the proposed style package for publication by voice vote.

Informational Items

Judge Rosenthal reported that proposed class action fairness act legislation would be re-introduced in the new Congress, be considered by the Senate early in February 2005, and proceed directly to the Senate floor without a hearing. The bill would then be taken up by the House Judiciary Committee.

She reported that on January 12, 2005, the day before the Standing Committee meeting, the advisory committee had conducted the first of three public hearings on the proposed electronic-discovery amendments. She noted that many of the participants in the Standing Committee meeting had attended the hearing, and a full transcript would be made public. She said that the committee continues to receive a heavy volume of written comments on the proposed amendments, and many more comments were expected before the February 15, 2005, comment deadline.

Judge Rosenthal noted that the advisory committee would meet in April 2005 to consider all the comments and testimony. At that time, she said, the committee would decide whether to proceed with the published changes, whether to republish any amendments, and whether to send proposals on to the Standing Committee for final approval.

She noted that the advisory committee had set forth in the agenda book the various future projects that it was considering, including: (1) a suggestion by the Department of Justice that the committee clarify how indicative court rulings should be handled; (2) a proposal to amend FED. R. CIV. P. 48 to deal with jury polling; and (3) a suggestion to improve the practice of taking depositions under FED. R. CIV. P. 30(b)(6). The committee, she said, had also been asked to consider possible changes in the pleading rules and the summary judgment rule. She pointed out that the committee had deferred action on these various substantive matters until completion of the style project.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachment of December 2, 2004. (Agenda Item 8)

Informational Items

Judge Bucklew reported that the advisory committee had no action items to present to the Standing Committee. She noted that amendments to five criminal rules had been published for public comment in August 2004 and explained that they were noncontroversial and had attracted only one comment.

Three of the five amendments, she said, would allow the government to transmit documents to the court by “reliable electronic means” — FED. R. CRIM. P. 5(c)(3) (initial appearance); FED. R. CRIM. P. 32.1(a) (revocation or modification of probation or supervised release); and FED. R. CRIM. P. 41(d) and (e) (search and seizure). The proposed amendment to FED. R. CRIM. P. 40 (arrest for failing to appear in another district) would fill a gap in the rule and allow a magistrate judge to set conditions of release for a person who fails to appear. The proposed amendment to FED. R. CRIM. P. 58 (petty offenses and other misdemeanors) would eliminate a conflict with FED. R. CRIM. P. 5.1 (preliminary hearing) and clarify the advice that a magistrate judge must give at an initial appearance in a petty offense or misdemeanor case.

Judge Bucklew reported that the advisory committee had a number of important matters on the agenda for its April 2005 meeting. Among other things, the members would consider a proposed new FED. R. CRIM. P. 49.1 (privacy in court filings) to implement the E-Government Act’s requirement that federal rules be promulgated to meet privacy and security concerns raised by posting court files on the Internet. She said that the advisory committee should be able to forward a rule to the Standing Committee in June 2005 for publication.

Judge Bucklew reported that the advisory committee at its last two meetings had discussed a proposal from the American College of Trial Lawyers for rule amendments to address problems that the college perceives with implementation of the government’s duties under *Brady v. Maryland* to turn over exculpatory evidence to the defendant. She said that one proposal under consideration would call for the government to provide information to the defendant 14 days before trial. But, she cautioned, the Department of Justice was likely to oppose any amendment codifying *Brady*. Professor Schlueter added that discussions are sensitive and on-going, and it was very unlikely that any proposal would be submitted to the Standing Committee in June 2005.

Judge Bucklew reported that the advisory committee was looking closely at the *Booker/Fanfan* case to determine what changes might be needed in the criminal rules. She also pointed out that the committee would look again at FED. R. CRIM. P. 6 (grand jury) to see whether additional changes are needed in light of the recent 9/11 statute. She added that the committee would also look at FED. R. CRIM. P. 11 (arraignment and plea)

to consider the need for an amendment to require a judge to make a finding on the record that a plea agreement recognizes the seriousness of the defendant's behavior.

She reported that the advisory committee had approved proposed amendments to FED. R. CRIM. P. 41 (search and seizure) to provide procedures for tracking device warrants, noting that magistrate judges have said clearly that they would like additional guidance in this area. She explained that the Standing Committee had approved the proposed rule at its June 2003 meeting and had forwarded it to the Judicial Conference. But the amendments were later deferred and have been in limbo ever since. She said that the advisory committee would like to know their status and whether the committee should proceed further. She noted that a recent poll of the magistrate judges had shown that there was still strong support for the amendments.

Judge Levi explained that the amendments had been deferred after the September 2003 Judicial Conference meeting at the request of the deputy attorney general. Assistant Attorney General McCallum reported that the Department of Justice's Criminal Division was looking into the matter and would present its definitive view to the committee soon. Judge Bucklew added that the advisory committee could take up the matter at its April 2005 meeting.

FED. R. CRIM. P. 29

Judge Bucklew reported that the advisory committee at its last two meetings had considered the Department of Justice's proposal to amend FED. R. CRIM. P. 29 (motion for judgment of acquittal) to require a judge to defer ruling on a motion to acquit until after the jury returns a verdict. The committee, she said, failed to approve the proposal, but the members stood ready to reconsider the issue. She pointed out that they had read the supplemental materials submitted by the Department to the Standing Committee.

Mr. Wray presented the government's position and emphasized the importance of the matter to the Department. He explained that Rule 29 authorizes a judge to grant a verdict of acquittal either before or after the return of a jury verdict. The main problem, he said, is that the Double Jeopardy Clause of the Constitution precludes an appeal by the government when a trial judge grants an acquittal before return of a verdict. He explained that the committee note to the 1994 revision of Rule 29 encouraged judges to await the jury's verdict before ruling on an acquittal motion. He noted, too, that the Supreme Court has stated that it is preferable for trial judges to await the jury's verdict before granting an acquittal.

Mr. Wray pointed out that the proposal to amend Rule 29 was fully supported by the leadership of the Department of Justice, but the impetus for the change was coming from the ground up — from front-line prosecutors. He stressed that a pre-verdict

acquittal is an anomaly under the rules. It may be the only action of a trial judge that is both dispositive and unappealable. Moreover, he said, a pre-verdict acquittal overrules the conscience of the community, as expressed through the action of a jury of citizens. And it may result in significant injustice in a given case.

Mr. Wray suggested that the advisory committee may not have been aware of the extent of the problem, and he acknowledged that the Department may not have been as persuasive as it could have been. But, he said, the supplemental materials submitted by the Department make the case for a change. He noted, for example, that the numbers alone are significant, even though statistics in this area are inherently imperfect and underinclusive. He pointed out that over a four-year period, there had been 259 Rule 29 judgments of acquittal. Of that total, 72% had been granted before the jury returned a verdict — not the preferred method under Rule 29. About 70% of these pre-verdict acquittals had disposed entirely of the prosecution, rather than just certain counts in a multi-count case.

He suggested that it cannot be determined whether these cases had been decided correctly because appellate review had been precluded by the trial judges' actions. But, he said, there is strong reason to suspect that a significant number of the pre-verdict acquittals had been erroneous and would have been reversed on appeal. He noted that the Department appeals about 60% to 70% of post-verdict acquittals, and about one published opinion a month reverses a trial judge's post-verdict action. He added that there is no reason to suppose that pre-verdict acquittals are less likely to be erroneous because they are often entered in the heat of trial.

Mr. Wray explained that the standards for granting an acquittal are stringent. The trial judge must assess the evidence in the light most favorable to the government and resolve all inferences and credibility questions in favor of the government. Then, an acquittal should be granted only if no rational trier of fact could find the defendant guilty beyond a reasonable doubt. Obviously, he argued, that is not the standard that some judges had used. He proceeded to describe the facts of some specific cases in which the Department believed that district judges had committed serious error by granting an acquittal before verdict.

He emphasized that the problem had to be fixed, but he added that there may be more than one way to address the problem by rule. He explained that the Department was not asking the Standing Committee to choose one particular solution, but was merely telling the committee that the status quo is unacceptable and should be remedied by the advisory committee. He suggested that providing the government an appellate remedy would be a modest response to an immodest problem.

He referred to Judge Levi's proposal made at the last advisory committee meeting to allow a judge to enter a pre-verdict judgment of acquittal, but only on condition that the defendant waive double jeopardy protection and permit an appeal by the government. He noted that this particular solution would allow judges to cull out individual defendants and counts in appropriate cases and protect the rights of both the defendant and the government. He said that Department attorneys had considered the proposal and found that, on balance, it was a good one. He added in response to a question that the defendant's waiver of double jeopardy protection appeared to be constitutional.

Judge Bucklew reported that the advisory committee would be pleased to take another look at the matter, and she suggested that part of the committee's problem with the proposal had been a lack of persuasive information. Judge Levi said that the advisory committee, not the Standing Committee, is the right body to draft a proposed rule. He suggested, moreover, that it would be inappropriate for the Standing Committee to tell the advisory committee that a rule should be published or to ask it to draft a particular rule. Rather, he said, the advisory committee, as the body with the relevant expertise, should be asked to consider the best formulation for a rule that would address the problems identified by the Department of Justice and then to make a separate recommendation as to whether that rule should be published for public comment. At its next meeting, then, the Standing Committee would have all the information it needs to make appropriate decisions on the matter.

He noted that the Advisory Committee on Criminal Rules had been very interested in the Department's proposal to defer acquittals until after verdict, and it had at first voted to proceed with an amendment to Rule 29. But, he added, the committee became concerned about deferring verdicts in hung-jury, multiple-count, and multiple-defendant cases. He said that the hung-jury problem had inspired his alternate suggestion that a pre-verdict acquittal might be conditioned on the defendant's waiver of double jeopardy rights. In essence, the proposal would offer the defendant a choice. If a defendant wants the judge to consider a pre-verdict acquittal, he or she must be willing to preserve the government's right to appeal. He noted that the advisory committee's reporter, Professor Schlueter, had reduced the proposal to text form, and it appears workable.

One member said that the waiver proposal looked very promising and should be pursued by the advisory committee. He added that the Standing Committee should express its sense that the advisory committee should seriously considering bringing forward a rule. Another member emphasized the advisory committee should document the analysis behind its recommendations and its reasons for choosing one alternative over another.

In light of the committee discussion, Judge Levi restated his suggestion and recommended that the advisory committee be asked to: (1) consider an amendment of Rule 29 as a serious topic that deserves further consideration; (2) formulate the best way to deal with the problems identified by the Department of Justice and draft the best rule and committee note; and (3) recommend to the Standing Committee whether that rule and note should be published for public comment. The advisory committee, he said, could then consider the matter at its spring meeting, and the Standing Committee would have all the information it needs to consider the proposal at its June 2005 meeting.

The Department of Justice representatives agreed to this course of action, and they expressed their commitment to resolving the matter through the rulemaking process.

The committee by voice vote without objection approved Judge Levi's proposal to the advisory committee.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of December 10, 2004. (Agenda Item 9)

Informational Items

Judge Smith reported that the advisory committee had not held a separate autumn meeting, but had decided, instead, to conduct a meeting immediately following the Standing Committee meeting. He noted that proposed amendments to four evidence rules had been published for comment.

He said that the advisory committee had been surprised by the lack of public comment to date on the proposed amendments to FED. R. EVID. 408 (compromise and offers to compromise). Among other things, the use of statements and conduct during civil settlement negotiations would not be barred when offered in a later criminal case. He pointed out that the Department of Justice had asked for a broader rule, but the committee was proposing a compromise rule that allows use of comments made at settlement negotiations, but not the settlement itself.

He reported that the proposed change to FED. R. EVID. 609(a)(2) (impeachment by evidence of conviction of a crime) deals with the automatic impeachment of a witness by evidence that he or she has been convicted of a crime of "dishonesty or false statement." He explained that the amendment permits the mandatory admission of evidence of conviction only when it "readily can be determined" that the crime of conviction was one

of dishonesty or false statement, such as by the elements of the crime or by clear information set forth in the indictment or other key document.

Judge Smith said that the proposed amendment to FED. R. EVID. 606(b) (competency of a juror as a witness) would make it clear that testimony by a juror may be used only to prove that the verdict reported by the jury was the result of a clerical mistake. The amendment, thus, rejects some case law that interprets the current rule to allow jurors to be polled as to whether the jury understood the instructions.

Judge Smith noted that a preliminary reading of the *Booker/Fanfan* case shows that the advisory committee will not have to make any changes in the Federal Rules of Evidence. But, he added, the committee will have to wait to see what Congress does in the wake of the case. He added that the advisory committee had also decided not to proceed on any rules issues that may be impacted by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), barring the use of "testimonial" hearsay against a criminal defendant in the absence of cross-examination. The committee, instead, will monitor case law development under *Crawford*.

Professor Capra said that a suggestion had been received recommending an amendment to FED. R. EVID. 803(8) (hearsay exception for public reports) to ensure that federal statutory standards are incorporated into the admissibility requirements of the rule. He noted that public records are considered presumptively trustworthy, and the courts do not seem to be having any difficulty in applying Rule 803(8). He added that the advisory committee would consider the suggestion at its January 2005 meeting.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater reported that the Technology Subcommittee had met in January 2004 and had prepared a template for the advisory committees to use in drafting rules to implement the E-Government Act of 2002. The statute requires that federal rules be issued to address the privacy and security concerns raised by posting court files on the Internet. He pointed out that the subcommittee had revised the template to incorporate views expressed by the advisory committees and some suggestions by the Department of Justice. Professor Capra added that working from a single template fosters the mandate of the E-Government Act that the federal rules be as uniform as possible.

Professor Capra reported that the goal was to have rules amendments presented by the advisory committees to the Standing Committee at its June 2005 meeting, so that they could be published in August 2005. He explained that the basic decisions reflected in the template had been derived from the extensive work of the Court Administration and Case Management Committee, which had conducted several public hearings and had

determined that the best policy for the Judicial Conference to adopt was a general rule that “public is public,” *i.e.*, that all case papers publicly available at the courthouse should also be made available on the Internet. But, he cautioned, certain specific categories of sensitive personal information would have to be redacted.

He noted that the Court Administration and Case Management Committee had spent a great of time discussing which sensitive information should be redacted. The Technology Subcommittee and the advisory committees, he said, had made a few additions to the policy to implement some requirements of the E-Government Act and to meet some concerns of the Department of Justice. He explained that the resulting template is necessarily complex, and it categorizes four different kinds of document filings: (1) documents that must be redacted; (2) documents exempt from the redaction requirement, such as administrative agency records; (3) social security and immigration appeals, for which public access will be restricted to the courthouse; and (4) documents filed under seal. He noted that the template states that a court by order in a case may limit or prohibit remote electronic access to a particular document in order to protect against disclosure of private or sensitive information.

Professor Schiltz reported that the proposal to be considered by the Advisory Committee on Appellate Rules states that documents in the appellate courts should be treated in the same manner that they are treated in the court below.

PROPOSED TRANSNATIONAL PROCEDURES

Dean Kane led a panel discussion of the American Law Institute’s transnational procedure project with Professor Hazard and distinguished San Francisco attorneys Elizabeth Cabraser and Melvyn Goldman. Dean Kane noted that Professor Hazard was the only American co-reporter on a project that developed a set of procedural rules drawn from both civil-law and common-law systems for use in handling commercial contests. The results of the project, she said, had been approved recently by the Institute. She asked Professor Hazard first to describe some provisions in the proposed rules, and then she asked Ms. Cabraser and Mr. Goldman to respond.

Professor Hazard noted at the outset that the transnational project had been started about 10 years ago with intense consultation by lawyers from many parts of the world. It was conceived as a procedure for commercial cases involving sophisticated lawyers and clients. But, he said, the rules could also be used in other categories of cases. And, he added, they are generally compatible with the American system and with jury trials. They include provisions dealing with notice, the right of participation, judicial management of proceedings, and full consultation by advocates.

Four of the ideas embraced in the rules, he said, could potentially be adapted for use in the federal court system: (1) more focused discovery; (2) fact pleading; (3) written statements of witnesses in lieu of oral testimony for direct examination; and (4) motions demanding proof.

1. With regard to discovery, Professor Hazard pointed out that the U.S. has the broadest discovery system in the world. In general, a party must — on demand and at its own expense — turn over to a requesting party any evidence it has that may lead to admissible evidence. Elsewhere in the world, on the other hand, discovery requests must be more specific. A producing party's obligation, moreover, extends only to relevant evidence. Other countries, he noted, are mindful of the problem of relevant evidence residing in the hands of an opposing party, but release of that type of evidence is usually governed by substantive law.

He said that the present federal rule dealing with document discovery had been adopted in contemplation of the exchange of a dozen or so documents, before the use of copying machines and computers. He questioned whether the sheer quantity of documents today makes a difference that calls for a rule change. He added that one interesting consequence of the enormous discrepancy between U.S. and foreign document production rules is that some foreign companies initiate litigation in the United States just to get broad discovery that they can use in a dispute back home.

2. Professor Hazard pointed out that the federal rules authorize notice pleading. But other countries and many U.S. states require a complainant to set forth specific facts at the outset. He suggested that most good plaintiff's lawyers already use fact pleading, even in the federal courts, because they want the court to understand their case from the outset. He explained that the proposed transnational rules require the complaint to set forth the relevant facts in reasonable detail and to describe with sufficient specification the available evidence to be offered in support of the allegations.
3. Professor Hazard explained that the transnational rules provide that in a nonjury trial a written statement by a witness is a necessary predicate to the testimony of that witness. This is contrary to U.S. procedure, where direct testimony is taken orally. Under the transnational rules, the first submission is a written statement prepared by the lawyer setting out what the testimony of a particular witness is going to be. Then an examination of the witness follows — either by the judge in civil law countries, or by the lawyers in common law countries. Thus, the oral testimony of the witness is essentially cross-examination.

4. Fourth, the transnational rules provide for a motion demanding proof, a sort of streamlined version of a summary judgment motion. Typically, he said, a summary judgment motion is made by a defendant arguing that the plaintiff lacks proof as to key elements of the case. The movant has to attach details to show that there is considerable proof that a particular issue is not subject to proof by the opposing party. Instead, he said, why not have a motion demanding proof? That way, the movant does not have the full burden of establishing that there cannot be proof on a particular issue.

Ms. Cabraser said that the federal and state procedural rules work very well in many cases, but they do not work well in others, nor do they always provide protection for litigants against bad practices. Parties, she said, can make litigation unjustifiably expensive and combative.

She suggested that the proposed transnational rules may work very well in commercial disputes, which usually involve litigation among equals. But, she added, much litigation in the American courts is among parties who are not equal. For example, she said, most countries do not have the highly developed tort law of the U.S., nor do they provide the same level of access for ordinary citizens. The courts of the U.S. follow a different national ethos and provide regulation through the litigation process.

With regard to the cost of producing documents, she said, the system should not place most of the cost of production on the plaintiffs. Judges, she pointed out, have authority to assess costs against requesting parties in appropriate cases.

She said that in her own individual cases, the same defendant has produced the same documents several times in past cases. But she must ask for them again in each new case, thereby adding costs to the defendant and running up transactional costs. She suggested that it might be helpful if there were a rule or protocol in the complex litigation manual enabling a defendant to identify documents previously discovered and placing the burden on the plaintiff to get them.

With regard to fact pleading, she said that plaintiffs should be required to set forth the facts in a clear manner. It helps both the pleader and the court, and it avoids the need for status conferences to find out what the case is about. She noted that she personally provides the same level of detail in federal complaints that she does in her state court complaints.

She suggested that a motion demanding proof could work in both sophisticated and simple cases, especially where there are a limited number of documents. She said that summary judgment had become unmanageable in complex cases, and it leads to

production of a huge volume of documents. She suggested that the concept of a motion demanding proof should be tried.

Mr. Goldman said that discovery, especially electronic discovery, is completely out of hand. He noted that civil cases are rarely tried, yet the parties in the end have to bear the cost of wasteful discovery.

He pointed out that effective case management is the appropriate reform. He said that a judge should take over a case from the first conference and identify the claims, defenses, issues, and evidence on both sides. The judge, he said, will learn quickly what discovery is needed and will tailor it to the circumstances of the particular case. Staged discovery, for example, would be particularly appropriate.

But, he said, early hands-on case management does not take place in the courts where he practices today, except with a handful of trial judges. Instead, he said, the normal practice is to have pro forma case management conferences with pro form orders. He suggested that if there were effective case management, there would be far less discovery and abuse.

He pointed out that judicial case management is clearly contemplated in the federal rules and in the new transnational rules. But it is not happening for a number of reasons. Not all trial judges, he suggested, are suited by temperament to case management. Judges, moreover, see that the vast majority of their cases settle, and they may conclude that hands-on case management is not a good use of their time. And most court systems lack sufficient flexibility to permit judges who are good at case management to take over cases that need management.

As for fact pleading, he asked whether it is designed to provide information to the other side or to serve as a means for filtering out cases that do not belong in the system. The latter, he said, is a laudable goal, but courts rarely dismiss cases for lack of sufficient facts, except in securities cases. He suggested that fact pleading is a gate-keeping mechanism that might work, and it should be explored. But, he added, even under the current rules, good case management is critical, as a judge can ask the parties to plead with more particularity.

Mr. Goldman said that the proposed motion for proof is a fascinating idea, but he doubted that it will come to pass. He said that appropriate use of summary judgment is a way to elicit the proof that parties have in a case. He noted that trial judges have a great deal of flexibility, and he has seen judges ask parties to file a motion for summary judgment. He noted, too, that Rule 56(f) gives a judge discretion to authorize discovery in connection with summary judgment.

Mr. Goldman said that the use of written statements for expert witnesses is an excellent idea and should be the rule. But he did not believe that it would be appropriate for non-expert witnesses. A trial judge, he said, wants to assess the credibility of the witness on direct examination, as well as on cross examination. Judges have a good ear for listening to evidence in person, and they will interject from time to time when they want clarification. But they may not receive the same education from reading written statements.

Professor Hazard noted that in civil law countries, the judge is in control from the moment a case is filed. The new English rules, too, place heavy emphasis on case management. He noted also that the Judicial Panel on Multi-District Litigation has authority to assign a case to a particular judge, and it regularly assigns cases to particularly competent judges. He said that the notion of randomly assigning cases is deeply embedded in the federal court system, but it needs to be reexamined.

Participants suggested that consideration might be given to developing different subsets of rules to deal with different kinds of cases. But both Ms. Cabraser and Mr. Goldman responded that early, effective case management, rather than different rules, is the appropriate answer. The judge, they said, can determine at the first pretrial conference how much time and effort are required in each case.

Ms. Cabraser added that every case should have an early case management conference, without all the requirements of FED. R. CIV. P. 26. A judge should sit with the parties and shape the rules for each individual case. Over time, she said, protocols would develop as to the appropriate procedures to apply in different types of cases. Cases, she said, could be handled without even referring to Rule 26, and discovery disputes would be averted. The judge should have inquisitory powers and broad discretion to make the parties act appropriately. This approach might mean more work for judges at the outset of a case, but it would save them considerable time in the long run, as there would be fewer discovery problems and disputes.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Wednesday and Thursday, June 15-16, 2005, in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe
Secretary

Draft Minutes

Civil Rules Advisory Committee

October 28-29, 2004

1 The Civil Rules Advisory Committee met on October 28 and 29, 2004, at the La Fonda hotel
2 in Santa Fe, New Mexico. The meeting was attended by Judge Lee H. Rosenthal, Chair; Judge Jose
3 A. Cabranes; Frank Cicero, Jr., Esq.; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Justice
4 Nathan L. Hecht; Robert C. Heim, Esq.; Dean John C. Jeffries, Jr.; Hon. Peter D. Keisler; Judge Paul
5 J. Kelly, Jr.; Professor Myles V. Lynk; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin.
6 Retiring members Judge Richard H. Kyle, Professor Myles V. Lynk, and Andrew M. Scherffius,
7 Esq. also attended. Professor Edward H. Cooper was present as Reporter, Professor Richard L.
8 Marcus was present as Special Reporter, and Professor Thomas D. Rowe, Jr., was present as
9 Consultant. Judge David F. Levi, Chair, Judge Sidney A. Fitzwater, and Professor Daniel R.
10 Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker, Jr., attended
11 as liaison from the Bankruptcy Rules Committee. Judge J. Garvan Murtha, chair of the Standing
12 Committee Style Subcommittee, and Style Subcommittee members Judge Thomas W. Thrash, Jr.,
13 and Dean Mary Kay Kane also attended. Professor R. Joseph Kimble and Joseph F. Spaniol, Jr.,
14 Style Consultants to the Standing Committee, were present. Professor Daniel J. Capra, Reporter for
15 the Evidence Rules Committee, attended as Lead Reporter for the E-Government Act Subcommittee.
16 Peter G. McCabe, John K. Rabiej, James Ishida, and Robert Deyling represented the Administrative
17 Office. Tim Reagan represented the Federal Judicial Center. Ted Hirt, Esq., and Elizabeth Shapiro,
18 Esq., Department of Justice, were present. Brooke D. Coleman, Esq., attended as Rules Law Clerk
19 for Judge Levi. Observers included Jeffrey Greenbaum, Esq. (ABA Litigation Section Liaison);
20 Loren Kieve and Irwin Warren (ABA Litigation Section Style Liaisons); and Alfred W. Cortese, Jr.,
21 Esq..

22 Judge Rosenthal opened the meeting by asking all participants and observers to identify
23 themselves, and by extending congratulations to the Boston Red Sox fans on the World Series
24 sweep. She introduced new members Cabranes and Girard, and noted that new member Chilton
25 Varner was prevented from attending by an unalterable obligation to appear in a West Virginia state
26 court.

27 The three new members replace three outgoing members who have distinguished themselves
28 by hard work and exemplary contributions to the Committee's work. They also have been marvelous
29 friends, whose companionship will be sorely missed.

30 Judge Rosenthal went on to report on the September meeting of the Judicial Conference. The
31 Conference approved proposed amendments to Civil Rules 6, 27, and 45, and also Supplemental
32 Rules B and C, for transmission to the Supreme Court. It devoted much of its attention to the budget
33 challenges that confront the federal courts.

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34 Proposed rules amendments published in August included a new Supplemental Rule G for
35 civil forfeiture proceedings, a revision of Rule 50(b), and discovery rules provisions designed to deal
36 with discovery of electronically stored information. The discovery amendments are already
37 attracting close attention in formal conferences and bar groups, and written comments have begun
38 to arrive. Requests for time at the scheduled public hearings also are being made.

39 It is desirable that as many Committee members as possible attend the public hearings. The
40 hearings are always important, and will be particularly important with respect to discovery of
41 computer-based information because the bar knows about developing practice and problems in ways
42 that do not quickly come to the attention of judges. We are likely to hear from many different
43 experiences and perspectives. To the extent possible, it helps to look at written comments even
44 before the hearings to become familiar with the sorts of issues that are being raised. Even now,
45 committee members who participate in bar conferences are learning things that were not learned
46 during the years of careful work that led up to the proposed amendments.

47 Last June, the Standing Committee approved Style Rules 38 through 63 for eventual
48 publication as part of a complete set of Style rules. The cycle of style work is precisely on schedule.

49 *Minutes*

50 The minutes for the April 14-15, 2004 meeting were approved.

51 *Legislative Report*

52 John Rabiej noted that the House passed a bill that would amend Civil Rule 11 in several
53 respects. The changes would delete the "safe harbor" and would make sanctions mandatory. In
54 addition, state courts would be obliged to apply the federal rule in actions that grow out of events
55 affecting commerce. As Secretary of the Judicial Conference, Leonidas Ralph Mecham sent a letter
56 on this bill to Senator Hatch as Chair of the Senate Judiciary Committee. The letter recounts the
57 history of the 1983-1993 period when Rule 11 mandated sanctions, including the several FJC studies
58 that found a consensus that there are better ways to deal with abusive litigation. The letter also
59 explains the reasons for changing to discretionary sanctions in the 1993 Rule 11 amendments,
60 describes the FJC study of the effects of the 1993 amendments, and urges that the present rule is
61 working well. These bills will come back in the next Congress. It may be desirable to consider
62 asking the FJC to undertake a further study of judges' views on the ongoing operation of present
63 Rule 11.

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64 An observer suggested that if there is to be a Rule 11 survey, it would be useful to include
65 experience under the Rule 11 provisions of the Private Securities Litigation Reform Act. There is
66 a "breathtaking lack of case law to show what actual practice is" under this statute.

67 Others observed that academics of all shades of view, liberal and conservative, oppose the
68 Rule 11 bills. And state judges strongly oppose the idea that Congress should legislate state
69 procedure. Texas, for example, had mandatory sanctions in its equivalent to Rule 11, and — just
70 as with Rule 11 — chose to go back to a system of discretionary sanctions.

71 Class-action reform legislation again passed in the House, but stalled in the Senate. It is
72 likely to come back in the next Congress.

73 Judge Levi noted that Congress at present seems fairly aggressive about rules of procedure.
74 Part of his job as Standing Committee Chair is to remind Congress of the Enabling Act process. He
75 regularly suggests that it would be useful to have Congressional staff attend advisory committee
76 meetings to learn about the actual operation of the process. These suggestions have not been notably
77 successful.

78 *Rule 5(e): Permission for Mandatory E-Filing Rules*

79 The Committee on Court Administration and Case Management (CACM) has asked adoption
80 on an expedited basis of rules that would authorize local rules that require electronic filing. For the
81 Civil Rules, the amendment to Rule 5(e) is simple:

82 **(c) Filing with the Court Defined.** * * * A court may by local rule permit or require papers
83 to be filed, signed, or verified by electronic means that are consistent with technical
84 standards, if any, that the Judicial Conference of the United States establishes.

85 If at least the Bankruptcy, Civil, and perhaps Criminal Rules Advisory Committees agree that
86 this change is proper and not controversial, the plan is to seek Standing Committee approval by mail
87 ballot for publication in November, 2004, with a public comment period that closes on February 15,
88 2005. The advisory committees could consider the public comments and — if all goes well —
89 recommend approval for adoption at the June 2005 Standing Committee meeting.

90 CACM believes that expedited action is desirable for two sets of reasons. First, electronic
91 filing saves money for the courts. This saving does not represent a transfer of costs to electronic
92 filers; to the contrary, a careful study has shown that electronic filers also save time and money.
93 Second, district courts already are requiring electronic filing. At the latest count, 31 districts by
94 standing order, procedural manual, or local rule require electronic filing of all documents, and seven

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95 more require that some documents be filed electronically. This number is an impressive proportion
96 of the courts that have gone "online" with the Court Management/Electronic Case Filing system
97 (CM/ECF). The national rules should catch up with the reality of actual practice.

98 Several participants noted that the bar and courts, including state courts, have become
99 enthusiastic converts to the advantages of electronic filing. Initial fears that small law offices would
100 be put at a disadvantage have disappeared in face of the reality that small offices reap proportionally
101 greater benefits than do large offices.

102 It was asked whether the need for speed is so great as to suggest asking Congress to adopt
103 an amendment that would take effect before the contemplated December 1, 2006 effective date of
104 the Rule 5(e) amendment. Several responses were offered. One was that if it goes to Congress, there
105 might be pressure to adopt a mandatory national rule, not one that relies on local discretion. In turn,
106 that could choke off desirable experimentation that will generate a sound basis for eventual adoption
107 of a nationally uniform set of qualifications or exceptions. As a practical matter, moreover, the mere
108 publication of the proposed amendments will give the amendments immediate effect. Districts that
109 want to require electronic filing will feel free to follow the lead of the many districts that already do
110 so. In these circumstances, finally, the adoption of an accelerated publication and comment period
111 does not do violence to the ordinary pace of rulemaking.

112 The Bankruptcy Rules Advisory Committee has already adopted the CACM proposal. The
113 Bankruptcy Rule amendment is accompanied by a brief Committee Note set out in the agenda
114 materials.

115 The proposed Rule 5(e) amendment does not attempt to identify the circumstances in which
116 exceptions should be permitted. Present practices uniformly allow exceptions for pro se litigants,
117 recognizing that many of them are not prepared to participate in electronic filing. It is not enough
118 to have access to a computer; appropriate programs must be used, and the user must become adept
119 in using them. The survey of electronic filing experience shows that small firms have had to acquire
120 new software and train staff in its use or even, at times, hire new staff. Individual litigants cannot
121 be expected to undertake this effort. Apart from this identifiable category of concerns, there also
122 may be concerns that some materials can be transformed to electronic form for filing only with
123 considerable expense and difficulty. Yet other needs for exceptions may arise. Although provision
124 for exceptions could be made by a general "good cause" provision, it seems too early to attempt to
125 draft national-rule provisions that qualify the permission to adopt local rules. More particularly, it
126 would be difficult to draft a sound rule for adoption on an expedited basis.

127 The lack of any qualifications or exceptions in the proposed amendment opens the question
128 whether the Committee Note should attempt to offer guidance on these or other questions. The

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129 Bankruptcy Rule Note includes a paragraph suggesting that "courts can include provisions to protect
130 access to the courts for those who may not have access to or the resources for electronic filing." A
131 shorter alternative proposed for consideration in the agenda materials suggests that local rules and
132 the model rule "will generate experience that will facilitate gradual convergence on uniform
133 exceptions to account for circumstances that warrant paper filing." This language is more general,
134 reflecting the thought that there may be good reasons for excusing electronic filing of some materials
135 even when the parties are generally filing in electronic form.

136 A second question also might be addressed in the Committee Note. Rule 5(b)(2)(D) permits
137 electronic service only if "consented to in writing by the person served." Some courts are treating
138 participation in electronic filing as consent to electronic service. There is no collision if a party has
139 a free choice whether to agree to electronic filing. But if local rules or practice require participation
140 in electronic filing, a rule that exacts consent to electronic service as part of electronic filing defeats
141 the consent protection embodied in Rule 5(b)(2)(D). The agenda includes a draft committee note
142 paragraph stating that a court that wishes to couple electronic filing with electronic service must
143 adopt a provision that enables a party to withdraw from electronic service, whether by withdrawing
144 from electronic filing entirely or by withdrawing consent only as to electronic service.

145 A motion to say nothing in the Committee Note about the Rule 5(b)(2)(D) question was
146 adopted without dissent.

147 It was suggested that the alternative brief Committee Note in the agenda materials was
148 preferable to the Bankruptcy Rules Committee Note. But it was recognized that all committees
149 should adopt a common note, and that the form to be published will be worked out under Standing
150 Committee auspices in the next few days.

151 Publication of the proposed Rule 5(e) amendment with an accelerated comment period was
152 approved unanimously.

153 *Style Project: Rules 64-86*

154 Style Rules 64 through 86 were reviewed by Subcommittees A and B in July, and are now
155 ready for consideration by the full Advisory Committee. If approved, the entire Style package of
156 rules can be presented to the Standing Committee in January for approval for publication in mid-
157 February. Publication of the full package will justify a lengthy comment period. If the comment
158 period closes in mid-January 2006, hearings could be held toward the close of the period, perhaps
159 including one in conjunction with the January Standing Committee meeting. Then the comments
160 would be considered at the spring Advisory Committee meeting. If all goes well, approval for

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161 adoption could be recommended to the June 2006 Standing Committee meeting, looking for an
162 effective date of December 1, 2007.

163 It is important to present as clean a package as possible to the Standing Committee. Some
164 of the decisions to be made at this meeting will require implementation. And there will be a “final
165 sweep” through the full package to check for uniform adherence to the resolution of global issues
166 and to find overlooked glitches. No major issues are anticipated. The final review process will be
167 undertaken by Judge Rosenthal as Committee chair, with the concurrence of the consultants and
168 reporters.

169 The issues presented by the Style Project are important. The gains can be great. But we are
170 bound by a vow not to change meaning. In the process, the Committee has “touched on all the great
171 issues of the day.” Indeed the recurring question whether to render a present-rule “shall” as “must”
172 or “may” found a parallel at oral argument this month in the Supreme Court cases considering
173 application of the *Blakely* decision to the federal Sentencing Guidelines: the statutory “shall”
174 provoked an exchange on the question whether “shall” can mean “may.”

175 Rule 64. Present Rule 64 adopts state remedies for seizure of person and property, “regardless of
176 whether by state procedure the remedy is ancillary to an action or must be obtained by an
177 independent action.” Style Rule 64(b) reduces this to “however designated and regardless of whether
178 state procedure requires an independent action.” It was agreed that it is proper to delete “ancillary
179 to an action”; “regardless of whether state procedure requires an independent action” clearly reaches
180 both remedies that are provided in the main action and those that must be pursued through an
181 independent action.

182 Rule 65. It was noted that Style Rule 65(b)(3) retains “older matters of the same character,”
183 replacing an earlier style suggestion that this phrase be replaced by “temporary restraining orders
184 issued earlier without notice.” Professor Rowe’s research suggests that there is no clear case-law
185 treatment defining the “older matters of the same character” that do not take precedence over a
186 preliminary injunction hearing that follows issuance of a no-notice TRO. It seems better to carry
187 forward the present language, which may recognize that “the same character” may refer to the same
188 character of urgency.

189 Present Rule 65(b) requires that a TRO granted without notice “be filed forthwith.” Style
190 Rule 65(b)(2) directs that it “be promptly filed.” It was asked whether “promptly” conveys the same
191 sense of immediacy as “forthwith.” Views were offered that “forthwith” indeed sets a shorter
192 deadline. But it was objected that “forthwith” seems antique. It is a good lawyerly term that means
193 “right now.” “Promptly,” on the other hand, implies reasonableness. The suggestion that

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194 “immediately” might be substituted was met by the observation that it is not an established term of
195 lawyerly art.

196 It was agreed that Rule 65(b) requires the court, not a party, to file the TRO. This might have
197 a bearing on the word chosen to convey the desire for expeditious entry. But the question seems one
198 appropriately resolved by the Style Subcommittee. Although three Committee members voted that
199 the Committee should make a choice, it was concluded that the choice whether to substitute some
200 word for “forthwith” — likely “immediately” — would be referred to the Style Subcommittee.

201 An observer suggested that two deletions from present Rule 65(b) should be restored. The
202 present rule speaks of an order issued without notice “to the adverse party or that party’s attorney,”
203 and requires the applicant’s attorney to certify “in writing” the efforts made to give notice. Style
204 Rule 65(b)(1) deletes the reference to notice to the party’s attorney, and also deletes “in writing.”
205 These proceedings are done on an emergency basis. It may be possible to give notice to an adverse
206 party’s attorney when it is not possible to give notice to the party, and it is important to recognize
207 that. It was responded that throughout the rules, we say “without notice” without adding a reference
208 to a party’s attorney. So too, “certify” appears in many places: do we want to create an
209 inconsistency — with possible negative implications — by adding “in writing” here but not
210 elsewhere?

211 Others expressed concern that no-notice TRO procedure is special, and deserves special
212 safeguards. Often a party does not have an attorney when the action is filed, and often enough the
213 plaintiff will not know whether there is an attorney. But there may be, and it was urged that this is
214 a reason to restore the reference to an attorney. It was asked whether the result is that the party
215 requesting a TRO has a choice whether to serve the adverse party or the adverse party’s attorney, and
216 responded that restoring this reference would leave the Style Rule exactly where the present rule is.
217 It was suggested that if you know an adverse party has representation, rules of professional
218 responsibility require that notice be directed to the attorney. Compare Rule 5(b)(1), directing service
219 on the attorney when a party is represented by an attorney. If we delete “or its attorney,” we seem
220 to suggest that it is proper to serve only the party.

221 On two motions, it was voted with one dissent to restore “or its attorney,” and voted
222 unanimously to restore “in writing.” The result is:

223 **(1) Issuing Without Notice.** The court may issue a temporary restraining order without
224 notice to the adverse party or its attorney only if: * * *

225 **(B)** the movant’s attorney certifies in writing any efforts made to give notice * * *.

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226 The Committee referred to the Style Subcommittee the suggestion that the tag line for Style
227 Rule 65(d)(2) should be “**(2) *Scope Persons Bound.***”

228 It was noted that Style Rule 65(d)(1)(C) directs that the order granting an injunction describe
229 the acts restrained “or required.” “Required” is new, but appropriately reflects abandonment of the
230 old fiction that an injunction can only forbid, not require, action by the party enjoined.

231 Present Rule 65(e) refers to a statute relating to temporary restraining orders “and”
232 preliminary injunctions in actions affecting employer and employee. Style Rule 65(e)(1) changes
233 “and” to “or.” This change was accepted.

234 Rule 65.1. Present Rule 65.1 refers to security given “in the form of a bond or stipulation or other
235 undertaking with one or more sureties.” Style Rule 65.1 deletes “stipulation.” It was asked whether
236 “stipulation” has some distinctive technical meaning that requires that it be restored. Two responses
237 defeated any suggestion that “stipulation” be restored. No case interpreting the rule has discussed
238 this word. And “or other undertaking with one or more sureties” — which is retained in the Style
239 Rule — seems all-encompassing. Still, it may be useful to identify this issue as one on which
240 comment will be helpful.

241 Rule 66. Present Rule 66 requires a court order for dismissal of an action “wherein a receiver has
242 been appointed.” Style Rule 66 at first suggested changing “has been” to “is” appointed. A question
243 arose whether court approval should be required if dismissal is sought after a receiver is appointed
244 and then is discharged. Research by Professor Rowe suggested that it would be risky to change “has
245 been” to “is.” The Committee agreed with the Style Subcommittee decision to restore “has been.”

246 Rule 67. No issues required further discussion.

247 Rule 68. Present Rule 68 provides for an offer of judgment after a determination of liability when
248 the extent of liability remains to be determined “by further proceedings.” Earlier Style drafts deleted
249 “by further proceedings.” Subcommittee A asked for research on the possible meaning of this
250 phrase. Professor Rowe’s research suggested that it would be safer to restore this phrase.
251 Restoration was approved.

252 The choice between “adverse party” and “opposing party” has been resolved as a global
253 matter by preferring “opposing party” unless “adverse party” is required for substantive reasons. It
254 was agreed that “opposing party” should be substituted in Style Rule 68(a) in the two places where
255 “adverse party” has been carried forward from present Rule 68.

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256 Another global issue has involved the choice between “allow” and permit. Present Rule 68
257 and Style Rule 68(a) both refer to an offer to “allow” judgment to be entered. It was agreed that the
258 Style Subcommittee should make the final choice.

259 It was observed that both present Rule 68 and Style Rule 68(d) do not expressly limit liability
260 for costs to the setting in which the offer of judgment is not accepted. The omission does not seem
261 important, although a judgment based on an accepted offer is literally not more favorable than the
262 offer. It is understood that the sanction is available only when the offer is not accepted. But it may
263 be helpful to indicate this proposition in the tag-line for subdivision (d), referring to “Offer not
264 Accepted” or something of the sort. This suggestion was referred to the Style Subcommittee.

265 Rule 69. In keeping with the global resolution, it was agreed that Style Rule 69(a)(1) properly
266 deletes “district” from the reference to “the state where the ~~district~~ court is located.”

267 Present Rule 69(b) states both that in an action against a revenue officer or an officer of
268 Congress the final judgment shall be satisfied as provided in two designated statutes and also that
269 execution shall not issue against the officer or the officer’s property. Style Rule 69(b) omits the
270 provision that execution shall not issue. The Department of Justice has explored this omission,
271 without drawing any particular conclusion. It would be possible to say that the judgment “must be
272 executed and satisfied” as provided in the designated statutes, but that might carry an untoward
273 implication that a judgment can be “executed” against the United States. 28 U.S.C. § 2006, one of
274 the statutes, provides for satisfaction, not execution. It was suggested that the present rule provides
275 a substantive protection for the officer that should not be changed. But it was noted that the Style
276 Rule carries this protection forward by providing that “the judgment must be satisfied as those
277 statutes provide.” The statutes bar execution against the officer, and this protection is incorporated
278 by this language. Both § 2006 and 2 U.S.C. § 118, further, provide protection against execution in
279 circumstances not reflected in the language of present Rule 69(b). It was agreed that Style Rule
280 69(b) should be proposed as drafted, with the addition of this paragraph to the Committee Note:

281 Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C.
282 § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which
283 execution does not issue against the officer.

284 Rule 70. Present Rule 70 refers to a judgment that “directs” a party to execute a conveyance. Style
285 Rule 70(a) had this as “orders,” but in its current form has it as “requires.” The Style Subcommittee
286 is free to conform this word to whatever global resolution is finally adopted.

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287 A later part of Style Rule 70(a) provides that the court may “order” another person to do an
288 act commanded. It was agreed that the tag line should be changed to reflect this word: “**Directing**
289 **Ordering Another to Act.**”

290 Present Rule 70 begins the sentence on a vesting order: “If real or personal property is within
291 the district * * *.” Style Rule 70(b) adds “the”: “If the real or personal property is within the district
292 * * *.” It was agreed that this addition properly reflects the limit that authorizes a vesting order only
293 as to property that is within the district.

294 Present Rule 70 authorizes sequestration or attachment of property on application of a party
295 entitled to performance. Style Rule 70(c) adds three words: “entitled to performance of an act.” The
296 addition was approved.

297 Rule 71: No issues required further discussion.

298 Rule 71.1. (Present Rule 71A has been renumbered as 71.1 to conform to the convention used for
299 all other rules interpolated between whole-numbered rules.)

300 It was agreed that as with Rule 65, the word to be substituted for “forthwith” should be left
301 to the Style Subcommittee.

302 Present Rule 71A(c)(2) says that “process” shall be served as provided in subdivision (d).
303 Style Rule 71.1(c)(4) changes this to “notice.” Both present Rule 71A(d) and Style Rule 71.1(d)
304 speak throughout of “notice.” The reference to “process” seems misleading, even though the rule
305 expressly provides that delivering the notice to the clerk and serving it have the same effect as
306 serving a summons under Rule 4, see Style Rule 71.1(d)(4). But this provision justifies carrying
307 forward the present tag line for subdivision (d) as “Process.”

308 Present Rule 71A(d)(1) says that notices are directed to the defendants “named or designated
309 in the complaint.” Style Rule 71.1(d)(1) shortens this to “the named defendants.” It was agreed that
310 it is proper to delete “or designated.” Under Style Rule 71.1(c)(1) the property is both “named” and
311 “designated” as a defendant, so “named” will cover both the property and the individual defendants.

312 Present Rule 71A(c) refers to the “use” for which property is to be taken, while present Rule
313 71A(d)(2) refers to “uses.” It was agreed that these provisions should be uniform. Because property
314 may be taken for multiple uses, it was further agreed that “uses” would be chosen for both Style
315 71.1(c)(2)(B) and (d)(2)(A)(iv).

316 An extraneous “of” will be deleted from Style Rule 71.1(d)(2)(A)(v).

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317 Two Style-Substance Track amendments were approved. In the present rule, both appear in
318 Rule 71A(d)(2). The first would add an explicit reminder — already provided in Form 28 — that
319 a party who does not serve an answer may file a notice of appearance. The second would parallel
320 Style-Substance Track amendments of Rules 11(a) and 26(g)(1), by directing that the notice include
321 the telephone number and electronic-mail address of the plaintiff's attorney. These changes would
322 be made in Style Rule 71.1 by adding a new item (vii) to subdivision (d)(2)(A) and by revising
323 subdivision (d)(2)(B).

324 Present Rule 71A(d)(3)(B) says that when the appropriate circumstances are shown, service
325 by publication "shall be made" in the described manner. Style Rule 71.1(d)(3)(B) renders this as
326 "[s]ervice is then made * * *." This rendition was accepted. This is one of the instances in which
327 a present rule uses "shall" to describe how an act is done when someone undertakes to do it.

328 Present Rule 71A(e) states that "the defendant may serve a notice of appearance designating
329 the property in which the defendant claims to be interested. Thereafter, the defendant shall receive
330 notice of all proceedings affecting *it*." The question is whether "it" should be rendered in Style Rule
331 71.1(e)(1) as "it," "the property," or "the defendant." Complicated arguments can be made to
332 imagine proceedings that affect a defendant but do not affect the underlying property — there may
333 be no dispute about the taking and no dispute about total compensation, but a dispute between
334 different claimants over distribution of the compensation. It is more difficult to imagine a dispute
335 that affects the property but does not also affect an individual claiming an interest in it. One
336 resolution of the ambiguity may be: "notice of all later proceedings relating to the property."
337 Although the Style project has often carried forward an ambiguity that does not seem to yield to
338 ready clarification, this ambiguity should be clarified if possible. The "proceedings relating to the
339 property" approach seems to work — it would reach distribution of proceeds. Concern was
340 expressed that this formula might be too broad. It often happens that in proceedings to condemn a
341 large number of small parcels many of the defendants seek to participate only in the distribution.
342 Must they be given notice of all proceedings that relate to the property, including those that challenge
343 the taking? Suppose co-owners of a single piece of property disagree about the taking itself — one
344 resists condemnation, while the other welcomes it: must notice of proceedings on the taking issue
345 go to the co-owner who is interested only in compensation? It was suggested that proceedings
346 affecting "the defendant" is the broader and better term. If we believe that the authors of the present
347 rule were drafting carefully, that is indeed what "it" means now: the only antecedent in this sentence
348 is "the defendant." The next sentence, moreover, having referred first to the defendant and then to
349 the property, closes by requiring the defendant to answer after service "upon the defendant." Respect
350 for our predecessors suggests we give them credit for intending the apparent meaning of "it." The
351 motion passed: Rule 71.1(e)(1) will conclude: "notice of all later proceedings affecting the
352 defendant." But it will be useful to point to the choice and solicit comment on this question.

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353 Present Rule 71A(f) allows free amendment of the complaint, but prohibits an amendment
354 “which will result in a dismissal forbidden by subdivision (i).” The difficulty is that subdivision (i)
355 does not directly forbid dismissals; the first two paragraphs describe means by which a plaintiff may
356 dismiss in certain circumstances. Style 71.1(f) carries forward the reference to a dismissal
357 “forbidden by” subdivision (i). It was suggested that perhaps this would better say “a dismissal not
358 authorized by (i)(1) or (2).” But it is not clear whether (i) is properly described as authorizing a
359 dismissal. It was agreed that “inconsistent” would be substituted. This part of Style Rule 71.1(f)
360 will read: “But no amendment may be made if it would result in a dismissal inconsistent with Rule
361 71.1(i)(1) or (2).”

362 Four means of determining compensation are provided by present Rule 71A(h). The final
363 sentence is “Trial of all issues shall otherwise be by the court.” As to compensation, the rule earlier
364 provides that compensation is determined by any tribunal specially constituted by Act of Congress,
365 and that if there is no such tribunal compensation is determined by a jury if a party has demanded
366 a jury unless the court orders that compensation is to be determined by a three-person commission.
367 It was agreed that under the present rule, a three-person commission can be appointed only if there
368 is no statutory tribunal and if a party has demanded a jury. If there is no jury demand, compensation
369 is determined by the court. The means of expressing these alternatives in Style Rule 71.1(h) has
370 proved difficult. Doubt was expressed whether the Style draft was clear enough on the proposition
371 that the court determines compensation unless one of the other three methods applies. One
372 suggestion was that 71.1(h)(1) could begin: “the court must try all issues, except when compensation
373 is determined * * *.” An alternative was “the court must try all issues, including compensation,
374 except when compensation must be determined * * *.” The “flow” of this version was doubted. In
375 the end, it was agreed that, subject to final review by the Style Subcommittee, Style Rule 71.1(h)(1)
376 would begin: “In an action involving eminent domain under federal law, the court must try tries all
377 issues, including compensation, except that when compensation must be determined * * *.”

378 It was asked whether Style Rule 71.1(h)(1)(A) and (B) would be better tied together by
379 adding a few words to (B): “if there is no ~~such~~ tribunal specially constituted, either party * * *.” The
380 answer was that under the Style Project conventions, “such” is the proper cross-reference back to a
381 preceding provision. The reader of subparagraph (B) should understand that “such” ties back to the
382 tribunal described in subparagraph (A).

383 Style Rule 71.1(i)(1) allows a plaintiff to dismiss “without a court order.” It was agreed that
384 the choice whether to include the “a” can be left for resolution as a global matter.

385 Present Rule 71A(i)(2) concludes by providing that on stipulation by the parties “the court
386 may vacate any judgment that has been entered.” Style Rule 71.1(i)(2) added several words: “may
387 vacate a judgment already entered that did not vest title.” The suggestion that these words be deleted

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388 was approved. Although the present rule is ambiguous, practice recognizes that a judgment vesting
389 title may be vacated on stipulation of the plaintiff and the other parties.

390 Style Rule 71.1(j)(2) initially deleted many words from present Rule 71A(j), so as to say only
391 that the court must enter judgment for the deficiency when a defendant is awarded greater
392 compensation than provided by an initial deposit, and that the court must enter judgment for the
393 overpayment when a defendant is awarded less compensation than provided by an initial deposit.
394 Concern was expressed that this reduced language might lead to “netting” — if one defendant is
395 overcompensated and another defendant is undercompensated, the court might enter judgment for
396 one defendant against the other, not the plaintiff. The result might be a loss if the defendant ordered
397 to pay cannot be made to pay. To address this concern, the Style draft restored the full language of
398 the present rule. It was agreed that the same effect can be achieved by again deleting some of these
399 words. As revised, Style Rule 71.1(j)(2) will read:

400 the court must enter judgment ~~for that defendant and~~ against the plaintiff for the deficiency.
401 If the compensation awarded to a defendant is less than the amount distributed to that
402 defendant, the court must enter judgment ~~for the plaintiff and~~ against that defendant for the
403 overpayment.

404 Rule 72. It was asked whether Style Rule 72(a) could be shortened by providing that the magistrate
405 judge “issue a written ~~order stating the~~ decision.” The next sentences repeatedly refer to objections
406 to the order, and so on. Each of these references would have to be changed to “decision.” In the end
407 it was decided to make no change. What you object to is the order, not the explanation of it by the
408 decision.

409 Rule 72 also became the occasion to discuss the choice between using numerals and spelling
410 out numbers. One suggestion was to spell out only “one,” leaving all other numbers to numerals.
411 A second suggestion was to spell every number from one through ten. More complex suggestions
412 were that numerals could be used for days, no matter how few; that words should be used as part of
413 compound structures, such as “three-judge court;” that words should be used for plural numbers
414 (twos, not 2s); that numbers should be spelled at the beginning of a sentence, no matter how large;
415 that numerals should be used when any number in the same sentence is a numeral — use “6” if the
416 same sentence also refers to “12.” It was observed that the criminal rules use numerals throughout,
417 however small the number; after extensive discussion, the Appellate Rules came to the same
418 practice. The view was expressed that it is better not to use numerals whenever possible. The
419 apparent conclusion was that the Style Subcommittee should adopt methods consistent with the
420 Appellate and Criminal Rules.

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421 Rule 73. It was agreed that Style Rule 73(a) should conclude: “must be made in accordance to
422 with 28 U.S.C. § 636(c)(5).”

423 The final sentence of present Rule 73(b) states that a district judge may vacate a reference
424 to a magistrate judge “under extraordinary circumstances shown by a party.” It was asked whether
425 “extraordinary” should be changed to “exceptional.” “Exceptional” is used in some other rules, and
426 may mean the same thing. It was urged that the same word should be used everywhere in the rules.
427 But it also was argued that “extraordinary” is a term of art, and should be retained. It sets a higher
428 standard than “exceptional,” and the choice is deliberate. The risk to be feared is judge-shopping,
429 that a party who has consented to trial by a magistrate judge will seek to renege when events seem
430 to be taking an unpleasant turn. It also was suggested that use of a single word can itself be
431 confusing — that “exceptional” actually has different meanings in each of the four uses identified
432 in this discussion. On motion, it was decided to retain “extraordinary” in Style Rule 73(b)(3), ten
433 yes and no contrary votes.

434 Earlier drafts of Style 73(a) began “When specially designated by local rule or a district court
435 order, a magistrate judge may, if all parties consent, conduct the proceedings in a civil action.” This
436 was changed to “When authorized under 28 U.S.C. § 636(c) * * * “ because local rules designate
437 magistrate judges generally. But it was observed that some courts allow the parties to consent to
438 appointment of a magistrate judge other than the one designated by the general selection system.
439 Does Style Rule 73(b)(1) reflect this clearly enough? Should we restore more of the present rule’s
440 “consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by
441 Title 28, U.S.C. § 636(c)””? It was responded that these words in the present rule do not clarify the
442 ability to consent to a different magistrate judge. Further discussion suggested that there may be
443 differences among the districts in the manner of designating magistrate judges for specific cases.
444 It also was suggested that a court may not want to designate all magistrate judges for all cases, that
445 individual judge designations are proper. One approach would be to change Style Rule 73(b) to the
446 active voice: “When the court has designated a magistrate judge to conduct a civil action * * *.”
447 This language would apply both to a general designation and to a specific judge designation. That
448 is what the present rule should mean. But it was responded that the change to the active voice does
449 not help, and might cause some confusion. The question whether the Committee Note to Style Rule
450 73 should address this question was opened but not decided.

451 The tag line for Style Rule 73(c), “Normal Appeal Route,” has drawn suggestions for
452 revision. It was agreed that the question is a matter of style to be resolved by the Style
453 Subcommittee.

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454 Rules 74, 75, and 76. These rules were abrogated in 1997. There was no further discussion of the
455 decision to reserve these rule numbers for possible future use, avoiding any renumbering of Rules
456 77 through 86.

457 Rule 77. Present Rule 77(a) says the district courts “shall be deemed always open.” Style Rule 77(a)
458 says every district court “is always open.” But not all courts have drop boxes. Not all are in fact
459 always open. Appellate Rule 45(a)(2) says a court of appeals is always open. Criminal Rule 56(a)
460 says a district court is “considered” always open. The manner of speech may be tied to electronic
461 filing, for which courts perhaps will be always open apart from power failures or equipment failures.
462 It was concluded that it remains useful to recognize the fiction in the Style rule, which will say that
463 “Every district court is considered always open.” The Style Subcommittee can decide whether the
464 tag line for subdivision (a) should incorporate “considered.”

465 Style Rule 77 also presents the question whether some substitute should be found for
466 repeated references to “mesne” process. Present Rule 77(a) refers to issuing and returning “mesne
467 and final process”; Style Rule 77(a) refers simply to “issuing and returning process,” and no one has
468 objected to that. Present Rule 77(c) directs that the clerk may issue “mesne process” and “final
469 process to enforce and execute judgments.” Style Rule 77(c)(2) separates these as subparagraph (A)
470 — “issue mesne process” — and subparagraph (B) — “issue final process to enforce and execute
471 a judgment.” It was suggested that (c)(2) should be revised on the model of (a), combining
472 subparagraphs (A) and (B) into one (A): “issue process.” A counter-suggestion was to keep (A) and
473 (B) separate, but revise (A) to “issue intermediate” process. It was noted that Rule 4 process is
474 neither “mesne” nor “final” process, but initial or initiating process, and that Rule 4 has its own
475 provisions for issuing the summons. Rule 4, however, does not seem to complicate the drafting of
476 Rule 77. In the end it was suggested that combining subparagraphs (A) and (B) may make sense,
477 but that this is a matter for final resolution by the Style Subcommittee.

478 Style Rule 77(d)(1) carries forward the cross-reference to Rule 5(b) that was added to present
479 Rule 77(d) in 2001. It was concluded that the specific reference to subdivision (b) should not be
480 changed.

481 Rule 78. Style Rule 78(a) omits parts of the present rule that may seem to affect meaning. Earlier
482 versions of Style Rule 78(a) began: “Unless local conditions make it impracticable,” and went on
483 to say that the district court must establish regular times and places for hearing motions “often
484 enough to dispatch business promptly.” These qualifications were omitted from the current draft on
485 the theory that they have been made obsolete by the widespread shift from master calendars to
486 individual judge dockets. It was protested that nonetheless they have meaning, and should not be
487 deleted. But it was countered that there is no real need for Style Rule 78(a) at all — it orders the
488 court to do something that no courts do. It is individual judges who set times for hearing motions,

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489 and this actual practice can be recognized. We have established the proposition that a rule that has
490 lost its apparent meaning to substantially uniform and contrary practice can be changed to reflect
491 reality; Rule 33(c) is a clear example.

492 It was agreed that Style Rule 78(a) should carry forward as presented. But the Committee
493 Note should be supplemented by a statement that a court that wishes to do so can establish regular
494 times and places for oral hearings on motions. The Note also will observe that most courts have
495 moved away from this practice.

496 The Committee also approved the Style-Substance Track proposal to amend Rule 78 by
497 deleting the provision that the judge may make an order to advance, conduct, and hear an action.
498 Rule 16, revised repeatedly since Rule 78 was adopted, now covers all of this provision. It was also
499 noted that the tag line for the Style-Substance version of Style Rule 78 should be revised by deleting
500 "other orders."

501 The second paragraph of present Rule 78, allowing for submission of motions without oral
502 hearing, begins "To expedite its business," the court may make such provisions. Style Rule 78(b)
503 omits this preface. It was suggested that these words establish a limit on the reasons that justify
504 submission without oral hearing; they are more than a mere intensifier, and should be retained. This
505 suggestion was echoed with a lament that the diminution of oral argument is unfortunate, however
506 necessary it may be. But a motion to restore "to expedite its business" failed with one vote yes and
507 eleven votes no.

508 Rule 79. It was agreed that a late change in Style Rule 79(a)(3) is an improvement: "Each entry
509 Entries must briefly show * * *."

510 Rule 80. Present Rule 80(c) refers to testimony "at a trial or hearing." Style Rule 80 reverses the
511 sequence to "at a hearing or trial." The theory is that hearings ordinarily come before trials in the
512 sequence of trial-court events. The change was accepted as a matter of style.

513 Rule 81. Present Rule 81(a)(4) refers, among others, to proceedings under 15 U.S.C. § 715d(c) "to
514 review orders of petroleum review boards." The snag is that § 715 does not provide any name for
515 the review boards. A full description might be "an order denying a certificate of clearance issued
516 by a board appointed by the President or by any agency, officer, or employee designated by the
517 President under 15 U.S.C. § 715j." It was agreed that Style Rule 81(a)(6)(D) should be revised to
518 read: "15 U.S.C. § 715d(c) for reviewing an order denying a certificate of clearance."

519 Present Rule 81(f) provides that any rule that refers to an officer of the United States includes
520 a district director of internal revenue, a former district director or collector, or the personal

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521 representative of a deceased district director or collector. All of these offices have been abolished.
522 There is no substantive right that might be affected by reflecting the disappearance of these offices
523 in Style Rule 81. It was agreed that it is proper to abandon the original Style Rule 81(e) that carried
524 forward the provisions of present Rule 81(f).

525 Rule 82. No issues required further discussion.

526 Rule 83. No issues required further discussion.

527 Rule 84. No issues required further discussion.

528 Rule 85. No issues required further discussion.

529 Rule 86. No issues required further discussion.

530 *Style Project: Rule 23*

531 Because class actions are an enormously sensitive area, and because Rule 23 has been
532 recently amended, Rule 23 was considered separately in the Style Project. It was reviewed in
533 subcommittee, and is now ready for its first consideration by the Committee as the final rule in the
534 Style Project.

535 The sensitivity of Rule 23 has led to retaining many words that might have been changed on
536 a more aggressive styling approach.

537 Style Rule 23(b)(1)(A) carries forward the language of present Rule 23(b)(1)(A):
538 “inconsistent or varying adjudications with respect to individual class members ~~which~~ that would
539 establish incompatible standards of conduct * * *.” “[T]hat” is a remote pronoun, separated from
540 its antecedent “adjudications.” But it was agreed that there is no ready fix for the remoteness; no
541 change will be made.

542 Present Rule 23(b)(1)(B) refers to adjudications with respect to individual class members that
543 would as a practical matter be dispositive of “the interests of the other members not parties to the
544 adjudication.” The draft Style Rule 23(b)(1)(B) changes this to “the other nonparty members’
545 interests.” This formula was challenged, and several substitutes were suggested: “interests of
546 nonparty class members,” “other class members,” “interests of other nonparty class members,” and
547 “absent class members’ interests.” The phrases that referred to “nonparty” class members were
548 challenged on the ground that they will give rise to arguments about the status of class members as
549 parties or as not parties for such purposes as discovery, intervention, and counterclaims. The

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550 underlying problem is that the rule addresses the setting in which no class has yet been certified or
551 defined; it speaks to those who would be members of the putative class if it is certified in terms of
552 the requested definition. It was concluded that the only safe course is to revert to the present rule
553 language, adding a reference to the anticipated independent adjudications that makes it clear that they
554 are adjudications in individual actions: “that, as a practical matter, would be dispositive of the ~~other~~
555 ~~nonparty members~~² interests of the other members not parties to the individual adjudications * * *.”

556 The resolutions proposed by footnotes 4, 5, 6, 7, and 8 on pages 19 and 20 of the agenda
557 materials were all approved.

558 Style Rule 23(d)(1) begins by carrying forward the present rule’s reference to “appropriate”
559 orders. It was agreed that this word should be deleted in accord with the general style: “the court
560 may issue **appropriate** orders * * *.”

561 It was agreed that Style Rule 23(d)(1)(B)(iii) properly carries forward notice to class
562 members of the right to “come into” the action. The same conclusion was reached as to Style Rule
563 23(d)(1)(D)’s reference to allegations about “representation of absent persons.”

564 Style Rule 23(d)(2) generated substantial discussion. The final sentence of present Rule
565 23(d) reads: “The orders may be combined with an order under Rule 16, and may be altered or
566 amended as may be desirable from time to time.” Style Rule 23(d)(2) reduces this: “An order under
567 (d)(1) may be combined with an order under Rule 16, and may be altered or amended.” The comma
568 separating Rule 16 from the rest of the sentence was attacked as incorrect. It was defended as a
569 separation essential to prevent confusion of the liberal standard for amending a Rule 23(d) order
570 from the demanding standards set for amending a Rule 16 order. It was readily agreed that the
571 standards are quite different. But the method of suggesting the difference was disputed.

572 The first suggestion was that the comma be deleted, but “also” be added: “with an order
573 under Rule 16 and also may be altered or amended.” The next suggestion was that the sentence be
574 made two sentences. One illustration of the second sentence was: “Either order may be altered or
575 amended.” Then it was suggested that a single sentence could be preserved by reordering the
576 thoughts: “An order under (d)(1) — which may be altered or amended — may be combined with an
577 order under Rule 16.”

578 Further discussion focused on “as may be desirable from time to time.” This language is
579 emphasized in the cases, which focus on the need for flexibility in revisiting Rule 23(d) orders as
580 the case moves along. Flexibility should be encouraged. It was also suggested, however, that most
581 of the cases focusing on flexibility and freedom to change deal with reconsideration of the class
582 certification and class definition under Rule 23(c). It was further noted that Rule 23(c) was recently

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583 amended, in part to discourage the occasional practice of tentative certifications. It also was
584 suggested that “the court has to manage the action. We all know that.”

585 Discussion returned to the proposition that the standard for amending a Rule 16 order is more
586 demanding than the standard for amending a Rule 23(d) order. It is useful to make sure that this
587 liberality is preserved by the language of Style Rule 23.

588 It was agreed, 8 yes and 5 no, to restore these words: “altered or amended as may be desirable
589 from time to time.” Style 23(d)(2) would read:

590 An order under (d)(1) — which may be altered or amended as may be desirable from time
591 to time — may be combined with an order under Rule 16.

592 It was further agreed that the Style Subcommittee may choose to divide this provision into
593 two sentences.

594 The Committee Note should state that the Rule 16 standard is different from the Rule 23
595 standard.

596 Style Rule 23(e) rearranges the structure of present Rule 23(e), which was adopted on
597 December 1, 2003. Despite the recent adoption of the rule, and despite the potential confusion that
598 may arise from misleading references in the 2003 Committee Note, it was agreed that the
599 rearrangement is an improvement and should be retained. A suggestion that the 2003 Committee
600 Notes be rewritten to reflect the changed designations was rejected. Several other Style Rules
601 change subdivision and other designations; the effort to establish a lengthy concordance in various
602 notes, or separately, runs the risk of incompleteness. To be complete, a concordance should reflect
603 the occasional drastic rearrangements of provisions even within a single present subdivision, and
604 could easily generate more confusion than assistance.

605 Present Rule 23(f), adopted in 1998, states that a court of appeals may “in its discretion”
606 permit appeal from an order granting or denying class certification. Style Rule 23(f) deletes “in its
607 discretion” as an undesirable intensifier. The deletion was accepted. A substantial body of case law
608 has emerged, clearly establishing the open-ended nature of the discretion and identifying
609 considerations that guide the exercise of discretion. But the Committee Note may explain that the
610 scope of appellate discretion remains unchanged.

611 Present Rule 23(f) provides for an application made to the court of appeals. Style Rule 23(f)
612 provides instead for a petition filed with “the circuit clerk.” It was protested that there is no such
613 thing as a circuit clerk; there is a clerk for the circuit court of appeals. But Appellate Rule 5(a)(1),

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646 A third approach, rather close to common practice in the present rules, is to provide an
647 additional word cue. In Rule 27(a)(3)(B), for example, the cross-reference would be to
648 “subparagraph (A),” not to “(A)” naked. The descriptive word would attach to the highest part of
649 the rule referred to. If Rule 27(a)(3)(B) were to refer to [the nonexistent] 27(b)(2)(A), for example,
650 it would refer to “subdivision (b)(2)(A).” This approach scores high on the elegance scale. It is
651 easily understood — the reader need only track to (b) to know what is a subdivision. But again, it
652 uses words and increases the word count for the entire set of Civil Rules.

653 Discussion focused on the advantages of adhering to the model used in the Appellate and
654 Criminal Rules. One advantage is that of consistency of style across different sets of rules. That
655 advantage is not an inexorable command — it has been agreed that style conventions need not be
656 frozen by the first style project, but may evolve as further style experience suggests significant
657 improvements. But the advantage is real. In addition, several Committee members thought that this
658 style is the clearest, and is the most “user-friendly.” Young lawyers, confronted with a reference
659 simply to (g)(2)(H) will be confused. And computers are completely literal — a search for
660 27(a)(3)(A) may work better than a search for (a)(3)(A), and surely will work better than a search
661 for (A).

662 It was protested that when Rule 27(a)(3)(B) refers to Rule 27(a)(3)(A), there is a miscue. The
663 reader will expect that attention is being directed further away than the immediately preceding
664 subparagraph. This protest availed not.

665 The Committee voted, 13 yes and zero no, to adhere to the full Rule cross-reference
666 convention adopted by the Appellate and Criminal Rules.

667 *Style Rules 1-63 (Apart from 23)*

668 Judge Rosenthal introduced the current drafts of Style Rules 1 through 63 by noting that each
669 rule had earlier been reviewed by a subcommittee and the full Committee. The Standing Committee
670 has approved each for publication as part of a comprehensive Style package of all the Civil Rules.
671 The present review is designed to elicit comments about implementation of the conventions that have
672 been adopted to resolve the “global issues,” and to present a final opportunity for pre-publication
673 comment on individual rules.

674 An observer suggested that Style Rule 23.1(b)(1) should be revised. The present rule requires
675 an allegation that the plaintiff was a shareholder at the time of the complained-of transaction or that
676 the plaintiff’s share “thereafter devolved on the plaintiff by operation of law.” The Style draft
677 eliminates “operation of,” saying only “devolved on it by law.” The rule addresses involuntary
678 acquisitions, such matters as inheritance, or an executor who steps into the shoes of a deceased

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679 shareholder, or acquisition of shares through a merger. This thought was echoed by a member who
680 observed that there is a lot of case law on what “by operation of law” means.

681 The Committee voted to restore “by operation of law.”

682 Another observer suggested that there may be an inconsistency between the notice provisions
683 of Style Rule 23.1 and the provisions of Rule 23(e). Rule 23(e) now requires notice of a voluntary
684 dismissal to class members only if the class members would be bound by the dismissal. This
685 provision was added in 2003, changing the result of several cases that had ruled that notice must be
686 given even if a voluntary dismissal comes before certification and does not bind class members.
687 Rule 23.1, both in present and in Style forms, seems to require notice whether or not shareholders
688 or members would be bound by the dismissal. It was agreed that any inconsistency involves matters
689 of meaning that cannot be addressed in the Style Project. The question is one that may deserve study
690 in the Reform Agenda.

691 Style document 625, Item 4, describes the global choices made in saying “terms” or
692 “conditions.” It includes a suggestion that “terms” be used consistently through Style Rule 62(b),
693 (c), and (h). The Committee approved these choices.

694 Style 625 Item 5 addresses the use of “undue hardship” and “undue burden.” It recommends
695 “undue burden” throughout. The present Style draft uses “undue hardship” in Rules 26(b)(3)(A)(ii)
696 and 45(c)(3)(C),” and “undue burden” in six other rules. But questions have been raised as to
697 substituting “undue burden” for “undue hardship” where it is used now. First is Rule 26(b)(3), the
698 work-product rule. This rule is special, allowing work-product protection to be defeated only on
699 showing that a party cannot effectively present its case without discovery of the protected
700 information. The Style Subcommittee, moreover, has been reluctant to tinker with the discovery
701 rules — they are used constantly, and are litigated frequently. It was agreed that “undue hardship”
702 should remain the term in Rule 26(b)(3)(A)(ii).

703 Then it was noted that the reporter had acquiesced in changing Rule 45(c)(3)(C)(i) from
704 “undue hardship” to “undue burden.” This position arose from the view that although hardship is
705 quite different from burden, the qualification added by “undue” seems to obliterate the distinction.
706 It is difficult to find a meaningful distinction between “undue hardship” and “undue burden.” But
707 it was pointed out that “undue burden” seems to imply a balancing process — the weight of the
708 burden is compared to the advantages to be gained. “Undue hardship” may authorize closer attention
709 to the cost to a particular person — a burden that may be due in relation to the possible advantages
710 still may impose an undue hardship on a person ill-equipped to carry the burden. Rule 45 is part of
711 the discovery rules, and should be treated with a measure of respect comparable to the respect paid
712 the rules from 26 through 37.

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713 The Committee voted, 13 yes to zero no, to restore “undue hardship” to Style Rule
714 45(c)(3)(C)(i).

715 The Committee voted to change Style Rule 9(h)(3) to the form of earlier Style drafts and the
716 present Rule: “~~An action~~ A case that includes * * *.”

717 The Committee considered whether to delete “substantial” from Style Rule 25(d)(1) in
718 keeping with the global convention. It was decided to retain “substantial” because it may be
719 intended to distinguish between substantive rights and procedural rights: “any misnomer not
720 affecting the parties’ substantial rights must be disregarded.”

721 Style 625 identifies several uses of “certificate” and “certification.” It was agreed that the
722 Department of State should be consulted on the choice between “certificate” and “certification” in
723 Style Rule 44.

724 Judge Rosenthal observed that a number of open issues remain in the footnotes to the Style
725 drafts of Rules 1 through 63. Those that have not been raised at this meeting will be resolved by the
726 Style Subcommittee, Judge Rosenthal, the consultants, and the reporter in preparing the final
727 package of rules to be submitted to the Standing Committee with a recommendation for publication.
728 Committee members should offer suggestions to anyone in this group. The Committee approved this
729 method of preparing the final publication package.

730 By 13 votes yes and zero votes no, the Committee approved transmission to the Standing
731 Committee for publication of the Style package of Rules 1 through 86.

732 The Committee expressed its congratulations to the Style Subcommittee, the consultants, and
733 Judge Levi for the great progress made in the speedy creation of the Style Package.

734 *Rule 5.1: Notice of Constitutional Challenge*

735 A proposed new Rule 5.1 was published in August 2003. The rule would embrace and
736 substantially change the provisions of present Rule 24(c) that implement 28 U.S.C. § 2403. Section
737 2403 requires a court of the United States to certify to the United States Attorney General or the
738 Attorney General of any State the fact that the constitutionality of an Act of Congress or state statute
739 has been drawn in question. Certification is designed to implement the statute’s further creation of
740 a right to intervene.

741 Proposed Rule 5.1 goes beyond the requirements of § 2403 in several directions. Section
742 2403 applies only if the Act of Congress or state statute affects the public interest; Rule 5.1 applies

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743 without requiring any determination whether the statute affects the public interest. Section 2403
744 applies only if the United States "or any agency, officer or employee thereof is not a party." Rule
745 5.1 applies if a United States or state officer or employee is a party but only in an individual capacity.
746 Section 2403 requires only that the court certify the fact that constitutionality is drawn in question.
747 Rule 5.1 requires that the party drawing the question file a Notice of Constitutional Question and
748 serve the notice on the Attorney General; the court still is obliged to certify the challenge.

749 The comments on proposed Rule 5.1 were discussed at the April 2004 Committee meeting,
750 and new questions were raised within the Committee. The discussion is summarized in the April
751 Minutes. It was agreed that it is wise to relocate the new provisions away from Rule 24(c), where
752 the implementation of § 2403 has been effectively buried. Present Rule 24(c) calls on the parties to
753 remind the court of its § 2403 certification duty, and it was agreed that the new rule should continue
754 to impose some such duty on the parties. But there was disagreement whether to add to the notice
755 requirement imposed on the party who draws the constitutionality of a statute into question. The
756 published rule requires both that the party file a Notice of Constitutional Question and also that the
757 party serve the notice on the Attorney General. It was agreed that the service requirement be
758 changed to state directly that service is made by certified or registered mail, rather than indirectly by
759 incorporating Rule 4(i)(1)(B). But the Committee first determined to remove any requirement that
760 a party serve notice on the Attorney General. Then the Committee voted to reconsider, and was
761 unable to complete consideration of this issue in the time available.

762 The April discussion also raised questions about the published provision that required the
763 court to set a time for intervention not less than 60 days from the court's certification to the Attorney
764 General, and about the Committee Note statements describing the activities that might properly
765 continue during the period set for intervention.

766 All of these questions were brought back for further discussion. It was noted that letters
767 supporting the published rule had been received from Patrick C. Lynch, Attorney General of Rhode
768 Island, and Ken Salazar, Attorney General of Colorado. Attorney General Salazar noted that a
769 Colorado rule and the state declaratory judgment statute require party notice to the Attorney General,
770 and that this practice works well. Later, it was noted that other attorneys general and the conference
771 of attorneys general support the party-notice requirement.

772 Committee discussion focused on a discussion draft rule that restores the requirement that
773 the challenging party serve notice on the Attorney General and departs from the published draft in
774 several details. Changes approved at the April meeting were carried forward. The change to a direct
775 statement of the method of serving by certified or registered mail has been noted already. In
776 addition, the published draft would have required notice when an officer of the United States or of

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777 a state brings suit in an official capacity; there is no need for notice to the United States or state
778 Attorney General of such actions, and this requirement was dropped.

779 The discussion draft also specifically addresses action by the court during the period set for
780 intervention. The court may reject the constitutional challenge during this period, but may not enter
781 a final judgment holding the statute invalid. The Committee Note would continue to amplify this
782 provision by describing other permissible actions, such as entering an interlocutory injunction
783 restraining a challenged statute. This Note discussion would have a stronger foundation in the rule
784 with the added rule text.

785 Following a review of the published draft, attention turned to a letter from Assistant Attorney
786 General Keisler stating in detail the reasons for the Department of Justice's support of the proposed
787 rule. The first concern is that failure to get notice of constitutional challenges is a significant
788 problem. An extreme illustration is provided by the Telecommunications Act of 1996 — it was
789 challenged in 180 cases, but § 2403 certifications were made to the Attorney General in only 13 of
790 those cases. In one of the cases without certification the district court held the statute invalid.
791 Another frequently challenged statute, the Religious Land Use and Institutionalized Persons Act of
792 2000, yielded a better but still unsatisfactory count. Of some 71 district court challenges,
793 certification was made in approximately 50; in six cases the court upheld the statute without having
794 certified the case to the Attorney General. There are no comprehensive statistics to measure
795 experience across the full range of constitutional challenges, but an incomplete survey found several
796 other cases in which the certification duty was overlooked.

797 The effect of no notice, or late notice, is that the Department of Justice enters these actions
798 late. Late intervention is a burden on the parties, on the court, and on the Department. Even if a
799 statute is upheld, the Department has lost the opportunity to participate in building the record for
800 appeal.

801 The second observation offered by the Department of Justice was that there is little reason
802 for concern about imposing on the parties an obligation to notify the Attorney General. Rule 24(c)
803 already states that a party challenging the constitutionality of legislation should call the court's
804 attention to the certification duty. Adding a requirement that the party also notify the Attorney
805 General is a small incremental burden. A party who brings an action against the United States to
806 declare a statute invalid perforce gives notice to the United States. The effect of an invalidating
807 judgment in litigation among others is similar, and a similar notice requirement is appropriate.
808 Seven districts have adopted local rules that require party notice, and there is no indication that they
809 impose undue burdens. Thirty-six states have adopted some form of the Uniform Declaratory
810 Judgment Act, which requires that a party serve the attorney general with a copy of any proceeding
811 that asserts the unconstitutionality of a statute, ordinance, or franchise. In addition 18 states have

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812 statutes that require party notice in any type of case, and 7 other states have party notification rules
813 that apply at the appeal stage. These statutes have not provoked complaints of undue burden.

814 As a general matter, it was urged that party notice will more often advance efficiency, not
815 impede it. Party notice often will reach the attorney general well ahead of court certification, and
816 may prompt earlier intervention.

817 The third Department of Justice suggestion was that it is better to set a specific 60-day
818 intervention period in the rule. If the rule is changed to say expressly that the court can reject the
819 constitutional challenge during the intervention period, the rule and the Committee Note will make
820 it clear that proceedings can continue. The intervention period need not delay the progress of the
821 action. The Department will benefit from a 60-day period because it has internal processes designed
822 to concentrate in a few persons the final decision whether the United States should intervene. These
823 questions arise regularly, come from all parts of the country, and uniform national control is essential
824 but also time-consuming.

825 General discussion began by asking whether a provision requiring a reasonable time to
826 intervene would work. It was responded that a general provision of this sort might work, but that
827 the proposed expansion of subdivision (c) ensures that district-court proceedings will not be delayed
828 by a set 60-day period. The Department will benefit from an assured 60 days. And the concern
829 about delay is further assuaged by the fact that the Department often is able to file its brief with the
830 motion to intervene.

831 It was suggested that it would be better to state the time to intervene as a reasonable period
832 no greater than 60 days. Or the time might be a reasonable period no less than 60 days. But further
833 support was offered for the flat 60-day period.

834 A different perspective was offered. A comprehensive survey of local rules shows that when
835 national rules call for action within a reasonable time, there is a strong tendency for related local
836 rules to set a specific time. A uniform specific time in the national rule will be useful.

837 This part of the discussion concluded by agreeing that the rule should say: "The Attorney
838 General has 60 days after the certification to intervene." Later discussion, however, modified this
839 provision to set the time as 60 days after the earlier of party notice or court certification, as described
840 below.

841 The question whether the challenging party should notify the Attorney General was reopened.
842 The need may be reduced by the simple relocation of the rule to a place that will draw attention.
843 Courts will be less likely to fail the duty to certify the challenge. The burden on the party, moreover,

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844 is untoward. Perhaps the present experience that courts do not always certify arises from failure of
845 parties to honor the present Rule 24(c) behest that they call the court's attention to the certification
846 duty. At any rate, sophisticated attorneys now frequently provide direct notice to the Department
847 and find it difficult to elicit a reaction. The response may well be: We cannot tell you what we will
848 do. Go ahead and file the challenge and we will decide. "Notice to the Department does not do much
849 good."

850 One response was that in Pennsylvania state courts parties are required to notify the state
851 Attorney General of challenges to a statute. This practice works very well in Pennsylvania, and
852 apparently works well in other states. The local federal district rules also seem to work. The burden
853 is slight. The modest increase in the party's burden is far outweighed by the benefit of notice. A
854 challenge to an Act of Congress is a serious matter. The United States has a substantial interest, and
855 should have notice. "This is a sensible way to move the action forward, to bring the right parties
856 before the court at the right time."

857 It also was suggested that an anomaly will arise if party notice is not required on challenging
858 a statute of a state that requires party notice to the attorney general when the challenge is made in
859 a state court. A state should not be less well protected when its statute is challenged in federal court.

860 There is a separate question about the consequences of a party's failure to give the required
861 notice. Will delay ensue when belated notice is given, or when the Department intervenes? What
862 if the Department intervenes after judgment? If we assume that notice has desirable effects, why not
863 state a consequence for failure to give notice? The "no forfeiture" provision proposed in subdivision
864 (d), carried forward from present Rule 24(c), may not fix the problem. It was responded that other
865 procedure rules impose obligations without defining specific sanctions for nonobservance. The most
866 likely consequence is that failure to give notice will slow the action down a bit. And the most likely
867 means of enforcement is that the first time the issue is raised, perhaps at a pretrial conference, the
868 court will direct that notice be given.

869 The need to worry about consequences for failure to give notice was addressed to pro se
870 cases. Forma pauperis actions are screened, but not other pro se cases.

871 Other issues also were raised. Section 2403 requires certification only when the Act of
872 Congress or state statute affects the public interest. Rule 5.1, both as published and in the discussion
873 draft, omits this limit. The Committee Note explains that the Attorney General should have the
874 opportunity to determine whether to argue that the public interest is affected. Eliminating this
875 requirement also relieves the court of any sense that it must draw fine distinctions in deciding
876 whether to certify the challenge. Appellate Rule 44(a), moreover, has eliminated the "public
877 interest" element. It is desirable to maintain consistency among the rules in this respect.

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878 The published draft and discussion draft carry forward the no-forfeiture language of present
879 Rule 24(c), stating that failure to serve the required notice, or the court's failure to certify, do not
880 forfeit "a constitutional right" otherwise timely asserted. It was objected that "right" smacks too
881 much of a legal conclusion — we do not know whether there is a right until the question has been
882 decided on the merits. It was concluded that "right" should be changed to "claim or defense."

883 The provision for notice by certified or registered mail was questioned on the ground that it
884 is obsolete now, or will be in the near future. Provision should be made for notice by electronic
885 mail. This provision in the rule will encourage Attorneys General to develop electronic mail boxes
886 for this specific purpose, greatly facilitating the speed of notice and immediate attention to it. It was
887 agreed that the method of service should be expanded by adding a provision allowing service by
888 sending notice to any electronic mail address established by an attorney general for this purpose. It
889 was further observed that with the CM/ECF system, a court could set up its system to send notice
890 to the Attorney General automatically when a Notice of Constitutional Question is filed, reducing
891 still further the slight burdens imposed by the service requirement.

892 A final suggestion was that those who are responsible for developing the civil cover sheet
893 should consider adding a box that directs attention to Rule 5.1. This strategy will not do much to
894 bring notice home to defendants who raise constitutional challenges, but it would help.

895 It was suggested that discussion draft 5.1(a)(1) should be revised to expand the Notice of
896 Constitutional Question. Present Rule 24(c) calls on the party to notify the court of the § 2403
897 certification duty. It was agreed that if this provision is to be added, the language would be: "stating
898 the question, identifying the paper that raises it, and calling the court's attention to its certification
899 duty under 28 U.S.C. § 2403." Support for the provision was found in concern that simply filing the
900 Notice of Constitutional Question will not actually bring the notice to the court's attention. With
901 electronic filing systems, judges get daily electronic notices of hundreds of events. Some judges
902 never see the notices, unless they say "motion." Others depend on their case managers to sort
903 through the notices. But it seems undesirable to address this level of detail in a national court rule.
904 Filing the Notice should suffice to call the court's attention — adding more words to the Notice is
905 not likely to make any difference in drawing the court's attention to the Notice, and once the Notice
906 has come to the court's attention the certification question is sufficiently identified. In the end, this
907 provision was removed from the motion to approve the discussion draft with a number of changes.

908 Discussion then turned to the combined effect of the party-notice requirement and the time
909 to intervene. It was urged that the time to intervene should run from the Notice, if Notice is given
910 earlier than the court's certification. Time periods generally run from party notice.

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911 An immediate response was that if the intervention period is tied to the Notice of
912 Constitutional question, it should not be tied to service of the Notice. The time of service can be
913 difficult to determine. If electronic service is adopted, moreover, filing and service will be virtually
914 simultaneous. Filing is a better trigger.

915 It was asked whether the Attorney General's interests are sufficiently protected by setting the
916 intervention period to the earlier of party notice or certification. Court certification suggests that the
917 court is taking the question seriously — that it is not inclined to dismiss the challenge without further
918 consideration. That may influence the Attorney General's evaluation of the need to intervene. It was
919 responded that the party notice should provide sufficient information to make an informed decision
920 whether to intervene.

921 The problem of tying intervention time to the party Notice was approached from a different
922 angle. A time period that runs from certification has a clear point of reference; there is no need to
923 determine the time of service, and no need to worry about the need to specify a time for service after
924 filing that ensures that the Attorney General actually receives the notice early in the intervention
925 period. There is a further advantage in looking to certification. Section 2403 requires the court to
926 certify the question and permit the United States to intervene. What happens if the court certifies
927 the fact of the challenge more than 60 days after the party notice? There is no reason to consider
928 exercising the Enabling Act authority to supersede the statute. Section 2403 probably requires the
929 court to allow intervention after certification unless Rule 5.1 is intended to supersede. Why create
930 a rule that may cause confusion about supersession, and — if there is no supersession — will be at
931 odds with the statute?

932 Discussion continued by accepting a motion that the rule provide that the court may enlarge
933 or reduce the 60-day presumptive intervention period. Turning to the event that triggers the
934 intervention period, it was urged that the period should run from the earlier event of notice or
935 certification. The parties can move to enlarge or shorten the period. Failure to rely on the earlier
936 event will result in delay. This suggestion was met by renewal of the arguments that it is simpler to
937 rely on certification to begin the intervention period. What is the purpose in requiring certification
938 if the time to intervene runs from notice? Notice is made to take over the role of certification
939 whenever it occurs earlier, and it is not likely that certification will come first. In many cases,
940 indeed, the court may not be aware of the action for some time after the Notice is filed. The
941 expanded version of Rule 5.1(c) ensures that the court can continue to act during the intervention
942 period, doing everything it otherwise might do apart from entering a final judgment invalidating a
943 statute. In response, it was suggested that the period should run from the party Notice as a reward
944 for filing the Notice.

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975 One general question is raised by subdivision (e). The background assumption, based on the
976 policies developed by the Committee on Court Administration and Case Management (CACM), is
977 that ordinarily nonparties have full access to electronic case files. It makes no difference whether
978 access is sought from a computer terminal in the courthouse or from a computer half a world away.
979 Subdivision (e) in its present form qualifies this assumption in actions for benefits under the Social
980 Security Act. The parties are allowed full electronic access to the court file, and nonparties are
981 allowed full access from the court's on-site computer. But nonparties are not allowed "remote
982 electronic access" to anything more than the docket and the court's "opinion, order, judgment, or
983 other disposition." The Department of Justice recommends that this exemption be expanded to
984 include immigration cases that involve immigration benefits, detention, or removal. CACM has
985 responded by recommending a "compromise provision." This provision would begin by exempting
986 the administrative record in immigration cases from electronic filing until a system is perfected for
987 redacting the administrative record at the time it is prepared. Electronic filing, with redaction, would
988 be required for all documents prepared for original filing in the district court or court of appeals. The
989 Department of Justice could accept the CACM proposal, but believes that immigration cases should
990 be treated in the same way as Social Security cases. There are tens of thousands of immigration
991 cases every year, and many of them find their way to the courts. The records commonly include
992 great amounts of intensely private information. This may be particularly true in asylum cases. Some
993 courts are swamped with immigration cases; they account for an astonishing portion of the Ninth
994 Circuit docket, and a large portion of the Second Circuit docket. The rule will be less complicated
995 if it treats social security and immigration cases the same way.

996 Professor Capra supported the Department position to the extent of suggesting that
997 immigration cases either should be treated in the same way as social security cases or should not be
998 given any special treatment. The middle road is not attractive.

999 It was suggested that the immigration bar will likely provide useful commentary on the
1000 desirability of the proposal for limited access. One special concern arises from projects to study the
1001 actual implementation of the immigration laws. Academic inquiry will be much easier with full
1002 electronic access from a remote location, and may be possible only on that basis. Template
1003 subdivision (e) provides that a court may allow remote access to the full file by remote means, but
1004 perhaps that is not protection enough.

1005 The Committee was asked to consider three approaches to immigration cases. The first was
1006 the "compromise" suggested by CACM; this approach was rejected. The second was to treat
1007 immigration cases in the same way as social security cases; the third was to say nothing about
1008 immigration cases in the rule. The Committee voted, with one abstention, to treat immigration cases
1009 in the same way as social security cases.

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1010 One judge asked why social security cases are given special treatment. Much of the
1011 information initially protected by the template rule is revealed in the opinion deciding the case. But
1012 it was agreed that not all of the information is revealed in the opinion, and agreed that the most
1013 sensitive and intimate information is most likely to be omitted from the opinion.

1014 Judge Fitzwater expressed the Subcommittee's hope that the advisory committees will adopt
1015 specific rules. The Subcommittee will try to offer its help as a resource on global issues. Work has
1016 begun on the assumption that the committees should accept the policy choices already recommended
1017 by CACM and adopted by the Judicial Conference. Departures should be undertaken only on finding
1018 strong justification.

1019 One question specific to the Civil Rule is whether a minor's name should be redacted to
1020 initials only, as provided by Template (a)(2). The Bankruptcy Rules Committee has limited the
1021 redaction requirement by adopting it for adversary proceedings and contested matters unless the
1022 minor being identified is the debtor in the case. If the minor is the debtor, full identification is
1023 necessary. It was observed that minors may be parties to litigation that is really brought and driven
1024 by their parents. And they may be parties to other forms of litigation that involve horrific events. The
1025 full name of the party may be important to the other parties, but the circumstances may call for denial
1026 of public access. There is no real risk that a party will not be able to identify its adversaries — if for
1027 some unusual reason the parties cannot agree to exchange the necessary information outside court
1028 filings, the court can order exchange on appropriate terms.

1029 A general question facing all the rules is posed by subdivision (f). This subdivision allows
1030 the court to limit or prohibit remote electronic access by nonparties to protect against widespread
1031 disclosure of private or sensitive information that is not otherwise protected by redaction under
1032 subdivision (a). The present draft may be longer than necessary to express the thought, but the
1033 central question is whether this is a desirable additional protection. The courts undoubtedly have
1034 authority to limit access without this express provision. But it helps to make the authority clear and
1035 to remind the parties. This thought was expanded by the observation that there is a big difference
1036 between allowing electronic access at the courthouse and allowing electronic access to anyone
1037 anywhere in the world. The template rule does not protect the last four numbers of social security,
1038 tax identification, or financial account numbers. Those four numbers alone are frequently used in
1039 requests to verify identity for telephone or on-line transactions. Diligent combing of court files could
1040 facilitate extensive identity theft. Some states may conclude that even this much remote electronic
1041 access is too much. But the Subcommittee has proceeded on the assumption that it is too late to
1042 reconsider the CACM decision to generally allow remote electronic access to anything that is
1043 accessible at the courthouse. Subdivision (f) may be all the more important in light of that basic
1044 starting point.

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1045 This concern about remote electronic access was met by the observation that as the PACER
1046 system operates today, remote access is allowed only with a password. Access is not available to
1047 random web surfers. At the same time, attorneys are advised to be careful about filing sensitive
1048 information. The Template Rule Committee Note repeats this advice.

1049 In the end, the Committee concluded that subdivision (f) is clearly acceptable.

1050 A separate question asked whether the categories of information protected by redaction
1051 should include home addresses. Earlier drafts called for disclosure only of the city and state of
1052 residence. The Bankruptcy Rules Committee believes that bankruptcy practice needs full home
1053 addresses. CACM spent a long time on this question, and concluded that generally redaction is not
1054 necessary. The Subcommittee has suggested that the Criminal Rules Committee may want to protect
1055 this information. But there has been a value judgment by CACM that generally redaction is not
1056 appropriate. At the same time, defendants in notorious cases may need protection. Individual
1057 defendants in securities or corporate implosion cases involving widespread public injury, for
1058 example, may be besieged by unhappy citizens if their home addresses are readily available in the
1059 files of high-profile litigation. Protection against remote electronic access under subdivision (f) may
1060 be some help, but perhaps greater protection is needed.

1061 An observer asked how this system is expected to work. If only the redacted paper is filed,
1062 how do other parties know what is intended? Part of the answer is that the rule does not require that
1063 an unredacted copy be filed. Subdivision (b) grants permission to file an unredacted copy under seal,
1064 but only if a redacted copy also is filed. To this extent it relies on the authority provided by §
1065 205(c)(3)(A)(iv) to adopt court rules that make the sealed copy “in addition to[] a redacted copy in
1066 the public file.” But subdivision (b) does not require that an unredacted copy be filed. The problem
1067 is addressed directly by subdivision (c) for cases in which a party elects to file a sealed reference list
1068 that describes full “identifiers” and associates each with a redacted identifier that is used in the filed
1069 papers. Presumably other parties will have access to the reference list, and will readily identify the
1070 redacted information. (And perhaps other parties will be able to adopt the first reference list,
1071 although that would create difficulties with the right to amend the reference list.) If there is no
1072 subdivision (c) reference list, a party who genuinely does not understand what is intended by any part
1073 of a redacted filing should be able to find out. Normally the filing party can be expected to provide
1074 the information directly to other parties. If cooperation is withheld, the court can decide whether
1075 there is reason to maintain confidentiality even among the parties.

1076 One clear problem that has not been addressed arises from trial transcripts. It may be self-
1077 defeating to redact trial testimony, and often it will be difficult. The status of trial transcripts as
1078 “filed” or not “filed” is unclear. It seems clear enough that a trial transcript is filed when it becomes
1079 part of the process of preparing a record for appeal. Similar questions arise with respect to trial

1080 exhibits — many courts do not now require that they be filed, but others may require filing. And the
1081 gradual adoption of electronic trial recording may lead to electronic imaging of trial exhibits.
1082 Further information is needed to support a coherent approach to trial transcripts and exhibits. The
1083 committees should work further on these questions.

1084 Further discussion of the question whether minors' names should be redacted to initials led
1085 to a different question. Subdivision (g) provides that a party may waive protection of its own
1086 information by filing the information without redaction. Does this override the provision of
1087 subdivision (a) that allows a court to override redaction of the listed forms of information? This
1088 question in turn led to the observation that the "unless the court orders otherwise" provision in
1089 subdivision (a) seems calculated to authorize greater disclosure, and does not address greater
1090 protection.

1091 The greater protection question in turn led to the question whether the Template Rule limits
1092 the court's authority to order protection under other rules or as a matter of inherent power. The
1093 Template Rule is deliberately not designed to address the general questions of sealing court records
1094 or access to trial. It does not address such other rules as the discovery protective order provisions
1095 in Rule 26(c). Rule 16 also may be a source of protective authority. But subdivision (a) might seem
1096 to imply a presumption that it is proper to disclose a minor's initials, the last four digits of a social
1097 security number, and so on. There may be legitimate needs for protection, and some litigants may
1098 be willing to seek advantage from another party's fear of injury from disclosure of even redacted
1099 information. It was agreed that a paragraph should be drafted for the Committee Note to address this
1100 concern, stating that the new rule does not imply any limitation on the exercise of other sources of
1101 protective authority.

1102 *Filed-Sealed Settlement Agreements*

1103 Tim Reagan presented a succinct reminder of the major findings of the FJC study of sealed
1104 settlement agreements. A survey of 288,846 civil cases found 1,270 cases — 0.44% of the total —
1105 with filed and sealed settlement agreements. They are rare. In almost all of these cases, the rest of
1106 the court file remained open and revealed any information about the litigation that might be a matter
1107 of public interest. Examination of a number of sealed agreements that became available for
1108 examination, moreover, showed that the settlement agreements themselves do not include any
1109 information of general public interest. They deny liability and state the amount of money to be paid,
1110 nothing more.

1111 The Committee approved, without dissent, a motion to ask Leonidas Ralph Mecham to send
1112 a letter to Senator Kohl describing the Federal Judicial Center's work and advising that the Advisory

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1113 Committee will continue to monitor court practices but does not intend to propose any new rules at
1114 this time.

1115 *Spring Meeting*

1116 Judge Rosenthal observed that the spring meeting will be busy with the need to consider
1117 public comments on the rules published for comment last August. The electronic discovery rules
1118 in particular are likely to generate extensive comment. But it also is desirable to begin planning for
1119 work to be done as the discovery and style projects wind down.

1120 One category of future work will involve matters of the sort that traditionally move directly
1121 between the Advisory Committee and the Standing Committee. Some possible topics are noted in
1122 the agenda materials. There is a thoughtful proposal to study developing practices in taking Rule
1123 30(b)(6) depositions of organizations. The longstanding proposal to adopt a rule that directly
1124 addresses the practice of securing “indicative rulings” from district courts while an appeal is pending
1125 seems useful. The ABA Litigation Section already has expressed approval of a Rule 48 amendment
1126 to cover jury polling. The Style Project has generated a number of ideas for a “Reform Agenda.”
1127 One of these ideas revives longstanding proposals to reconsider the entire package of pleading rules,
1128 whether for small changes or perhaps for more comprehensive revision. It even may be time to
1129 revive the Simplified Procedure project, in part because developing experience with discovery of
1130 computer-based information may make a simplified alternative system more attractive to more
1131 litigants.

1132 A second category of future work will involve other advisory committees. Every time a
1133 proposal dealing with the rules for counting time is published, one or more observers lament the
1134 confusions that inhere in the time rules and urge that a comprehensive revision be undertaken. It
1135 would be a great benefit to the bar if a uniform and clear set of time-counting conventions could be
1136 adopted for all of the rules sets. The task, however, will be complicated. It may invite
1137 reconsideration of the times presently allowed to take various actions. A change in the method of
1138 calculating periods of less than eleven days, for example, would virtually force reconsideration of
1139 the periods themselves.

1140 A second trans-committee project involves the evidence rules that linger on in the Civil
1141 Rules. There is a plausible argument that all evidence rules should be located in the Evidence Rules;
1142 the provisions in the Civil Rules may be seen as a simple residue of the days before the Evidence
1143 Rules were adopted. Some of the Civil Rules provisions, moreover, seem inconsistent with the
1144 Evidence Rules — Rule 32, for example, seems to permit use of deposition testimony in some
1145 circumstances not authorized by the Evidence Rules. And some of the Civil Rules provisions may
1146 escape much attention — Rule 65(a)(2), for example, provides that evidence taken at a preliminary

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1147 injunction hearing becomes part of the record on the trial and need not be repeated at trial. Working
1148 out the details of this project may prove difficult, particularly if the committees disagree on which
1149 rule should be favored in reconciling inconsistencies.

1150 All Committee members indicated that both the time-counting and the evidence rules projects
1151 are worthy subjects for future work.

1152 Before the Spring meeting, a memorandum will be circulated suggesting items for deletion
1153 from the standing (and growing) agenda, with the opportunity to nominate any of them for discussion
1154 at the meeting.

1155 Committee members were asked to consider priorities. Which projects are more pressing?
1156 Should the long-deferred project to revise the Rule 56 summary-judgment procedures be taken on
1157 at last, either to address relatively minor matters such as the brevity of the periods provided for
1158 responding to a motion or to undertake more thorough revisions to reflect long experience with local
1159 rules?

1160 The date for the Spring meeting will be set soon, most likely for some time in April.

Respectfully submitted,

Edward Cooper

Admiralty Rule G: Civil Forfeiture

Admiralty Rule G represents the culmination of several years of work to adapt the Supplemental Rules to the great growth of civil forfeiture actions. Many civil forfeiture statutes explicitly invoke the Supplemental Rules. The procedures that best serve civil forfeiture actions, however, often depart from the procedures that best serve traditional admiralty and maritime actions. Rule G was developed in close cooperation with the Department of Justice and representatives of the National Association of Criminal Defense Lawyers to establish distinctive forfeiture procedures within the framework of the Supplemental Rules. In addition, Rule G establishes new provisions to reflect enactment of the Civil Asset Forfeiture Reform Act of 2000, and to reflect developments in decisional and constitutional law. The result is a nearly complete separation of civil forfeiture procedure from Supplemental Rules A through F, invoking them for civil forfeiture only to address interstitial questions that are not covered by Rule G.

The only lengthy comments on Rule G were provided by the Department of Justice. A summary of all the comments is set out below.

Several modest changes in Rule G and the Committee Note are proposed as a result of the comments. They are identified in rule text and Committee Note by underlining. They also are identified by footnotes. The footnotes recommend adoption of most of the revisions, identify several suggestions that are not recommended, and leave some changes to be resolved by Committee discussion.

The changes that are most likely to require some discussion are those identified in note 6, relating to numerical limits on special interrogatories; note 9, recommending that subdivision (8)(c) be rewritten to clarify the relevant procedural alternatives; and note 11, raising a question whether the published Committee Note gave undue emphasis to the costs of publishing notice.

Conforming amendments to other Supplemental Rules were published with Rule G. An addition to Rule 26(a)(1)(E) was published, adding "a forfeiture action in rem arising from a federal statute" to the exemptions from initial disclosure requirements. There was no comment on these amendments.

In addition to the published proposals, a technical change in Civil Rule 14 is needed to conform cross-references to the Supplemental Rule C(6) provisions redesignated in the conforming amendments that were published with Rule G. Because this change is purely mechanical, it can be recommended to the Standing Committee with a recommendation for adoption without publication.

With the changes proposed below, it is recommended that Rule G be sent to the Standing Committee with a recommendation that it be proposed to the Judicial Conference for adoption.

**SUPPLEMENTAL RULES FOR CERTAIN
ADMIRALTY AND MARITIME¹
ASSET FORFEITURE CLAIMS**

Rule G. Forfeiture Actions In Rem

1 **(1) Scope.** This rule governs a forfeiture action in rem
2 arising from a federal statute. To the extent that this rule does
3 not address an issue, Supplemental Rules C and E and the
4 Federal Rules of Civil Procedure also apply.

5 **(2) Complaint.** The complaint must:

6 **(a)** be verified;

7 **(b)** state the grounds for subject-matter jurisdiction, in
8 rem jurisdiction over the defendant property, and
9 venue;

10 **(c)** describe the property with reasonable particularity;

11 **(d)** if the property is tangible, state its location when any
12 seizure occurred and—if different—its location when the
13 action is filed;

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

¹Robert J. Zapf, who has long been involved with the Maritime Law Association's work on the Supplemental Rules, suggests that "maritime" be stricken from the title "[b]ecause no currently living human being knows the difference between the admiralty claim and maritime claim." 2 Benedict's Maritime Bulletin 337 n.1 (Fourth Quarter 2004). The Department of Justice joins the recommendation, 004-CV-203, p. 10. **The change is recommended for adoption.**

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14 (e) identify the statute under which the forfeiture action
15 is brought; and

16 (f) state sufficiently detailed facts to support a reasonable
17 belief that the government will be able to meet its burden
18 of proof at trial.

19 **(3) Judicial Authorization and Process.**

20 (a) **Real Property.** If the defendant is real property, the
21 government must proceed under 18 U. S. C. § 985.

22 (b) **Other Property; Arrest Warrant.** If the defendant
23 is not real property:

24 (i) the clerk must issue a warrant to arrest the
25 property if it is in the government's possession,
26 custody or control²;

27 (ii) the court—on finding probable cause—must issue
28 a warrant to arrest the property if it is not in the
29 government's possession, custody or control and is
30 not subject to a judicial restraining order; and

² The Department of Justice suggests adding “custody or control” to provide a clear answer for situations in which it does not have physical possession. An example is the seizure of currency that is deposited in an interest-bearing account at a financial institution. **The change is recommended for adoption.**

31 **(iii)** a warrant is not necessary if the property is
32 subject to a judicial restraining order.

33 **(c) Execution of Process.**

34 **(i)** The warrant and any supplemental process must
35 be delivered to a person or organization authorized to
36 execute it, who may be: (A) a marshal; (B) someone
37 under contract with the United States; (C) someone
38 specially appointed by the court for that purpose; or
39 (D) any United States officer or employee.

40 **(ii)** The authorized person or organization must
41 execute the warrant and any supplemental process on
42 property in the United States as soon as practicable
43 unless:

44 **(A)** the property is in the government's
45 possession; or

46 **(B)** the court orders a different time when the
47 complaint is under seal, the action is stayed before
48 the warrant and supplemental process are
49 executed, or the court finds other good cause.

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50 (iii) The warrant and any supplemental process may
51 be executed within the district or, when authorized by
52 statute, outside the district.

53 (iv) If executing a warrant on property outside the
54 United States is required, the warrant may be
55 transmitted to an appropriate authority for serving
56 process where the property is located.

57 **(4) Notice.**

58 **(a) Notice by Publication.**

59 **(i) When Publication Is Required.** A judgment of
60 forfeiture may be entered only if the government has
61 published notice of the action within a reasonable
62 time after filing the complaint or at a time the court
63 orders. But notice need not be published if:

64 (A) the defendant property is worth less than
65 \$1,000 and direct notice is sent under Rule
66 G(4)(b) to every person the government can
67 reasonably identify as a potential claimant; or

68 **(B)** the court finds that the cost of publication
69 exceeds the property's value and that other means
70 of notice would satisfy due process.

71 **(ii) Content of the Notice.** Unless the court orders
72 otherwise, the notice must:

73 **(A)** describe the property with reasonable
74 particularity;

75 **(B)** state the times under Rule G(5) to file a claim
76 and to answer; and

77 **(C)** name the government attorney to be served
78 with the claim and answer.

79 **(iii) Frequency of Publication.** Published notice
80 must appear

81 **(A)** once a week for three consecutive weeks, or

82 **(B)** only once if, before the action was filed,

83 notice of nonjudicial forfeiture of the same

84 property was published on an official internet

85 government forfeiture site for at least 30

86 consecutive days, or in a newspaper of general

87 circulation for three consecutive weeks in a

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88 district where publication is authorized under Rule
89 G(4)(a)(iv).

90 **(iv) Means of Publication.** The government should
91 select from the following options a means of
92 publication reasonably calculated to notify potential
93 claimants of the action³:

94 **(A)** if the property is in the United States,
95 publication in a newspaper generally circulated in
96 the district where the action is filed, where the
97 property was seized, or where property that was
98 not seized is located;

99 **(B)** if the property is outside the United States,
100 publication in a newspaper generally circulated in
101 a district where the action is filed, in a newspaper
102 generally circulated in the country where the
103 property is located, or in legal notices published
104 and generally circulated in the country where the
105 property is located; or

³ A change in the Note has been suggested to reflect this text more closely.

106 (C) instead of (A) ~~and~~ or⁴ (B), posting a notice on
107 an official internet government forfeiture site for
108 at least 30 consecutive days.

109 **(b) Notice to Known Potential Claimants.**

110 **(i) Direct Notice Required.** The government must
111 send notice of the action and a copy of the complaint
112 to any person who reasonably appears to be a potential
113 claimant on the facts known to the government before
114 the end of the time for filing a claim under Rule
115 G(5)(a)(ii)(B).

116 **(ii) Content of the Notice.** The notice must state:

- 117 (A) the date when the notice is sent;
118 (B) a deadline for filing a claim, at least 35 days
119 after the notice is sent;
120 (C) that an answer or a motion under Rule 12
121 must be filed no later than 20 days after filing the
122 claim; and
123 (D) the name of the government attorney to be
124 served with the claim and answer.

⁴ This change is **recommended for adoption** as a style improvement.

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125 **(iii) Sending Notice.**

126 **(A)** The notice must be sent by means reasonably
127 calculated to reach the potential claimant.

128 **(B)** Notice may be sent to the potential claimant or
129 to the attorney representing the potential claimant
130 with respect to the seizure of the property or in a
131 related investigation, administrative forfeiture
132 proceeding, or criminal case.

133 **(C)** Notice sent to a potential claimant who is
134 incarcerated must be sent to the place of
135 incarceration.

136 **(D)** Notice to a person arrested in connection with
137 an offense giving rise to the forfeiture who is not
138 incarcerated when notice is sent may be sent to the
139 address that person last gave to the agency that
140 arrested or released the person.

141 **(E)** Notice to a person from whom the property
142 was seized who is not incarcerated when notice is
143 sent may be sent to the last address that person
144 gave to the agency that seized the property.

145 **(iv) When Notice Is Sent.** Notice by the following
146 means is sent on the date when it is placed in the mail,
147 delivered to a commercial carrier, or sent by electronic
148 mail.

149 **(v) Actual Notice.** A potential claimant who had
150 actual notice of a forfeiture action may not oppose or
151 seek relief from forfeiture because of the
152 government's failure to send the required notice.

153 **(5) Responsive Pleadings.**

154 **(a) Filing a Claim.**

155 **(i)** A person who asserts an interest in the defendant
156 property may contest the forfeiture by filing a claim in
157 the court where the action is pending. The claim
158 must:

- 159 **(A)** identify the specific property claimed;
160 **(B)** identify the claimant and state the claimant's
161 interest in the property;
162 **(C)** be signed by the claimant under penalty of
163 perjury; and

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164 (D) be served on the government attorney
165 designated under Rule G(4)(a)(ii)(C) or (b)(ii)(D).

166 (ii) Unless the court for good cause sets a different
167 time, the claim must be filed:

168 (A) by the time stated in a direct notice sent under
169 Rule G(4)(b);

170 (B) if notice was published but direct notice was
171 not sent to the claimant or the claimant's attorney,
172 no later than 30 days after final publication of
173 newspaper notice or legal notice under Rule
174 G(4)(a) or no later than 60 days after the first day
175 of publication on an official internet government
176 forfeiture site; or

177 (C) if notice was not published and direct notice
178 was not sent to the claimant or the claimant's
179 attorney:

180 (1) if the property was in government
181 possession when the complaint was filed, no
182 later than 60 days after the filing, not counting
183 any time when the complaint was under seal

184 or when the action was stayed before
185 execution of a warrant issued under Rule
186 G(3)(b); or
187 **(2)** if the property was not in government
188 possession when the complaint was filed, no
189 later than 60 days after the government
190 complied with 18 U.S.C. § 985(c) as to real
191 property, or 60 days after process was
192 executed on the property under Rule G(3).
193 **(iii)** A claim filed by a person asserting an interest as
194 a bailee must identify the bailor⁵.

⁵ The government recommends that new words be adopted here: “* * * must identify the bailor and state the authority to file a claim on the bailor’s behalf.” **It is recommended that the change not be made.** The arguments seem to be these: Present Rule C(6)(a)(ii) will be deleted, but the parallel provision for admiralty cases will carry forward. Each says that “an agent, bailee, or attorney must state the authority to file a statement of interest in or right against the property on behalf of another.” This expression is not perfect. What of a bailee who wishes to assert a claim on its own behalf, not on behalf of the bailor? A bailee for a term, for example, may very well have a claim based on seizure before the term expires. Both bailor and bailee may make claims. Present Rule C(6) should be read to require a statement of authority only if the bailee is making a claim, whether exclusively or in part, on behalf of the bailor. It may be as well to carry forward the words that will continue to be used in the surviving part of Rule C(6). The alternative suggested by the government is too restrictive — the new words would be “and state that the person is authorized to file a claim in the bailor’s behalf.” Those words, without qualification, would seem to exclude the right to file a claim on the bailee’s own behalf. The case cited by the government, *Via Mat Internat. South Am. Ltd. v. U.S.*, S.D.Fla.Dec.17, 2004, No 04-20518-CIV-Hoeveler, is one in which the owner actually filed a claim on its own behalf. The question was whether the bailee, who had “a less apparent connection to the money that was

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195 **(b) Answer.** A claimant must serve and file an answer to
196 the complaint or a motion under Rule 12 within 20 days
197 after filing the claim. A claimant waives an objection to
198 in rem jurisdiction or to venue if the objection is not made
199 by motion or stated in the answer.

200 **(6) Special Interrogatories.**

201 **(a) Time and Scope.** The government may serve special
202 interrogatories under Rule 33⁶ limited to the claimant’s

seized” from yet a different bailee, had “statutory standing” under Rule C(6). The owner elected to proceed administratively and achieved a final disposition (it got back all but \$80,000 of nearly \$2,580,000 seized in transit through Miami). The court found that the plaintiff bailee had no claim separate from the owner’s injury and dismissed the bailee’s claim, initially framed as one to recover the money. The bailee’s claim “was rendered invalid” when the owner elected to proceed administratively. This decision does not shed any light on the question whether a bailee may have standing to claim for its own injuries, one illustration of the standing questions we have decided not to address in Rule G. The government also points to a CAFRA provision, 18 U.S.C. § 983(d)(6)(B). Subsection (d) establishes an “innocent owner defense.” Paragraph (6) is part of defining “owner” for this purpose: “(6) In this subsection, the term ‘owner’ * * * (B) does not include— * * * (ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized * * *.” We have had lengthy discussions about the extent to which the definition of “owner” for this purpose should be carried forward to test claim standing. The Committee has continued to resist adoption of the CAFRA definition as a standing test.

⁶ The government proposes to leave this rule text as it is, but to revise the Note to say that the G(6) interrogatories do not count against the presumptive 25-interrogatory limit in Rule 33. That would create a dissonance between the rule and the Note. The subcommittee deliberately chose this mode of expression with the idea that the 25-interrogatory limit would apply. That view is noted in the Minutes for the April 2004 Advisory Committee meeting — “The special interrogatories are described as ‘under Rule 33’ to ensure that they count in applying the presumptive numerical limits of Rule 33.”

203 identity and relationship to the defendant property without
204 the court's leave at any time after the claim is filed and
205 before discovery is closed. But if the claimant serves a
206 motion to dismiss the action, the government must serve
207 the interrogatories within 20 days after the motion is
208 served.

209 **(b) Answers or Objections.** Answers or objections to
210 these interrogatories must be served within 20 days after
211 the interrogatories are served.

212 **(c) Government's Response Deferred.** The government
213 need not respond to a claimant's motion to dismiss the
214 action under Rule G(8)(b) until 20 days after the claimant
215 has answered these interrogatories.

If we are to make a change, there are several alternatives. The simplest is to delete the reference to Rule 33: "The government may serve special interrogatories ~~under Rule 33~~ limited to * * *." Admiralty Rule C(6)(c) has managed to do without any explicit incorporation of Rule 33. Rule 33 was added to Rule G(6) as a means of incorporating the numerical limit. Deletion is the best course if we want to avoid the limit. The Committee Note then could add that these are "special" interrogatories recognized for a specific purpose and that they do not count against the limit.

Yet a third approach has been suggested: the rule could impose an independent numerical limit: "The government may serve no more than five special interrogatories ~~under Rule 33~~ limited to the claimant's identity and * * *."

216 **(7) Preserving, Preventing Criminal Use, and Disposing**
217 **of Property; Sales.**

218 **(a) Preserving and Preventing Criminal use of**
219 **Property.** When the government does not have actual
220 possession of the defendant property the court, on motion
221 or on its own, may enter any order necessary to preserve
222 the property, ~~and~~ to prevent its removal or encumbrance,
223 or to prevent its use in a criminal offense⁷.

224 **(b) Interlocutory Sale or Delivery.**

225 **(i) Order to Sell.** On motion by a party or a person
226 having custody of the property, the court may order all
227 or part of the property sold if:

⁷ **This change is recommended for adoption.** The government recommends addition of these words — the brackets suggest that the enclosed words are not necessary to the purpose. The idea is that the government may seek to restrain use of property to commit crimes. The examples are an Internet domain name or a Website used to collect money for terrorists, to promote child pornography offenses, or to facilitate distribution of illegal drugs. The idea has obvious force. The government points out that the long tradition that equity does not enjoin a crime has given way. CAFRA specifically authorizes an ex parte order to seize real property “without prior notice and an opportunity for the property owner to be heard,” 18 U.S.C. § 985(d)(1)(B)(ii). The government offers as an example an order to seize a hotel “where drug activity was rampant,” *U.S. v. All Right, Title and Interest . . . Kenmore Hotel*, 888 F. Supp. 580 (S.D.N.Y.1995). It also points to 18 U.S.C. § 1345, which authorizes a civil action by the Attorney General to enjoin fraud, banking law violations, and health-care offenses.

228 (A) the property is perishable or at risk of
229 deterioration, decay, or injury by being detained in
230 custody pending the action;

231 (B) the expense of keeping the property is
232 excessive or is disproportionate to its fair market
233 value;

234 (C) the property is subject to a mortgage or to
235 taxes on which the owner is in default; or

236 (D) the court finds other good cause.

237 (ii) **Who Makes the Sale.** A sale must be made by a
238 United States agency that has custody of the property,
239 by the agency's contractor, or by any person the court
240 designates.

241 (iii) **Sale Procedures.** The sale is governed by 28
242 U.S.C. §§ 2001, 2002, and 2004, unless all parties,
243 with the court's approval, agree to the sale, aspects of
244 the sale, or different procedures.

245 (iv) **Sale Proceeds.** Sale proceeds are a substitute res
246 subject to forfeiture in place of the property that was
247 sold. The proceeds must be held in an interest-

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248 bearing account maintained by the United States
249 pending the conclusion of the forfeiture action.

250 **(v) Delivery on a Claimant's Motion.** The court may
251 order that the property be delivered to the claimant
252 pending the conclusion of the action if the claimant
253 shows circumstances that would permit sale under (i)
254 and gives security under these rules.

255 **(c) Disposing of Forfeited Property.** Upon entry of a
256 forfeiture judgment, the property or proceeds from selling
257 the property must be disposed of as provided by law.

258 **(8) Motions.**

259 **(a) Motion To Suppress Use of the Property as**
260 **Evidence.** If the defendant property was seized, a party
261 with standing to contest the lawfulness of the seizure may
262 move to suppress use of the property as evidence.
263 Suppression does not affect forfeiture of the property
264 based on independently derived evidence.

265 **(b) Motion To Dismiss the Action.**

266 (i) A claimant who establishes standing to contest
267 forfeiture may move to dismiss the action under Rule
268 12(b).

269 (ii) In an action governed by 18 U. S. C. §
270 983(a)(3)(D) the complaint may not be dismissed on
271 the ground that the government did not have adequate
272 evidence at the time the complaint was filed to
273 establish the forfeitability of the property. The
274 sufficiency of the complaint is governed by Rule G(2).

275 **(c) Motion To Strike a Claim or Answer.⁸**

276 (i) At any time before trial, the government may move
277 to strike a claim or answer:

278 (A) for failing to comply with Rule G(5) or (6); or

279 (B) because the claimant lacks standing to contest
280 the forfeiture.

281 (ii) The government's motion must be decided before
282 any motion by the claimant to dismiss the action.

⁸ The government recognizes the decision not to address claim standing in Rule G. But it urges that "the abundance of recent case law dealing with challenges to a claimant's standing" justifies further clarification of the intended operation of Rule G(8)(c). An alternative text is offered below.

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283 (iii) If, because material facts are in dispute, a motion
284 under (i)(B) cannot be resolved on the pleadings, the
285 court must conduct a hearing. The claimant has the
286 burden of establishing standing based on a
287 preponderance of the evidence.

288 *Proposed Alternative (c)*

289 (c) (i) At any time before trial, the government may move
290 to strike a claim or answer:

291 (A) for failing to comply with Rule G(5) or (6), or

292 (B) because the claimant lacks standing.

293 (ii) The motion:

294 (A) must be decided before any motion by the
295 claimant to dismiss the action;

296 (B) may be presented as a motion for judgment on

297 the pleadings or as a motion to determine after a

298 hearing or by summary judgment whether the

299 claimant can carry the burden of establishing

300 standing by a preponderance of the evidence.⁹

⁹ This alternative seeks to reach two goals. One is to correct a mis-step in published G(8)(c)(iii): “If, because material facts are in dispute, a motion under (i)(B) cannot be resolved on the pleadings * * *.” Disputes about material facts go

to the appropriateness of summary judgment, not deciding a motion for judgment on the pleadings. The more general goal is to provide better guidance on the alternative means to challenge claim standing. If the claim fails on its face to show standing, a motion to strike or for judgment on the pleadings against the claimant is proper. If the claim seems on its face to show standing, the facts that support standing can be tested by summary judgment or a hearing. The proposed Alternative (c) clarifies the motions that the government may file to challenge compliance with subdivisions (5) or (6) or to challenge standing.

The government raises a question that goes to one of our style conventions. (c)(ii)(B) says the government may present the motion as “a motion for judgment on the pleadings *or* as a motion to determine * * *.” “or” is, by our convention, inclusive rather than exclusive: the intent is that the government can move for judgment on the pleadings, then for summary judgment, and then for a determination after a hearing. Or, in some circumstances, might mix and match motions in a different sequence. Is this clear enough? Or should we add an explicit Note statement? Or depart from convention and be more explicit in the rule text?

New Committee Note language is sketched here, rather than in the Committee Note on (8)(c) because the suggested drafting remains tentative:

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a plaintiff has standing. It also reflects the procedure to test compliance with subdivisions (5) and (6).

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failing to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (c)(ii) directs that a motion to strike a claim or answer be decided before any motion by the claimant to dismiss the action. A claimant who lacks standing is not entitled to challenge the forfeiture on the merits.

Paragraph (c)(ii) further identifies the three procedures for addressing claim standing. If a claim fails on its face to show facts that support claim standing, the claim can be dismissed by judgment on the pleadings. If the claim shows facts that would support claim standing, those facts can be tested by a motion for summary judgment. If material facts are disputed, precluding a grant of summary judgment, the court may hold an evidentiary hearing. The evidentiary hearing is held by the

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(d) Petition To Release Property.

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(i) If a United States agency or an agency's contractor holds property for judicial or nonjudicial forfeiture under a statute governed by 18 U.S.C. § 983(f), a person who has filed a claim to the property may petition for its release under § 983(f).

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(ii) If a petition for release is filed before a judicial forfeiture action is filed against the property, the petition may be filed either in the district where the property was seized or in the district where a warrant to seize the property issued. If a judicial forfeiture action against the property is later filed in another district—or if the government shows that the action will be filed in another district—the petition may be transferred to that district under 28 U.S.C. § 1404.

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(e) Excessive Fines. A claimant may seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth

court without a jury. The claimant has the burden to establish claim standing at a hearing; procedure on a government summary-judgment motion reflects this allocation of the burden.

320 Amendment by motion for summary judgment or by
 321 motion made after entry of a forfeiture judgment if:

322 (i) the claimant has pleaded the defense under Rule 8,
 323 and

324 (ii) the parties have had the opportunity to conduct
 325 civil discovery on the defense.

326 **(9) Trial.**

327 Trial is to the court unless any party demands trial by jury
 328 under Rule 38.

Committee Note

Rule G is added to bring together the central procedures that govern civil forfeiture actions. Civil forfeiture actions are in rem proceedings, as are many admiralty proceedings. As the number of civil forfeiture actions has increased, however, reasons have appeared to create sharper distinctions within the framework of the Supplemental Rules. Civil forfeiture practice will benefit from distinctive provisions that express and focus developments in statutory, constitutional, and decisional law. Admiralty practice will be freed from the pressures that arise when the needs of civil forfeiture proceedings counsel interpretations of common rules that may not be suitable for admiralty proceedings.

Rule G generally applies to actions governed by the Civil Asset Forfeiture Reform Act of 2000 (CAFRA) and also to actions excluded from it. The rule refers to some specific CAFRA provisions; if these statutes are amended, the rule should be adapted to the new provisions during the period required to amend the rule.

Rule G is not completely self-contained. Subdivision (1) recognizes the need to rely at times on other Supplemental Rules and

the place of the Supplemental Rules within the basic framework of the Civil Rules.

Supplemental Rules A, C, and E are amended to reflect the adoption of Rule G.

Subdivision (1)

Rule G is designed to include the distinctive procedures that govern a civil forfeiture action. Some details, however, are better supplied by relying on Rules C and E. Subdivision (1) incorporates those rules for issues not addressed by Rule G. This general incorporation is at times made explicit—subdivision (7)(b)(v), for example, invokes the security provisions of Rule E. But Rules C and E are not to be invoked to create conflicts with Rule G. They are to be used only when Rule G, fairly construed, does not address the issue.

The Civil Rules continue to provide the procedural framework within which Rule G and the other Supplemental Rules operate. Both Rule G(1) and Rule A state this basic proposition. Rule G, for example, does not address pleadings amendments. Civil Rule 15 applies, in light of the circumstances of a forfeiture action.

Subdivision (2)

Rule E(2)(a) requires that the complaint in an admiralty action “state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.” Application of this standard to civil forfeiture actions has evolved to the standard stated in subdivision (2)(f). The complaint must state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. *See U.S. v. Mondragon*, 313 F.3d 862 (4th Cir.2002). Subdivision (2)(f) carries this forfeiture case law forward without change.

Subdivision (3)

Subdivision (3) governs in rem process in a civil forfeiture action.

Paragraph (a). Paragraph (a) reflects the provisions of 18 U.S.C. § 985.

Paragraph (b). Paragraph (b) addresses arrest warrants when the defendant is not real property. Subparagraph (i) directs the clerk to issue a warrant if the property is in the government's possession, custody, or control¹⁰. If the property is not in the government's possession, custody, or control and is not subject to a restraining order, subparagraph (ii) provides that a warrant issues only if the court finds probable cause to arrest the property. This provision departs from former Rule C(3)(a)(i), which authorized issuance of summons and warrant by the clerk without a probable-cause finding. The probable-cause finding better protects the interests of persons interested in the property. Subparagraph (iii) recognizes that a warrant is not necessary if the property is subject to a judicial restraining order. The government remains free, however, to seek a warrant if it anticipates that the restraining order may be modified or vacated.

Paragraph (c). Subparagraph (ii) requires that the warrant and any supplemental process be served as soon as practicable unless the property is already in the government's possession. But it authorizes the court to order a different time. The authority to order a different time recognizes that the government may have secured orders sealing the complaint in a civil forfeiture action or have won a stay after filing. The seal or stay may be ordered for reasons, such as protection of an ongoing criminal investigation, that would be defeated by prompt service of the warrant. Subparagraph (ii) does not reflect any independent ground for ordering a seal or stay, but merely reflects the consequences for execution when sealing or a stay is ordered. A court also may order a different time for service if good cause is

¹⁰ This addition corresponds to a parallel addition suggested for the text of subdivision (3).

shown for reasons unrelated to a seal or stay. Subparagraph (iv) reflects the uncertainty surrounding service of an arrest warrant on property not in the United States. It is not possible to identify in the rule the appropriate authority for serving process in all other countries. Transmission of the warrant to an appropriate authority, moreover, does not ensure that the warrant will be executed. The rule requires only that the warrant be transmitted to an appropriate authority.

Subdivision (4)

Paragraph (a). Paragraph (a) reflects the traditional practice of publishing notice of an in rem action.

Subparagraph (i) recognizes two exceptions to the general publication requirement. Publication is not required if the defendant property is worth less than \$1,000 and direct notice is sent to all reasonably identifiable potential claimants as required by subdivision (4)(b). Publication also is not required if the cost would exceed the property's value and the court finds that other means of notice would satisfy due process. Publication on a government-established internet forfeiture site, as contemplated by subparagraph (iv), would be at a low marginal publication cost, which would likely be the cost to compare to the property value.

Subparagraph (iv) states the basic criterion for selecting the means and method of publication. The purpose is to adopt a means reasonably calculated to reach potential claimants. The government should choose among these means a method that is reasonably ~~A reasonable choice of the means~~ likely to reach potential claimants at a cost reasonable in the circumstances ~~suffices~~.¹¹

¹¹ The change is made so that the Note reflects the Rule text, which requires only choice of a means of notice reasonably calculated to reach potential claimants. One draft of the rule would have required a means of notice "reasonably calculated to be the most effective to notify potential claimants." The Department objected that this provision would invite endless arguments that it should have published in a different newspaper, or in a different location, and so on. The rule was revised back to its present form, relying in part on the statement that the government serves its own interests by seeking the most effective means of publication. The revised

If the property is in the United States and newspaper notice is chosen, publication may be where the action is filed, where the property was seized, or—if the property was not seized—where the property is located. Choice among these places is influenced by the probable location of potential claimants.

If the property is not in the United States, account must be taken of the sensitivities that surround publication of legal notices in other countries. A foreign country may forbid local publication. If potential claimants are likely to be in the United States, publication in the district where the action is filed may be the best choice. If potential claimants are likely to be located abroad, the better choice may be publication by means generally circulated in the country where the property is located.

Newspaper publication is not a particularly effective means of notice for most potential claimants. Its traditional use is best defended by want of affordable alternatives. Paragraph (iv)(C) contemplates a government-created internet forfeiture site that would provide a single easily identified means of notice. Such a site could allow much more direct access to notice as to any specific property than publication provides.

Paragraph (b). Paragraph (b) is entirely new. For the first time, Rule G expressly recognizes the due process obligation to send notice to any person who reasonably appears to be a potential claimant.

Subparagraph (i) states the obligation to send notice. Many potential claimants will be known to the government because they have filed claims during the administrative forfeiture stage. Notice must be sent, however, no matter what source of information makes it reasonably appear that a person is a potential claimant. The duty to send notice terminates when the time for filing a claim expires.

sentence tracks the rule text, carrying forward the published Note suggestion that cost enters the calculation. **The change is recommended for adoption, but subject to discussion of the question whether the published reference to reasonable cost was too favorable to the government.**

Notice of the action does not require formal service of summons in the manner required by Rule 4 to initiate a personal action. The process that begins an in rem forfeiture action is addressed by subdivision (3). This process commonly gives notice to potential claimants. Publication of notice is required in addition to this process. Due process requirements have moved beyond these traditional means of notice, but are satisfied by practical means that are reasonably calculated to accomplish actual notice.

Subparagraph (ii)(B) directs that the notice state a deadline for filing a claim that is at least 35 days after the notice is sent. This provision applies both in actions that fall within 18 U.S.C. § 983(a)(4)(A) and in other actions. Section 983(a)(4)(A) states that a claim should be filed no later than 30 days after service of the complaint. The variation introduced by subparagraph (ii)(B) reflects the procedure of § 983(a)(2)(B) for nonjudicial forfeiture proceedings. The nonjudicial procedure requires that a claim be filed “not later than the deadline set forth in a personal notice letter (which may be not earlier than 35 days after the date the letter is sent) * * *.” This procedure is as suitable in a civil forfeiture action as in a nonjudicial forfeiture proceeding. Thirty-five days after notice is sent ordinarily will extend the claim time by no more than a brief period; a claimant anxious to expedite proceedings can file the claim before the deadline; and the government has flexibility to set a still longer period when circumstances make that desirable.

Subparagraph (iii) begins by stating the basic requirement that notice must be sent by means reasonably calculated to reach the potential claimant. No attempt is made to list the various means that may be reasonable in different circumstances. It may be reasonable, for example, to rely on means that have already been established for communication with a particular potential claimant. The government’s interest in choosing a means likely to accomplish actual notice is bolstered by its desire to avoid post-forfeiture challenges based on arguments that a different method would have been more likely to accomplish actual notice. Flexible rule language accommodates the rapid evolution of communications technology.

Notice may be directed to a potential claimant through counsel, but only to counsel already representing the claimant with respect to

the seizure of the property, or in a related investigation, administrative forfeiture proceeding, or criminal case. Notice to counsel provides a desirable safety net when notice also is sent to the potential claimant, adding protection against the risk that notice to the claimant may miscarry. But this provision should be used to substitute for notice to a potential claimant only when notice to counsel reasonably appears to be the most reliable means of notice.¹²

Subparagraph (iii)(C) reflects the basic proposition that notice to a potential claimant who is incarcerated must be sent to the place of incarceration. Notice directed to some other place, such as a pre-incarceration residence, is less likely to reach the potential claimant. This provision does not address due process questions that may arise if a particular prison has deficient procedures for delivering notice to prisoners. See *Dusenbery v. U.S.*, 534 U.S. 161 (2002).

Items (D) and (E) of subparagraph (iii) authorize the government to rely on an address given by a person who is not incarcerated. The address may have been given to the agency that arrested or released the person, or to the agency that seized the property. The government

¹² **This change is recommended, subject to a possible addition described at the end of this footnote that is not recommended.** The government “strongly objects” to the published sentence. It states that it typically sends notice both to the potential claimant and to counsel, but the purpose of this provision “is to make clear that in those cases where the effort to send the notice to the claimant turned out, for any reason, to be inadequate, the sending of notice to counsel would preclude any attempt by the claimant to challenge the forfeiture on grounds unrelated to the merits of the case.” The rule provision for notice to counsel was strongly resisted by NACDL, who protested that it imposes duties on counsel that properly should be borne by the government. The present Note sentence was deliberately crafted to address these concerns. One response to the government’s present concern would be to revise the rule to allow notice to counsel only if notice also is sent to the potential claimant. But the revised Note language seems to do the job better. The government would be still better pleased if the Note could read: “* * * adding protection against the risk that notice to the claimant might miscarry. If notice is directed to the claimant but miscarries, notice to counsel satisfies this rule. But this provision should be used to substitute for notice to a potential claimant * * *.” The only question is whether we are prepared to be adamant about this proposition.

is not obliged to undertake an independent investigation to verify the address.¹³

Subparagraph (iv) identifies the date on which notice is considered to be sent for some common means, without addressing the circumstances for choosing among the identified means or other means. The date of sending should be determined by analogy for means not listed. Facsimile transmission, for example, is sent upon transmission. Notice by personal delivery is sent on delivery.

Subparagraph (v), finally, reflects the purpose to effect actual notice by providing that a potential claimant who had actual notice of a forfeiture proceeding cannot oppose or seek relief from forfeiture because the government failed to comply with subdivision (4)(b).

Subdivision (5)

Paragraph (a). Paragraph (a) establishes that the first step of contesting a civil forfeiture action is to file a claim. A claim is required by 18 U.S.C. § 983(a)(4)(A) for actions covered by § 983. Paragraph (a) applies this procedure as well to actions not

¹³ The government suggests that this paragraph be substantially expanded, as set out below. Its concern is that a potential claimant may give one address to agency officials actually involved with arrest, release, or seizure, and give a different address to an agency "agent or employee of his acquaintance who had no connection whatsoever with the instant case." It does not want the burden of cross-agency inquiry in every case. Its proposed substitute Note paragraph is:

Items (D) and (E) of subparagraph (iii) authorize the Government to rely on an address that the potential claimant has provided to the Government in connection with the seizure of the defendant property, or in connection with the potential claimant's arrest or release in a related criminal case. The Government is not obliged to undertake an independent investigation to verify the address or to take steps to find a better one, nor is the Government required to verify that it did not obtain a different address for the potential claimant in an unrelated matter or investigation.

There may be nothing wrong with any of these suggestions. The central questions are whether this much advice is appropriate for a Committee Note, and whether the Committees can be sufficiently confident of the advice. **It is recommended that the Note not be expanded.**

covered by § 983. “Claim” is used to describe this first pleading because of the statutory references to claim and claimant. It functions in the same way as the statement of interest prescribed for an admiralty proceeding by Rule C(6), and is not related to the distinctive meaning of “claim” in admiralty practice.

If the claimant states its interest in the property to be as bailee, the bailor ~~should~~ must¹⁴ be identified.

The claim must be signed under penalty of perjury by the person making it. An artificial body that can act only through an agent may authorize an agent to sign for it. Excusable inability of counsel to obtain an appropriate signature may be grounds for an extension of time to file the claim.

Paragraph (a)(ii) sets the time for filing a claim. Item (C) applies in the relatively rare circumstance in which notice is not published and the government did not send direct notice to the claimant because it did not know of the claimant or did not have an address for the claimant.

Paragraph (b). Under 18 U.S.C. § 983(a)(4)(B), which governs many forfeiture proceedings, a person who asserts an interest by filing a claim “shall file an answer to the Government’s complaint for forfeiture not later than 20 days after the date of the filing of the claim.” Paragraph (b) recognizes that this statute works within the general procedures established by Civil Rule 12. Rule 12(a)(4) suspends the time to answer when a Rule 12 motion is served within the time allowed to answer. Continued application of this rule to proceedings governed by § 983(a)(4)(B) serves all of the purposes advanced by Rule 12(a)(4), see *U.S. v. \$8,221,877.16*, 330 F.3d 141 (3d Cir. 2003); permits a uniform procedure for all civil forfeiture actions; and recognizes that a motion under Rule 12 can be made only after a claim is filed that provides background for the motion.

Failure to present an objection to in rem jurisdiction or to venue by timely motion or answer waives the objection. Waiver of such

¹⁴ The government correctly points out that the rule text says “must.”

objections is familiar. An answer may be amended to assert an objection initially omitted. But Civil Rule 15 should be applied to an amendment that for the first time raises an objection to in rem jurisdiction by analogy to the personal jurisdiction objection provision in Civil Rule 12(h)(1)(B). The amendment should be permitted only if it is permitted as a matter of course under Rule 15(a).

A claimant's motion to dismiss the action is further governed by subdivisions (6)(c), (8)(b), and (8)(c).

Subdivision (6)

Subdivision (6) illustrates the adaptation of an admiralty procedure to the different needs of civil forfeiture. Rule C(6) permits interrogatories to be served with the complaint in an in rem action without limiting the subjects of inquiry. Civil forfeiture practice does not require such an extensive departure from ordinary civil practice. It remains useful, however, to permit the government to file limited interrogatories at any time after a claim is filed, to gather information that bears on the claimant's standing. Subdivisions (8)(b) and (c) allow a claimant to move to dismiss only if the claimant has standing, and recognize the government's right to move to dismiss a claim for lack of standing. Subdivision (6) interrogatories are integrated with these provisions in that the interrogatories are limited to the claimant's identity and relationship to the defendant property. If the claimant asserts a relationship to the property as bailee, the interrogatories can inquire into the bailor's interest in the property and the bailee's relationship to the bailor. The claimant can accelerate the time to serve subdivision (6) interrogatories by serving a motion to dismiss—the interrogatories must be served within 20 days after the motion is served. Integration is further accomplished by deferring the government's obligation to respond to a motion to dismiss until 20 days after the claimant moving to dismiss has answered the interrogatories.

The statement that subdivision (6) interrogatories are served under Rule 33 recognizes that these interrogatories are included in applying the numerical limit in Rule 33(a).

Subdivision (6) supersedes the discovery “moratorium” of Rule 26(d) and the broader interrogatories permitted for admiralty proceedings by Rule C(6).

Subdivision (7)

Paragraph (a). Paragraph (a) is adapted from Rule E(9)(b). It provides for preservation orders when the government does not have actual possession of the defendant property. It also goes beyond Rule E(9) by recognizing the need to prevent use of the defendant property in ongoing criminal offenses.¹⁵

Paragraph (b). Paragraph (b)(i)(C) recognizes the authority, already exercised in some cases, to order sale of property subject to a defaulted mortgage or to defaulted taxes. The authority is narrowly confined to mortgages and tax liens; other lien interests may be addressed, if at all, only through the general good-cause provision. The court must carefully weigh the competing interests in each case. ~~This provision does not address the questions whether a mortgagee or other lien holder can force sale of property held for forfeiture or whether the court can enjoin the sale.~~¹⁶ Neither does it attempt to

¹⁵ This new sentence reflects the recommendation to add new language to the G(7)(a) rule text.

¹⁶ **Deletion of these two sentences is recommended.** The government observes that this sentence is intended to be neutral, but “may have the unintended effect of suggesting that there is some uncertainty regarding a matter of law that is in fact well-settled.” It thinks it would be better to revise this sentence to read: “This provision does not change the existing law with respect to the authority of the court to enjoin third parties from collecting outstanding mortgage payments or taxes through foreclosure.” That version reduces the statement of matters not touched by the rule — it omits any reference to the lien holder’s ability to foreclose absent a federal-court injunction. It also may seem to imply what the government asserts — that the law is well-settled. A modified approach might be to say: “This provision leaves it to the courts to apply and develop the law governing the right of a mortgagee or other lien holder to force sale of property held for forfeiture and the law governing the forfeiture court’s authority to enjoin a sale.” The government responds that “there is simply no way to be ‘neutral’ when one side believes the law is well-settled and the other believes that it is not.” It suggests that this sentence be dropped from the Note. That suggestion seems sensible; over-long and over-suggestive Notes need to be resisted vigorously. We might do well to drop the next

account for the interest that a crime victim may have in restoration of forfeited property under 18 U.S.C. § 981(e)(6).

Paragraph (b)(i)(D) establishes authority to order sale for good cause. Good cause may be shown when the property is subject to diminution in value—the classic example is a load of fresh fish. Care should be taken before ordering sale to avoid diminished value.¹⁷ In some cases the government and claimants will agree to sale. But this ground should be invoked with restraint in circumstances that do not involve physical deterioration. An automobile, for example, is likely to lose value continually unless it is a collector's item. Shares of stock are subject to market-value fluctuations. But the government's interest in maximizing the value gained upon forfeiture and in avoiding storage costs must be balanced against the claimant's interests. A claimant may prefer to regain the specific asset, or to retain a voice in the timing of sale in relation to market fluctuations through the agreed-sale provisions of (b)(iii).

Paragraph (b)(iii) recognizes that if the court approves, the interests of all parties may be served by their agreement to sale, aspects of the sale, or sale procedures that depart from governing statutory procedures.

sentence as well, rather than rewrite to say “This provision does not attempt to account for the interest that a crime victim may have * * *.”

¹⁷ **It is recommended that the balance of this paragraph be deleted. It is better to avoid a possibly tendentious statement on a subject that can be left to sensible development in the courts.** The government initially suggested that this sentence be deleted, and the balance of this paragraph be shortened “simply to state that the balancing of interests of all parties, including victims, should be taken into account in determining whether or not to order an interlocutory sale.” The government correctly observes that it had sought to include “diminution in the value of the property” as a ground for interlocutory sale. The compromise in the drafting process was to include this Note paragraph explaining that diminution in value may be “good cause” for an interlocutory sale. The need for compromise arose from the strong objections made by some subcommittee members that the claimant has a strong interest in the timing of sale. Markets fluctuate. A claimant also may have a strong non-market interest: “I know and trust and love my 2002 Accord, they are not making that version any more, and I would rather have it back a year from now than have the money representing its higher current market price.” The compromise is adequately protected by the simple statement that care should be taken.

Paragraph (c) draws from Rule E(9)(a), (b), and (c). Disposition of the proceeds as provided by law may require resolution of disputed issues. A mortgagee's claim to the property or sale proceeds, for example, may be disputed on the ground that the mortgage is not genuine. An undisputed lien claim, on the other hand, may be recognized by payment after an interlocutory sale.

Subdivision (8)

Subdivision (8) addresses a number of issues that are unique to civil forfeiture actions.

Paragraph (a). Standing to suppress use of seized property as evidence is governed by principles distinct from the principles that govern claim standing. A claimant with standing to contest forfeiture may not have standing to seek suppression. Rule G does not of itself create a basis of suppression standing that does not otherwise exist.

Paragraph (b). Paragraph (b)(i) is one element of the system that integrates the procedures for determining a claimant's standing to claim and for deciding a claimant's motion to dismiss the action. Under paragraph (c)(ii), a motion to dismiss the action cannot be addressed until the court has decided any government motion to strike the claim or answer. This procedure is reflected in the (b)(i) reminder that a motion to dismiss the forfeiture action may be made only by a claimant who establishes claim standing. The government, moreover, need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered any subdivision (6) interrogatories.

Paragraph (b)(ii) mirrors 18 U.S.C. § 983(a)(3)(D). It applies only to an action independently governed by § 983(a)(3)(D), implying nothing as to actions outside § 983(a)(3)(D). The adequacy of the complaint is measured against the pleading requirements of subdivision (2), not against the quality of the evidence available to the government when the complaint was filed.

Paragraph (c). As noted with paragraph (b), paragraph (c) governs the procedure for determining whether a claimant has standing. It does not address the principles that govern claim standing.^{18 19}

Paragraph (c)(i)(A) provides that the government may move to strike a claim or answer for failure to comply with the pleading requirements of subdivision (5) or to answer subdivision (6) interrogatories. As with other pleadings, the court should strike a claim or answer only if satisfied that an opportunity should not be afforded to cure the defects under Rule 15. So too, not every failure to respond to subdivision (6) interrogatories warrants an order striking the claim. But the special role that subdivision (6) plays in the scheme for determining claim standing may justify a somewhat more demanding approach than the general approach to discovery sanctions under Rule 37.

Paragraph (d). The hardship release provisions of 18 U.S.C. § 983(f) do not apply to a civil forfeiture action exempted from § 983 by § 983(i).

Paragraph (d)(ii) reflects the venue provisions of 18 U.S.C. § 983(f)(3)(A) as a guide to practitioners. In addition, it makes clear the status of a civil forfeiture action as a “civil action” eligible for transfer under 28 U.S.C. § 1404. A transfer decision must be made on the circumstances of the particular proceeding. The district where the forfeiture action is filed has the advantage of bringing all related proceedings together, avoiding the waste that flows from consideration of ~~the~~ different parts of the same forfeiture proceeding

¹⁸ **These new words are recommended.** The government suggests adding two sentences: “Nor does this Rule include a definition of claim standing. That omission indicates nothing other than the Rule’s neutrality on this still developing substantive legal issue.” **These sentences are not recommended.**

¹⁹ The government also would like a statement that Rule G(8)(c) does not preclude a government motion to dismiss a claim on grounds other than lack of claim standing. Dismissal as a discovery sanction under Rule 37 is offered as an example. Any argument for this negative implication from (8)(c) would be so strained that adding still further language to the Note seems unnecessary. **It is recommended that nothing be added to the Note.**

in the court where the warrant issued or the court where the property was seized. Transfer to that court would serve consolidation, the purpose that underlies nationwide enforcement of a seizure warrant. But there may be offsetting advantages in retaining the petition where it was filed. The claimant may not be able to litigate, effectively or at all, in a distant court. Issues relevant to the petition may be better litigated where the property was seized or where the warrant issued. One element, for example, is whether the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of trial. Another is whether continued government possession would prevent the claimant from working—whether seizure of the claimant’s automobile prevents work may turn on assessing the realities of local public transit facilities.

Paragraph (e). The Excessive Fines Clause of the Eighth Amendment forbids an excessive forfeiture. *U.S. v. Bajakajian*, 524 U.S. 321 (1998). 18 U.S.C. § 983(g) provides a “petition” “to determine whether the forfeiture was constitutionally excessive” based on finding “that the forfeiture is grossly disproportional to the offense.” Paragraph (e) describes the procedure for § 983(g) mitigation petitions, and adopts the same procedure for forfeiture actions that fall outside § 983(g). The procedure is by motion, either for summary judgment or for mitigation after a forfeiture judgment is entered. The claimant must give notice of this defense by pleading, but failure to raise the defense in the initial answer may be cured by amendment under Rule 15. The issues that bear on mitigation often are separate from the issues that determine forfeiture. For that reason it may be convenient to resolve the issue by summary judgment before trial on the forfeiture issues. Often, however, it will be more convenient to determine first whether the property is to be forfeited. Whichever time is chosen to address mitigation, the parties must have had the opportunity to conduct civil discovery on the defense. The extent and timing of discovery are governed by the ordinary rules.

Subdivision (9)

Subdivision (9) serves as a reminder of the need to demand jury trial under Rule 38. It does not expand the right to jury trial. See *U.S. v. One Parcel of Property Located at 32 Medley Lane*, 2005 WL

465241 (D.Conn.2005), ruling that the court, not the jury, determines whether a forfeiture is constitutionally excessive.²⁰

Summary of Comments — 2004 Rule G

04-CV-127: Federal Magistrate Judges Assn., 04-CV-127: Supports. It is appropriate to adopt a rule that consolidates civil forfeiture procedure in one place and that takes account of the changes in forfeiture practice arising from CAFRA.

04-CV-203: U.S. Department of Justice: (These are long comments, focused on details rather than the larger enterprise. Adoption of Rule G is supported, with suggested refinements. “Consolidating civil forfeiture provisions in one rule will aid the administration of justice.” “Nevertheless, there are a number of areas in which the Rule could be improved by resolving unnecessary ambiguities.”)

Title: The title should be changed: “Supplemental Rules for Admiralty and Asset Forfeiture Claims.”

G(3): This rule authorizes the clerk to issue a warrant to arrest property already in the government’s possession. It should be expanded to include “custody or control” to avoid ambiguity in such circumstances as deposit in a financial institution account.

G(4): (1) The Note says that it suffices to make a reasonable choice of the means of notice most likely to reach potential claimants at a reasonable cost. The Rule says only that the government should select a means reasonably calculated to notify potential claimants. The Note should be revised to reflect the Rule.

(2) (a)(iv)(C) should read “instead of (A) and or (B).”

²⁰ **This change is recommended.** Judge Kravitz expressed concern that “under Rule 38” may not suffice to deter arguments that Rule G(9) expands the right to jury trial to include any issue on which a party makes a demand. 004-CV-208. Our Style conventions say that the rule text recognizes only a demand that Rule 38 authorizes. Rule 38 recognizes a demand only when there is an independent right to jury trial. A caution in the Note should resolve the question if anyone feels a doubt and seeks an answer.

(3) (b)(i) requires notice to any person who reasonably appears to be a potential claimant. It seems clear, but a court has cited it to support notice to crime victims who do not have standing to contest forfeiture. The rule should include a new sentence: "Notice need not be sent to persons without standing to contest the forfeiture."

(4) (b)(iii)(B) allows notice either to a potential claimant or to the potential claimant's attorney, without expressing a preference. The Note says that notice should be sent to the attorney only when that appears to be the most reliable means. This statement is inconsistent with Mullane. Typically the government sends notice to both. But notice to the attorney alone should suffice if for any reason the attempt to send notice to the claimant proves inadequate.

(5) (b)(iii)(D) and (E) provide for notice to the last address a potential claimant gave to the agency that arrested or released the claimant or to the agency that seized the property. This is ambiguous. As drafted, the rule could be read to require notice to an address given to an agent or employee acquainted with the claimant even though the agent or employee had no connection whatsoever with the case. The Note should be revised to make clear that this does not count.

(6) (b)(iv) is awkward; the cure is to delete some words: "Notice by the following means is sent on the date when it is placed in the mail, delivered to a commercial carrier, or sent by electronic mail."

G(5): (a)(iii) says a bailee filing a claim must identify the bailor. The Note only says "should"; it should be amended to say "must."

(a)(iii) should be amended to reflect present C(6)(a)(ii), which says that a bailee who files a statement of interest must state the authority to file on behalf of another. This would be accomplished by adding: "A claim filed by a person asserting an interest as a bailee must identify the bailor and state the person is authorized to file a claim in the bailor's behalf."

(b) should be amended for the sake of clarity: "A claimant must serve and file an answer * * * or a motion under Rule 12 * * *. A claimant waives an objection to in rem jurisdiction or to venue if the objection is not made by motion under Rule 12 or stated in the answer."

G(6): The rule describes the special interrogatories served by the government to address a claimant's identity and relationship to the defendant property as interrogatories "under Rule 33." That is appropriate, but the Note is wrong in saying that these interrogatories count against the presumptive 25-interrogatory limit in Rule 33. The Note should say that they do not count against the limit. "Otherwise, a claimant who created complex standing issues by styling its claim in a particular way would enjoy a windfall vis a vis similarly situated claimants: the more complex the standing issues, the fewer interrogatories the Government could serve under Rule 33 on the merits of the case."

G(7): (a) recognizes authority to enter orders "to preserve the property and to prevent its removal or encumbrance." A restraining order also may be needed to prevent use of property in ongoing criminal offenses — examples are an Internet domain name or Website used to collect money for terrorists, to promote child pornography offenses, or to facilitate the distribution of illegal drugs. The rule should be amended: "to preserve the property, and to prevent its removal or encumbrance, or to prevent its use in the commission of a criminal offense."

(b)(i) was drafted as a compromise. The government wanted it to include explicit authorization for sale to protect against diminution in the defendant property's value. The response was sale on this ground could be sought under item (D), which allows sale for "other good cause." But the Note says that diminution in value is a ground that "should be invoked with restraint in circumstances that do not involve physical deterioration." The Note could frustrate the government's effort to obtain fair market value in the many cases that do not involve physical deterioration. The Note should be revised to include a neutral statement about balancing interests of all parties, including victims.

(b)(1)(C) authorizes sale of property subject to defaulted mortgage or tax obligations. The Note says that the rule does not address the question whether a mortgagee or other lien holder can force sale of property held for forfeiture, or whether the court can enjoin the sale. Although intended to be neutral, this Note statement may be read to suggest that there is some uncertainty in the law. The

Note should be revised to say that it does not change the existing law with respect to the court's authority to enjoin third parties from collecting through foreclosure.

G(8): (b)(i) refers to dismissing the action, while (ii) refers to dismissing the complaint. "Complaint" should be used in both places, as well as in the caption. The same change should be made in (c)(ii).

(c) represents a compromise. The government relinquished arguments that Rule G should establish claim-standing standards, leading to provisions that define only the procedure for determining claim standing. Case law continues to develop, warranting further development of this procedure in subdivision (8). It should address separately a government motion for judgment on the pleadings (not simply a motion to strike the claim); a motion to dismiss the claim for lack of standing, imposing the burden of establishing standing on the claimant and leaving fact issues to be determined by the court; and disposition of the motion to dismiss the claim by summary judgment.

The Note to (8)(c) should be supplemented by a statement that it regulates only government motions addressed to standing and does not limit the government's rights to seek dismissal on other grounds.

04-CV-208: Hon. Mark Kravitz: Proposed G(9) states that trial is to the court unless any party demands trial by jury under Rule 38. Although "under Rule 38" is intended to incorporate all the limits of Rule 38 — a demand does not create a right to jury trial that does not otherwise exist — there is a risk that the rule will be read to expand the right to jury trial. In keeping with style conventions, the cure may be to add a sentence to the Committee Note stating that paragraph (9) does not expand the right to jury trial.

Supplemental Rules A, C, E Amended To Conform to G

Rule A. Scope of Rules

1 **(1)** These Supplemental Rules apply to:

2 **(A)** the procedure in admiralty and maritime claims
3 within the meaning of Rule 9(h) with respect to the
4 following remedies:

5 **(i1)** maritime attachment and garnishment;

6 **(ii2)** actions in rem;

7 **(iii3)** possessory, petitory, and partition actions; and

8 **(iv4)** actions for exoneration from or limitation of
9 liability;

10 **(B)** forfeiture actions in rem arising from a federal
11 statute; and

12 **(C)** ~~These rules also apply to~~ the procedure in statutory
13 condemnation proceedings analogous to maritime actions
14 in rem, whether within the admiralty and maritime
15 jurisdiction or not. Except as otherwise provided,
16 references in these Supplemental Rules to actions in rem
17 include such analogous statutory condemnation
18 proceedings.

19 (2) The ~~general Federal~~ Rules of Civil Procedure for the
20 United States District Courts are also applicable apply to the
21 foregoing proceedings except to the extent that they are
22 inconsistent with these Supplemental Rules.

Committee Note

Rule A is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions. Rule G(1) contemplates application of other Supplemental Rules to the extent that Rule G does not address an issue. One example is the Rule E(4)(c) provision for arresting intangible property.

Rule C. In Rem Actions: Special Provisions

1 (1) **When Available.** An action in rem may be brought:
2 (a) To enforce any maritime lien;
3 (b) Whenever a statute of the United States provides for
4 a maritime action in rem or a proceeding analogous
5 thereto.

6 * * * * *

7 (2) **Complaint.** In an action in rem the complaint must:
8 (a) be verified;
9 (b) describe with reasonable particularity the property
10 that is the subject of the action; and

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11 ~~(c) in an admiralty and maritime proceeding~~ state that the
12 property is within the district or will be within the district
13 while the action is pending;

14 ~~(d) in a forfeiture proceeding for violation of a federal~~
15 ~~statute, state:~~

16 ~~(i) the place of seizure and whether it was on land or~~
17 ~~on navigable waters;~~

18 ~~(ii) whether the property is within the district, and if~~
19 ~~the property is not within the district the statutory~~
20 ~~basis for the court's exercise of jurisdiction over the~~
21 ~~property; and~~

22 ~~(iii) all allegations required by the statute under which~~
23 ~~the action is brought.~~

24 **(3) Judicial Authorization and Process.**

25 **(a) Arrest Warrant.**

26 ~~(i) When the United States files a complaint~~
27 ~~demanding a forfeiture for violation of a federal~~
28 ~~statute, the clerk must promptly issue a summons and~~
29 ~~a warrant for the arrest of the vessel or other property~~
30 ~~without requiring a certification of exigent~~

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50 (ii) If the property that is the subject of the action is
51 other property, tangible or intangible, the warrant and
52 any supplemental process must be delivered to a
53 person or organization authorized to enforce it, who
54 may be: (A) a marshal; (B) someone under contract
55 with the United States; (C) someone specially
56 appointed by the court for that purpose; or (D) in an
57 action brought by the United States, any officer or
58 employee of the United States.

59 * * * * *

60 **(6) Responsive Pleading; Interrogatories.**

61 ~~(a) Civil Forfeiture.~~ In an in rem forfeiture action for
62 violation of a federal statute:

63 ~~(i) a person who asserts an interest in or right against~~
64 ~~the property that is the subject of the action must file~~
65 ~~a verified statement identifying the interest or right:~~

66 ~~(A) *within 30 days after the earlier of (1) the~~
67 ~~date of service of the Government's complaint or~~
68 ~~(2) completed publication of notice under Rule~~
69 ~~C(4), or~~

70 ~~(B) within the time that the court allows:~~

71 ~~(ii) an agent, bailee, or attorney must state the~~

72 ~~authority to file a statement of interest in or right~~

73 ~~against the property on behalf of another; and~~

74 ~~(iii) a person who files a statement of interest in or~~

75 ~~right against the property must serve and file an~~

76 ~~answer within 20 days after filing the statement.~~

77 **(ab) Maritime Arrests and Other Proceedings.** In an

78 ~~rem action not governed by Rule C(6)(a):~~

* * * * *

80 **(bc) Interrogatories.**

* * * * *

81

Committee Note

Rule C is amended to reflect the adoption of Rule G to govern procedure in civil forfeiture actions.

Rule E. Actions in Rem and Quasi in Rem: General Provisions

1 * * * * *

2 **(3) Process.**

3 (a) In admiralty and maritime proceedings process in rem
4 or of maritime attachment and garnishment may be served
5 only within the district.

6 ~~(b) In forfeiture cases process in rem may be served~~
7 ~~within the district or outside the district when authorized~~
8 ~~by statute.~~

9 (bc) Issuance and Delivery.

10 * * * * *

11 (5) Release of Property.

12 (a) **Special Bond.** ~~Except in cases of seizures for~~
13 ~~forfeiture under any law of the United States, w~~Whenever
14 process of maritime attachment and garnishment or
15 process in rem is issued the execution of such process
16 shall be stayed, or the property released, on the giving of
17 security, to be approved by the court or clerk, or by
18 stipulation of the parties, conditioned to answer the
19 judgment of the court or of any appellate court. The
20 parties may stipulate the amount and nature of such
21 security. In the event of the inability or refusal of the
22 parties so to stipulate the court shall fix the principal sum

23 of the bond or stipulation at an amount sufficient to cover
24 the amount of the plaintiff's claim fairly stated with
25 accrued interest and costs; but the principal sum shall in
26 no event exceed (i) twice the amount of the plaintiff's
27 claim or (ii) the value of the property on due
28 appraisal, whichever is smaller. The bond or
29 stipulation shall be conditioned for the payment of the
30 principal sum and interest thereon at 6 per cent per
31 annum.

32 * * * * *

33 **(9) Disposition of Property; Sales.**

34 ~~(a) Actions for Forfeitures. In any action in rem to~~
35 ~~enforce a forfeiture for violation of a statute of the United~~
36 ~~States the property shall be disposed of as provided by~~
37 ~~statute.~~

38 **(ab) Interlocutory Sales; Delivery.**

39 * * * * *

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40 (ii) In the circumstances described in ~~Rule E(9)~~
41 subdivision (ab)(i)²¹, the court, on motion by a
42 defendant or a person filing a statement of interest or
43 right under Rule C(6), may order that the property,
44 rather than being sold, be delivered to the movant
45 upon giving security under these rules.

46 **(bc) Sales, Proceeds.**

47 * * * * *

Committee Note

Rule E is amended to reflect the adoption of Rule G to govern
procedure in civil forfeiture actions.

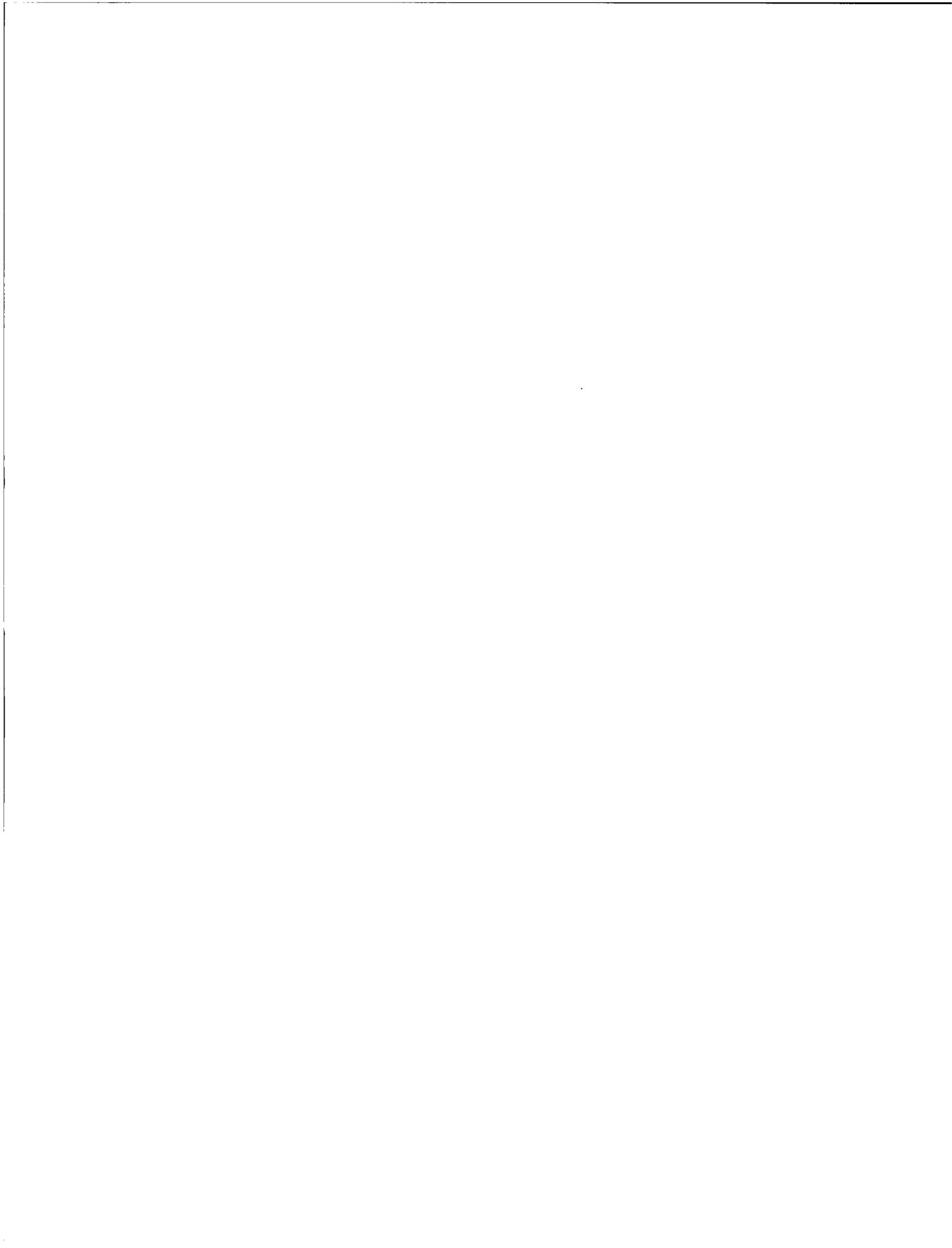
²¹ Under current Style conventions, this apparently should be: "In the
circumstances described in (i), the court * * *."

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15 under Supplemental Rule C(6)(b~~a~~)(1), as a third-party
16 plaintiff, may bring in a third-party defendant * * *.”

Committee Note

Rule 14 is amended to conform to changes in designating the paragraphs of Supplemental Rule C(6).



B. PROPOSED AMENDMENT TO RULE 50(b)

Introduction

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

Few comments were made during the public comment period. They did not raise any new issues. The amendments seem ready for submission to the Standing Committee with a recommendation that they be proposed for adoption. The only changes that might be made involve the Rule 50(a) style changes. The Rule 50(a) published as part of the Style Package differs from the August 2004 version by one word; it may be sensible to change the word now. Whether or not the word is changed, the standard Style Package language should be added to the Committee Note. (The Style Package changes in Rule 50(b) seem too extensive to warrant adoption as part of the present amendment.)

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

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

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

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

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

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

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

19 (A) ~~determine~~ resolve¹ the issue against the party; and
20 (B) grant a motion for judgment as a matter of law
21 against the party on a claim or defense that, under the
22 controlling law, can be maintained or defeated only
23 with a favorable finding on that issue.

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

¹ The February 2005 Style Package makes this change.

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

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

43 (1) if a verdict was returned:

44 (A) allow the judgment to stand,

45 (B) order a new trial, or

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46 (C) direct entry of judgment as a matter of law; or

47 (2) if no verdict was returned:

48 (A) order a new trial, or

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

50 * * * * *

Committee Note

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

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

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

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

Finally, an explicit time limit is added for making a post-trial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict. The motion must be made no later than 10 days after the jury was discharged.

* * * * *

1. Background and Synopsis

The proposed amendment addresses the problem that arises when a party moved for judgment as a matter of law before the close of all the evidence, failed to renew the motion at the close of all the evidence, then filed a postverdict motion renewing the motion for judgment as a matter of law. The appellate decisions have begun to permit slight relaxations of the requirement that a postverdict motion be supported by—be a renewal of—a motion made at the close of all the evidence. These are departures, however, made to avoid harsh results that seemed required by the current rule language. The departures come at the price of increasingly uncertain doctrine and

practice and may invite more frequent appeals. Other courts adhere to the rule's language, holding that a motion at the close of all the evidence was necessary even if the party had made an earlier motion based on the same grounds.

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

Separately, the proposed amendment also provides a time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict on an issue addressed by the motion. The Advisory Committee agenda has carried for some years the question whether to revise Rule 50(b) to establish a clear time limit for renewing a motion for judgment as a matter of law after the jury has failed to return a verdict. The question was raised by Judge Stotler while she chaired the Standing Committee. The problem appears on the face of the rule, which seems to allow a motion at the close of the evidence at the first trial to be renewed at any time up to ten days after judgment is entered following a second (or still later) trial. It would be folly to disregard the sufficiency of the evidence at a second trial in favor of deciding a motion based on the evidence at the first trial, and unwise to allow the question to remain open indefinitely during the period leading up to the second trial. There is authority

saying that the motion must be renewed ten days after the jury is discharged. See C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 2357, p. 353. This authority traces to the 1938 version of Rule 50(b), which set the time for a judgment n.o.v. motion at ten days after the jury was discharged if a verdict was not returned. This provision was deleted in 1991, but the Committee Note says only that amended Rule 50(b) “retains the former requirement that a post-trial motion under the rule must be made within 10 days after entry of a contrary judgment.” Research into the Advisory Committee deliberations that led to the 1991 amendment has failed to show any additional explanation. It now seems better to restore the 1991 deletion.

Summary of Comments: 2004 Rule 50(b)

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

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

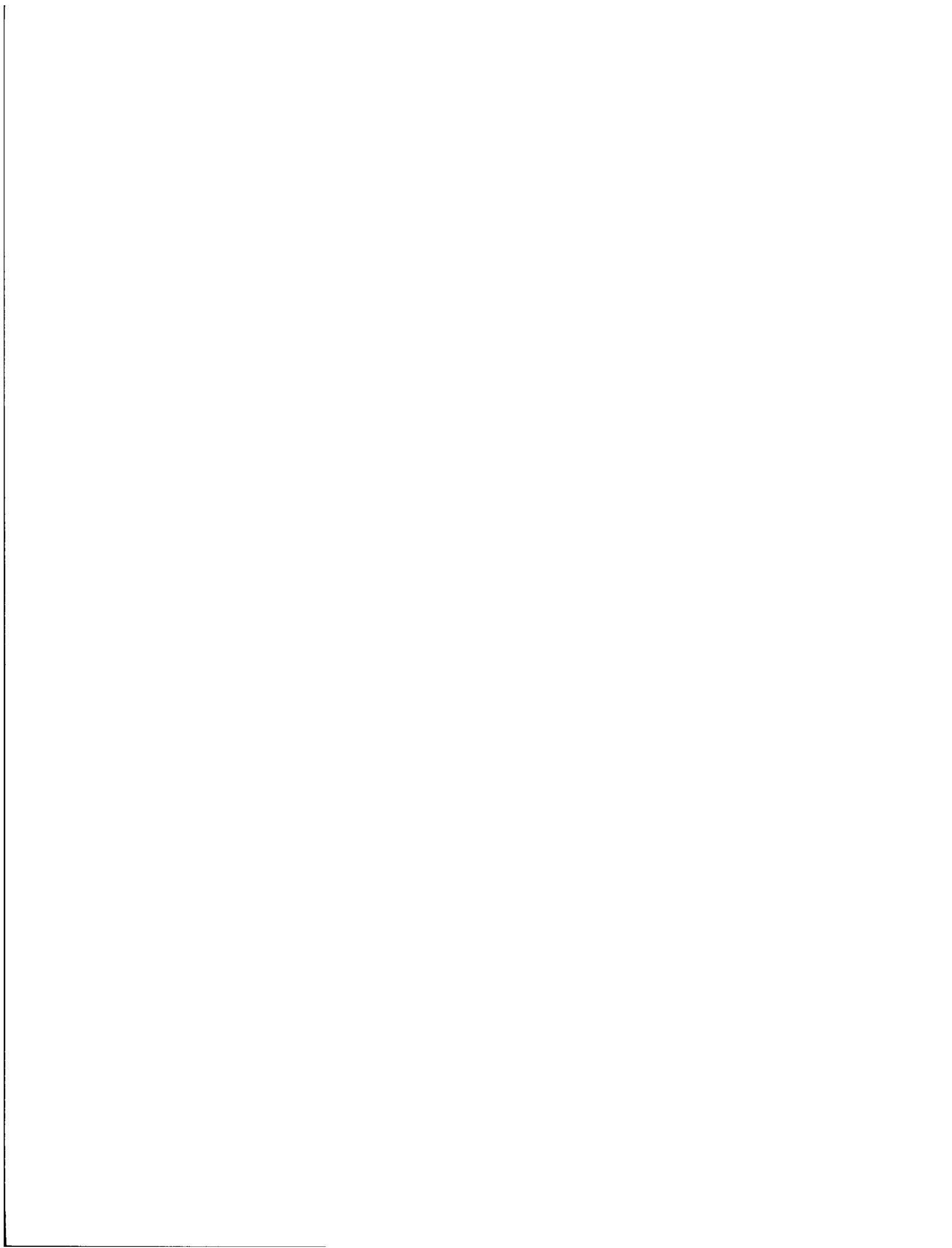
04-CV-128, Gregory B. Breedlove, Esq., for Cuningham, Bounds, Yance, Crowder & Brown, L.L.C.: A motion should be required at the close of all the evidence because “any deficiency in the evidence at an earlier stage of the proceeding may have been cured by the time all the evidence is in. * * * By the close of the evidence, the plaintiff

might cure any such deficiency either through cross-examination of a defense witness or through rebuttal testimony.” The proposed change is not justified by the argument that parties continue to fail to meet the close-of-all-the-evidence requirement. It is not necessarily a bad thing that courts allow relief from the requirement in some circumstances, but this should not be generalized in the rule.

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

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

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



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

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JERRY E. SMITH
EVIDENCE RULES

To: Civil Rules Committee

From: Lee H. Rosenthal

Date: March 31, 2005

Re: The Electronic Discovery Proposals

I. Introduction

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

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

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

The public comments, both in writing and in testimony in the three hearings held in late 2004 and early 2005, have been enormously helpful, but in one respect unsurprising. The proposals that the Committee expected to be uncontroversial—the amendments to Rules 16, 26(f), 33, and 34—met with consistent approval in the public comment period, with suggestions for improvement and refinement that are addressed in these materials. The proposals that were expected to be more controversial—the amendments to Rules 26(b)(2) and 37(f) and, to a lesser extent, Rule 26(b)(5)—generated more divided comments.

Since the public comment period ended, the reporters and, indeed, the entire Committee, have been working very hard to revise and refine the proposed rule amendment and note language in light of the reactions and suggestions received. The task now before the Committee is to decide what rule amendment and note language to recommend that the Standing Committee adopt when it meets in June. This task must proceed on two levels. The first level is the more general: is each proposal a valid and useful way to improve the rule, which should be adopted? The second level is the more specific examination of the proposed rule and language. This introduction sets out a brief background for the discussion of those tasks and, for each of the five categories of proposed amendments, identifies some of the most significant changes made since publication and the issues to be decided.

II. Background

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

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

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

In 1946 and 1970, amendments to the discovery rules continued to expand the discovery devices. The 1970 amendments were what Professor Marcus has called the high-water mark of “party-controlled discovery.”² Those amendments included the elimination of the requirement for a motion to obtain document production and of the good cause standard for document production. In 1970, the description of “documents” was also revised to accord with changing technology. At the time, the Advisory Committee expected it would require a producing party to provide a “print-out of computer data.”³ It is safe to say that the technological developments that prompted the 1970 amendment to Rule 34(a) have been dwarfed by the revolution in information technology in the past decade, which we are grappling with today.

Since the “high-water mark,” the discovery rules have been amended in 1980, 1983, 1993, and 2000, to provide more effective means for controlling the discovery devices. In 1980, the Committee made the first change designed to increase judicial supervision over discovery, adding a provision that allowed counsel to seek a discovery conference with the court. The Committee considered, and rejected, a proposal to narrow the scope of discovery from “relevant to the subject matter” to “relevant to the issues raised by the claims or defenses,” and to limit the number of interrogatories. The public comment that proposal generated was similar in tone and in approach to the comments we have heard since August 2004. Many protested any narrowing of discovery as inimical to the basic premise of American litigation; others protested that the Committee had not gone far enough in restricting discovery and controlling the costs and delay it caused; yet others worried that the Committee would feel “pressure” to approve rules prematurely.⁴ In the face of the vigorous debate, the Committee withdrew these proposals and submitted what then-chair Judge Walter Mansfield characterized as “watered down” proposals. The scope change rejected in 1980 did become law—but not until 2000, and then in a modification that emphasized the supervisory responsibility of the court.

Despite an institutional bias against frequent rule changes, the lack of meaningful amendments in 1980 resulted in significant amendments three years later. The 1983 amendments marked a significant shift toward greater judicial involvement in all pretrial preparation, most particularly in the discovery process. The amendments expanded Rule 16 case-management orders; deleted the final sentence of Rule 26(a), which had said that “[u]nless the court orders otherwise under subdivision (c) of this rule, the frequency and use of these methods is not limited”; and added the paragraph to Rule 26(b) directing the court to limit disproportionate discovery. The newly-appointed reporter to this Committee, Professor Arthur Miller, described these changes as a “180 degree shift in orientation.” Yet, as Professor Miller has pointed out in his written submission to the Committee endorsing the proposed electronic discovery amendments, those amendments turned out not to be effective by themselves to calibrate the amount of discovery to the needs of particular cases.⁵

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

³ Rule 34(a), Advisory Committee Note, 1970.

⁴ Marcus, 39 Boston Coll. L. Rev. at 770.

⁵ Prof. Arthur Miller, 04-cv-221.

In 1993, continued unhappiness about discovery costs and related litigation delays led to a package of proposals that included mandatory broad initial disclosures (with a local rule opt-out feature added in response to vigorous criticism) and presumptive limits on the number of interrogatories. In part, these amendments were "designed to give teeth to the proportionality provisions added in 1983."⁶ In 2000, the initial disclosure obligations were made uniform, and Rule 26(b)(1) was changed to limit the scope of party-controlled discovery to matters "relevant to the claim or defense of any party," with a second tier over which the court could order broader discovery for good cause.

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

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

⁶ Marcus, Discovery Containment, 39 Boston Coll. L. Rev. at 766.

Without understating the nature or depth of the concerns raised in response to specific proposals, discussed at length below, it is useful to note some points of agreement. There was a high level of support for some changes to the federal rules to recognize and accommodate electronic discovery. Although there is certainly disagreement on the more controversial proposals, there was support from broad-based organizations that do not represent a reflexive plaintiff or defense view, such as the American Bar Association Section of Litigation,⁷ the Federal Bar Council,⁸ and the New York State Bar Association Commercial and Federal Litigation Section.⁹ In addition, leading plaintiff side lawyers such as Elizabeth Cabraser, Bill Lann Lee, James Finberg,¹⁰ and Allen Black¹¹ broadly supported the amendment proposals. Some of the proposals, such as those addressing the form of producing electronically stored information and calling for early discussion of preservation and e-discovery, received very broad support from plaintiffs' lawyers.

Many of the comments from both sides of the bar offered criticism of the more controversial proposals based on aspects of the published proposals that are offered now in a revised form. The public comment period has served its intended purpose. The Committee has gone back to each proposal and asked whether it identifies and properly responds to distinctive problems of electronic discovery, in ways that the present rules do not adequately recognize and accommodate. In answering that question, the Committee revised and refined the proposed rule amendment and note language in ways that attempt to satisfy many of the concerns expressed.

The historical review is also a useful context for considering the question of timing. This Committee is not known for rushing to make rules. The Committee has repeatedly rejected amendments after public comment—the class action proposals of 1996 are a good example—and has not continued to support amendments merely because they absorbed considerable time and energy. The history of discovery amendments in particular shows great caution. The most prominent example is the 1978 decision to defer the “scope” proposal because there was vigorous opposition, as well as vigorous support. That decision to defer was criticized on the ground that it would significantly delay the proposal. The scope limitation did become effective—twenty years later.

It is always tempting to defer action because more time brings more information and the opportunity for further refinement. It may be particularly tempting on this topic, given the constant possibility that technological changes may alter the landscape. This Committee may decide that some of the proposed rule amendments are problematic and should not go forward, or that they require republication. But we should be cautious about deferring based on a belief that further work will result in a better rule within a short period. The calendar of the rules enabling process makes

⁷ 04-cv-062.

⁸ 04-cv-191.

⁹ 04-cv-045.

¹⁰ 04-cv-113.

¹¹ 04-cv-011.

this difficult. Proposed rule changes that are recommended to the Standing Committee and proceed without difficulty will become effective on December 1, 2006. Proposed rule changes that are republished or published for the first time in August 2005 will not become effective until, at the earliest, December 1, 2007.

As long ago as the 1998-99 hearings on what became the discovery amendments of 2000, lawyers were urging the Committee to proceed with alacrity in rulemaking for e-discovery. The need for rulemaking now in this area is reflected in the local rules and state rules that have been enacted, and the growing number of such rules that have been proposed. Many of these local rule efforts have been deferred because of the proposals to amend the national rules, but we cannot expect them to remain in check indefinitely. The 1993 amendments led in part to the 2000 amendments, teaching us much about the problems of local rulemaking in areas that the national discovery rules address, problems that we do not want to create in the area of electronic discovery. And the possibility of technological change will always exist; there is no reason to think that stability on that front will arrive any time soon. The Committee has been studying electronic discovery for the last five years. We have learned a great deal, reflected in the refinements to the rule proposals made since publication. Those refinements to the published proposals, and the primary issues now before the Committee, are summarized below.

III. The Specific Proposals

A. Early Attention to Electronic Discovery Issues

The proposed amendments to Rule 16, Rule 26(f), and Form 35 require early attention to issues relating to the disclosure and discovery of electronically stored information when they are involved in a case. The proposed rules cover general discussion of electronic discovery and focus on three of the most troublesome areas: the form of production, preservation, and privilege waiver. The comments consistently favored including electronic discovery issues in those given early attention. In this rule and others, the reference to the "form of production" was changed to "form or forms of production," recognizing that more than one might apply to a given case. The rule language has been revised to clarify the discussion of preservation obligations as applied to electronically stored information.

The primary issue for the Committee to decide is whether to retain the proposed Rule 26(f)(4) and related Rule 16(b) provision for a case-management order adopting a party agreement on privilege waiver. The major concerns are that such an order may provide less protection against a finding of waiver as to third parties than the proposed rule and note language suggest, and that judges may insist on such an agreement to facilitate discovery. As to the first concern, revised rule and note language is provided for the Committee to consider. As to the second concern, the rule only authorizes a court to enter such an order if the parties have consented. The note emphasizes this point.

The Committee is also asked to consider a proposal to amend Rule 26(a) that was not presented in the August 2004 publication. The proposal is a "conforming amendment" that would simply add "electronically stored information" to the matters subject to initial disclosure obligations in Rule 26(a)(1)(B) and pretrial disclosures in Rule 26(a)(3)(C). The proposal would make the reference to "documents" and "data compilations" in Rule 26(a) consistent with the addition of electronically stored information to Rule 34(a) and other discovery rules. The Committee must decide whether the proposed amendment should be recommended as a conforming amendment that would not require additional publication.

B. The Proposed Changes to Rules 33 and 34

The proposed changes to Rules 33 and 34 are designed to adapt these discovery workhorses to the discovery of electronically stored information. The public comment supported these changes, with a number of suggestions.

The proposed amendments to Rule 33 clarify the way in which the option to produce business records should operate in the information age. The note language offers some explanation of how the limitation in Rule 33(d), permitting production of records to answer an interrogatory when "the burden of deriving or ascertaining the answer" is substantially the same for either party, applies to electronically stored information. In response to comments, a revision to the note is suggested to clarify when a requesting party might be provided direct access to the responding party's information system to satisfy the Rule 33(d) requirement.

Two primary issues relating to Rule 34 emerged from the public comment period. The first is whether "electronically stored information" should be included within the term "documents," or whether it should be a third category with "documents" and "things." There are good arguments supporting both choices and there do not appear to be many negative consequences flowing from either choice. The Committee must nonetheless choose.

The arguments in favor of making "electronically stored information" separate from "documents" are, briefly, that although courts and litigants have included such information in the word "documents" to make it discoverable under the present rule language, there are significant and growing differences between them. Electronically stored information can be produced in the form of a document, but it also exists in forms not limited to tangible, immutable artifacts, such as databases. Rather than continue to try to stretch the word "document" to make it fit this new category of "stuff," the published proposed amendment to Rule 34 explicitly recognized electronically stored information as a separate category. During the hearings, many technically sophisticated witnesses confirmed that significant types of electronically stored information—most notably dynamic databases—are extremely difficult to characterize as "documents." In addition, it is worth noting that having electronically stored information as a category of information recognized in Rule 34(a) facilitates the use of the term in all of the other rules in which we propose to insert it to prescribe special treatment of discovery of this sort of information. Including it in a catalogue of types of documents in which "data compilations" are another co-equal type might detract from that function.

Many lawyers spoke in favor of including “electronically stored information” as a subset of “documents.” The reasons go beyond the fact that lawyers are used to this formulation. In a way, the Committee made the choice back in 1970, when it decided to include “data compilations” as a subset of “documents” rather than as a separate category of information. In addition, the same information can simultaneously or at different times exist as a document and as electronically stored information. It can be confusing to separate “documents” from “electronically stored information,” then state that both include the list of items within the parenthetical that follows both terms. Before a human being can comprehend the electronically stored information that is produced, it must appear in a form that we understand as a document, whether on a computer screen or printed on a piece of paper. These considerations may weigh in favor of simply including “electronically stored information” within the existing category of “documents.”

The primary issue that the public comment period identified as to proposed Rule 34(b) concerned the form of production. The published rule provided that if there is no request for a specific form for producing electronically stored information, the parties do not agree to a particular form, and the court does not order one, the producing party would have two options: to produce the information in a form in which it is ordinarily maintained or in an electronically searchable form. These choices were intended to be functionally analogous to the choices provided for producing hard-copy documents: either the form in which it is kept in the usual course of business or organized and labeled to correspond to the categories in the request. The Committee sought specific comment on this provision. In response, a number of comments expressed concern that the rule would be read as requiring “native format” production unless the parties agreed on a different form or the court ordered a different form. These comments noted the anomaly of making the producing party provide what was perceived as a “more onerous” form of production, with some disadvantages for use in discovery, if there was no request and no agreement for a particular form. The published rule made it more advantageous in some respects for the requesting party not to specify a form of production or to seek an agreement. The intent was not to make the difficulties greater for the producing party when the request is silent on the form of production than when the request is specific about form of production. Nor was the intent to make native format the default form of production. On the other hand, a number of comments emphasized that producing parties may seek to use forms of production that are not searchable and therefore of limited utility to the requesting party.

In response to the public comment, the proposed rule is changed to state that “if a request for electronically stored information does not specify the form or forms of production, a responding party must produce the information in a form or forms that are reasonably usable by the requesting party.” This option only applies if there is no request, agreement, or order that a different form of production be used. The rule allows a requesting party to specify the form of production it would prefer, including “native format.” Language in the note is added to clarify that “reasonably usable by the requesting party” means that the requesting party can reasonably use the electronically stored information. The note does not attempt further definition, which would necessarily be limited by existing technologies.

In response to many comments that electronically stored information can exist in more than one form, the rule is also amended from the published version to state that “a party need not produce the same electronically stored information in more than one form.” This limitation should apply whether or not the request specifies a desired form of production. The primary issue Rule 34(b) presents for the Committee is whether the change to “reasonably usable to the requesting party” formulation as the form of production applies absent a request, agreement, or order is appropriate.

C. Procedure for Belated Assertion of Privilege

Ever since the Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay required for privilege review. The Committee has long studied whether it could offer a rule that would helpfully address these concerns, recognizing the limitations of the Rules Enabling Act and 28 U.S.C. § 2074(b). The Committee’s more recent focus on electronic discovery revealed that the problems of privilege review are often more acute in that setting than with conventional discovery. The volume of electronically stored information responsive to discovery and certain features of such information make it more difficult to review for privilege than paper.¹² The production of privileged material is a substantial risk and the costs and delay caused by privilege review are increasingly problematic. The proposed amendment to Rule 26(b)(5) addresses these problems by setting up a procedure to apply when a responding party asserts that it has produced privileged information without intending to waive the privilege. Although the reasons that led to the proposal apply with particular force to electronically stored information, this rule would apply to all discovery.

During the public comment period, a number of concerns were raised, and the rule and note language have been revised to respond to many of these concerns. Many comments stated that the party who received the information belatedly asserted as privileged should have the option of submitting the information directly to the court to decide whether the information is privileged and, if so, if the privilege was waived. Rule language has been proposed to make that change.

A number of comments also suggested that the rule provide greater specificity on the form and content of the notice given by the producing party of its privilege claim. Rule and note language are suggested that would require the producing party to state the reasons for the privilege assertion in the notice, which could then be provided to the court if it is asked to resolve the privilege claim. Responding to numerous comments, rule and note language are also suggested to make it clear that until the privilege claim is resolved, the receiving party may not disclose the information, elevating what was in the note to the rule.

¹² Brian J. Leddin, 04-cv-029, described the particular problems of reviewing electronically stored information for privilege, noting the sheer volume of the material, the informality associated with such communication, the increased use of nonlegal personnel to perform the review. Other comments have noted the additional complexity resulting from levels or sources of data that are not readily apparent, such as metadata and embedded data.

During the public comment period, the Committee specifically asked whether the proposed amendment should require that the party who receives notice that privileged material has been produced must certify that the material has been sequestered or destroyed if not returned. Little support was expressed for such language, and it is not added. Another issue under examination as a result of the public comment process is how to address the problem of inadvertently produced information that has been disseminated to third parties. Language was proposed that would require the receiving party to take reasonable steps to retrieve such information, but that imposes burdens on the receiving party because of the producing party's mistake. As an alternative, language is suggested to require the receiving party to cooperate with the producing party so that it may retrieve information that was previously disclosed. Such cooperation could, for example, take the form of telling the producing party who received copies of the information from the receiving party before the privilege was asserted.

In short, a number of drafting changes have been made that respond to the public comments. The Committee will also need to consider two other issues. The first is whether the "reasonable time" limit on when a party may assert a belated privilege claim should be revised. The discussion of the rule sets out the history of that limit, the concerns that have emerged, and the arguments to consider in deciding whether to retain it. The second issue is whether to extend the rule to cover not only belated assertions of privilege, but also belated assertions of trial preparation material protection. The discussion of the rule sets out the reasons the Committee chose not to expand it to other protections and to focus on privilege, the reasons identified in the comments to consider expansion, and the arguments in favor of maintaining the present focus.

The basic structure of the proposal, and its limited but helpful purpose, remain unchanged. The proposed amendment does not address the substantive aspects of whether privilege has been waived or forfeited. Instead, the amendment sets up a procedure to allow the responding party belatedly to assert privilege and to require the return, sequestration, or destruction of the material, or submission to the court in camera, pending resolution of the privilege claim. This supplements the existing procedure in Rule 26(b)(5) for a party that has withheld information on the ground of privilege to assert the claim, the requesting party to contest the claim, and the court to resolve the dispute. It is a nod to the pressures of litigating in the present age; a procedural device for addressing blunders that, given the amount and nature of electronically stored information, are inevitable, yet engender increasingly costly and time-consuming efforts to avoid.

D. Rule 26(b)(2)

This proposal has generated significant criticism. Much of the criticism has focused on specific drafting problems in the published rule, including a lack of clarity in the term "not reasonably accessible," how that term and the "good cause" showing related to the existing (b)(2) proportionality limits, and how designating or finding information as not reasonably accessible related to preservation obligations. Much effort has been expended in revising the proposal to respond to the concerns identified. The work has clarified the purpose and justification for the proposal. The work has resulted in two versions of rule and note language, one closer to the

published rule in structure, but both designed to achieve the same purpose. The issue for the Committee is whether the concept is valid and, and if so, which revision best describes and implements it.

The central premise is that as compared to paper discovery, electronically stored information poses distinctively frequent and genuinely troubling barriers to access. Paper may be widely distributed and it may exist in large amounts, but there are generally no other barriers to accessing the information it contains. Paper presents problems of volume and dispersion, and occasionally problems of foreign language; these problems are familiar to parties and judges and do not change over time. Electronically stored information, by contrast, may be on sources that are difficult to access for a number of reasons related to the technology of information storage. These reasons are unfamiliar and are likely to change over time. Examples from current technology are numerous. Back up tapes intended for disaster recovery purposes are often not indexed, organized, or susceptible to electronic searching. Legacy data may remain from obsolete systems and be unintelligible on the successor systems. Data that was "deleted" may remain in fragmented form, requiring a modern version of forensics to restore and retrieve. Electronically stored information may endure almost forever, and it may be costly to determine whether in fact it has perished. Databases that were designed to create certain information in certain ways cannot readily create very different kinds or forms of information. Each of these is an example of electronically stored information that is difficult to access. Such difficulties present particular problems for discovery. A party may have a large amount of information on sources or in forms that may be responsive to discovery requests, but would require recovery, restoration, or translation before it could be located, retrieved, reviewed, or produced.

The question before us is a pragmatic one. Can the discovery process be improved by directing a responding party to identify sources of potentially responsive electronically stored information that have not been searched because they are not "reasonably accessible," and by providing a procedure that will allow a requesting party to learn about those sources and to obtain a court order permitting discovery into the information they contain? The public comments and testimony confirmed that parties conducting discovery, particularly when it involves large volumes of information, first look in the places that are likely to produce responsive information. Parties sophisticated in electronic discovery first look in the reasonably accessible places that are likely to produce responsive information. From what we were told, it is usually true now that inaccessible electronically stored information is not produced in initial responses to discovery; on that level saying in the rule that such production is not required simply recognizes reality.

Under proposed Rule 26(b)(2), we may expect this existing practice to continue—parties would search sources that are reasonably accessible and likely to contain responsive, relevant information, with no need for court order. But unlike the present situation—when parties are simply not producing inaccessible electronically stored information—the amendment requires the responding party to identify the sources of information that were not searched, thus clarifying and focusing the issue for the requesting party. In many cases, discovery from accessible sources will be sufficient to meet the needs of the case. If information from such sources does not satisfy the

requesting party, that party can obtain additional discovery of sources identified as not reasonably accessible, subject to judicial supervision. The proposal is consistent with the two-tier structure of Rule 26(b)(1) and applies that structure to discovery of electronically stored information.

Is it useful to make this distinction between party-controlled discovery for relevant electronically stored information that can be obtained from reasonably accessible sources, and judicially-controlled discovery for discovery of information that must be restored, recovered, or translated from the sources on which it is stored before it can be located, retrieved, and reviewed? The distinction appears to capture the best practices of sophisticated lawyers. Because many lawyers and judges are not sophisticated about electronic discovery, and because the problems of accessibility can themselves be complicated and likely to change over time, this rule could indeed be helpful if it is clear as to when and how it applies. Reliance on the existing proportionality factors alone may be inadequate. Discovery requests are usually broad. A responding party may know that backup and legacy systems contain responsive information, but that information may be expensive and difficult to obtain. The likelihood of finding something useful that is not also available from readily accessible sources is not great. But until those readily accessible sources are searched and the information they provide is evaluated, it is unclear that any effort to search the sources that are difficult to access is worth it. The responding party should be permitted to respond with information that is reasonably accessible and see if that will satisfy. If that information does not satisfy, the rule provides a clear procedure and basis to obtain further discovery.

Many comments expressed concern as to what "not reasonably accessible" meant, and how it related to cost and burden. Others found the concept flexible yet workable, while cautioning the Committee to avoid definition by examples from present technology, which would likely become obsolete. The revisions clarify what accessibility means and the relationship between accessibility and costs and burden. An alternative formulation expresses the same concept in terms of substantial barriers to or difficulties accessing the information.

Many comments expressed concern over the meaning of the identification requirement. This has also been clarified in the revisions. A responding party must provide the requesting party with information about categories and types of sources of potentially responsive information that are not searched on the ground that they are not reasonably accessible. This requires identification of the sources, not the specific responsive information that may be stored on those sources; the responding party does not have to identify information that it cannot identify because it has not looked to see what it might be.

The comment and subsequent revisions have also clarified the usefulness of the identification requirement. It tells the requesting party about sources of potentially responsive information that are not searched because they are not reasonably accessible. That allows the requesting party to make initial decisions about whether to press for further discovery from those sources. The identification requirement allows the requesting party to put the responding party to the task of showing that the asserted difficulties in obtaining access to the requested information are indeed substantial. The requesting party needs to know about sources not searched in order to be

able to argue that the potential importance of the information justifies the burdens of search—an argument that may be advanced by undertaking to pay at least the costs of putting the information in usable form.

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

The public comments also questioned the formulation of the test that should be used to determine whether a party should be ordered to attempt to overcome any specific barrier to access. “Good cause” has the advantage of being a flexible and familiar term. The concern is that there is no bright-line distinction between good cause and the general balancing of cost, burden, and prospective benefit that characterizes Rule 26(b)(2) and (c). There is a difference, explained in the revised notes. If the responding party has little or no knowledge about the information that might be contained on the inaccessible sources, except to know that it might be responsive, it is very difficult to apply the proportionality factors. Those factors assume some knowledge about what the information sought in discovery consists of, whether it is relevant, and what its value to the litigation might be. As the notes point out, the more knowledge the parties and court have about the information contained on inaccessible sources, the more the “good cause” test resembles the familiar proportionality factors. But this may be too fine a distinction for the rule and, at bottom, depends on the same balance that the proportionality factors represent. It may be better to substitute a direct invocation of Rule 26(b)(2), and proposed language is provided. This revision would meet many of the commentators’ concerns.

Questions were also raised as to the procedure for challenging an assertion that electronically stored information is not reasonably accessible. It is generally agreed that the burden of showing the nature of the barriers or difficulties that impede access should lie on the producing party. And it also is generally agreed that the requesting party should be able to force the producing party to discuss these issues before seeking court assistance. It also seems to be agreed that the requesting party should have access to discovery to test the producing party’s assertions; the discovery might include sampling that tests the actual difficulty of access. Those aspects have been clarified in the revisions.

If at the end the court must act, and if the court concludes that indeed there are substantial barriers that impede a search of electronically stored information, the balancing of cost, burden, and benefit must be made. There is an inescapable link between the cost of determining whether information can be retrieved in usable form, the cost of retrieving it, and the potential importance of the information in relation to the information that may be gathered from other sources and to the justifiable needs of the specific action. This approach implements the proportionality limits

introduced in 1983. These limits require judicial management to be effective. The two-tier structure of the proposal is designed to make the application of the proportionality limits to this new type of discovery, with its distinctive problems of accessibility, more effective.¹³

The Committee may decide that the “good cause” formulation is not as clear as direct invocation of the proportionality factors. It may also be helpful to use a different term than “not reasonably accessible,” focusing directly on the nature and extent of the impediments or barriers to access. Revisions are provided for the Committee to consider.

Two other areas of concern were expressed during the comment period. One is the relationship to preservation. A second, related concern is that this proposal would lead corporations to make information inaccessible in order to frustrate discovery. As to the first concern, the notes have been revised to clarify that the rule does not undermine or reduce common law or statutory preservation obligations. As to the second concern, the Committee also heard many dispute that entities or individuals will “bury” information that is necessary or useful for business purposes or that regulations or statutes require them to retain. The rule requires that the information be inaccessible to the producing party for all purposes, not for a particular litigation. A party that makes information “inaccessible” because it is likely to be discoverable in litigation is subject to sanctions now and would still be subject to sanctions under the proposed rule changes.

The proposal has been revised in light of the very helpful comments received. Two drafts are presented, but both rest on the same concept. That concept is that there is a distinct difference in the discovery of electronically stored information that can be handled better under the rules. The Committee must decide whether this concept is valid and properly implemented by the revisions that are provided for consideration.

E. Rule 37(f)

The proposed amendment to Rule 37 provides a narrow “safe harbor” to a party that fails to provide electronically stored information, under a limited and specific set of circumstances.

The Advisory Committee specifically sought comment on whether the culpable state identified—lack of reasonable steps to preserve—is correct, or whether a more rigorous standard of intentional destruction should be set. The argument in favor of a more rigorous standard is that to set it lower provides a safe harbor for conduct unlikely to be sanctioned in the first place. The argument in favor of a less rigorous standard is that to set the mental state higher would unduly curtail the authority of judges, and might license organizations to use their computer systems to allow important information to be lost. That issue is before the Committee for decision.

Some comments expressed concern that the proposed amendment will encourage organizations to accelerate the routine destruction of electronic data. These comments rest on the

¹³ Prof. Arthur Miller, 04-cv-221.

presumption that entities should keep information, especially email, even if it is not necessary or useful for business purposes or required for regulatory or legal purposes—that is, even if it is not subject to preservation requirements—because some of it could be useful in litigation years later. That is a questionable presumption. At the same time, Rule 37(f) is not intended to allow targeted deletion or destruction of material to keep it from production in litigation. The goal is to allow parties to continue routine recycling that computers require, not to target specific information and to delete or destroy it to avoid production.

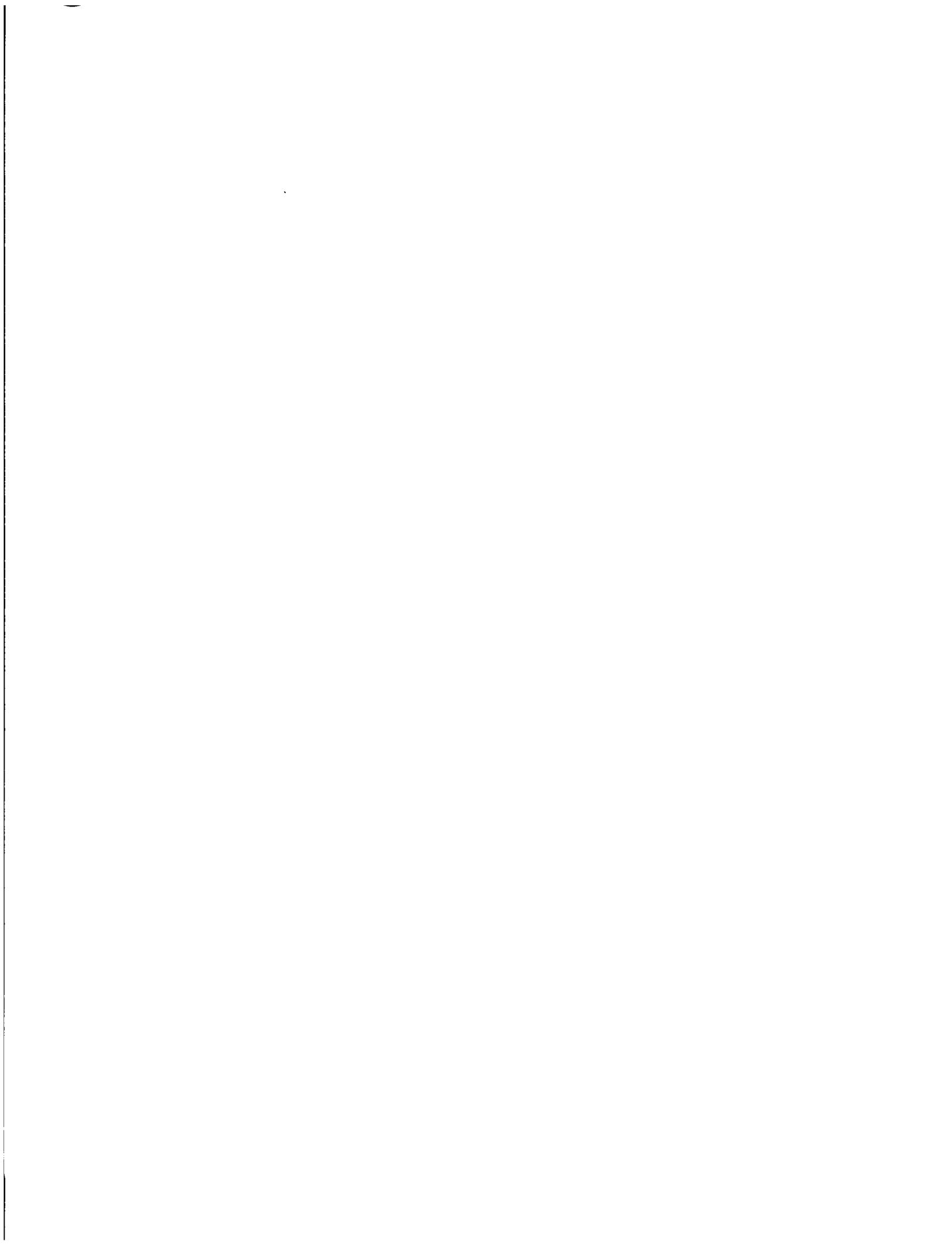
The proposed revisions from the published rule include clarifying the relationship to accessibility and preservation orders, in response to comments. Many comments also suggested that if the lower standard of culpability is used in the rule, the note should provide some guidance as to the relationship between the sanction and the level of culpability involved. The proposed rule applies to a range of sanctions, from the relatively minor punishments of fines, cost-shifting, and attorney's fees, to the more severe sanctions of adverse inference instructions, striking of pleadings or defenses, and default judgments. The reported cases reveal a kind of sliding scale: if there is intentional destruction, severe sanctions are appropriate; if the mental state is of lesser culpability, lesser sanctions are imposed. Proposed language is suggested for the committee note.

F. Rule 45

The package also contains revisions to Rule 45 mirroring the changes to the other rules. Unless the Committee identifies particular aspects that should be handled in a distinctive way in nonparty discovery, the Rule 45 proposals will follow the decisions made on the other proposed amendments.

IV. Conclusion

Discovery rules are always a complex mixture of principle and pragmatism. When the electronic discovery proposals were published in August, the Committee hoped for vigorous and broad comment from a variety of experiences and perspectives. The hearings and written comment provided many thoughtful and helpful criticisms, for which the Committee is grateful. The process has worked precisely as it should, aided by the very electronic communication capability that inspired the work in the first place. The Committee has before it a package of proposals that attempt to make the discovery rules better able to accommodate electronically stored information, without lessening the basic commitment to discovery that is fair and manageable for all litigants. The materials that follow set out each of the proposed amendments, with a brief discussion of the issues to be resolved, a version of both the rule and note showing the proposed changes from the present version and the published version, and a restyled version.



Rule 26(a)

1. Issues

This Rule 26(a) proposal was not included in the published proposals. It is suggested now as a “conforming amendment,” making the reference to “documents” and “data compilations” in Rule 26(a) consistent with the addition of electronically stored information to the discovery rules. As presently drafted, Rule 26(a) is inconsistent with both the present version of Rule 34, which makes “data compilation” a subset of “documents,” and with the proposed versions of Rule 34, which add “electronically stored information” to the list of what is subject to production.

The suggestion to add “electronically stored information” to Rule 26(a) also responds to concern that the omission of electronically stored information from the rule might be read by some to excuse disclosure of such information under Rule 26(a)(1) if it could be said not to be a “data compilation,” and under Rule 26(a)(3) if it could be said not to be within “other evidence.” The concern results in significant measure from the published version of Rule 34(a), which distinguishes “documents” from “electronically stored information.” One who applied that dichotomy to Rule 26(a)(1)

might take the position that under revised 34(a) there is no duty to disclose electronically stored information. If Alternative 2 for Rule 34(a) is used, there is less reason to add electronically stored information to Rule 26(a). One could also conclude that this amendment is unnecessary and that the current rule is adequate even if Rule 34(a) is amended to distinguish between “documents” and “electronically stored information.”

Whichever version of Rule 34(a) ends up going forward, there could be benefits from adding electronically stored information to Rule 26(a) as a conforming amendment. The term “electronically stored information” is used in a number of places in the discovery rules, including Rules 33(d), 34(b), 26(b)(2), and 37(f). Rule 26(f) directs the parties to talk about electronically stored information during their initial conference to plan discovery. Since the Rule 26(a)(1) initial disclosures are to occur shortly after that conference (if not during or before it), it may be inconsistent to require the parties to cover electronically stored information if it applies to their case in their Rule 26(f) conference, but not to require their initial disclosures to extend to such information.

One concern with adding electronically stored information to Rule 26(a)(1) is that it could require parties to locate and review such information too early in the case. Such information, often voluminous and dispersed, can be burdensome to locate and review, and many cases end before they get far into discovery. This concern may not be an argument against this proposal, because the initial disclosure obligation as limited in the 2000 amendments only applies to information that the disclosing party has decided it may use to support its case. As electronically stored information becomes the primary, if not the exclusive, way in which litigants maintain records, the arguments for including it in the limited initial disclosure obligation become stronger. And to the extent that preservation issues with regard to this information should be attended to early, creating the stimulus that adding the term to Rule 26(a)(1) would provide could be beneficial.

Interestingly, only one public comment raised the question of including electronically stored information in Rule 26(a). The absence of comment may reflect the assumption that Rule 26(a)(1) already covers electronically stored information by virtue of applying to “documents” and “data compilations,” and that Rule 26(a)(3)

already covers such information by virtue of applying to “other evidence.” If so, the utility of a “conforming” amendment to Rule 26(a) would not be to add a new obligation to Rule 26(a), but to achieve consistency with the terminology used in other discovery rules. If that is not a sufficient basis for adding electronically stored information to Rule 26(a)(1) and/or (a)(3), this proposal can be dropped.

2. Proposed Revision

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

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

1 **(a) Required Disclosures; Methods to Discover Additional**
2 **Matter.**

3 (1) **Initial disclosures.** Except in categories of
4 proceedings specified in Rule 26(a)(1)(E), or to the extent
5 otherwise stipulated or directed by order, a party must,
6 without awaiting a discovery request, provide to other
7 parties:

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

FEDERAL RULES OF CIVIL PROCEDURE

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

14 (B) a copy of, or a description by category and
15 location of, all documents, electronically stored
16 information, ~~data compilations~~,¹ and tangible things
17 that are in the possession, custody, or control of the
18 party and that the disclosing party may use to support
19 its claims or defenses, unless solely for impeachment;

20 * * * * *

¹ The suggestion to remove “data compilations” was based on the assumption that any such item would be included within “electronically stored information.” That seems warranted if Rule 34(a) is drafted to make “electronically stored information” separate from “documents” but to keep “data compilations” within the parenthetical describing what is included within both “documents” and “electronically stored information.” It is worth noting that “data compilations” is used in several Evidence Rules. See, e.g., Fed. R. Evid. 803(6); 803(8); 902(4). Since those are directed toward trial, rather than pretrial discovery or disclosure, they would seem more pertinent to Rule 26(a)(3), which does not now use the term “data compilation.”

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21 **(3) Pretrial Disclosures.** In addition to the disclosures
22 required by Rule 26(a)(1) and (2), a party must provide to
23 other parties and promptly file with the court the following
24 information regarding the evidence that it may present at trial
25 other than solely for impeachment:

26 **(A)** the name and, if not previously provided, the address
27 and telephone number of each witness, separately
28 identifying those whom the party expects to present and
29 those whom the party may call if the need arises;

30 **(B)** the designation of those witnesses whose testimony is
31 expected to be presented by means of a deposition and, if
32 not taken stenographically, a transcript of the pertinent
33 portions of the deposition testimony; and

34 **(C)** an appropriate identification of each document, all
35 electronically stored information, or other exhibit,
36 including summaries of other evidence, separately

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37 identifying those which the party expects to offer and
38 those which the party may offer if the need arises.²

39 * * * * *

Committee Note

Subdivision (a). Rule 26(a)(1)(B) is amended to parallel Rule 34(a) by recognizing that a party must disclose electronically stored information along with any other information that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26(a)(1) as in Rule 34(a). This amendment is consistent with the 1993 addition of Rule 26(a)(1)(B). The Note accompanying that amendment said the disclosure requirement should include "computerized data and other electronically-recorded information." This amendment makes clear that any information within the term electronically stored information, whether or not considered a "data compilation," is subject to the disclosure requirement. The term "data compilations" is deleted as unnecessary and arguably narrower than electronically stored information.

As with other disclosures under Rule 26(a)(1), disclosures of electronically stored information are subject to the supplementation requirements of Rule 26(e). If such information is not disclosed, a party that did not disclose it is subject to the provisions of Rule 37(c)(1).

² One question is whether there is any advantage in adding "electronically stored information" to 26(a)(3)(C) pretrial disclosure. If it is going to be introduced at trial, will it not be in the form of a "document" or "other exhibit"? Even if the computer screen is presented directly as the source of evidence, isn't it an exhibit? It may be that the evolution of electronically stored information, and the increasing sophistication of courtroom use of electronically stored information as evidence, could make the answer to this question harder, and support the addition of electronically stored information to the rule to cover situations in which it would not be said that the information was a traditional exhibit.

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Rule 26(a)(3) is similarly amended to confirm that any electronically stored information a party may use at trial, unless solely for impeachment, must be identified in its pretrial disclosures. It is not meant to apply to nonstenographically recorded depositions, which should be handled as provided in Rule 26(a)(3)(B).

Restyled Version

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 **(a) Required Disclosures.**

2 **(1) *Initial Disclosure***

3 **(A) *In General.*** Except as exempted by Rule
4 26(a)(1)(B), or as otherwise stipulated or ordered by
5 the court, a party must, without awaiting a discovery
6 request, provide to the other parties:

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

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13 (ii) a copy -- or a description by category and
14 location -- of all documents, electronically stored
15 information, ~~data compilations~~, and tangible
16 things that the disclosing party has in its
17 possession, custody, or control and may use to
18 support its claims or defenses, unless the use
19 would be solely for impeachment;

20 * * * * *

21 **(3) Pretrial Disclosures.**

22 (A) In addition to the disclosures required by Rule
23 26(a)(1) and (2), a party must provide to other parties and
24 promptly file the following information about the
25 evidence that it may present at trial other than solely for
26 impeachment:

27 (i) the name and, if not previously provided, the
28 address and telephone number of each witness --
29 separately identifying those the party expects to
30 present and those it may call if the need arises;

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31 (ii) the designation of those witnesses whose
32 testimony the party expects to present by deposition
33 and, if not taken stenographically, a transcript of the
34 pertinent portions of the deposition; and
35 (iii) an identification of each document, all
36 electronically stored information, or other evidence --
37 separately identifying those items the party expects to
38 offer and those it may offer if the need arises.

39 * * * * *

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Rule 26(f) and Rule 16(b)

1. Issues

Commentators consistently applauded Rule 26(f)'s directive to discuss electronically stored information at the beginning of discovery. Several issues were identified in the public comment period, but one has emerged as significant: whether to include the Rule 26(f)(4) provision for a case-management order adopting a party agreement on privilege waiver. This issue, as well as other issues identified in the comment period, are discussed below.

a. The Level of Detail for the Topics for Early Discussion

An early draft of what became proposed Rule 26(f) included considerable detail in the rule about what should topics should be discussed. That detail was removed from the Rule on the ground that such lists are by nature incomplete and will include factors inappropriate for some cases and omit factors important for others. The form of production topic was returned to the Rule because it is consistently important and often problematic if unaddressed. One change is proposed to the rule language of 26(f)(3). Many comments noted that more than one form of production might be appropriate in

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a case, because a party may store different information in different forms. Accordingly, the Rule is revised to state that the parties should discuss “any issues relating to . . . electronically stored information, including the form or forms in which it should be produced.” No other topics are added to the rule.

Some commentators urged that the Rule or Note should require the lawyers to know, exchange, and disclose more information about their client's computer systems. At least one commentator expressed concern that the Note emphasizes this topic too much.³ The District of New Jersey has a local rule directing counsel to acquaint themselves with pertinent details about client computer systems before the Rule 26(f) conference so that they can talk intelligently about the topic. During the drafting process, there was discussion of including similar details in the proposed national rule. The consensus was that such a detailed directive should not be included in the national rule, but was more appropriate for the *Manual for Complex*

³ Thomas Burt, Microsoft, (04-CV-001).

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Litigation and various practice protocols.⁴ Other comments suggested encouraging direct communications between parties' IT personnel, but this level of detail seemed inappropriate for the Rule or Note. The Note's comments on what lawyers must learn before the Rule 26(f) conference for intelligent discussion with the other parties have not been strengthened.

b. Including Preservation in the Rule's Text

Some comments urged that the explicit directive in the Rule to discuss preservation of discoverable information be downgraded to the Note.⁵ Some fear that calling for discussion of the question will promote early applications for preservation orders.⁶ Others say that it is very important to address these questions early on to avoid

⁴ One argument for strengthening this requirement is to enable a requesting party to challenge a responding party's assertion that certain information is not reasonably accessible under proposed amended Rule 26(b)(2)(B). It might sometimes be useful for the requesting party to have an overview of the party's computer systems. But such generalized information may not be of significant utility in addressing a claim based on Rule 26(b)(2), and the better focus seems to be on calibrating the identification requirement of that rule to try to ensure that the pertinent information is then provided.

⁵ See, e.g., Thomas Allman (S.F.); Alfred Cortese (Dallas and D.C.).

⁶ See, e.g., ABA Section of Litigation (04-CV-062).

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problems later.⁷ Some say that waiting until the Rule 26(f) conference delays discussion of preservation too long.⁸ Most, however, supported the inclusion of preservation as a topic to be discussed early in the case. No significant change to the Rule 26(f) language is proposed. Several comments raised concerns about preservation orders. The Note has been revised to state that preservation orders should not routinely be included in Rule 16 case-management orders, should rarely, if ever, be issued on ex parte applications, and should be narrowly tailored.

c. Privilege Waiver

During the comment period, many expressed uneasiness about the proposal that the court enter a case-management order “protecting” against waiver of privilege because it is not clear that this protection is effective against third parties.⁹ Many also asked what purpose this provision serves if Rule 26(b)(5)(B) goes forward. Finally, many

⁷ See, e.g., Joan Feldman (S.F.); N.Y. St. Bar Ass'n (04-CV-045).

⁸ E.g., Kathryn Burkett Dickson (S.F.), Anne Kershaw (Dallas), and Lerach, Coughlin, Soia, Geller, Rudman & Robbins (04-CV-067).

⁹ See, e.g., Philadelphia Bar Ass'n (04-CV-058); Charles Ragan (S.F.).

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expressed fears that judges will press too hard to get parties to produce before they have time to do a proper privilege review.

For years, the Committee has wrestled with how to address privilege waivers within the rules, based on the expense and delay attendant to reviewing hard copy documents for privilege and generating a privilege log. Reviewing electronically stored information for privilege adds to the expense, delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information. Metadata and embedded data are examples of such complexities; they may contain privileged communications, yet are not visible when the information is displayed on a computer monitor or printed on paper. Another approach considered in the drafting was adopting a rule provision directly addressing what is a waiver, using the middle of the road multifactor analysis that most federal courts adopt. For a variety of reasons, the agreed order format was proposed as a useful way to facilitate agreements for preserving privilege that would enable parties to conduct discovery on a faster, less costly basis. The notion was that a case-management order adopting the

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parties' agreement was an improvement over a naked agreement, even if it could not guarantee protection with regard to third parties.

The issue is whether the risk of lulling litigants into a false sense of security—or of inspiring judges to demand production on an unreasonably abrupt schedule because all privilege claims are “preserved” under a coerced “agreement”—makes the addition of proposed Rule 16(b)(6) unwise. As noted below, Rule 26(f)(4) could be revised to invite the parties to discuss privilege waiver, without any reference to an agreed order. If that were done, Rule 16(b)(6) could be removed from the package. The question is whether a suggestion that the parties discuss the problem, standing alone, is sufficiently useful to be included in the rule. Parties can, although many do not, discuss this topic without the prompt. Many of our commentators said that they had reached such agreements under the present rules. Others said that they refused so to agree, and still others said this would just be something else to fight about.

2. The Proposed Rule

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16 statement as to when disclosures under Rule 26(a)(1)
17 were made or will be made;

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

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

25 **(4)** whether, on agreement of the parties, the court should
26 enter an order protecting the right to assert privilege after
27 production of privileged information.⁸

⁸ If the Committee decides that the benefits of suggesting that the court be asked to enter an order are outweighed by the possible drawbacks of making that order look more protective than it may be, the question of privilege waiver could be approached in terms more similar to proposed Rule 26(f)(3):

(4) whether the parties can agree to procedures for protecting against privilege waiver during discovery;

The Note could then detail the reasons for considering this sort of provision, and the possibility that the parties could make an agreement about it that would facilitate discovery. But if Rule 26(b)(5)(B) is adopted, it is unclear what this would add.

An alternative to the formulation in the published proposal could be:

(4) whether the court should enter an order confirming any agreement the

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

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

33 The attorneys of record and all unrepresented parties that
34 have appeared in the case are jointly responsible for arranging
35 the conference, for attempting in good faith to agree on the
36 proposed discovery plan, and for submitting to the court
37 within 14 days after the conference a written report outlining
38 the plan. A court may order that the parties or attorneys
39 attend the conference in person. If necessary to comply with
40 its expedited schedule for Rule 16(b) conferences, a court
41 may by local rule (i) require that the conference between the

parties reach regarding the right to assert a privilege after production of
information to a party.

This approach eliminates the word “protecting” that appears in the published
version, and makes this provision more analogous to the Rule 26(b)(5)(B) proposal.
But if that is done, arguably this would add nothing to that proposal (assuming it
goes forward). It is unclear that such an order would add protection to the parties
against assertions of waiver, perhaps by third parties. Rule 16(b)(6) would need to
be changed as well, since it speaks of “the parties’ agreement for protection against
waiving privilege.”

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42 parties occur fewer than 21 days before the scheduling
43 conference is held or a scheduling order is due under Rule
44 16(b), and (ii) require that the written report outlining the
45 discovery plan be filed fewer than 14 days after the
46 conference between the parties, or excuse the parties from
47 submitting a written report and permit them to report orally
48 on their discovery plan at the Rule 16(b) conference.

“Clean” Version of the Rule

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

1 * * * * *

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

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10 arrange for the disclosures required by Rule 26(a)(1), to
11 discuss any issues relating to preserving discoverable
12 information, and to develop a proposed discovery plan that
13 indicates the parties' views and proposals concerning:

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

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

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

25 (4) whether, on agreement of the parties, the court should
26 enter an order protecting the right to assert privilege after
27 production;

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

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

33 The attorneys of record and all unrepresented parties that
34 have appeared in the case are jointly responsible for arranging
35 the conference, for attempting in good faith to agree on the
36 proposed discovery plan, and for submitting to the court
37 within 14 days after the conference a written report outlining
38 the plan. A court may order that the parties or attorneys
39 attend the conference in person. If necessary to comply with
40 its expedited schedule for Rule 16(b) conferences, a court
41 may by local rule (i) require that the conference between the
42 parties occur fewer than 21 days before the scheduling
43 conference is held or a scheduling order is due under Rule
44 16(b), and (ii) require that the written report outlining the
45 discovery plan be filed fewer than 14 days after the
46 conference between the parties, or excuse the parties from

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- 47 submitting a written report and permit them to report orally
48 on their discovery plan at the Rule 16(b) conference.

Committee Note

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

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties’ information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference.⁹ With that information, the parties can develop a

⁹ As noted above, a number of commentators have urged that the rules include a more forceful requirement of gathering and disclosure of information about client computer systems, or at least promote that activity more vigorously. Perhaps this sentence could be replaced with something like:

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discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.¹⁰

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms or formats in which a party keeps such information ~~may be considered~~, as well as the form or forms in which it might be produced. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication."

It may be important for the parties to exchange relatively detailed information about the operation of the information systems from which the electronically stored information will be sought. Lawyers often will have to obtain information from a client's information technology personnel before the Rule 26(f) conference takes place.

¹⁰ Reference to the "techie-to-techie" interaction that some commentators have praised could be added here:

In some instances, direct communication between technical experts for the parties may smooth discovery of electronically stored information. In some cases it may be useful to bring information technology experts to the conference.

This level of detail may be better suited to a manual or discovery protocol than the national rule or note.

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Manual for Complex Litigation (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

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

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

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address these issues early in the litigation increases uncertainty and raises a risk of later disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete cessation of a party's ordinary computer operations— including automatic creation and deletion of information— that activity could paralyze the a party's activities operations. Cf. *Manual for Complex Litigation* (4th) § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties

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dependent on computer systems for their day-to-day operations.”) The parties should take account of these considerations in their discussions, with the goal of agreeing on a reasonable preservation regime.

If the parties reach an agreement, there should be no occasion for court intervention. Courts should not routinely issue preservation orders. Ex parte preservation orders should issue only in extraordinary circumstances. A preservation order entered over objections should be narrowly tailored and based on a showing that there is a substantial risk that discoverable information will become unavailable unless an order is entered. Ex parte preservation orders should issue only in extraordinary circumstances.¹¹

~~Rule 37(f) addresses these issues by limiting sanctions for loss of electronically stored information due to the routine operation of a party’s electronic information system. The parties’ discussion should aim toward specific provisions, balancing the need to preserve relevant evidence with the need to continue routine activities critical to ongoing business. Wholesale or broad suspension of the ordinary operation of computer disaster-recovery systems, in particular, is rarely warranted. Failure to attend to these issues early in the litigation increases uncertainty and raises a risk of later unproductive controversy. Although these issues have great importance with regard to electronically stored information, they are also important with hard copy and other tangible evidence. Accordingly, the rule change should prompt discussion about preservation of all evidence, not just electronically stored information.~~

¹¹ This language responds to comments during the public comment period that preservation orders can be extremely disruptive. But it might be argued that this disapproving language about such orders is too strong. This concern might grow from the possible interaction of Rules 26(b)(2) and 37(f) if they are taken to endorse routine discarding of inaccessible information. Efforts have been made elsewhere in redrafting to respond to those concerns. In addition, it could be argued that the statements about issuing preservation orders go beyond what should be included in a Note to instruct a court on how to handle a case.

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Rule 26(f) is also amended to provide that the discovery plan may include a request ~~any agreement~~ that the court enter a case-management order facilitating discovery by protecting against privilege waiver.¹² The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege are often difficult to identify, and failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Not only may this effort impose substantial costs on the party producing the material, but the time required for the privilege review can substantially delay access for the party seeking discovery.

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

¹² The phrase “protecting against privilege waiver” might be debated on the ground that the effectiveness of such an order in protecting against waiver is uncertain. It might be better to say “. . . that the court enter an order addressing privilege waiver.”

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

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

~~*Manual for Complex Litigation* (4th) § 11.446.~~

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege—sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called “clawback agreements”—that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those

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circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

~~Although~~ As noted in the *Manual for Complex Litigation*, these agreements may not be appropriate for all cases, where agreed upon and used they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. ~~As the Manual also notes, a~~ case-management order implementing such agreements may ~~can~~ further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to recognize that ~~emphasize~~ the court's ~~entry of~~ may enter an order recognizing and implementing such an agreement as a case-management order.¹³ The amendment to Rule 26(f) is modest; the entry of such a case-management order merely implements the parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.¹⁴

¹³ It may be desirable to soften this statement, which still seems to promise more than, perhaps, an order can deliver:

... Rule 16(b) is amended to alert the court to the possibility of entering such an order, although the extent of protection such an order affords against waiver claims by third parties is uncertain.

But if we say this, one can certainly ask why we are bothering to include the provision at all. As noted in the introductory comments, some commentators urged that this is not the right way to go, and that proposed Rule 26(b)(5)(B) is the right tack.

¹⁴ If we later adopt the alternative mentioned in a footnote to the rule of suggesting only party agreement regarding privilege waiver (rather than a court order based on that agreement), it may be desirable to discard this paragraph except for the first sentence.

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

“Clean” Version of the Note

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on “issues related to disclosure or discovery of electronically stored information”; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

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

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation* (4th) § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party’s control that should be searched for electronically stored information. They may discuss whether the

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information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. See Rule 26(b)(2)(B). Rule 26(f)(3) explicitly directs the parties to discuss the form or forms in which a party keeps such information, as well as the form or forms in which it might be produced. "Early agreement between the parties regarding the forms of production will help eliminate waste and duplication." *Manual for Complex Litigation* (4th) § 11.446. Even if there is no agreement, discussion of this topic may prove useful. Rule 34(b) is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. An informed request is more likely to avoid difficulties than one made without adequate information.

Form 35 is also amended to add the parties' proposals regarding disclosure or discovery of electronically stored information to the list of topics to be included in the parties' report to the court. Any aspects of disclosing or discovering electronically stored information discussed under Rule 26(f) may be included in the report to the court. Any that call for court action, such as the extent of the search for information, directions on evidence preservation, or cost allocation, should be included.

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address these issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete

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cessation of a party's ordinary computer operations—including automatic creation and deletion of information—could paralyze the party's activities. *Cf. Manual for Complex Litigation* (4th) § 11.422 (“A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.”) The parties should take account of these considerations in their discussions, with the goal of agreeing on a reasonable preservation regime.

Courts should not routinely issue preservation orders. A preservation order entered over objections should be narrowly tailored and based on a showing that there is a substantial risk that discoverable information will become unavailable unless an order is entered. *Ex parte* preservation orders should issue only in extraordinary circumstances.

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

These problems can become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored

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information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic document files but not apparent to the creator of the document or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic document file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic document (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege—sometimes known as a “quick peek.” The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements—sometimes called “clawback agreements”—that production without intent to waive privilege should not be a waiver so long as the producing party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation.

Although these agreements may not be appropriate for all cases, where agreed upon and used they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and reducing the cost and burden of review by the producing party. A case-management order implementing such agreements may further facilitate the discovery

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process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent privilege forfeiture or waiver that the parties have reached, and Rule 16(b) is amended to recognize that the court may enter an order implementing such an agreement as a case-management order. The amendment to Rule 26(f) is modest; the entry of such a case-management order merely implements the parties' agreement. But if the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a procedure for assertion of privilege after production, leaving the question of waiver to later determination by the court.

Rule 16. Pretrial Conferences; Scheduling; Management

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* * * * *

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

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

FEDERAL RULES OF CIVIL PROCEDURE

11 **(2)** to file motions; and

12 **(3)** to complete discovery.

13 The scheduling order may also include

14 **(4)** modifications of the times for disclosures under Rules
15 26(a) and 26(e)(1) and of the extent of discovery to be
16 permitted;

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

19 **(6)** adoption of the parties' agreement for protection
20 against waiving privilege;¹⁵

21 **(75)** the date or dates for conferences before trial, a final
22 pretrial conference, and trial; and

23 **(86)** any other matters appropriate in the circumstances of
24 the case.

25 The order shall issue as soon as practicable but in any event
26 within 90 days after the appearance of a defendant and within
27 120 days after the complaint has been served on a defendant.

¹⁵ As noted above, one option would be to remove this provision and substitute a softer version of proposed Rule 26(f)(4). The second paragraph of the Note would also be deleted.

FEDERAL RULES OF CIVIL PROCEDURE

28 A schedule shall not be modified except upon a showing of
29 good cause and by leave of the district judge or, when
30 authorized by local rule, by a magistrate judge.

31 * * * * *

“Clean” version of rule

Rule 16. Pretrial Conferences; Scheduling; Management

1 * * * * *

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3 actions exempted by district court rule as inappropriate, the
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12 (3) to complete discovery.

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FEDERAL RULES OF CIVIL PROCEDURE

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

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18 stored information;

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22 pretrial conference, and trial; and

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29 good cause and by leave of the district judge or, when
30 authorized by local rule, by a magistrate judge.

FEDERAL RULES OF CIVIL PROCEDURE

Committee Note

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

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege to enable the party seeking production to designate the materials desired for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged information is inadvertently produced the producing party may by timely notice assert the privilege and obtain return of the materials without waiving the privilege. Other arrangements are possible. A case-management order to effectuate the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and may add protection against nonparty assertions that privilege has been waived.

FEDERAL RULES OF CIVIL PROCEDURE

although the extent of that protection is uncertain.¹⁶ The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

"Clean" Version of the Note

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

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¹⁶ Here again, the idea is to recognize that there is room for debate about whether there really is protection. Perhaps a less negative alternative would be preferable, along these lines:

Court adoption of the chosen procedure by order may advance enforcement of the parties' agreement.

FEDERAL RULES OF CIVIL PROCEDURE

delay and excessive cost in discovery. *See Manual for Complex Litigation* (4th) § 11.446. Rule 16(b)(6) recognizes the propriety of including such directives in the court's case management order. Court adoption of the chosen procedure by order advances enforcement of the agreement between the parties and may add protection against nonparty assertions that privilege has been waived, although the extent of that protection is uncertain. The rule does not provide the court with authority to enter such a case-management order without party agreement, or limit the court's authority to act on motion.

Form 35. Report of Parties' Planning Meeting

* * * * *

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

Discovery will be needed on the following subjects: _____

(brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically stored information

should be handled as follows: _____ (brief description of parties' proposals) _____

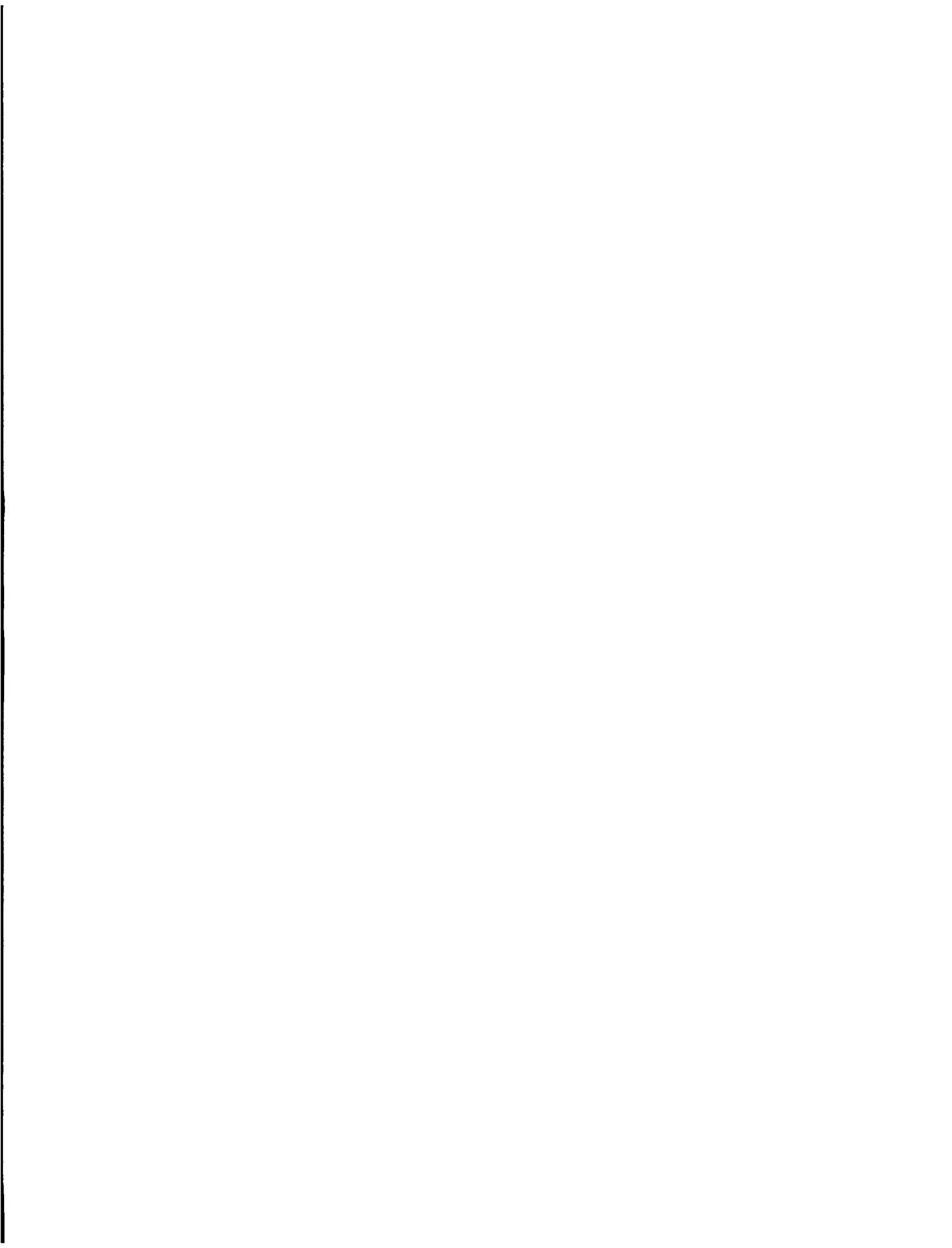
FEDERAL RULES OF CIVIL PROCEDURE

The parties have agreed to [a privilege protection order.] {an order addressing privilege waiver.}¹⁷ as follows: (brief description of provisions of proposed order)

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

* * * * *

¹⁷This alternative would soften the description of the order.



Rule 33

1. Issues

The public comment broadly supported the proposed Rule language and identified one issue as to the Note. Some who commented¹ said that they regarded the change as unnecessary, but most endorsed the amendment.²

A number of commentators³ raised concerns about Note language suggesting that there might often be direct access to the responding party's information systems. The concern is that such access might enable the litigation opponent to obtain much information beyond the scope of the question, some of which might be privileged, trade secrets, proprietary information, etc. To address these concerns, possible revisions to the Note are suggested.

¹ Thomas Burt (Microsoft) (04-CV-001); David Fish (Dallas testimony & 04-CV-021).

² See, e.g., Philadelphia Bar Ass'n (04-CV-031); N.Y. St. Bar Ass'n Comm. & Fed. Lit §. (04-CV-045); Gregory Joseph (04-CV-066); St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174).

³ E.g., Charles Ragan (San Francisco testimony); Michael Nelson (Washington testimony and 04-CV-005); U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192).

FEDERAL RULES OF CIVIL PROCEDURE

18 locate and to identify, as readily as can the party served, the
19 records from which the answer may be ascertained.

“Clean” Version of the Rule

Rule 33. Interrogatories to Parties

1 * * * * *

2 **(d) Option to Produce Business Records.** Where the
3 answer to an interrogatory may be derived or ascertained from
4 the business records, including electronically stored
5 information, of the party upon whom the interrogatory has
6 been served or from an examination, audit or inspection of
7 such business records, including a compilation, abstract or
8 summary thereof, and the burden of deriving or ascertaining
9 the answer is substantially the same for the party serving the
10 interrogatory as for the party served, it is a sufficient answer
11 to such interrogatory to specify the records from which the
12 answer may be derived or ascertained and to afford to the
13 party serving the interrogatory reasonable opportunity to
14 examine, audit or inspect such records and to make copies,
15 compilations, abstracts, or summaries. A specification shall

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

Committee Note

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

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) says that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it “as readily as can the party served,” and also provides that the responding party must give the interrogating party a “reasonable opportunity to examine audit, or inspect” the information. Depending on the circumstances of the case, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software[, access to the pertinent computer system,]⁴ or other assistance. The key question is

⁴ The bracketed material could be removed to downplay the idea that frequent access to a computer system is appropriate. Proposed additional Note language is suggested at the end of this paragraph to address the issue. The bracketed material probably should come out if that language is added, and might be removed even if that language is not added.

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whether such support enables the interrogating party to derive or ascertain the answer from use⁵ the electronically stored information as readily as the responding party. Direct access to a party's electronic information system would be justified only if necessary [essential] to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. Such access may raise particularly sensitive problems of confidentiality or privacy; ordinarily it would suffice to provide the requesting party with electronically stored information from which it can obtain the answer.⁶

“Clean Version of the Note”

Committee Note

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

Special difficulties may arise in using electronically stored information, either due to its format or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) says that a party

⁵ This change recognizes that the objective of Rule 33(d) is to enable the requesting party to obtain an answer to the question it asked. It is not to enable the party to “use” electronically stored information from which the answer may be derived for other purposes. Although that may sometimes occur, it is not the objective of the requirement, and the change more accurately reflects the provisions of the Rule.

⁶ These two sentences attempt to address the concern about direct access to the computer system of the adversary.

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electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it “as readily as can the party served,” and also provides that the responding party must give the interrogating party a “reasonable opportunity to examine, audit, or inspect” the information. Depending on the circumstances of the case, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software[, access to the pertinent computer system,] or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. Direct access to a party's electronic information system would be justified only if necessary [essential] to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. Such access may raise particularly sensitive problems of confidentiality or privacy; ordinarily it would suffice to provide the requesting party with electronically stored information from which it can obtain the answer.

Rule 34(a) and (b)

1. Issues

The comment period generated several questions about and improvements to the published Rule and Note language. One issue to be decided is whether to define electronically stored information as included in, or separate from, “documents.” A second set of issues involves the Rule and Note language addressing the form of production.

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a. *Choice between Alternatives 1 and 2 for 34(a)*

The issue is presented in two versions of Rule 34(a). Alternative 1 is the version published, breaking out electronically stored information to a status co-equal with “documents.” Alternative 2 adds electronically stored information to the list included within “documents.”

Several considerations bear on the choice between breaking out electronically stored information as proposed in the published Rule, or including electronically stored information within the term “documents.” From the perspective of the practicing bar, several have remarked that separating out electronically stored information could cause problems because Rule 34 requests that formerly would mean that this information was sought under the title “documents” would now have to specify that electronically stored information is also requested.⁷ The Note now tries to deal with this concern by saying that ordinarily a request for “documents” should be taken to request electronically stored information, and one of the

⁷ See, e.g., Philadelphia Bar Ass'n (04-CV-031), ABA Section of Litigation (04-CV-062); Fed. Civ. Pro. Comm., Amer. Coll. of Tr. Lawyers (04-CV-109); Gregory Joseph (04-CV-066).

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commentators' suggestions for clarifying that point has been added to the proposed revision to the Note set out below.

Given other provisions addressing electronic discovery, these concerns may not appear compelling. The parties are directed by Rule 26(f) to discuss the form for producing electronically stored information if such discovery is going to occur in the case; that should alert them to whether discovery is seeking this information. Rule 34(b) permits the requesting party to specify the form or forms for production of electronically stored information, which should lay to rest any enduring uncertainty about whether this information is sought. Altogether, it would seem unusual for there often to be genuine uncertainty about what is sought. And a party can solve that problem by being clear about what it is asking for. That, indeed, is required by the Texas rule. A responding party, similarly, can inquire if it is not sure.

The thinking behind the addition of electronically stored information as a co-equal focus with “documents” is that it is likely to be more important than traditional documents soon, if that is not already true. Some say that Rule 34 discovery in the future will be

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handled entirely electronically. With that prospect, it may be odd to try to distend “documents” so that it covers whatever may evolve in the electronically stored information field. On the other hand, that process of stretching “document” has a venerable history. With regard to electronically stored information, it began in 1970, when “data compilation” was added to Rule 34(a) by prescient rulemakers. Until now, courts have been able to deal with discovery of electronically stored information under the current term “document,” so introducing a new term now may seem gratuitous. Yet introducing a new co-equal term may provide more flexibility in the future, as reflected in the comments of several.⁸ Commentary has also highlighted at least one area in which we have been told that it is extremely difficult to conceptualize electronically stored information as a “document” – dynamic databases.⁹ So there seems considerable

⁸ See, e.g., Charles Ragan (failure to acknowledge the revolution in information technology is to blind oneself to reality); Thomas Burt (Microsoft, 04-CV-001) (the definition of “document” has long lagged reality); N.Y. State Bar Ass'n (04-CV-045) (the current language is clearly out of step with reality).

⁹ See, e.g., 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); Dan Regard (04-CV-044) (a database cannot reasonably be conceived as a “document”); see also Dennis Kiker (04-CV-077) (even the most expansive definition of “document” does not adequately cover current and emerging

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reason to believe that (at least for the more technical among our commentators), the inclusion of electronically stored information as a separate category is an important way to recognize what is really happening. What the future holds that might ill fit within “document” is impossible to foresee, but one can support “document” on the ground that it has proved serviceable until now.

There may also be some slight benefit in terms of drafting to break electronically stored information out separately. That way, we will have a broadly defined term that can be used in other places to signify what we are talking about when we devise rules specifically for this information. To offer some illustrations, our proposed amendment to Rule 26(f) calls for separate discussion of discovery of “electronically stored information,” our proposed amendment to Rule 33(d) addresses the role of “electronically stored information” in that setting, our Rule 26(b)(2) proposal introduces the question of accessibility of “electronically stored information,” and our Rule 37(f) proposal deals only with loss of “electronically stored information.” Separating “documents” and “electronically stored

forms of electronically stored information).

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information” worked well for the proposed default provisions on form of production in Rule 34(b), although it is not hard to adapt those provisions to accommodate including “electronically stored information” as part of “documents.” More generally, separating the term from “documents” in Rule 34 helps identify what we are talking about in these rules. If Alternative 2 is adopted, the question is whether a definition of this term should appear elsewhere in the rules or notes.

One other drafting matter deserves mention: the significance of the litany in the parenthetical in the current rule. One reason for the confusion is the punctuation itself. Some have asked whether that parenthetical refers only to “documents.” That would be odd, since it includes “data compilations,” and calling electronically stored information something different from “documents” would make it odd for data compilations to be included in the definition of “documents” only (although one of our witnesses suggested that the reason for initial inclusion of this phrase was to include punchcards, which were once used to store information that a computer would use, and which sound more like “documents”). The revision borrows

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from the style project to change the punctuation to eliminate the parentheses in favor of dashes. The Note is revised to be consistent. The items listed in what is now the parenthetical refer, as applicable, to either or both electronically stored information and documents. To take one example, an “image” could be in a document, or in an electronic form. The items listed reflect the breadth we have in mind with regard to both “documents” and “electronically stored information.”

In sum, there do not seem to be particularly strong arguments either way. It is likely that continuing to house all forms of electronically stored information under the label “documents” will continue to work, even for such things as databases. On the other hand, the likelihood there will be widespread (or longstanding) problems from the possible need to specify that a Rule 34 request seeks electronically stored information seems small.

b. Default Form of Production—“Reasonably Usable by the Requesting Party”

The revised proposed rule set out below substitutes “reasonably usable by the requesting party” for the published language that described the so-called default form of production. Many

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commentators supported this sort of change.¹⁰ The Note is revised to borrow from the Note to our Rule 33(d) proposal to convey that the responding party is responsible to ensure that the material is reasonably usable. The default option of producing in a form in which the party maintains the information raised several concerns. A number of commentators said that this seemed to be a slant in favor of “native format” due to the difficulties that attend providing something that is electronically searchable, leaving only “native format” as a permitted form. That might be removed by substitution of an alternative of a “reasonably usable” form only for “electronically searchable.” But once the “reasonably usable” locution is used, it becomes difficult to determine what value there is to leaving in the alternative of providing the information in a form in which the producing party maintains it. If that form is reasonably usable by the requesting party, then the revised default permits it to be used. Should we provide that a party may always use the form in which it maintains the information even if it is not reasonably usable? That seems unwise.

Whether to collapse the default into a single standard could easily be debated. The original idea was to model the default on the

¹⁰ See, e.g., Kathryn Burkett Dickson (S.F.), Thomas Allman (04-CV-007); Charles Ragan (S.F.); Thomas Burt (Microsoft, 04-CV-001); Alfred Cortese (04-CV-054).

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existing standards of Rule 34 for production of hard-copy materials—as kept by the producing party or organized to correspond to the requests. The “electronically searchable” alternative, thus, was designed to afford the requesting party an opportunity to organize the material for itself without difficulty. But numerous commentators have told us that this option presents numerous difficulties, and have urged the alternative of “reasonably usable” form. Once that is adopted, the parallel to the current rule seems much weaker, and the “as maintained” option therefore was not retained.

Some concerns have been raised about the new formulation. The responding party may not be able to determine what would be reasonably usable by the requesting party if the responding party has not specified what it wants. Although the proposed language uses the term “reasonably usable,” some have questioned whether this provision could impose a burden on the responding party to convert its electronically stored information into a new and possible esoteric format because that is what the requesting party would find most usable.

These concerns may not provide cause for abandoning the usable format formulation, which was proposed in many instances by parties that would usually be producing parties. This obligation to make electronically stored information usable to the requesting party is

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similar to the provision in Rule 33(d) directing a responding party using its option to ensure that the requesting party can use the electronically stored information supplied in lieu of an interrogatory answer. And Rule 34(b) allows the requesting party to specify whatever form it wants for production—even an esoteric one. If that happens, the responding party can object and, if the parties do not work the problem out between themselves, the court will have to resolve it. The same technique would seem appropriate when the requesting party does not specify a form. The proposed amendment to Rule 26(f) directs that parties to talk about form of production, so lines of communication should have been opened. And a bracketed possible addition to the rule below would direct the responding party to notify the requesting party of the proposed form of production before production occurs. Altogether, there seem sufficient avenues to solve the problems of the producing party.

Particularly in light of the Rule's additional directive that a party need produce the same electronically stored information in only one form, it would seem undesirable to leave the responding party entirely unconstrained as to form. The problem with our original formulation was that it was too constraining for the responding party. This formulation should offer more flexibility.

2. A Proposed Revision of Rule 34(a) and (b)

[Alternative 1 -- the published version]

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

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

1 **(a) Scope.** Any party may serve on any other party a request
2 (1) to produce and permit the party making the request, or
3 someone acting on the requestor's behalf, to inspect, ~~and~~
4 copy, test, or sample any designated documents or
5 electronically stored information or any designated documents
6 ~~(—~~including writings, drawings, graphs, charts, photographs,
7 sound recordings, images ~~phonorecords~~, and other data or
8 data compilations stored¹¹ in any medium —¹²from which

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

¹¹ The word "stored" was added to emphasize that discovery is limited to that which is stored, not all that might be stored. Many types of electronic information might be stored, but are not. Perhaps instant messaging would be an example. Indeed, our definition of what we are talking about is electronically *stored* information. But the addition of "stored" to the rule might be questioned. Would it exclude "deleted" information that could still be retrieved? That would seem to be "stored" even if later slated for overwriting. Probably this issue can best be handled under the heading of accessibility. How would one treat the information created by a dynamic database in response to a query? Should that be viewed as "stored"? Probably that would also depend on whether it is retrievable at the time that production is sought. So the addition of "stored" seems to fit in with the package of amendments.

Concerns were raised about the addition of "stored," however, because of the history that word has under the Stored Communications Act. In that context, "stored" is sometimes interpreted to mean any lodging of information in a computer hard drive or relay device, however transitory. Indeed, it is reported that the "next

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

21 * * * * *

big area” for electronic discovery is instant messaging. To say that IM is not “stored” may be incorrect under the Stored Communications Act because IM is composed on one computer, relayed to several others, and viewed on the destination computer. Each stage involves storage. But in some circumstances (banking, broker/dealer communications) it is stored in the sense that a transcript is made and the transcript is treated as a record for records management purposes. The supposed “stored/not stored” dichotomy is really just a variant of the accessibility continuum. The basic question is whether the information is available when sought through discovery. If it was briefly “stored,” but is no longer retrievable, than it cannot be obtained whether or not it was once “stored.” To avoid confusion, on this view, the word “stored” could be replaced with “available” or “existing.”

¹²The punctuation change, deleting the parentheses in favor of the em-dash, occurs here. It adopts the punctuation used in the style version.

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*[Alternative 2 -- making electronically stored information a subset of "documents"]*¹³

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

1 **(a) Scope.** Any party may serve on any other party a request
2 (1) to produce and permit the party making the request, or
3 someone acting on the requestor's behalf, to inspect, ~~and~~
4 copy, test, or sample any designated documents (— including
5 writings, drawings, graphs, charts, photographs, sound
6 recordings, images ~~phonorecords~~, electronically stored
7 information, and other data or data compilations stored in any
8 medium — from which information can be obtained,
9 translated, if necessary, by the respondent through detection
10 devices into reasonably usable form), or to inspect, ~~and~~ copy,
11 test, or sample any designated tangible things which
12 constitute or contain matters within the scope of Rule 26(b)
13 and which are in the possession, custody or control of the
14 party upon whom the request is served; or (2) to permit entry
15 upon designated land or other property in the possession or
16 control of the party upon whom the request is served for the

¹³ This version would also delete electronically stored information from the title of Rule 34.

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17 purpose of inspection and measuring, surveying,
18 photographing, testing, or sampling the property or any
19 designated object or operation thereon, within the scope of
20 Rule 26(b).

21 **(b) Procedure.** The request shall set forth, either by
22 individual item or by category, the items to be inspected, and
23 describe each with reasonable particularity. The request shall
24 specify a reasonable time, place, and manner of making the
25 inspection and performing the related acts. The request may
26 specify the form or forms¹⁴ in which electronically stored
27 information is to be produced. Without leave of court or
28 written stipulation, a request may not be served before the
29 time specified in Rule 26(d).

30 The party upon whom the request is served shall serve a
31 written response within 30 days after the service of the
32 request. A shorter or longer time may be directed by the court
33 or, in the absence of such an order, agreed to in writing by the
34 parties, subject to Rule 29. The response shall state, with
35 respect to each item or category, that inspection and related

¹⁴ One concern expressed was that adding the plural at this point raised a risk that a requesting party would demand production of the same information in more than one form. That should be precluded by the final sentence of Rule 34(b), but its placement made that unclear. For that reason, the final sentence has been moved, and additional clarification in the Note has been added.

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36 activities will be permitted as requested, unless the request is
37 objected to, including an objection to the requested form or
38 forms for producing electronically stored information, stating
39 in which event the reasons for the objection shall be stated.
40 If objection is made to part of an item or category, the part
41 shall be specified and inspection permitted of the remaining
42 parts. [If sources of electronically stored information that is
43 potentially responsive are not being searched because the
44 information is not reasonably accessible, the response must
45 identify those sources and specify the barriers that impede
46 access.]¹⁵ [If objection is made to the requested form or forms
47 for producing electronically stored information – or if no form
48 was specified in the request -- the responding party must state
49 the form or forms it intends to use.]¹⁶ The party submitting
50 the request may move for an order under Rule 37(a) with

¹⁵ This additional sentence in the Rule would address the same concerns as Rule 26(b)(2), but in a more focused way relating to Rule 34 requests, while Rule 26(b)(2) addresses all discovery. With this additional requirement, the response may provide a more suitable basis for a motion to compel than the identification called for by Rule 26(b)(2). This sentence is intended to be used only if proposed amendment Rule 26(b)(2)(B) does not proceed.

¹⁶ This additional sentence picks up on suggestions from a number of commentators. This requirement would seem not to be a significant burden for the producing party since it will have to provide such information anyway, and having it included in this manner may reduce the likelihood that there will be conflict later about form of production.

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51 respect to any objection to or other failure to respond to the
52 request or any part thereof, or any failure to permit inspection
53 as requested.

54 Unless the parties otherwise agree, or the court otherwise
55 orders:

56 (i) ~~a~~^A party who produces documents¹⁷ for inspection
57 shall produce them as they are kept in the usual course of
58 business or shall organize and label them to correspond
59 with the categories in the request;

60 ~~(ii) if a request for electronically stored information does~~
61 ~~not specify the form or forms for producing electronically~~
62 ~~stored information, of production, a responding party~~
63 ~~must produce the information in a form or forms that are~~
64 ~~reasonably usable by the requesting party in which it is~~
65 ~~ordinarily maintained, or in an electronically searchable~~
66 ~~form. The party need not only produce the same~~

¹⁷ If Alternative 2 for Rule 34(a) is used, and “documents” includes electronically stored information, it will be necessary to revise this provision so that it distinguishes electronically stored information, perhaps as follows:

Unless the parties otherwise agree, or the court otherwise orders, a^A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request, except that if a request does not specify a form or forms for producing electronically stored information, the responding party may select the form of production, as long as it is reasonably useable by the requesting party.

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67 ~~electronically stored such information in more than one~~
68 ~~form;~~ and
69 (iii) a party need not produce the same electronically
70 stored information in more than one form.¹⁸

71 * * * * *

“Clean” Version of the Rule

[Alternative 1 -- the published version]

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

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

¹⁸ This provision was moved to make it clear that it applies even when the request does specify the form of production. A request cannot simply specify multiple forms for the same information.

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

20 * * * * *

*[Alternative 2 -- making electronically stored
information a subset of "documents"]*

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

1 **(a) Scope.** Any party may serve on any other party a request
2 (1) to produce and permit the party making the request, or
3 someone acting on the requestor's behalf, to inspect, copy,
4 test, or sample any designated documents – including
5 writings, drawings, graphs, charts, photographs, sound
6 recordings, images, electronically stored information, and
7 other data or data compilations stored in any medium – from

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

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

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29 The party upon whom the request is served shall serve a
30 written response within 30 days after the service of the
31 request. A shorter or longer time may be directed by the court
32 or, in the absence of such an order, agreed to in writing by the
33 parties, subject to Rule 29. The response shall state, with
34 respect to each item or category, that inspection and related
35 activities will be permitted as requested, unless the request is
36 objected to, including an objection to the requested form or
37 forms for producing electronically stored information, stating
38 the reasons for the objection. If objection is made to part of
39 an item or category, the part shall be specified and inspection
40 permitted of the remaining parts. [If sources of electronically
41 stored information that is potentially responsive are not being
42 searched because the information is not reasonably accessible,
43 the response must identify those sources and specify the
44 barriers that impede access.] [If objection is made to the
45 requested form or forms for producing electronically stored
46 information -- or if no form was specified in the request -- the
47 responding party must state the form or forms it intends to
48 use.] The party submitting the request may move for an order
49 under Rule 37(a) with respect to any objection to or other

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50 failure to respond to the request or any part thereof, or any
51 failure to permit inspection as requested.

52 Unless the parties otherwise agree, or the court otherwise
53 orders:

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

58 (ii) if a request does not specify the form or forms for
59 producing electronically stored information, a responding
60 party must produce the information in a form or forms
61 that are reasonably usable by the requesting party; and

62 (iii) a party need not produce the same electronically
63 stored information in more than one form.

64 * * * * *

Committee Note

[Not revised to address Alternative 2 for 34(a)]

Subdivision (a). As originally adopted, Rule 34 focused on discovery of “documents” and “things.” In 1970, Rule 34(a) was amended to include ~~authorize discovery of~~ data compilations, ~~anticipating in anticipation~~ that the use of computerized information would increase ~~grow in importance~~. Since ~~then, that time~~, the growth in electronically stored information and in the variety of systems for creating and storing such information has ~~have~~ been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper

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to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on pieces of paper. Accordingly, Rule 34(a) is amended to confirm acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. The title of Rule 34 is modified to acknowledge that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. Although discovery of electronically stored information has been handled under the term "document," this change avoids the need to stretch that word to encompass such discovery. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."¹⁹

Discoverable information often exists in both paper and electronic form, and the same or very similar information might exist in both. The items listed in Rule 34(a) show the different kinds of media on which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. The definition in Rule

¹⁹ A clause was added to emphasize the point. The question is whether the sentence should be retained. As noted in the material in text above on choosing between Alternatives 1 and 2 for Rule 34(a), we may hope that any transition to what the revised rule says will be brief and relatively easy. Maybe this sentence will make it easier. On the other hand, several commentators suggested that this sentence is confusing, because the revised rule says that "documents" and "electronically stored information" are different things, but then the note says that a request for documents should be read to ask for electronically stored information. So an alternative to fortifying the note language might be to remove it altogether and rely on the requirement under Rule 26(f) that the parties discuss whether there will be discovery of electronically stored information as sufficient to clarify what is sought in a given case. If Alternative 2 is used for Rule 34(a), there is no need for this sentence at all.

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

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive ~~definition~~ approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used ~~definition~~ in Rule 34(a)(1) is invoked in a number of other amendments, such as those to Rules 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).

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

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise particularly sensitive problems of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct

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access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspection or testing of such systems.²⁰

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

Subdivision (b). The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different multiple forms of production may be appropriate for different types of electronically stored information responsive to a Rule 34 request. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse ranges of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the burdens of production and impede access to the information by the requesting party. The rule therefore provides that the requesting party may choose different forms of production for different types of electronically stored information. The responding party has the same option when the requesting party has not specified a form for production. The parties should exchange information about the form of production well before production actually occurs, ~~such as during the early opportunity provided by the Rule 26(f) conference. Rule 26(f) now calls for discussion of form of production during that conference.~~

The rule does not require the requesting party to choose a form or forms of production; this party may not have a preference, or may not know what form the producing party uses to maintain its

²⁰ This was added to respond to some comments indicating that the change could be read to support a broad right of direct access to an opposing party's computer system.

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electronically stored information. If the request does not specify a form or forms of production for electronically stored information, Rule 34(b) provides that ~~-- unless the court orders otherwise or the parties otherwise agree --~~ the responding party ~~may must~~ ~~unless the court orders otherwise or the parties otherwise agree~~ choose the form or forms of production, but must select between options analogous to those provided for hard-copy materials. The responding party may produce the information in a form or forms that are reasonably usable by the requesting party. Under some circumstances, the producing party may need to provide some combination of technical support, information on application software, or other assistance to enable the requesting party to make use of the electronically stored information. The key question is whether the information is in a form that is reasonably usable to the requesting party, in which it ordinarily maintains the information. If it ordinarily maintains the information in more than one form, it may select any such form. But the responding party is not required to produce the information in a form in which it is maintained. Instead, the responding party may produce the information in a form it selects for the purpose of production, providing the form is electronically searchable. Although this option is not precisely the same as the option to produce hard-copy materials organized and labelled to correspond to the requests, it should be functionally analogous because it will enable the party seeking production to locate pertinent information.

If the requesting party does specify a form or forms of production, Rule 34(b) permits the responding party to object. The grounds for objection depend on the circumstances of the case. When such an objection is made, Rule 37(a)(2)(B) requires the parties to confer about the subject in an effort to resolve the matter before a motion to compel is filed. If they cannot agree, the court will have to resolve the issue. ~~The court is not limited to the form initially chosen by the requesting party, or to the alternatives in Rule 34(b)(2), in ordering an appropriate form or forms for production. The court may consider whether a form is electronically searchable in resolving objections to the form of production.~~

Whether or not the requesting party specified the form of production, Rule 34(b) also provides that the same electronically stored information ordinarily need be produced in only one form, although it must be produced in a form that as long as it is reasonably usable by the requesting party if the request did not specify a form in

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~~the form in which it is produced, but production in an additional form may be ordered for good cause. One such ground might be that the party seeking production cannot use the information in the form in which it was produced. Advance communication about the form that will be used for production might avoid that difficulty.~~

“Clean” Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of “documents” and “things.” In 1970, Rule 34(a) was amended to include data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term “documents” to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a “document.” Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper. Rule 34(a) is amended to acknowledge that discovery of electronically stored information stands on equal footing with discovery of documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of “documents” should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and “documents.”

Discoverable information often exists in both paper and electronic form, and the same or very similar information might exist in both. The items listed in Rule 34(a) show the different kinds of media on which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive, including any type of information that is stored electronically. A common example often sought in discovery is

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electronic communications, such as e-mail. The reference to “data or data compilations” includes any databases currently in use or developed in the future. The rule covers information “stored in any medium,” to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to “electronically stored information” should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) is invoked in a number of other amendments, such as those to Rules 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1).

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

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly provides that such discovery is permitted. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party’s electronic information system may raise particularly sensitive problems of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party’s electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspection or testing of such systems.

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

Subdivision (b). The amendment to Rule 34(b) permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although one format a requesting party could designate would be hard copy. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information in response to a Rule 34 request. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse ranges of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the burdens of production and impede access to the information by the requesting party. The rule therefore provides that the requesting party may choose different forms of production for different types of electronically stored information. The responding party has the same option when the requesting party has not specified a form for production. The parties should exchange information about the form of production well before production actually occurs.

The rule does not require the requesting party to choose a form or forms of production; this party may not have a preference, or may not know what form the producing party uses to maintain its electronically stored information. If the request does not specify a form or forms of production for electronically stored information, Rule 34(b) provides that—unless the court orders otherwise or the parties otherwise agree—the responding party may choose the form or forms of production, but must select a form or forms that are reasonably usable by the requesting party. Under some circumstances, the producing party may need to provide some combination of technical support, information on application software, or other assistance to enable the requesting party to make use of the electronically stored information. The key question is whether the information is in a form that is reasonably usable to the requesting party.

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

Whether or not the requesting party specified the form of production, Rule 34(b) also provides that the same electronically stored information ordinarily need be produced in only one form, although it must be produced in a form that is reasonably usable by the requesting party if the request did not specify a form.

Restyled Version

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

1 **(a) In General.** Any party may serve on any other party a
2 request within the scope of Rule 26(b):

3 **(1)** to produce and permit the requesting party or its
4 representative to inspect, ~~and copy, test, or sample~~ the
5 following items in the responding party's possession,
6 custody, or control:

7 **(A)** any designated documents or electronically stored
8 information—including writings, drawings, graphs,
9 charts, photographs, sound recordings, images, and
10 other data or data compilations stored in any
11 medium—from which information can be obtained

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12 either directly or after the responding party translates
13 it into a reasonably usable form, or

14 (B) any designated tangible things ~~and to test or~~
15 ~~sample these things~~; or

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

21 **(b) Procedure.**

22 (1) *Contents of the Request.* The request ~~must~~:

23 (A) must describe with reasonable particularity each
24 item or category of items to be inspected; ~~and~~

25 (B) must specify a reasonable time, place, and
26 manner for the inspection and for performing the
27 related acts; ~~and~~

28 (C) may specify the form or forms in which
29 electronically stored information is to be produced.

30 (2) *Responses and Objections.*

31 (A) *Time to Respond.* The party to whom the request
32 is directed must respond in writing within 30 days

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33 after being served. A shorter or longer time may be
34 stipulated to under Rule 29 or be ordered by the court.

35 **(B) *Responding to Each Item.*** For each item or
36 category, the response must either state that inspection
37 and related activities will be permitted as requested or
38 state an objection to the request, including an
39 objection to the requested form for producing
40 electronically stored information, stating the reasons.

41 **(C) *Objections.*** An objection to part of a request
42 must specify the part and permit inspection of the rest.

43 **[(D) *Form for Producing Electronically Stored***
44 ***Information.*** Unless production will be in the form or
45 forms specified by the requesting party under Rule
46 34(b)(1)(C), the response must state the form or forms
47 to be used.]

48 **(D) *Producing the Documents or Electronically***
49 ***Stored Information.*** Unless the parties otherwise
50 agree, or the court otherwise orders,

51 **(i)** ~~A~~ a party producing documents for inspection
52 must produce them as they are kept in the usual
53 course of business or must organize them and

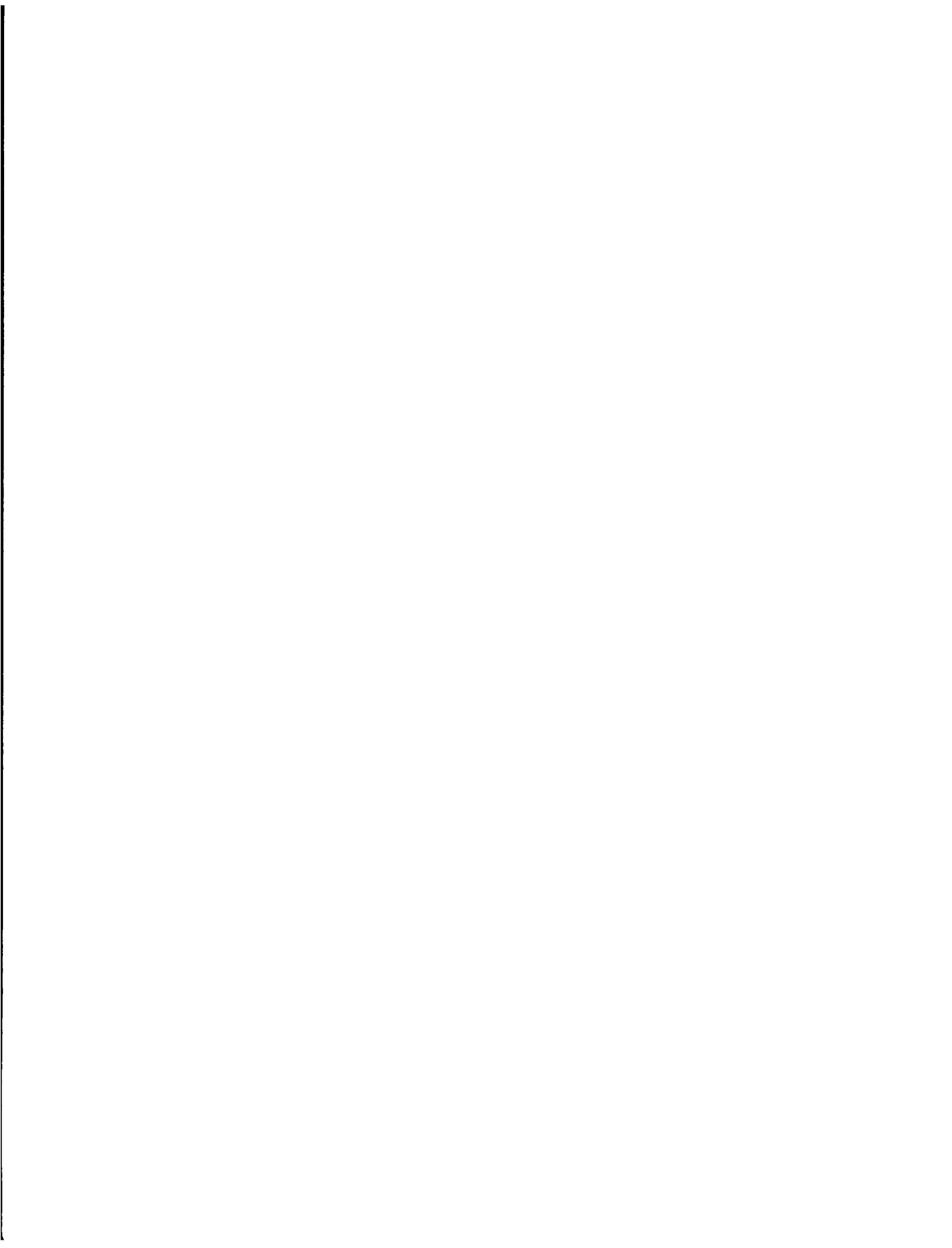
FEDERAL RULES OF CIVIL PROCEDURE

54 label them to correspond to the categories in the
55 request.

56 (ii) if a request does not specify the form for
57 producing electronically stored information of
58 production, a party must produce it in a form that
59 is reasonably usable by the requesting party.

60 (iii) a party need not produce the same
61 electronically stored information in more than one
62 form.

63 * * * * *



Rule 26(b)(5)

1. Issues

The public comments and recent circulation among the Committee have identified several issues that the full Committee must resolve. They are identified in this introductory section and discussed in the footnotes to the proposed Rule and Note in the following section.

a. "Reasonable Time" Alternatives

There has been much commentary on the “reasonable time” provision. Some have argued that it is too amorphous and suggested that it should be replaced with a specific time limitation. Others have argued that the rule should say that it is too late to assert privilege after a specific event, such as the other side’s reliance on the information in its preparation of its case. Although not raised in the public comments, two additional concerns as to the reasonable time limitation have emerged. The first concern is that if a requesting party believes that the belated privilege assertion is unreasonably late, that party may read the rule as authorizing it not to comply. The second concern is that the reasonable time limitation bears only on whether there is a waiver, and does not limit the producing party’s

ability to invoke this rule or instruct the producing party how to follow the rule. The published rule used the “reasonable time” criterion deliberately, based on the Committee’s conclusion that it was the best formulation given the narrow and targeted purpose of this rule. That purpose, of course, is to establish a clear procedure to apply to belated privilege assertions, not to establish a substantive standard for privilege waiver. Proposed Rule 26(b)(5) does not state that following the procedure it establishes will preclude a finding of waiver.

At the same time, the Committee wanted to make it clear that a responding party cannot delay in making a belated assertion of privilege. The Committee recognized that this rule must be flexible enough to encompass the many different circumstances that can arise. Because of the need for flexibility, the Committee decided against putting a definite time—such as 30 days or 90 days—or a definite trigger—such as the date of production of the information or the date of learning of the production of the information—in the rule itself. The “reasonable time” formulation tells the producing party that it must act quickly, but allows application of the rule’s procedure in a

variety of circumstances.¹ The “reasonable time” formulation was intended to guide the responding party’s actions under the rule, in addition to bearing on the court’s decision as to whether the responding party waived its privilege claim by waiting too long to assert it. Suggested revisions to the Note language attempt to clarify this point. Much of the public comment supported the “reasonable time” formulation.

The concern that a requesting party may unilaterally decide that the responding party has not provided notice within a reasonable time and ignore the rule was not raised in the public comment period. The rule clearly requires that when a requesting party receives a notice of belated assertion of privilege, it must return, destroy, or sequester the information, and it may also submit the information to the court for a ruling on the privilege issues. If the requesting party believes that the rule is not timely invoked, the rule certainly provides

¹ Using “a reasonable time” or a certain number of days after the date of production may be too short in cases involving voluminous productions, particularly of electronically stored information. If the production is a supplementary production and is very close to trial, 30 days after production may be much too long. Similar problems are present if the trigger is learning of the production of the privileged information. That knowledge may not occur until trial, or during a deposition. Using a specified date, such as 90 days before the scheduled date for trial, is also problematic. Many courts do not schedule a “date” for trial until shortly before trial. And dates for trial are often reset, sometimes repeatedly.

for the presentation of that argument to the court, but it is not a basis for refusing to comply with the rule at all. Under the rule, if the parties are unable to resolve the dispute, a court will be asked to determine whether the information is indeed privileged and whether any privilege was waived because of the circumstances of the production. Whether the responding party timely asserted the privilege is, in many jurisdictions, one of the factors that a court considers in analyzing waiver. A court would likely consider whether the producing party gave notice of its claim of privilege within a reasonable time in determining whether a waiver occurred. That does not, however, appear to require eliminating the reasonable notice requirement from the rule, but rather to clarify the language of the Rule and Note. In the material set out below, the Rule is edited and the Note is revised to clarify the relationship between the returning, destroying, or sequestering the information belatedly asserted as privileged and submitting the information to the court. The Note is also revised to clarify the application of “reasonable time.”

b. Notification in Writing

Neither the published rule proposal nor the Note says how notice is to be given. Some comment has suggested that insisting in the rule that the notice be given in writing will avoid disputes about what was in the notice and when it was delivered. Although the rule does not specify “written” notice, it is likely that lawyers will always memorialize the belated assertion of privilege unless circumstances preclude it. An obvious example is the realization by the producing party that it has produced privileged information in the middle of a deposition or during the production of the information. The rule should not prohibit a responding party from immediately notifying the requesting party of the privilege claim. Language is suggested to clarify the contents of the notification of a belated privilege assertion. In addition, the revision emphasizes the need for the producing party to provide sufficient information in the notice to permit the court to evaluate the privilege claim if the receiving party submits the information to the court for a ruling.

c. Informing the Court of the Reason for the Submission

An additional issue has emerged over the proposed addition of a Rule provision authorizing the receiving party to submit the

information asserted to be privileged under seal to the court. The concern is that the court is not provided with enough information to know what to do with the submission. The Rule does not expressly call for the producing party to file a response with the court explaining the basis for the privilege claim. One suggestion is to require the party claiming the privilege to file a motion for protection, submit the information for in camera review, and to explain the basis for the privilege assertion. But unless one assumes that most claims of privilege will be contested, that option seems likely to result in unnecessary motion practice.

An alternative is to modify the Rule to require the party asserting privilege to set out the basis for the privilege claim when giving notice. The receiving party could then be directed to submit that information to the court, along with the information itself, if it chose to contest the privilege claim. The notice would inform the court of the basis for the privilege claim and the submission could seek a ruling as to waiver, privilege, or both. Additional Rule and Note language are provided to clarify this point. This approach seems preferable to requiring the party asserting privilege to file a motion in every case.

d. Elevating Prohibition on Disclosure Pending Privilege Ruling

Some commentators have urged that a directive presently in the Note be placed in the rule itself. The revised rule contains such a directive. Whether this is necessary could be discussed. Absent such a provision in the rule, it might be that parties who have received the information would be tempted to take actions (e.g., turn information over to the press, or file it as part of a summary judgment motion) that arguably would undermine the effort to assert privilege. The issue is whether the rule's requirement that the material be returned, sequestered, or destroyed, with the proposed added language providing for submission to the court for decision on both privilege and waiver, coupled with the current Note language, is sufficient. Adding this to the rule seems less important if (as suggested below) the rule provides an opportunity for the party that got the information to go directly to the court for a ruling on privilege. Although that is not directly addressed to the behavior covered by the above addition, it may reduce the temptation to such self-help.

e. Requiring the Receiving Party to Retrieve Information Disseminated to Third Parties Before the Privilege Claim was Asserted

The published Rule said nothing about any obligation by the receiving party to retrieve information it disclosed to third parties before the producing party belatedly asserted a privilege claim. Some have urged that the Rule or Note should be amended to state that the receiving party has this obligation. One major concern is that it seems anomalous to put this extra burden on the requesting party because of the responding party's mistake in inadvertently producing information belatedly claimed to be privileged. One suggestion is to place language in the Note that would require the requesting party to cooperate with the producing party in identifying who received the information belatedly asserted as privileged, so that the responding party can do the work of retrieval.

The rule is intended only to set up a procedure for resolving disputed belated privilege assertions and the waiver issues such assertions raise, and to preserve the status quo pending that resolution. The rule language may be sufficient without imposing an additional obligation on the receiving party. The Note could continue to address this issue and to require the requesting party to cooperate with the producing party in order to enable the producing party to retrieve the information pending resolution of the privilege issues.

Rule language addressing this issue is included in brackets. Proposed Note language is also provided.

f. Adding Work Product

The question has arisen whether trial preparation materials should be covered in (B) as well.² The heading of (5) refers to them, as does (A). The omission of such materials from (B) was purposeful. There is not such a broad subject matter waiver doctrine with regard to these materials. For another, It may often be much easier to recognize these materials than attorney-client materials, and they may be considerably less dispersed.

g. Certification by Party Notified of Privilege Claim

The Committee specifically sought reaction during the comment period on whether to require the party that received the notice to certify compliance with the rule.³ Several commentators

² Including work product information under (B) could be accomplished by stating:

When a party produces information without intending to waive a claim of privilege or protection as trial preparation material, . . .

³ A certification requirement could be included as follows:

After being notified, a party must promptly return, sequester, or destroy the specified information and promptly certify to the producing party that it has done so.

have favored some form of certification; most have opposed it. As noted by the ABA Section of Litigation, the producing party's mistake should not lead to imposing a new burden on the requesting party. In addition, the rules do not generally require a certification of fulfillment of discovery duties. Rule 26(g) reads such a certification into the signature on a discovery document, but it does not require the creation of any new or separate document. Providing such a requirement in Rule 26(b)(5)(B) would go beyond that provision, and might seem an odd imposition on the "innocent" party who did not make the mistake that precipitated the problem in the first place. One alternative would be to require the responding party to issue an acknowledgment of its receipt of the notice of privilege assertion, but this places an additional burden on the requesting party, and responding parties usually have the ability to obtain such an acknowledgment without a rule provision.

2. Proposed Revisions

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

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

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

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

(A) Privileged Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things

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

FEDERAL RULES OF CIVIL PROCEDURE

14 not produced or disclosed in a manner that, without
15 revealing information itself privileged or protected,
16 will enable other parties to assess the applicability of
17 the privilege or protection.

18 **(B) *Privileged Information produced.*** When a party
19 produces information without intending to waive a
20 claim of privilege claim,⁴ it may, within a reasonable

⁴ If the Committee believes that this procedure should apply to information claimed as protected because it is trial preparation material, as well as to information claimed as privileged, the Rule could state:

When a party produces information without intending to waive a privilege claim or a claim of protection as trial preparation materials . . .

As noted in the introductory section, such information is not the reason the Committee published this proposal. The risk of subject matter waiver is not generally viewed as the kind of problem for work product as it is for attorney client communications. And work product is often easier to identify than attorney client communications, even with electronically stored information.

FEDERAL RULES OF CIVIL PROCEDURE

21 time,⁵ notify⁶ any party that received the information
22 of the basis for its privilege claim of privilege. After
23 being notified, a party must promptly return,
24 sequester, or destroy the specified information and
25 any copies and may not disclose⁷ the information until
26 the privilege claim is resolved.⁸ A receiving party

⁵ Some have recommended deleting the words “within a reasonable time.” The Rule is edited to make it clearer that a receiving party who believes that too much time has passed for the assertion of privilege cannot refuse on that basis to comply with the procedure of the Rule. The Rule and Note language are also revised to clarify that the reasonable time criterion tells the producing party whether it can invoke the rule and when it must do so, as well as providing a factor for the court to consider in deciding whether any privilege has been waived because it was not asserted within a reasonable time.

⁶ If the Committee decided to require the notice of the belated assertion of privilege to be written, and to set out the basis for the claim of privilege, the Rule could easily be revised to state:

When a party produces information without intending to waive a privilege claim, it may, within a reasonable time, give written notice to any party that received the information, setting forth the basis for the claim.

⁷ “Disclose” is chosen because it is broad enough to include both revelation and dissemination.

⁸ A number of comments suggested elevating from the Note to the Rule the language stating that after a party receives notice of the privilege claim, the party may not disclose the information until the claim is resolved. This revision adopts that suggestion.

This revision includes an edit of the Rule to place the obligation to return, sequester, or destroy information after receipt of the notice asserting privilege into one sentence, and the opportunity to submit the information to the court for a decision on privilege and waiver in a separate sentence. This punctuation change

FEDERAL RULES OF CIVIL PROCEDURE

27 may promptly present the information to the court
28 under seal for a determination of the privilege claim.⁹
29 [If the receiving party disclosed the information
30 before being notified, it must take reasonable steps to
31 retrieve it.]¹⁰ The producing party must comply with
32 Rule 26(b)(5)(A) with regard to the information and

is intended to make it clear that the obligation to return, sequester, or destroy applies whether or not the receiving party thinks that the producing party waited too long to assert the privilege. Language is also provided in the Note to make this point.

⁹ The addition of the option of presenting the privilege claim to the court for determination was suggested by many, and seems to be a useful addition to the Rule. It is placed in a separate sentence to clarify that even if the receiving party believes that the information is not privileged or that the producing party waited too long to assert the privilege, the party must follow the Rule, including by submitting the information to the court in camera for review and making these arguments to defeat the privilege claim.

¹⁰ This sentence elevates a statement from the published Note into the Rule. One major concern is that it places a burden on the receiving party to retrieve information disclosed before the privilege was asserted. It may be unfair or unwise to burden the receiving party as a result of the producing party's mistake. An alternative would be to modify the sentence, either in the Rule or the Note, to place the burden of retrieval on the producing party with the receiving party's obligation defined as one of cooperation in identifying to whom the information was disclosed before the notice of belated privilege assertion was made. Such a revision could read as follows:

If the receiving party disclosed the information before being notified, it must cooperate with the producing party in retrieving the information.

Such a revision could remain in the Note, where it is presently located, or be elevated to the Rule. One consideration is whether it is a level of detail that is more appropriate in the Note.

FEDERAL RULES OF CIVIL PROCEDURE

15 revealing information itself privileged or protected,
16 will enable other parties to assess the applicability of
17 the privilege or protection.

18 **(B) Information produced.** When a party produces
19 information without intending to waive a privilege
20 claim, it may, within a reasonable time, notify any
21 party that received the information of the basis for its
22 privilege claim. After being notified, a party must
23 promptly return, sequester, or destroy the specified
24 information and any copies and may not disclose the
25 information until the privilege claim is resolved. A
26 receiving party may promptly present the information
27 to the court under seal for a determination of the
28 privilege claim. [If the receiving party disclosed the
29 information before being notified, it must take
30 reasonable steps to retrieve it.] The producing party
31 must preserve the information until the privilege
32 claim is resolved.

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Committee Note

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary review required to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis grounds of privilege to make a privilege claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has produced privileged information without intending to waive the privilege to assert that claim and, if the claim is contested, permit the requesting party to present the matter ~~to be presented~~ to the court for its determination.

Rule 26(b)(5)(B) does not address whether production and belated assertion of privilege waives the privilege there has been a privilege waiver. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged information. See 8 Federal Practice & Procedure § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule 26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b), which as is amended allows the parties to present to the court for its approval an agreed to alert the court to consider a case-management order to provide for protection against privilege waiver of privilege.¹¹ Orders entered under Rule 16(b)(6) may be considered when a court determines ~~bear on~~ whether a waiver has occurred. ~~In addition, the~~

¹¹ This sentence will need to be revised if proposed Rule 26(f)(4) is changed to remove reference to a court order, and that is removed from the proposals to change Rule 16(b).

FEDERAL RULES OF CIVIL PROCEDURE

~~courts have developed principles for determining whether waiver results from inadvertent production of privileged information. See 8 Fed. Prac. & Pro. § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for addressing these issues.~~

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a “reasonable time.” A party asserting a belated privilege claim must not delay unreasonably. Many factors bear on whether the party gave notice within a reasonable time in a given case; These factors can include how long after the production the notice was given, including the date when the producing party learned or reasonably should have learned of the production, the difficulty of discerning that the information was privileged, the volume and difficulty of the production, and the nature and extent to which other parties had made use of the information in connection with the litigation¹² ; the difficulty of discerning that the material was privileged, and the magnitude of production. If the parties have agreed to a time or date for giving notice, that agreement should be regarded as presumptively prescribing a “reasonable time” for the action.

The notice of belated privilege assertion should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of a privilege during a deposition. The rule does not prescribe a particular method of notice. As with the question whether notice has been given in a reasonable time, the manner of notice should depend on the circumstances of the case. In many cases informal but very rapid and effective means of asserting a privilege claim as to produced information, followed by more formal notice, would be reasonable. Whatever the method, the notice should be as

¹² Another consideration could be added to the list in the Note: “. . . or the extent of any disclosure of the information before notice.” Under some circumstances, such disclosure or dissemination might affect a finding whether there had been a waiver. As discussed in the introductory notes, however, there is a concern about strategic dissemination after notice. Including mention of the effect of dissemination here might be taken as a signal to do so to defeat a claim of waiver.

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specific as possible in identifying about the information claimed to be privileged, stating the basis for the privilege claim, and stating whether about the producing party wants 's desire that the information to be promptly returned, sequestered, or destroyed. Because the receiving party must decide whether to challenge the privilege claim, and may submit the information to the court for a ruling on whether the claimed privilege applies and whether it has been waived, the statement of the basis for the privilege claim should be sufficiently detailed for the court to understand the basis for the claim and the issues to be resolved, including whether a waiver has occurred.

After receiving notice, eEach party that received the information must promptly return, sequester, or destroy it on being notified. The option of sequestering or destroying the information is included because the receiving party may have incorporated some of the information in protected trial-preparation materials. No After receiving notice, receiving party notice, a may party must not use, or disclose the information pending resolution of the privilege claim. The receiving party may present the question whether the information is privileged or whether any privilege has been waived to the court. If it does so it must provide the court with the grounds for the privilege specified in the producing party's notice, and serve all parties. If a party disclosed the information to nonparties before receiving notice of a privilege claim, it must take reasonable steps to obtain the return of the information or arrange for its destruction or sequestration until the privilege claim is resolved.¹³ A party that has disclosed or provided the information to a nonparty before receiving

¹³ This obligation could be modified as follows if the rule only imposes a duty to cooperate rather than a duty to retrieve:

If a party disclosed the information to nonparties before receiving notice of a privilege claim, it must cooperate with the responding party's steps to obtain the return of the information or arrange for its destruction or sequestration until the privilege claim is resolved. That cooperation would usually consist of identifying the nonparties that received the information claimed as privileged.

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~~notice should attempt to obtain the return of the information or arrange for it to be destroyed.~~

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

~~If the party that received the information contends that it is not privileged, or that the privilege has been waived, it may present the issue to the court by moving to compel production of the information.~~

"Clean" Version of the Note

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege to make a privilege claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party that has produced information without intending to waive privilege to assert that claim and, if the claim is contested, permit the requesting party to present the matter to the court for its determination.

Rule 26(b)(5)(B) does not address whether production and belated assertion waives the privilege. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged information. See 8 Federal Practice & Procedure § 2016.2 at 239-46. Rule 26(b)(5)(B) provides a procedure for presenting and addressing these issues. Rule

FEDERAL RULES OF CIVIL PROCEDURE

26(b)(5)(B) works in tandem with Rule 26(f), which is amended to direct the parties to discuss privilege issues in their discovery plan, and Rule 16(b), which as amended allows the parties to present to the court for its approval an agreed case-management order to provide for protection against privilege waiver. Orders entered under Rule 16(b)(6) may be considered when a court determines whether a waiver has occurred.

Under Rule 26(b)(5)(B), a party that has produced privileged information must notify the parties who received the information of its claim of privilege within a “reasonable time.” A party asserting a belated privilege claim must not delay unnecessarily. Many factors bear on whether the party gave notice within a reasonable time in a given case. These factors can include how long after the production the notice was given, when the producing party learned or reasonably should have learned of the production, the difficulty of discerning that the information was privileged, the volume and difficulty of the production, and the nature and extent to which other parties had made use of the information in connection with the litigation. If the parties have agreed to a time or date for giving notice, that agreement should be regarded as presumptively prescribing a “reasonable time” for the action.

The notice of belated privilege assertion should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of a privilege during a deposition. The notice should be as specific as possible in identifying the information claimed to be privileged, stating the basis for the privilege claim, and stating whether the producing party wants the information to be promptly returned, sequestered, or destroyed. Because the receiving party must decide whether to challenge the privilege claim, and may submit the information to the court for a ruling on whether the claimed privilege applies and whether it has been waived, the statement of the basis for the privilege claim should be sufficiently detailed for the court to understand the basis for the claim and the issues to be resolved, including whether a waiver has occurred.

FEDERAL RULES OF CIVIL PROCEDURE

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

If a party disclosed the information to nonparties before receiving notice of a privilege claim, it must take reasonable steps to obtain the return of the information or arrange for its destruction or sequestration until the privilege claim is resolved.

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

Restyled Rule

Rule 26. Duty to Disclose; General Provisions Governing Discovery

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2 **(b) Discovery Scope and Limits.**

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FEDERAL RULES OF CIVIL PROCEDURE

4 (5) *Claiming Privilege or Protecting Trial-Preparation*

5 *Materials.*

6 (A) Information withheld. When a party withholds
7 information otherwise discoverable by claiming that
8 the information is privileged or subject to protection
9 as trial-preparation material, the party must:

- 10 ~~(i)(A)~~ expressly make the claim; and
11 ~~(ii)(B)~~ describe the nature of the documents,
12 communications, or things not produced or
13 disclosed—and do so in a manner that, without
14 revealing information itself privileged or
15 protected, will enable other parties to assess the
16 claim.

17 (B) Information produced. When a party produces
18 information without intending to waive a privilege
19 claim it may, within a reasonable time, notify any
20 party that received the information of the basis for its
21 privilege claim. After being notified, a party must
22 promptly return, sequester, or destroy the specified

FEDERAL RULES OF CIVIL PROCEDURE

23 information and any copies. A receiving party may
24 promptly present the information to the court under
25 seal for a determination of the privilege claim. [If
26 the receiving party disseminated the information
27 before being notified, it must take reasonable steps to
28 retrieve it.] The producing party must preserve the
29 information until the privilege claim is resolved.

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Rule 26(b)(2)

1. Issues

This proposal, more than any of the others, has generated two levels of discussion. At one level is the question whether there is any need for adopting a “two-tiered” approach for resisting discovery of difficult-to-access electronic information. Some have argued that because the issue is at bottom one of costs and burdens, applied to electronically stored information, the proportionality factors already in the rules are sufficient. Others have argued that electronically stored information is sufficiently different from paper to call for the additional tools and guidance the Rule 26(b)(2) amendments attempt to provide. That is an important question that the Committee will need fully to explore.

The second level of discussion addresses particular drafting issues raised during the comment period. This discussion attempts to improve and refine the drafts, but does not resolve whether we should continue with the proposal. The relationship between the two levels of discussion is obvious. The two-tier proposal may be sound conceptually, but inadequately drafted. The best achievable draft will sharpen and clarify the question whether to proceed with the proposal to amend Rule 26(b)(2).

These draft revisions attempt to clarify what the rule is intended to do. One clarification addresses what is meant by “reasonably accessible.” That clarification in turn clarifies the reasons for proposing this distinction only for electronically stored information and not hard copy. A third clarification sharpens the relationship between the present (b)(2)(i), (ii), and (iii) factors and the analysis of inaccessibility (cost and burden of obtaining information) and good cause (the need for the information, examined in light of the other information that is available and the importance of the inaccessible information to the case).

In examining the comments and the testimony, it is useful to note that good lawyers sophisticated in dealing with electronically stored information are using a two-tier approach now. That is, we were repeatedly told by lawyers and litigants sophisticated in electronic discovery that

they do not expect that initial discovery responses will include information from sources difficult to access. Instead, accessible information is examined first to see if it is adequate to the discovery needs of the case. If it is not, the parties then consider whether, to what extent, and on what terms, information that is not reasonably accessible should be restored, retrieved, and reviewed. This approach makes a great deal of sense. It includes, but is not limited to, questions of cost-shifting if a court orders discovery of information that is not reasonably accessible. It could be extremely helpful if we can provide such guidance in the rule for lawyers, litigants, and judges who do not have this level of sophistication.

Many commentators have noted specific problems with the drafting. Those issues, and some proposed drafting responses, are addressed in the two drafts that follow. The first draft hews closer to the language of the published proposal; although significant changes are made in the rule text, much of the work is done in a thoroughly rewritten note. The second draft preserves the basic purpose of the published proposal but revises the rule text more extensively and provides a shorter Note that could be shortened still further. Although it looks quite different, the underlying effort is to respond to the difficulties raised by the testimony and comments in ways that do not require republication for further comment.

*1. Clarifying the Definition of “Reasonably Accessible”
and the Relationship to the Existing Proportionality Factors*

The comments urged that we give a better explanation of “not reasonably accessible” and what separates it from that which is outside this category. Closely related to this issue is identifying what problem we are targeting here and how the costs and burdens involved in showing “not reasonably accessible” and “good cause” relate to the existing proportionality factors of 26(b)(2)(i),(ii), and (iii). The Note language is particularly important. Many have argued that any explanation of what is “not reasonably accessible” should avoid specific present ways of storing data, and instead take a functional approach. In particular, we are urged to avoid categorically characterizing something as inaccessible (such as legacy data or backup tapes). Technology changes.

Because the purpose of drawing a distinction between information that is and is not reasonably accessible applies only to electronically stored information and not to hard copy information, the distinction should correspond to how electronically stored information differs from paper. The testimony and comments have focused on distinctive features of electronically stored information that frequently make such information inaccessible in ways that have few parallels with access to paper. A responding party may have to restore, recover, or otherwise work to “translate” the source in which its own information is stored before it is intelligible to anyone, including that party. Paper seldom presents comparable problems. To be sure, paper may be shredded or otherwise damaged or deteriorated to a point that both requires and may permit restoration. And both paper and electronic information may present problems of translation from a foreign language or cryptic notations not readily available to the producing party. But the problems of electronically stored information remain distinctive in frequency, complexity, and the difficulty of arriving at a clear understanding of the problems. The proposed revision attempts to capture this distinct feature and explain it better.

This distinct feature of electronically stored information also helps explain why this second tier presents a distinctive application of the existing proportionality factors in (b)(2). The responding party that has not accessed – retrieved or reviewed – information in the second tier may have little or no knowledge about what the information contains, whether it has any relevance to the litigation, and, if so, what benefit it provides. Without this knowledge, the proportionality factors are very difficult to apply. Whether to require a responding party to access this second tier of electronically stored information has to be analyzed when neither the parties nor the court have the kind of knowledge that is usually important to applying the proportionality factors. The proposed revisions attempt to explain this better.

2. The “Identify” Requirement

Many have asked for greater clarification of what is required. Some suggest that we change the idea into a requirement of an affirmative statement of what was searched rather than a statement

of what was not. Our reaction has been that the identification requirement is not like a privilege log and can be general, by categories. The clarification should avoid encouraging boilerplate responses that will not inform the other side. What is useful is identification of sources that, but for access problems, would be searched because they may contain responsive information.

3. The Relationship to Preservation

Many commentators suggested that additional guidance on the relationship of two-tier to preservation was necessary. There is concern that parties will feel emboldened to destroy any information that is “second tier,” and will lead to a change in companies’ (and other organizations’) records retention and destruction practices to put material beyond discovery. Others have responded by pointing out that companies and organizations will not make inaccessible or recycle information that is useful or necessary to business or that must be kept because of regulations and other legal requirements (which could include not only statutes and regulatory requirements, but also common-law preservation duties triggered by anticipated or pending litigation). Companies, organizations, and even individuals have records retention policies and procedures precisely for the purpose of identifying and destroying information and material neither needed for business purposes nor legally required to be kept. Such policies and procedures are essential for “cleaning house”; the alternative is that everyone keeps everything, making discovery – not to mention the conduct of business and government – untenable. At the same time, the rules cannot enable parties to target specific information because it is likely to be called for in discovery and make it “inaccessible” or subject to routine recycling or deletion to avoid production.

The proposed Note revisions in the first alternative draft attempt to clarify the relationship of this second tier to preservation, without leading to a “save nothing” or a “save everything” approach. The second alternative draft includes a preservation obligation in rule text, but simultaneously expresses reasons for not going that far.

4. Procedure

Many comments questioned the description and wisdom of the procedure for raising and litigating the issue. In the proposed revision, greater specificity is used to describe the types of motions used to raise the issue and to clarify the procedure to be used.

5. Terms and Conditions; Costs

The present rule and note language make it sound as if sampling and inspection are conditions that are imposed only after good cause has been determined. Clarification of the use of such tools as discovery techniques to test whether certain information is inaccessible (how hard it is to access and retrieve) and whether good cause exists to require production (how much responsive stuff there is and how valuable it is to the case) is helpful. The proposed revision clarifies that sampling and inspection may create the factual record as to the responding party's ability to access and review the information and whether there is good cause to require the discovery of the information.

Many comments spoke out in favor of the Texas rule requiring a court to shift the costs of obtaining electronically stored information that is not reasonably accessible. Many of these are probably people who would say that the court should be quite demanding before ordering discovery of such information. But if a requesting party shows strong reasons to obtain discovery, requiring it also to pay the cost of the discovery may seem at odds with the established tradition that the cost of responding to discovery ordinarily is borne by the producing party. The proposed rule separates the question whether production should be required from who should pay but places the burden of showing good cause on the requesting party. One approach would be to give more direction in the rule about the role of cost allocation in providing incentives to a requesting party not to make overbroad requests – that is, to show by undertaking to pay that it truly believes there is good cause to seek information that is costly and burdensome to obtain.

6. The “Fact of Access” Comment in the Note

Several people have objected to that; others have applauded it. The fact that some use of backup materials has been made for disaster recovery of some sort should not forever put those materials into the accessible column. But a party who checks the “inaccessible” stuff, finds it harmful for litigation, and then makes it “inaccessible” again, should not be within this provision. The Note has been clarified in the proposed revision.

7. The Relationship Between the Safe Harbor and the Second Tier

If information is not reasonably accessible, there is no duty to inspect or produce it without court order. What obligation is there to preserve such information until the court decides whether it must be produced? The Note answers this question by stating that if the producing party has a reasonable basis for believing that the inaccessible information is discoverable and not otherwise available, that information should be preserved. The proposed revision clarifies and expands this discussion of a litigation hold.

2. Proposed Revision to Rule 26(b)(2) and Committee Note

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

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* * * * *

2

(b) Discovery Scope and Limits. Unless otherwise limited

3

by order of the court in accordance with these rules, the scope

4

of discovery is as follows:

5

* * * * *

6

(2) Limitations.

7

(A) By order, the court may alter the limits in these

8

rules on the number of depositions and interrogatories

9

or the length of depositions under Rule 30. By order

10

or local rule, the court may also limit the number of

11

requests under Rule 36.

12

(B) A party need not provide discovery of electronically

13

stored information that the party identifies as not

14

reasonably accessible from the sources on which it is

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

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15 stored.¹ On motion by the requesting party to compel
16 discovery or for a protective order,² the responding party

¹ Several variations have been proposed. The common focus is on saying more about the phenomena that make some information potentially accessible but not “reasonably” accessible. All agree that the rule cannot describe the variety of problems that may impede access. Adding a reference to the “sources” is a functional way to describe the distinction between ESI and paper that led to the two-tier proposal.

Footnote 3 addresses a related issue that might be addressed at this point in the rule as well. What is reasonably accessible is measured by the burden or cost of attempting access. The most elaborate suggestion is to write the rule like this:

A party need not provide discovery of electronically stored information that it identifies as not reasonably accessible without undue burden or cost because it is not maintained on a usable source.

The reference to “usable source” may invite unnecessary arguments. A simpler version might do the job: “identifies as not unreasonably accessible without undue burden or cost.”

If a reference to burden or cost is added here, it may be possible to omit “from the sources on which it is stored.” “Burden or cost” says it all.

² In most cases, a motion to compel would be filed by the requesting party. The comments suggest that such motions would not be routinely, or even frequently, filed. In most cases, the parties first examine the information that can readily be obtained. We were repeatedly told that requesting parties seek to require resort to inaccessible information only after failing to find what they needed/expected/hoped to find in the accessible information. That need not preclude or foreclose a Rule 26(c) protective-order motion by the responding party. Of course this provision is not intended to encourage premature motions for protection against disputes that will never arise. We have been told repeatedly that in most cases the requesting party is satisfied with the information produced from accessible sources.

One concern is that procedure on a motion to compel will be complicated by the disadvantages faced by the requesting party, who begins without knowing much about the nature of the asserted barriers to access or about the potential value of the information behind the barriers. Not knowing these things means that the “good cause” showing usually can be made only after the court has decided that the information is not reasonably accessible. One part of a remedy is that a responding

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17 must show that the information is not reasonably
18 accessible without undue burden or cost.³ ~~is not~~
19 reasonably accessible. If that showing is made, the court
20 may order discovery of the information {for good
21 cause}[when consistent with Rule 26(b)(2)(C)]⁴ and may
22 specify terms and conditions for such discovery.

party who identifies not reasonably accessible information should be required to explain the barriers. Suggested Note language is underlined.

³Tying the problem of accessibility to burden and cost responds to many comments. It also allows us to focus on the real problems of access. Some information may be inaccessible without retrieval, restoration, translation, etc.—but it can be very easy and cheap to do that work. All information in our computers is unintelligible to us without retrieving it and translating it to forms that humans can understand. But our computers are set up to do that fast and cheap. We would not expect two-tier to provide a basis to refuse to produce information that may require more than a push of a button to read, but can nonetheless be accessed quickly and inexpensively.

⁴ One approach would be to equate “good cause” with application of the (b)(2)(C) factors or make “good cause” a specific application of those factors. If we mean that, it might be better to substitute a reference to (b)(2)(C) in the Rule text: “the court may order discovery of the information for good cause when consistent with Rule 26(b)(2)(C) and may * * *.” Proposed new Note language says, deliberately, that the good-cause factors and 26(b)(2)(C) “have similarities. The primary difference is * * *.” This draft retains the “good cause” formulation. But if we decide that good cause is only a specialized application of the (b)(2)(C) factors, we can clarify that by referring to them in the Rule in lieu of, or in describing, good cause. Alternative Note language is provided to illustrate as well.

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23 [including payment by the requesting party of part or all
24 of the reasonable costs of accessing the information].⁵
25 **(C)** The frequency or extent of use of the discovery
26 methods otherwise permitted under these rules and by any
27 local rule shall be limited by the court if it determines
28 that: (i) the discovery sought is unreasonably cumulative
29 or duplicative, or is obtainable from some other source
30 that is more convenient, less burdensome, or less
31 expensive; (ii) the party seeking discovery has had ample
32 opportunity by discovery in the action to obtain the
33 information sought; or (iii) the burden or expense of the

⁵ Our recent experience with trying to put an express reference to cost bearing into 26(b)(2) suggests that it may be better to stick with the published version, relying on the Committee Note to explain that “terms and conditions” include cost bearing. That would omit “including payment by the requesting party of part or all of the reasonable costs of accessing the information” from the text of the rule. (Whatever the choice is, the same words should be included in Rule 45.)

By describing the “costs” as the “costs of accessing the information,” we make it clear that this ordinarily does not include the costs of reviewing for responsiveness or for privilege, or for other activities that are not distinctive to electronically stored information. The proposals to change the note try to pursue this line by distinguishing what is normal for hard copy discovery from that which is specific to discovery of electronically stored information. Of course, courts relying on Rule 26(b)(2) as currently written – 26(b)(2)(C) as newly designated – could decide that some of those costs might properly be assignable to the party seeking discovery.

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34 proposed discovery outweighs its likely benefit, taking
35 into account the needs of the case, the amount in
36 controversy, the parties' resources, the importance of the
37 issues at stake in the litigation, and the importance of the
38 proposed discovery in resolving the issues. The court
39 may act upon its own initiative after reasonable notice or
40 pursuant to a motion under rule 26(c). ~~A party need not~~
41 ~~provide discovery of electronically stored information that~~
42 ~~the party identifies as not reasonably accessible. On~~
43 ~~motion by the requesting party, the responding party must~~
44 ~~show that the information is not reasonably accessible. If~~
45 ~~that showing is made, the court may order discovery of~~
46 ~~the information for good cause and may specify terms and~~
47 ~~conditions for such discovery.~~

Clean Version, Rule 26(b)(2)

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

1

* * * * *

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21 Rule 26(b)(2)(C)] and may specify terms and
22 conditions for such discovery, [including payment by
23 the requesting party of part or all of the reasonable
24 costs of accessing the information].

25 (C) The frequency or extent of use of the discovery
26 methods otherwise permitted under these rules and by
27 any local rule shall be limited by the court if it
28 determines that: (i) the discovery sought is
29 unreasonably cumulative or duplicative, or is
30 obtainable from some other source that is more
31 convenient, less burdensome, or less expensive; (ii)
32 the party seeking discovery has had ample opportunity
33 by discovery in the action to obtain the information
34 sought; or (iii) the burden or expense of the proposed
35 discovery outweighs its likely benefit, taking into
36 account the needs of the case, the amount in
37 controversy, the parties' resources, the importance of
38 the issues at stake in the litigation, and the importance
39 of the proposed discovery in resolving the issues. The

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40 court may act upon its own initiative after reasonable
41 notice or pursuant to a motion under rule 26(c).

Committee Note⁶

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

It is not possible to define in a rule the different types of technological barriers that may impede access to electronically stored information. The purpose of electronic storage ordinarily is to provide easy access. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed in ways that provide ready access to information that is not regularly used. But, either by design or as a consequence of accepting design constraints, or as a result of more human factors, a system may retain information that is accessible only with great effort, if at all. Subparagraph (B) is added to regulate discovery of information that can be searched and retrieved only with substantial burden or cost.

Under this rule, a responding party should provide all electronically stored information that is relevant and reasonably

⁶ The Committee Note is largely redrafted. The redlined version is not easy to follow. One central goal was to shorten the Note, balancing the need to explain the problems that underlie access difficulties with the need to avoid creating a condensed Manual of Electronic Discovery.

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accessible, subject to the (b)(2)(C) proportionality limits that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The goal of the identification requirement is to inform the requesting party that the responding party has not searched sources that may contain requested information because of barriers to accessing that information. The identification should, to the extent possible, provide enough information to enable the requesting party to evaluate the burden and cost of providing the discovery. The identification of sources not searched need not approach the detail of a “privilege log” that may be necessary to comply with Rule 26(b)(5).

A party’s identification of electronically stored information as not reasonably accessible does not relieve a party of its common-law or statutory duties to preserve evidence. The application of preservation obligations to electronically stored information in a particular case depends on a number of factors. See Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003). One factor is whether the responding party has a reasonable basis for believing that an inaccessible source contains discoverable information that is not available on accessible sources that have been protected by a reasonably designed litigation hold. Id.⁷ See new Rule 37(f).

⁷ It would be possible to add a more detailed description of what might be a reasonable litigation hold. One suggestion is:

If the responding party has placed a litigation hold on reasonably accessible electronically stored information that may be discoverable in the action, information stored on inaccessible sources generally would not need to be preserved. A responding party would need to include in the litigation hold information that is not reasonably accessible if that party had a reasonable basis to believe that it may be discoverable in the action and was not available on accessible sources.

There is a risk in offering advice along these lines. There is, for instance, a powerful argument that the obligation to preserve inaccessible information should be affected by the cost of preservation. Information held in a “legacy” format might be preserved at little or no cost; no doubt there are other and more common

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The volume of — and the ability to search — much electronically stored information means that in many cases, the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. The question whether the responding party must search sources it has identified as not reasonably accessible may be raised by a motion to compel discovery or by a motion for a protective order. Either motion must be preceded by a conference at which the parties discuss the nature of the barriers to access and the reasons that may establish good cause⁸ for discovery even if the information is not reasonably accessible. In many cases, the issues can be resolved in conference.

If the parties do not resolve the issue, the responding party must show that the information is not reasonably accessible because of the undue burden or cost required. The requesting party may need discovery to test an assertion of inaccessibility, including at times such measures as depositions of the responding party's technical experts or sampling or inspection of the sources on which the information is stored.

Once it is shown that electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause.⁹ The showing required for such an order depends on a number of factors. The reasonableness of requiring a

examples. Beyond that, a party's assertion of access difficulties may be self-interested or based on the inabilities of its own technology staff to understand search processes that may make the information readily accessible. The essential purpose of the Note at this point is to deflate the oft-expressed concern that a party can avoid or evade its preservation obligations by a unilateral designation of information sources as not reasonably accessible. The current language seems to do that.

⁸ Here and elsewhere, if the rule is revised by deleting "good cause" and substituting a direct invocation of Rule 26(b)(2)(C) or something else, the Note will be revised accordingly.

⁹ This is another example of the "good-cause" references that will be changed if the rule text is changed.

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responding party to retrieve information not reasonably accessible depends not only on the cost and burden of doing so, but also on whether those costs and burdens can be justified in the circumstances of the case. Factors to be considered include the quantity of information available from other and more easily accessed sources, the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, predictions as to the importance and usefulness of the further information, the importance of the issues at stake in the litigation, and the parties' resources.

In determining whether to order discovery of information that is not reasonably accessible, a court should consider the (b)(2)(C) proportionality factors. These good-cause factors and the (b)(2)(C) proportionality factors have similarities. The primary difference is that when the court is determining whether to require the responding party to access information that has been shown to be not reasonably accessible the court and parties likely do not have detailed knowledge about what information may exist, whether it is relevant, and how valuable it may be to the litigation. The more the court and parties know about the information that is not reasonably accessible, through sampling, inspecting, or other techniques, the more the good-cause showing required for discovery of information that is not reasonably accessible resembles the familiar proportionality test.¹⁰

¹⁰ The text is intended to illustrate the tight relationship between good cause and the proportionality factors of Rule 26(b)(2)(C). If we retain good cause in the rule, a shorter statement might be useful here as an alternative: "The good cause inquiry and the (b)(2)(C) proportionality factors are distinct in one major respect. When certain information is not reasonably accessible, neither the court nor the parties are able to determine whether the information is relevant and how valuable it may be to the litigation. Sampling, inspection, or other techniques may provide a basis for making that determination. After that is done, the court will be able to apply the proportionality factors to the inaccessible information." One problem with this formulation is that it could imply that proportionality can be considered only after an attempt to sample, "inspect," or employ "other techniques." To avoid this problem, the sentence could be recast: "When a certain *source of* information is not

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

The proper application of Rule 26(b)(2)(B) will be developed through judicial decisions. Case law has already begun to develop principles for making such determinations. *See, e.g., Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Rowe Entertainment, Inc. v. William Morris Agency*, 205 F.R.D. 421 (S.D.N.Y. 2002); *McPeck v. Ashcroft*, 202 F.R.D. 31 (D.D.C. 2001). Courts will adapt the principles of Rule 26(b)(2) to the specific circumstances of each case.

Rule 26(b)(2)(C) carries forward a separate set of limits that continue to apply to all discovery. The conclusion that electronically stored information is reasonably accessible does not address whether discovery nonetheless should be limited for the reasons described in items (i), (ii), and (iii).

Changes in Published Committee Note

reasonably accessible, the court and the parties may know little about what it might contain and cannot determine whether it is relevant or how valuable it may be to the litigation. Without such knowledge, the proportionality factors may be difficult to apply. Sampling or other limited inquiries may provide the knowledge necessary to apply the proportionality test.”

If “good cause” is deleted from the rule text, this paragraph would be framed as an observation about the difficulties of applying the Rule 26(b)(2)(C) proportionality tests when a source is difficult to search.

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Subdivision (b)(2). The amendment to Rule 26(b)(2) is designed to address issues raised by some of the distinctive features of the difficulty of locating, retrieving, and providing discovery of some electronically stored information, including the volume of that information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information. Electronic storage systems often make it easier to locate, retrieve, and review the information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But at times many parties have significant quantities of electronically stored information that can be accessed located, retrieved, or reviewed only with very substantial burden and cost. In a particular case, these burdens and costs may make such information not reasonably accessible, effort or expense. For example, some information may be stored solely for disaster-recovery purposes and be expensive and difficult to use for other purposes. Time-consuming and costly restoration of the data may be required and it may not be organized in a way that permits searching for information relevant to the action. Some information may be “legacy” data retained in obsolete systems; such data is no longer used and may be costly and burdensome to restore and retrieve. Other information may have been deleted in a way that makes it inaccessible without resort to expensive and uncertain forensic techniques, even though technology may provide the capability to retrieve and produce it through extraordinary efforts. Ordinarily such information would not be considered reasonably accessible.

It is not possible to define in a rule the different types of technological barriers that may impede access to electronically stored information. The purpose of electronic storage ordinarily is to provide easy access. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed in ways that provide ready access to information that is not regularly used. But, either by design or as a consequence of accepting design constraints, or as a result of more human factors, a system may retain information that is accessible only with great effort, if at all. Subparagraph (B) is added to regulate

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discovery of information that can be searched and retrieved only with substantial burden or cost.

~~In many instances, the volume of potentially responsive information that is reasonably accessible will be very large, and the effort and extra expense needed to obtain additional information may be substantial. The rule addresses this concern by providing that a responding party need not provide electronically stored information that it identifies as not reasonably accessible. If the requesting party moves to compel additional discovery under Rule 37(a), the responding party must show that the information is not reasonably accessible. Even if the information is not reasonably accessible, the court may nevertheless order discovery for good cause, subject to the provisions of Rule 26(b)(2)(i), (ii), and (iii).~~

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

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

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

~~Whether given information is “reasonably accessible” may depend on a variety of circumstances. One referent would be whether the party itself routinely accesses or uses the information. If the party routinely uses the information—sometimes called “active data”—the~~

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~~information would ordinarily be considered reasonably accessible. The fact that the party does not routinely access the information does not necessarily mean that access requires substantial effort or cost.~~

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

~~The amendment to Rule 26(b)(2) excuses a party responding to a discovery request from providing electronically stored information on the ground that it is not reasonably accessible. The responding party must identify the information it is neither reviewing nor producing on this ground. The specificity the responding party must use in identifying such electronically stored information will vary with the circumstances of the case. For example, the responding party may describe a certain type of information, such as information stored solely for disaster recovery purposes. In other cases, the difficulty of accessing the information—as with “legacy” data stored on obsolete systems—can be described. The goal is to inform the requesting party that some requested information has not been reviewed or provided on the ground that it is not reasonably accessible, the nature of this information, and the basis for the responding party’s contention that it is not reasonably accessible. But if the responding party has actually accessed the requested information, it may not rely on this rule as an excuse from providing discovery, even if it incurred substantial expense in accessing the information.~~

Under this rule, a responding party should provide all electronically stored information that is relevant and reasonably accessible, subject to the (b)(2)(C) proportionality limits that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The goal of the identification requirement is to inform the requesting party that the responding party has not searched sources that may contain requested information because of barriers to accessing that information. The identification

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should, to the extent possible, provide enough information to enable the requesting party to evaluate the burden and cost of providing the discovery. The identification of sources not searched need not approach the detail of a “privilege log” that may be necessary to comply with Rule 26(b)(5).

A party’s identification of electronically stored information as not reasonably accessible does not relieve a party of its common-law or statutory duties to preserve evidence. The application of preservation obligations to electronically stored information in a particular case depends on a number of factors. See Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003). One factor is whether the responding party has a reasonable basis for believing that an inaccessible source contains discoverable information that is not available on accessible sources that have been protected by a reasonably designed litigation hold. Id. See new Rule 37(f).

The volume of — and the ability to search — much electronically stored information means that in many cases, the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties’ discovery needs. The question whether the responding party must search sources it has identified as not reasonably accessible may be raised by a motion to compel discovery or by a motion for a protective order. Either motion must be preceded by a conference at which the parties discuss the nature of the barriers to access and the reasons that may establish good cause for discovery even if the information is not reasonably accessible. In many cases, the issues can be resolved in conference.

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

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~~26(c), it would have to demonstrate that the information is not reasonably accessible to invoke the protections of this rule.~~

If the parties do not resolve the issue, the responding party must show that the information is not reasonably accessible because of the undue burden or cost required. The requesting party may need discovery to test an assertion of inaccessibility, including at times such measures as depositions of the responding party's technical experts or sampling or inspection of the sources on which the information is stored.

~~The rule recognizes that, as with any discovery, the court may impose appropriate terms and conditions. Examples include 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, limits on the amount of information to be produced, and provisions regarding the cost of production.~~

Once it is shown that electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause. The showing required for such an order depends on a number of factors. The reasonableness of requiring a responding party to retrieve information not reasonably accessible depends not only on the cost and burden of doing so, but also on whether those costs and burdens can be justified in the circumstances of the case. Factors to be considered include the quantity of information available from other and more easily accessed sources, the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources, the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources, predictions as to the importance and usefulness of the further information, the importance of the issues at stake in the litigation, and the parties' resources.

In determining whether to order discovery of information that is not reasonably accessible, a court should consider the (b)(2)(C)

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proportionality factors. These good-cause factors and the (b)(2)(C) proportionality factors have similarities. The primary difference is that when the court is determining whether to require the responding party to access information that has been shown to be not reasonably accessible the court and parties likely do not have detailed knowledge about what information may exist, whether it is relevant, and how valuable it may be to the litigation. The more the court and parties know about the information that is not reasonably accessible, through sampling, inspecting, or other techniques, the more the good-cause showing required for discovery of information that is not reasonably accessible resembles the familiar proportionality test.

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

The good-cause inquiry is coupled with the authority to set terms and conditions for discovery. These terms and conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The terms and conditions may also include payment by the requesting party of part or all of the reasonable costs of accessing information that is not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing

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5 reasonably accessible¹² may be responsive¹³ if it [the
6 party] identifies the sources¹⁴ and describes the substantial
7 barriers that impede access¹⁵ to the information. On
8 motion ~~by the requesting party;~~ to compel discovery or for

¹² A post-publication revision added these words: "that the party identifies as not reasonably accessible from the sources on which it is stored."

¹³ We do not want to demand a description of every source not searched. Just as with paper, there will be many files that are not at all likely to include responsive information. The focus should be on files that a party would be expected to search if there were no substantial technological barriers.

¹⁴ Requiring identification of the sources more accurately describes the thought behind the published requirement to identify "the information." Many comments observed that you cannot identify the information without actually retrieving it.

¹⁵ "substantial barriers that impede access to the information" uses a lot more words than "not reasonably accessible." But it has advantages. "Reasonably" implies cost-benefit comparisons ---- what is reasonable turns on how difficult it is to get the information and what the predicted value of the information may be. Predicted value should enter only at a later stage. At the first stage, the critical thing is to appraise the actual difficulties involved. "substantial" is intended to indicate a moderate threshold of difficulty, but no attempt is made to define it. "barriers" is not a term of computer art, but that is an advantage; it evokes an image, not a concept that may change with technology. "impede access" simply describes the type of barrier that concerns us.

"Barriers" also may have a disadvantage; it may seem to imply physical obstacles, not the limits of programming and storage media. If it seems too physical, another word might be substituted. One cogent suggestion is "difficulties":

* * * if it identifies the sources and describes the substantial *difficulties* in accessing the information. * * * the responding party must show the nature and extent of the *difficulties*. If substantial *difficulties* are shown, * * *.

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9 a protective order,¹⁶ the responding party must show ~~that~~
10 ~~the information is not reasonably accessible~~¹⁷ the nature
11 and extent of the barriers that impede access.¹⁸ If ~~that~~
12 ~~showing is made~~ substantial barriers are shown, the court
13 may order discovery of the information ~~for good cause~~
14 [when] {if the requesting party shows that such discovery

¹⁶ This version recognizes that either party may make a motion to resolve the question.

¹⁷ A post-publication revision added these words: "is not reasonably accessible without undue burden or cost * * *." The change in focus to substantial barriers supersedes the potential value of these words.

¹⁸ This approach strips out both "good cause" and "undue burden or cost." Those concepts fit with the (b)(2)(C) balancing process that applies after the height of the barriers is established.

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6 to the information. On motion to compel discovery or for
7 a protective order, the responding party must show the
8 nature and extent of the barriers that impede access. If
9 substantial barriers are shown, the court may order
10 discovery of the information [when]{if the requesting
11 party shows that such discovery is} consistent with Rule
12 26(b)(2)(C) and may specify terms and conditions for
13 such discovery.

Committee Note

Subdivision (b)(2). Continuing problems are posed by requests to discover information stored in electronic forms that are not easily searched. Substantial effort may be required even to determine whether any responsive information is held in a particular storage form. Requesting parties and responding parties alike must develop sensible methods for dealing with these problems. The continuing rapid pace of technological innovation has impeded spontaneous development of workable solutions. Rule 26(b)(2) is amended to provide a uniform procedure for addressing these issues.

One identifiable feature seems to remain constant across the technological changes. A party asked to produce information from its electronic information system ordinarily has a better understanding of the system than the requesting party has. The producing party has advantages in knowing what information is likely to be stored, where it may be stored, and what steps are needed to retrieve it.

Just as with production of paper documents, the producing party ordinarily will not bother to search sources not likely to contain responsive information. But it also may confront circumstances in

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which it has reason to believe that responsive information may be stored in sources that can be searched only with difficulty, if at all.

The purpose of new subparagraph (B) is to require the producing party to identify sources of electronically stored information that may be responsive to a discovery request but that can be searched only with substantial difficulty. The nature of the information system and the barriers to access also must be described. Electronically stored information is distinguished from paper information for this purpose because electronic information storage systems vary greatly. And they change greatly — and often rapidly — over time. A requesting party is at a great disadvantage in guessing at the technological barriers that may impede access to sources of potentially responsive information. Even the producing party, familiar only with daily applications of its system, may not be aware of methods that can readily reach sources that seem surrounded by high barriers. A producing party that wishes to avoid a search because of technological difficulties should provide enough information to enable the requesting party to decide whether to challenge the assertion that the information is difficult to access and, after evaluating the discovery that is provided, whether to press for further discovery from sources identified as difficult to access.

Because these problems arise from the variability of electronic information storage systems, specific illustrations drawn from any moment in technology may quickly become obsolete. There was a time when preserving and retrieving specific information from the disaster-recovery storage methods used by complex systems could be enormously expensive. The same barriers may exist for many systems today, but other systems have lowered them, and for some systems they may not exist at all. The very point of requiring a producing party to provide a specific description of the barriers to access is that a producing party should not be able to resist discovery on an unexplained statement that a broadly described source — such as “disaster-recovery sources” — need not be searched.

The same variability also means that the test cannot turn on the frequency with which a particular source is actually consulted. A

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producing party may never have had occasion to utilize a particular source within its system, but if the source may contain information responsive to a discovery request and can be efficiently searched, the search should be made.

A party's identification of sources of potentially responsive information that have not been searched sets the stage for further discovery management by the parties themselves. Information produced from other sources may satisfy all parties that there is no need to search further. If disagreements remain, the issue can be framed by a Rule 37(a) motion to compel or by a Rule 26(c) motion for a protective order. Either motion must be preceded by a conference of the parties that attempts to resolve the question. If informal resolution fails and the motion must be made, the producing party has the burden of showing the nature of the barriers that impede the search. The inquiry at this stage focuses on the technological difficulties. Although the producing party has the burden, the requesting party may be entitled to pre-hearing discovery to prepare to contest the issue. In an appropriate case, discovery may include sampling, inspection, or other measures to provide direct information about the barriers asserted to impede access.

If the court finds that there are no substantial barriers to accessing the requested information, discovery follows, subject to all the limits that apply to discovery of easily accessed information. But if the court finds substantial barriers, further court management may be required. The familiar principles of Rule 26(b)(2)(C) that apply to all discovery govern the question whether attempts should be made to access the information despite the difficulties. The court may be able to apply these principles at the same time that it measures the difficulties, and the parties should attempt to present their positions in a way that facilitates this resolution. The requesting party should have gained good information about the nature of the barriers. It should have assessed the extent of the information provided from other sources. It may have some reasonable sense of the probability that other useful information may be held in the sources that are difficult to access. But application of the (b)(2)(C) principles may not be feasible as part of the proceedings that determine that the barriers

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are substantial. It may remain necessary to gather additional information about the probable costs and yield of a search by sampling a portion of the impeded sources or by other means. Such partial steps are one example of the terms and conditions that a court may exact in ordering discovery. And if the parties have not yet exhausted other information sources, exhaustion of the other sources may be another appropriate term or condition.

Yet another term or condition that may be imposed in ordering discovery is that the requesting party pay part or all of the costs of searching the difficult-to-search sources. But the requesting party's willingness to bear the search costs does not always justify discovery. The producing party still faces costs that may include disruption of its ordinary operations and that almost always will include the costs of reviewing any retrieved information for responsiveness, privilege, and other protections.

Identification of information as difficult to search does not affect the independent duties to preserve information for litigation that arise from common law, statutes, or administrative regulations. The interdependence of preservation obligations and access difficulties is addressed with Rule 37(f). Whether there is a duty to preserve a source of information that a party identifies as difficult to access depends on several factors, including the difficulty of access, the cost of preservation, and the probability that the source contains information that is not available on readily accessible sources and cannot be found by less costly methods.

Rule 37(f)

1. Issues

Discussion about specific drafting issues appears in footnotes, but some overall introduction is appropriate.

a. The Extent of the Protection Offered

Because the published version did not require proof of intentional or wilful misconduct to support sanctions, some comments criticize the proposal for providing too little protection for the loss of electronically stored information. Because the published version did protect against sanctions for the loss of certain information, others criticize it -- particularly in combination with Rule 26(b)(2)'s two-tier approach to discovery of electronically stored information -- as providing too much protection and encouragement for parties to make information inaccessible and allow it to be deleted without fear of sanctions. The overall issue presented by the drafting choices presented in the published version, now before us for decision, is whether the footnote version of the proposed safe harbor unduly shelters behavior that should be sanctionable, or whether the text version is so narrow that it is not worth creating.

b. The Relationship to Preservation

Some have urged that the rule specify what the preservation obligation is. Others have urged us to avoid it, in part because of the potential clash with other bodies of law. But the problem is not to define preservation obligations in the abstract. Instead, the uncertainty is over how to apply such obligations to the unique features of electronically stored information when the "routine operation" of computer systems results in an inability to produce information in discovery conducted under the civil rules.

Some comments urged greater precision and detail on the role of the party's information retention and destruction policy, adopted without regard to any particular litigation. One approach is distinguishing between data discarding that can be justified on business, regulatory, or technological grounds and that which can't. Others have urged that we require a party to show, or emphasize the role of, its preservation policy and whether it is reasonable. Some of these factors may helpfully be worked into the Note, and language is proposed to illustrate how that can be done.

Some comments urged that the proposal will encourage an onslaught of applications for preservation orders. Language to respond to this concern has been suggested in the Note to Rule 26(f).

c. The Relationship to Accessibility

If inaccessible information is subject to destruction through the routine operation of a party's computer system and is not preserved, the judge cannot later order production. The Note says that there may be a need to preserve inaccessible information such as backup tapes if there seems no alternative source of the information and the information seems likely to matter. In other words, a litigation hold is required for information that is not reasonably accessible if it is discoverable and only available on inaccessible media. If such information is routinely destroyed, no sanctions could be imposed if the party has put a reasonable litigation hold in place. But merely identifying information as not reasonably accessible does not by itself provide immunity from sanction. Language is proposed in both the revisions of this rule and to Rule 26(b)(2) to respond to these concerns.

d. The Standard for Sanctions and Degree of Sanctions

The Rule covers a range of sanctions. Many comments urged that we provide some guidance by stating that the most severe

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5 impose sanctions under these rules² on the party for failing to
6 provide such information if:

7 (1) the party took reasonable steps to preserve the
8 information after it knew or should have known the

addressed in the first instance to the judge who entered the order. If the goal is to get the judge to be more particular in preservation orders, this may not be the best way to achieve that goal. It seems awkward to tell a judge he or she is not allowed to sanction a violation of his or her own order because it was not specific enough. And how is the judge (or the other side) to know enough so as to frame a specific order? Would this cut against an incentive for parties to be clear on how their information systems work? In any event, it is not clear that many federal judges are entering overbroad preservation orders.

Adding the word might prompt considerable litigation about the specificity of the original order. Since that issue might well bear on the decision whether to impose a sanction at all, and if so what sanction to impose, making specificity a prerequisite to any consideration of the order could be counterproductive because it might prompt highly detailed, but nevertheless "boilerplate" orders. But if the order has to be more specific to provide a basis for sanctions, how is the court to determine how to fashion such an order?

² The phrase "under these rules" was added by the Standing Committee. Some commentators have argued that it robs Rule 37(f) of needed force because it leaves untouched the court's inherent authority. See, e.g., Gregory Joseph, 04-CV-066. The Note already says that violation of a retention requirement imposed by another source of law bears on whether a party acted reasonably within the meaning of Rule 37(f)(1), and that the rule does not purport to limit sanctions against a party for violating such a legal requirement to preserve in any other setting. And it appears that most cases imposing the sort of sanctions addressed here are based on the rules. See Scheindlin & Wangkeo, *Electronic Discovery Sanctions in the Twenty-First Century*, 11 Mich. Tel. & Tech. L. Rev. 71, 78 (2005) (available at www.mttl.org) (in 57% of the federal-court cases the courts based their authority to impose sanctions on Rule 37).

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9 information was [would be] {likely would be}³
10 discoverable in the action; and
11 (2) the failure resulted from loss of the information
12 because of the routine operation of the party's electronic
13 information system.⁴

³ The substitution of “would be” or “likely would be” for “was” may address concerns about retention of inaccessible information. Ultimately there probably is no certitude available for parties in determining when to retain such information. Saying that they should do so if they should have known it “would be” discoverable may be better, given that Rule 26(b)(2) says that it is discoverable only on a showing of good cause, which comes later in the case and would often depend on whether there are alternative accessible sources for the information. As of the beginning of the litigation, one could say that a party fully aware of the topical focus of the litigation still would not know that the information “was” discoverable because it is not discoverable without the later involvement of the court. The “likely would be” locution implies somewhat stronger awareness of discoverability.

It may be objected that “would be” is too broad. By the time the sanctions issue arises, there will be a temptation to use 20/20 hindsight on what a party should have foreseen. A rule saying “would be” could be read as “could be,” and lead to preservation of virtually everything. Shifting to “likely would be” might reduce this possible source of heartburn, but the advantage of “was” -- in the published proposal -- was that it made clear what the court should be asking when, well along in the case, it is asking whether a party's preservation efforts satisfied Rule 37(f)(1).

⁴ The published amendment proposals included the following footnoted alternative formulation (with a couple of possible changes consistent with those in text) that introduces a higher culpability requirement. A revision of the Note addresses these concerns somewhat, by saying that the selection of the sanction should take account of the culpability of the party that lost information.

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

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14

* * * * *

*“Clean” Version of Rule
(with bracketed material retained)*

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

1

* * * * *

2

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

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(1) the party took reasonable steps to preserve the
information after it knew or should have known the
information was [would be] {likely would be}
discoverable in the action; and

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

(2) the party [willfully or recklessly] violated an order issued in the action
[specifically] requiring the preservation of the information.

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system ~~refers to is an open-ended attempt to describe~~ the ways in which a specific ~~piece of~~ electronically stored information ~~may be lost or become inaccessible disappears~~ without a conscious human direction to destroy that specific information. No attempt is made to catalogue all the system features that, now or in the future, may cause such loss of information. Familiar examples from present systems include programs that recycle storage media, automatically overwriting of information that has been “deleted,” or and programs that automatically discard information that has not been accessed within a defined period or that has existed beyond a defined period without an affirmative effort to store it for a longer period.⁶ Similarly, many databases automatically create and discard information in response to [specific directions from users] {ordinary use}⁷ and to update the information stored on the database. By protecting against sanctions for the routine operation of a computer

⁶ One suggestion is to modify these two sentences more vigorously:

Familiar examples from present systems include ~~programs that recycle storage media, automatic overwriting of information that has been “deleted,” and programs that automatically discard information that has not been accessed within a defined period or that has existed beyond a defined period without an affirmative effort to store it for a longer period.~~ Similarly, some dynamic databases routinely recycling, overwriting, erasures, and deletions. Similarly, many databases automatically create and discard information in response to specific directions from users and to update material the information stored on the database.

It may be better to set out more detail for (1) current readers (particularly judges) who might find it informative, and (2) future readers who might find detail on our understanding of current technological circumstances useful in deciding how technological changes should affect application of the rule. The addition of the word “all” in the sentence before this passage makes it clear that the Note's catalogue is partial.

⁷ This alternative phrase is included because the original suggestion -- “specific directions from users” seems at tension with the idea that this is semi-automatic. The point is that ordinary use leads to these consequences without any intentional effort to cause these results on the part of the user.

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~~system, the Rule The purpose is to~~ recognizes that it is proper to design efficient electronic information storage systems that serve the user's needs unrelated to litigation. These routine and automatic features are wholly different from deliberate efforts to design or apply an information system intended. ~~Different considerations would apply if a system were deliberately designed to destroy litigation-related material. "Routine operation" contemplates an information system designed to serve business or technical purposes. A system deliberately designed to destroy litigation-related information without case-specific human intervention—a system that has a "routine operation" thwarting discovery—would not satisfy this requirement.~~⁸

Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. It does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced; common law and other preservation obligations continue to apply. Rule 37(f) does not, however, require that there be an actual discovery request. It requires that a party take reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a litigation hold.

⁸ It has been suggested that it is hard to imagine how there could be such a system design unless it was case-specific. The concern is that this Note language will invite repeated inquiry into the motivation behind system design. One response is that the point of the sentence is to contrast such a design with one that serves business or technical purposes. Another is that there have been examples of such purging of hard-copy files that was not case-specific in that no case was on file (much less the case in which the issue arose and led to sanctions). See *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D. Fla. 1984), which involved a generalized "purge" of the company's files in the 1960s and 1970s designed to eliminate documents that might be detrimental to it in a possible future law suit. As expressed by some during the public comment period, the concern was that such purging could be built into the system before any litigation has arisen. It would seem clear that destruction that is keyed to this case would be subject to sanctions.

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The reasonableness of the steps taken to preserve electronically stored information must be measured in at least three dimensions.⁹ The outer limit is set by the Rule 26(b)(1) scope of discovery. A second limit is set by the new Rule 26(b)(2) provision that electronically stored information from sources identified by the party as not reasonably accessible must be provided only on court order for good cause.¹⁰ In most instances, a party acts reasonably by ~~identifying and~~ preserving reasonably accessible electronically stored information that is discoverable without court order. In some instances, reasonable care may require preservation of electronically stored information from sources that the party identified as is not reasonably accessible if the party knew or should have known that the information it [might be] {likely would be}¹¹ ~~was~~ discoverable in the

⁹ Concerns expressed during the public comment period about the impact of Rule 26(b)(2)'s proposed amendment on preservation obligations might be addressed by recasting the paragraph somewhat as follows:

The reasonableness of steps taken to preserve electronically stored information focuses on information “discoverable in the action,” which invokes the scope of discovery under Rule 26(b)(1). Rule 26(b)(2)'s provision that discovery of electronically stored information from sources a party identifies as not reasonably accessible occurs only on court order does not excuse preservation called for by Rule 37(f)(1) with regard to such information. In most instances, a party acts reasonably by preserving reasonably accessible electronically stored information that is discoverable without court order. In some instances, reasonable care may require preservation of electronically stored information from sources that the party identified as not reasonably accessible if the party knew or should have known that the information might be discoverable in the action and might not be available from accessible sources.

¹⁰ This Note material may need to be revised in light of the Committee's eventual action on the proposed amendment to Rule 26(b)(2).

¹¹ Would this be better as “likely would be”? Once the choice of terminology for the rule is made, the Note will need to be examined for consistency with the rule. The choice between “might” and “would” turns on how clear it must be to the party sought to be sanctioned that such unique information was on “inaccessible” sources.

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action ~~because it and might [would]~~¹² ~~could~~ not be available from accessible sources obtained elsewhere. Preservation would normally ~~may~~ be less burdensome than taking the steps necessary to access the sources that the party identified as not reasonably accessible, and is necessary to support discovery under Rule 26(b)(2) if good cause is shown.¹³ The third limit depends on what the party knows about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information. Once the subjects and information systems are identified, e-mail records and electronic “files” of key individuals and departments will be the most obvious candidates for preservation. Other candidates for preservation will be more specific to the litigation and information system.

Preservation steps should include consideration of the impact of system design features that otherwise may lead to automatic loss of discoverable information, a problem further addressed in Rule 37(f). Courts evaluating the adequacy of a party’s preservation efforts may consider whether the party advised other parties of the nature and operation of its information systems, and particularly about design features that could lead to the automatic loss of information. This advice might be provided during the Rule 26(f) conference.¹⁴ In

¹² The choice between “might” and “would” turns on how clear it must be to the party sought to be sanctioned that such unique information was on “inaccessible” sources.

¹³ One suggestion is to rewrite the introductory sentence:

Preservation would normally be less burdensome than taking ~~the~~ steps ~~necessary~~ to access the inaccessible information, and is necessary to permit support discovery under rule 26(b)(2) if good cause is shown.

Most preferred the language in text.

¹⁴ This addition was prompted by the suggestion of some (e.g., ARMA, 04-CV-041) that a party be required to provide a copy of its records retention policy as a prerequisite to invoking Rule 37(f). Such a point could also be made in connection with the discussion of preservation in relation to Rule 26(f).

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assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary widely depending on the nature of the party's electronic information system and the nature of the litigation.

One objection to stressing this disclosure might be that the Note to Rule 26(f) cautions against entry of preservation orders. Perhaps that caution would reduce the value of this encouragement of disclosure if it means that the other side can't get a preservation order even though it is apprised of the problem. But the disclosure could prompt fruitful discussions of these issues during the Rule 26(f) conference. Indeed, one possible revision of Rule 26(f) is to direct that this topic—like form of production—be discussed. Moreover, whether or not there is a preservation order the requirements of Rule 37(f)(1) apply to determine whether the party has adopted an appropriate litigation hold.

Furthermore, one could argue that this sentence focuses on something that should not be relevant to this inquiry, which is about what the party did to preserve, not what it told the other party about its electronic systems. Yet to some extent there might be a variety of estoppel against later objections to the effects of processes that were fully explained at the outset.

Finally, one could distinguish between situations in which there is no discussion of system design during the 26(f) conference and those in which a party fails to be candid, limiting the Note observation to the latter situation. Perhaps failure to bring up the subject is not a valid consideration in regard to sanctions, and only misleading statements are. In this way, it would be left to the other party to inquire about system design during the conference. But it does seem desirable to promote such discussions, and Rule 26(f) does say that the parties are to discuss preservation, so there could be a value to providing this incentive.

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Another ~~One~~ consideration¹⁵ that may ~~sometimes~~ be important in evaluating the reasonableness of steps taken is the existence of a statutory or regulatory provision for preserving information, if it required retention of the information sought through discovery. *See, e.g.*, 15 U.S.C. § 78u-4(b)(3)(C); Securities & Exchange Comm'n Rule 17a-4. Although violation of such a provision does not automatically preclude the protections of Rule 37(f), the court may consider ~~take account of~~ the statutory or regulatory violation in determining whether the party took reasonable steps to preserve the information for litigation. Whether or not Rule 37(f) is satisfied, violation of such a statutory or regulatory requirement for preservation may subject the violator to sanctions in another proceeding—either administrative or judicial—but the court may not impose sanctions in the action if it concludes that the party's steps satisfy Rule 37(f)(1).

Rule 37(f) does not apply if the party's failure to provide information resulted from its violation of an order in the action requiring preservation of the information. The rule is limited to an order entered "in the action" because it would not be appropriate to preclude the protection of Rule 37(f) by referring to orders entered in

¹⁵ At this point, one could add a thought by beginning the paragraph with this additional sentence:

One important consideration in determining whether a party acted reasonably within the meaning of Rule 37(f)(1) is whether it complied with any pertinent common law duties to preserve information.

Adding such a sentence would address concerns that the rule might undercut or weaken those common law preservation requirements. But it also might weaken the rule itself. The rule already requires reasonable steps to preserve. If the protection is absolutely unavailable when the party fails to satisfy Rule 37(f)(1), and violation of a common law duty to preserve means that 37(f)(1) was violated, the protection looks limited indeed. And to the extent that sanctions not "under these Rules" remain available for violation of the common law requirement, the extent of any weakening of the common law duty is unclear. There has been limited support for adding this thought.

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any action, no matter how unrelated. But the phrase should not be interpreted too literally; often coordinated preparation of numerous actions will proceed on the assumption that an order entered in one would be honored in the others even though not formally entered on the docket of each of them. In such situations, an order in one of the related actions may be considered to be “in the action” for purposes of Rule 37(f) questions in the related cases. An order that directs preservation of information on identified topics ordinarily should be understood to include electronically stored information. Should such information be lost even though a party took “reasonable steps” to comply with the order, the court may impose sanctions. But a party loses the protection of Rule 37(f) only if loss of the electronically stored information at issue violated the order. If such an order was violated in ways that are unrelated to the party’s current inability to provide the electronically stored information at issue, the violation does not deprive the party of the protections of Rule 37(f). The determination whether to impose a sanction, and the choice of sanction, will be affected by the party’s reasonable attempts to comply.

If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, are is for the court. The court has broad discretion to determine whether sanctions are appropriate and to select a proper sanction. *See, e.g.*, Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions.¹⁶ Although the rule permits sanctions for a negligent loss of electronically stored information, it is expected that the severity of any sanctions would correspond to the culpability

¹⁶ It might be argued that this portion of the Note unnecessarily explores the handling of situations not covered by the rule, and that it should be deleted. It was originally included due to concerns about the argument that, if Rule 37(f) did not forbid sanctions, they might be automatic. The narrower the safe harbor, the more significant it is to make clear that sanctions are not automatic outside the harbor. In addition, this material from the published Note provides a lead-in for the following sentences that respond to concerns expressed during the public commentary period.

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of the party's conduct. Ordinarily the most severe sanctions would not be appropriate unless the party acted intentionally or recklessly.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is no longer not reasonably accessible because a party has failed to take reasonable steps to preserve it in a more accessible form ~~the information~~, it may be appropriate to direct the party to take steps to restore or retrieve information that the court otherwise might ~~otherwise~~ not direct.

“Clean” Version of Note

Subdivision (f) is new. It addresses a distinctive feature of computer operations, the routine and automatic deletion of information that attends ordinary use. Partially in recognition of this feature, Rule 26(f) is amended to direct the parties to address issues of preserving discoverable information in cases in which they are likely to arise. In many instances, their discussion may result in an agreed protocol for preserving certain electronically stored information and for managing the routine operation of a party's information system to avoid the loss of certain information. Violation of such an agreement may bear on whether a party has complied with Rule 37(f)(1).

Rule 37(f) provides that, unless a party's loss of electronically stored information violates a court order requiring preservation of that [specific] information, the court may not impose sanctions under these rules on a party when such information is lost because of the routine operation of its electronic information system if the party took reasonable steps to preserve the discoverable information.

Rule 37(f) applies only to information lost due to the “routine operation of the party's electronic information system.” The

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reference to the routine operation of the party's electronic information system refers to the ways in which specific electronically stored information may be lost or become inaccessible without a conscious human direction to destroy that information. No attempt is made to catalogue all the system features that, now or in the future, may cause such loss of information. Familiar examples from present systems include programs that recycle storage media, automatically overwrite information that has been "deleted," or automatically discard information that has not been accessed within a defined period or that has existed beyond a defined period without an affirmative effort to store it for a longer period. Similarly, many databases automatically create and discard information in response [to specific directions from users] {ordinary use} and to update the information stored on the database. By protecting against sanctions for the routine operation of a computer system, the Rule recognizes that it is proper to design efficient electronic information storage systems that serve needs unrelated to litigation. These routine and automatic features are wholly different from deliberate efforts to design or apply an information system intended to destroy litigation-related material. "Routine operation" contemplates an information system designed to serve business or technical purposes. A system deliberately designed to destroy litigation-related information without case-specific human intervention—a system that has a "routine operation" thwarting discovery—would not satisfy this requirement.

Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. It does not define the scope of a duty to preserve and does not address the loss of electronically stored information that may occur before an action is commenced; common law and other preservation obligations continue to apply. Rule 37(f) does not, however, require that there be an actual discovery request. It requires that a party take reasonable steps to preserve electronically stored information when the party knew or should have known it was [would be] discoverable in the action. Such steps are often called a litigation hold.

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The reasonableness of the steps taken to preserve electronically stored information must be measured in at least three dimensions. The outer limit is set by the Rule 26(b)(1) scope of discovery. A second limit is set by the new Rule 26(b)(2) provision that electronically stored information from sources identified by a party as not reasonably accessible must be provided only on court order for good cause. In most instances, a party acts reasonably by preserving reasonably accessible electronically stored information that is discoverable without court order. In some instances, reasonable care may require preservation of electronically stored information from sources that the party identified is not reasonably accessible if the party knew or should have known that the information [might be] {likely would be} discoverable in the action because it might [would] not be available from accessible sources. Preservation would normally be less burdensome than taking the steps necessary to access the sources the party identified as not reasonably accessible, and is necessary to support discovery under Rule 26(b)(2) if good cause is shown. The third limit depends on what the party knows about the nature of the litigation. That knowledge should inform its judgment about what subjects are pertinent to the action and which people and systems are likely to have relevant information. Once the subjects and information systems are identified, e-mail records and electronic "files" of key individuals and departments will be the most obvious candidates for preservation. Other candidates for preservation will be more specific to the litigation and information system.

Preservation steps should include consideration of the impact of system design features that may otherwise lead to automatic loss of discoverable information. Courts evaluating the adequacy of a party's preservation efforts may consider whether the party advised other parties of the nature and operation of its information systems, and particularly about design features that could lead to the automatic loss of information. This advice might be provided during the Rule 26(f) conference. In assessing the steps taken by the party, the court should bear in mind what the party knew or reasonably should have known when it took steps to preserve information. Often, taking no steps at all would not suffice, but the specific steps to be taken would vary

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widely depending on the nature of the party's electronic information system and the nature of the litigation.

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

Rule 37(f) does not apply if the party's failure to provide information resulted from its violation of an order in the action requiring preservation of the information. The rule is limited to an order entered "in the action" because it would not be appropriate to preclude the protection of Rule 37(f) by referring to orders entered in any action, no matter how unrelated. But the phrase should not be interpreted too literally; often coordinated preparation of numerous actions will proceed on the assumption that an order entered in one would be honored in the others even though not formally entered on the docket of each of them. In such situations, an order in one of the related actions may be considered to be "in the action" for purposes of Rule 37(f) in the related cases. An order that directs preservation of information on identified topics ordinarily should be understood to include electronically stored information. Should such information be lost even though a party took "reasonable steps" to comply with the order, the court may impose sanctions. But a party loses the protection of Rule 37(f) only if loss of the electronically stored information at issue violated the order. The determination whether to impose a sanction, and the choice of sanction, will be affected by the party's reasonable attempts to comply.

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If Rule 37(f) does not apply, the question whether sanctions should actually be imposed on a party, and the nature of any sanction to be imposed, are for the court. The court has broad discretion to determine whether sanctions are appropriate and to select a proper sanction. *See, e.g.*, Rule 37(b). The fact that information is lost in circumstances that do not satisfy Rule 37(f) does not imply that a court should impose sanctions. Although the rule permits sanctions for a negligent loss of electronically stored information, it is expected that the severity of any sanctions would correspond to the culpability of the party's conduct. Ordinarily the most severe sanctions would not be appropriate unless the party acted intentionally or recklessly.

Failure to preserve electronically stored information may not totally destroy the information, but may make it difficult to retrieve or restore. Even determining whether the information can be made available may require great effort and expense. Rule 26(b)(2) governs determinations whether electronically stored information that is not reasonably accessible should be provided in discovery. If the information is no longer reasonably accessible because a party has failed to take reasonable steps to preserve it in a more accessible form, it may be appropriate to direct the party to take steps to restore or retrieve information that the court otherwise might not direct.

**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 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.

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

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

Kristin 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 resounding party to justify why certain storage areas were not searched or produced. There is a problem with terminology sometimes used in this area. For example, the term "archival data" may refer to data stored in a way that the company can access and use it, which would mean that it is accessible, or to information that is not really accessible. Therefore, care should be used in employing the term "archival data" in relation to this issue.

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Wachovia Corp. (04-CV-214): The term is indefinite and could create inconsistent standard among federal courts. It could also be interpreted to require such a rigorous standard

(e.g., requiring the production of any extant data that can be extracted regardless of expense) as to be little improvement over the current situation.

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

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

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

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

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

Joe Hollingsworth and Marc Mayerson (04-CV-233): The demarcation of material to be produced based on whether it is reasonably accessible is a good start. This standard may not prove workable in practice, but it is a reasonable effort to strike a balance between the needs for production and the burden of identifying and producing the information. Nonetheless, it would

be desirable to explain in the Note that metadata, embedded data, fragmented data, cached data, echoed copies, and similar electronic detritus are not considered to be the "document" itself that has to be produced. In the ordinary case, the modest informational value of this material is outweighed by the difficulty of trying to produce it.

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

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

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

Rule 26(b)(2) -- costs

San Francisco

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

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

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

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

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

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

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

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

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

Dallas

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

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

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

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 26(b)(5)(B)

San Francisco

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

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

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

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

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

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

Dallas

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

attorneys, and reclaiming that information months after production becomes truly problematic. Lat 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 thorough 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 unreasonable 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 Nimsger and Michele Lange (Kroll Ontrack) (04-CV-209): We commend the proposal to prompt early discussion of issues relating to electronically stored information.

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

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

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

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

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

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

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

Rule 26(f) -- agreement regarding privileged information

San Francisco

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

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

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

Washington

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 33(d)

San Francisco

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

Dallas

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

Washington

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

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

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

Comments

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

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

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

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

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

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

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

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

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

Rule 34(a)

San Francisco

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

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

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

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

Dallas

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

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): It should not be controversial to update the rule to use the term electronically stored information. As a practical matter, courts have been treating electronically stored information as discoverable Rule 34 or decades. Nonetheless, the current language is clearly out of step with this reality; as the Note observes, it is a stretch to include all electronically stored information within "documents." Even the phrase

"data compilations" seems arcane because it is not a term used in referring to the most common subjects of discovery. Indeed, just how far the discovery of electronically stored information extends has been the subject of debate. Given the ongoing development of technology, it was wise to avoid a closed list. The question about whether the Note should state that a party responding to a Rule 34 request should include electronically stored information addresses an issue that should not cause a problem. The topic should have been discussed at the Rule 26(f) conference, and that should remove any ambiguity by the time Rule 34 requests are made. Moreover, all the requesting party need do is point out that its requests cover all information discoverable under Rule 34 to solve the problem. Under the circumstances, it is probably reasonable for a responding party to assume that if the requesting party has not asked for electronically stored information in either a Rule 16 or a Rule 26 conference or in the Rule 34 request, it is not interested in that information. Accordingly, the Note should not say that "a Rule 34 request for production of 'documents' should be understood to include electronically stored information." The addition here (and in Rule 45) of a right to test or sample is a good idea, and may be of particular importance with electronically stored information.

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

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

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

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

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

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Although the adoption of the concept of electronically stored information in many rules makes sense, it may do mischief as used here because it treats this as different from documents. We see no need to treat it as a category of information unto itself. We agree that arcane words such as "phonorecords" should be removed from the rule, but the emphasis on "electronically stored information" uses today's

jargon to create tomorrow's arcanity. There is already great buzz that the next generation of computing will be based not on silicon but upon biometrics. We believe that the emphasis in the rule should be on the production of information, no matter how maintained. So we suggest that Rule 34(a) might be amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 34(b)

San Francisco

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

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

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

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

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

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

Dallas

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

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

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

Washington

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

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

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

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

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

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

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

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

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

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

permits the requesting party to choose different forms of production for different types of electronically stored information and provides the same option for the producing party.

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

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

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

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

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

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

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

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

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

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

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

Comments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Kristin Nimsgar 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 "unmaintainable." 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, Couglin, Stoia, Geller, Rudman & Robbins, LLP (04-CV-067): This proposal will produce increased motion practice and will encourage the destruction of relevant data. In our experience, the parties will meet soon after service of the complaint in securities fraud litigation in an effort to confirm that adequate preservation efforts have been undertaken. Although plaintiffs may send a letter demanding complete preservation of defendants' information systems, and defendants generally refuse to specifically identify their preservation efforts, the process allows the parties to informally address discovery concerns. But under the proposed rule, plaintiffs will be compelled to move for a preservation order in every case. Plaintiff will have to move to preserve, and also to prove that any destruction that occurs was not

routine -- a nearly impossible task. There is no justification for such burden shifts, which serve to create an ethical escape hatch for responding parties. Unless defendants are required to specify their preservation efforts at the outset, careful plaintiffs will always have to assume that relevant data will be destroyed, and that the only way to prevent such destruction is to move immediately for a preservation order. This is particularly true in cases governed by the PSLRA. This prospect is particularly troubling in conjunction with proposed changes to Rule 26(b)(2) that would put "inaccessible" information beyond initial discovery responses. If that provision is adopted, older and archived data will often not be produced until after a party has reviewed production including "accessible" information. And this data is most likely to be overwritten due to the routine operation of the computer system. The costs of preserving electronically stored information have been dramatically reduced due to technological changes. The cost for backup tapes has dropped as much as 85% in the past five years, to less than \$100 each. Increasingly inexpensive storage devices also allow a party to quickly and cheaply "mirror image" servers and hard drives. The right way to deal with preservation is through Rule 26(f), not through this rule.

David Shub (04-CV-068): I am concerned about the effectiveness of this proposal. It limits the safe harbor to sanctions under the rules, but there is no limitation on the court's inherent authority to sanction a party, so the protection is severely diminished. But it is likely that no rule language would effectively curtail the court's inherent authority. Under the rules, however, Rule 37 sanctions are only available when a party violated an order in the action, and that seems to be an exception to the rule. If the rule does provide protection, why is that limited to actions taken by the object of the sanctions motion after the suit was filed? Rule 27 allows discovery before the suit is filed. Why shouldn't Rule 37(f) apply in regard to that period of time?

Duncan Lott (04-CV-085): I object to exempting defendants from sanctions when they destroy electronic files through their routine document retention system as this would give corporations an incentive to routinely purge their data at very short intervals.

Alan Morrison (04-CV-086): Once a motion has been made to preserve, specifying the records that cannot be routinely destroyed, there is no need for a safe harbor since the party should act to prevent destruction until the court rules. But proponents of the safe harbor want total safety until there is either a specific request or a court order. Whatever powers the Rules Enabling Act confers on the rulemakers, it does not authorize regulation of pre-litigation conduct. So the earliest any rule-based immunity can apply is when the suit is filed. It is true that, once the suit is filed, the defendant may have some difficulty determining exactly what it is about since complaints are often written broadly. Proposed 37(f) does not appear to provide a workable solution to these and other problems. It doesn't help defendants very much because the safe harbor begins only when they receive the required notice. But then the key word is "discoverable," which is very difficult to interpret and apply in this context with limited information available. And it's odd to forbid all sanctions, not just very severe ones. Having heard both sides of this debate, I think that it will be impossible to write detailed rules in this area. The better approach is to direct district judges to exercise their discretion in these situations based on all the circumstances, and make it clear that the most severe sanctions should be used only in the most egregious cases. A new Note to Rule 37 would not suffice, but I don't have rule language in hand that would do the job.

Scott Lucas (04-CV-098): This proposal invites wrongdoers to establish document retention policies that will hide their wrongdoing. Given the ease and low cost of storing electronic data, this proposal unnecessarily invites abuse.

Michelle Smith (04-CV-099): this proposal would not only allow but would encourage routine destruction of evidence that would establish liability. Parties will set up "routine" data purges at short intervals. This is both extremely bad policy and technologically unjustified. Vast amounts of data can be stored indefinitely and searched quickly.

Richard Broussard (04-CV-100): This change invites corporations to destroy otherwise useful information before a court can have an opportunity to determine the importance of the data.

Gary Berne (04-CV-101): This provision would make destruction of electronically stored information more likely. This evidence is among the easiest and cheapest to preserve, and our rules should never countenance more destruction of evidence. There is no similar protection for destruction of hard copy evidence.

Mica Notz (04-CV-102): You might as well give every defendant corporation out there permission to destroy all evidence at any time pertaining to any matter. What if Enron had gotten this protection? "I am sickened inside to think that our legal system would even consider placing such a rule into effect." The fact remains that six months of electronic communications could easily be stored on a backup hard drive that costs under \$300 in the average business.

Stephen Herman (04-CV-103): I am troubled that such a rule will inevitably have an effect on substantive rights. On its face, it is limited to "sanctions under these Rules," but parties would undoubtedly cite the Rule, if adopted, for the proposition that no affirmative duty to preserve evidence arises until an action is filed. Some courts will agree. But in many jurisdictions there is a requirement to preserve before a suit is filed. Moreover, it will prompt the destruction of information and, in conjunction with the Rule 26(b)(2) proposal, will lead to routine destruction of a large amount of information.

Hon. Michael Baylson (04-CV-106): I think this is a sensible proposal. The Note might be expanded to discuss the difficult practicalities facing a large corporation in maintaining backup tapes. Very often a corporation with a large collection of backup tapes has no idea that it may be facing litigation on a specific topic about which there is some material on those tapes.

Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): Our committee had great difficulty trying to come to a consensus about this, and ultimately we urge that your Committee take a further hard look at the proposal. We offer some thoughts. We unanimously recognize the validity of the concerns behind the proposal and support the principle of a safe harbor. But some of us believe that the current proposal is illusory because it only protects things that would not be sanctioned anyway. Those who see the proposal as illusory think that the rules should articulate a standard for preservation. The discovery rules are about production of information, but Rule 37(f) is not about that and instead is focused solely on preservation. It would enhance the rules if they included a standard for preservation and for production. As to both, we believe that it should be reasonableness. This rule should not be limited to electronically stored information. As drafted, it would seem to permit sanctions for any loss of information not caused by routine operation of a computer system, and we see no reason for keeping that possibility open. With the focus on the routine operation of computer systems, the proposed rule could encourage parties to adjust those operations to accelerate deletion of information.

Elizabeth Cabraser, Bill Lann Lee, and James Finberg (04-CV-113): Because sanctions are rarely granted, and only after a hearing, we do not believe that this rule is needed. If it is adopted, we recommend that it be modified to require that the party take reasonable steps to preserve information "after it knew or should have known the information was relevant to the

subject matter of the action." The phrase "relevant to the subject matter" is clearer than the word "discoverable," particularly with the proposed addition of the "not reasonably accessible" exemption from discovery.

Brian King (04-CV-123): This would create real problems because unscrupulous parties would destroy evidence and then claim that the loss resulted from routine operation of their electronic information systems. But my clients are not going to have information lost because of "routine" operation of their systems. This will benefit unscrupulous parties.

Federal Magistrate Judges Ass'n (04-CV-127): The FMJA opposes this proposal. It recommends that there be no special safe harbor for electronically stored information. The current Rule 37 procedures are adequate to deal with the problem. The narrowness of the harbor provided means that it would only apply in situations in which there would not be sanctions in any event. Moreover, the litigation hold specified in proposed 37(f)(1) is related to the provisions of new 26(b)(2), and the scenario contemplated in 37(f) could be addressed in a Note to that rule. Finally, the language creates as many questions as it answers. The terms "reasonable steps to preserve the information," "knew or should have known the information was discoverable," and "routine operation of the party's electronic information system" all invite disputes over their meaning. It makes more sense to use case law to develop suitable responses to these problems.

Cunningham, Bounds, Yance, Crowder & Brown (04-CV-128): We object to this proposal, which inappropriately minimizes the possibility of sanctions where parties destroy electronically stored information. It would give incentives to create routine procedures to destroy electronically stored information.

Donna Bader (04-CV-130): This change would encourage parties to destroy files routinely using their document retention policies, arranging that these purges occur at very short intervals.

Caryn Groedel (04-CV-131): I strongly oppose this proposal. Under the current rules, spoliation sanctions deter destruction of information. The amendment would encourage companies to set up systems that routinely purge data at very short intervals. This change would be fatal to many civil rights claims.

James Buarnieri (04-CV-144): This rule would prompt companies to adopt procedures that would eliminate the ability of plaintiffs to obtain relevant information. They would purge information at very short intervals. But the cost of storage of this material is very low, so that this rule has no justification.

Mark Buchanan (04-CV-146): I represent employment discrimination plaintiffs. I fear that 37(f) would create a gaping hole in regulations requiring employers to retain information about treatment of employees who have alleged discrimination.

Bruce Elfin (04-CV-166): This will encourage companies to purge data routinely at very short intervals, a change that will be fatal to many employment and civil rights claims.

Chicago Bar Ass'n (04-CV-167): This proposal focuses on a problem that does not exist. Existing case law already protects innocents from sanctions for the truly inadvertent and unavoidable destruction of documents. Moreover, there could be adverse consequences. As one of our members put it, the safe harbor is akin to encouraging the breeding of dogs to eat homework assignments.

Hon. Ronald Hedges (D.N.J.): (04-CV-169): The proposed amendment is fatally underinclusive for two reasons. First, it says nothing about retention of information before the suit is filed. Second, it is limited to sanctions under the rules. Moreover, the proposal will interact with 26(b)(2) to encourage corporate entities to shift information from being accessible to inaccessible. How can this be guarded against? Do the proposals provide any incentives to counteract these tendencies? I would expect that parties will routinely seek preservation orders to protect themselves against the effects of the new rule provision.

Timothy Moorehead (BP America, Inc.) (04-CV-176): The rules should contain a safe harbor to avoid use of E-discovery as a tactical weapon.

Gary Epperley (American Airlines) (04-CV-177): For American to have to shut down all its computers every time it is served with a complaint would be crippling. Provided a party has taken reasonable steps to preserve reasonably accessible information, it should be protected against sanctions.

American Petroleum Institute (04-CV-178): API favors this proposal. It dovetails with proposed 26(b)(2), since information not reasonably accessible under that rule would not be considered discoverable under this rule absent a court order requiring discovery for good cause. This proposal resolves the conflict between the necessity to continue operating computer systems that routinely overwrite, alter or delete data and the risk that such routine operations might result in onerous sanctions for spoliation.

Assoc. of the Bar of N.Y. (04-CV-179): The Association believes that the safe harbor proposal is ill conceived. There is no reason to believe that courts and litigants are not equipped to deal with issues of spoliation. It does believe that a substantial argument can be made in support of an amendment to the rules that (1) provides an express textual basis for sanctions in the preservation context for all forms of discovery; (2) clarifies when the duty to preserve is triggered, and (3) sets forth the appropriate standard of care for production and preservation. But the proposal does none of these things. Nor is the proposal well-suited to provide a meaningful safe harbor, as noted by Gregory Joseph. The Association agrees with his comment (04-CV-066). The amendment is inexplicably limited to sanctions "under these rules," and then only where no court-imposed preservation order has been violated. Because the rules do not provide an express basis for sanctioning for absent a violation of a discovery order, as a practical matter the proposed rule provides no safe harbor at all. The Association believes that any meaningful safe harbor must be part and parcel of a single rule that provides the standard for preservation and sanctions in the spoliation context. If there is to be such a rule, it should not be limited to failures to produce electronically stored information, or to losses of information resulting from the routine operation of a party's electronic information systems. The focus of this rule would prompt parties to speed up routine deletion of information.

Steve Berman (04-CV-183): It is clear that the rule would forbid sanctions for destruction of information deemed inaccessible by the defendant. Backup tapes, for example, could routinely be recycled or discarded because the Note to 26(b)(2) says they are not reasonably accessible. This would contradict legal precedent requiring the preservation of all relevant evidence from the time the party has notice of the possibility of a claim.

Assoc. of Business Trial Lawyers (L.A. Chapter) (04-CV-188): Our committee was unable to reach agreement on this proposal and neither supports nor opposes it. We do suggest, however, that if it goes forward it would be improved with attention to two matters. First, we believe that there should be a statement that the rule does nothing to vitiate a party's common-law duties to preserve evidence. We also suggest that it might be wise to provide that negligence is

sufficient for lesser sanctions, but that a heightened standard should be employed for more severe sanctions, such as case termination, striking pleadings, issue sanctions, evidence sanctions, or establishing facts.

Stephen Chow (04-CV-190): The language "discoverable in" should be replaced with "material to" in proposed Rule 37(f)(1) of the draft rule. The concept of knowledge of discoverability is too narrow a standard for the litigation hold. The discoverability of information is based on relevance, which is measured in both materiality and absence of undue burden. The focus of the safe harbor should be on the materiality of the information.

Federal Bar Council (04-CV-191): We strongly support the safe harbor rule, but have some specific recommendations.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A safe harbor provision is integral to redressing the current problem of over-preservation. Presently, the uncertainty regarding what actions can be taken without fear of sanctions has compelled many to unnecessarily err on the side of extreme caution, resulting in excessive burden and expense. Sanctions should be imposed only for violation of a court order requiring preservation of specific information. We think the amendment should read as follows:

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

This sort of approach would reduce the problems created by the "Sanctions Tort" practice without reducing the ability to produce discoverable information.

William Herr (Dow) (04-CV-195): We support this change, but believe that it should make the standard higher than negligence. The complexity of company systems means that entirely innocent losses of information are almost bound to occur. Absent bad intent, these should not lead to sanctions. And stopping all automatic discard systems will prove very difficult.

Edward Wolfe (General Motors) (04-CV-197): We support this change. But it would be very helpful for the Note to clarify that usually accessible information will suffice, and that this point affects preservation obligations. We support the basic principle that sanctions for non-production of information should be limited to those instances where a producing party has acted contrary to its obligations under the rules or the terms of a specific preservation order. Under Rule 26(b)(2), the obligation to produce inaccessible information will not exist without a court order, which should be specific with regard to the source of that information. The Committee could emphasize this point by modifying the introductory clause to say it refers to an order that requires a party to "preserve specified electronically stored information." We support the general proposition that preservation obligations should not be explicitly included in the rules. But all parties will benefit from a common understanding that reasonableness guides such obligations.

Guidance Software (04-CV-198): The proposal uses the right standard in 37(f)(1), but the interplay between that rule and 37(f)(2) should be considered further. The Note suggests that routine operations that lead to loss of data may often continue. Suppose a party had a system that could not be operated without those effects. Would having such a system be beneficial for the party in obtaining the protection of 37(f)? There should not be a rule that will impede the

development of better systems. A better rule would require litigants to have up-to-date systems to qualify for the protection of the rules.

Eileen Inglesby-Houghton (04-CV-199): I think that the rule should also protect a party against sanctions for failure to produce electronically stored information unless the party violated an order requiring it to do so if it took reasonable measures to search for information within the scope of the discovery request, but the search did not identify the information. Different standards are needed for discovery of electronically stored information than hard copies because there are different methods of searching for this information. Using a keyword method for searching electronically stored information, for example, will not catch all responsive information that would come from a page-by-page review of hard copy versions of the information. In addition, the Note should go into more detail on what the party knows when responding to the discovery. In addition, it is worth noting that parties don't know what electronically stored information their employees have.

C. Richard Reese (04-CV-200): 26(b)(2) would seem to exempt "inaccessible" information from any need to preserve under 37(f)(1). The Note should say that the word "discoverable" is not meant to import whether the information is reasonably accessible. In addition, it seems to make no sense to say that the party must take reasonable steps to preserve information since the assumption is that the information was not preserved. Doesn't that fact mean that the steps were not reasonable?

Partrick Keegan (04-CV-205): This rule potentially abrogates well-established legal authority requiring parties to retain discoverable information prior to the filing of a complaint where there is reason to believe that it will be relevant to litigation. It also creates incentives for responding parties to destroy relevant electronically stored information with impunity. And new backup media technology eliminates many of the concerns expressed by corporations about the volume and expense of maintaining backup tapes.

Peter Kraus (04-CV-207): This will lead to the routine destruction of crucial evidence because it provides defendants an incentive to destroy evidence.

Kristin Nimsgar 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 though 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 whose system has a pop-up window that includes a question about whether a document should be preserved for possible use in litigation.

Stephen Gardner (National Ass'n of Consumer Advocates) (testimony and 04-CV-069): The standard should be negligence. Don't give defendants more reason to be sloppy. Negligence is not a low standard. Anything more relaxed says it's o.k. to be negligent.

Stephen Morrison: For the death penalty sanction, there should be a showing of willful or reckless conduct. There should be proportionality for sanctions. Adverse inferences should be regarded as death penalty sanctions for these purposes.

Laura Lewis Owens: Almost anything can be alleged to be negligent. The standard needs to be higher.

Washington

Greg Arneson & Adam Cohen (N.Y. State Bar Ass'n): We favor the text approach, not the footnote. We feel that it is a more objective rule, and does not call for analysis of the state of mind of the person who should have retained the information.

Jonathan Redgrave (04-CV-048): The footnote version is a better formulation of a narrow safe harbor. This would not preclude the evaluation of reasonable and good faith preservation efforts under established law, but it does provide a presumptive level of protection. I would replace "intentionally or recklessly" with "willfully." This includes a concept of conscious conduct that is important.

Jeffrey Greenbaum (ABA Section of Litigation): The standard of culpability should be linked to the degree of sanctions. To retake a deposition or something like that would be justified by negligent loss of information, but for an adverse inference or striking of a defense or a claim, there would have to be more, something like willfulness.

Michael Nelson (testimony and 04-CV-005): The rule goes beyond the majority of jurisdictions that have limited the imposition of an adverse inference sanction to cases in which the loss of evidence was the result of intentional or bad faith conduct. I propose the following:

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

Alfred Cortese (testimony and 04-CV-054): A high degree of culpability should be required. In my view, an "intentional or reckless" standard is required because of the extremely narrow scope of the proposed safe harbor and the better protection it would provide against abusive sanctions practices, the uncertainties created by dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable information. Best of all, it should key to a court order, as follows:

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

Michael Ryan (testimony and 04-CV-083): The lack of a culpability measurement eliminates the ability of the requesting party to inquire into the motivation of the producing party in adopting routine destruction policies that may encourage expedited destruction of information. But that is the basis of current spoliation law. The footnote brings the rule more into line with current law.

Catherine DeGenova-Carter (State Farm) (testimony and 04-CV-084): The rule should require a high degree of culpability if before sanctions are imposed. State Farm therefore supports the version of the rule in the footnote on p. 13 of the proposals.

Dabney Carr (testimony and 04-CV-003): The footnote language better addresses preservation of disaster-recovery materials. the "knew or should have known" standard is subject to abuse. For example, under the current approach a party can abrogate the safe harbor simply by notifying the other side that it believes that disaster recovery tapes are discoverable in the action.

M. James Daley (testimony and 04-CV-053): I agree with those who favor inserting the concept of willfulness into the rule as a limitation on sanctions. That would be better than the footnote version's "intentionally and recklessly." It would also be desirable to have the Note emphasize that consideration of a company's standards for retention should be a significant factor in evaluating whether it acted properly.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): We believe that a showing of mere negligence should not be sufficient to overcome the safe harbor. It will always be possible to show that more care could have been taken to preserve information. The rule should require that the entity actually know, or be so close to knowing as to be reckless, that discoverable data is being lost. Any other approach would be paralyzing for large data producers.

Alfred Cortese (testimony and 04-CV-054): The more I look at it, the more I prefer the footnote alternative.

Commentary

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: Microsoft believes that the current standard of negligence is too narrow, and that the alternative version in the footnote is preferable. Litigants strive every day to take all reasonable steps to comply with their discovery obligations. Parties seeking discovery know that they can gain an advantage by claiming that these obligations have not been satisfied. Even the threat of spoliation sanctions can have a substantial effect on discovery. The various deterrents -- including criminal sanctions -- "have the undivided attention of corporate America and its counselors." All those who hope to rely on the safe harbor intend to act reasonably, but mere negligence should not automatically make them ineligible for its protection. Responding parties that operate their businesses in a reasonable fashion should not be sanctioned because a requesting party later thinks that it was unreasonable that additional preservation steps were not taken. If the footnote version of the rule is adopted, it should also be made clear that the deletion of material that is done automatically by a computer system is in some sense intentional. Some person had to set the system to make the deletions. What should be emphasized is that the safe harbor applies unless a party intended to dispose of known potentially responsive documents that it was specifically ordered to maintain or disposed of materials in reckless disregard of such an obligation. Finally, it should be made clear that the fact the safe harbor does not apply is not itself a reason for imposition of sanctions.

Allen Black (04-CV-011): I favor the rule as drafted, with the negligence threshold. Recklessness is too high. However, it might be good to add a sentence in the Note to say that the court should consider the degree of culpability in deciding whether to impose a sanction, and its severity.

Philadelphia Bar Association (04-CV-031): We disagree with the Rule 37(f) proposal overall, but particularly with the footnoted recklessness standard. As a matter of public policy, a party should not be given a license to be negligent.

N.Y. St. Bar Ass'n Comm. & Fed. Lit. Sec. (04-CV-045): By a divided vote, we endorse the standard in the text. The proposal in the footnote contains a gap between the routine operation of an electronic information system (within the safe harbor) and a reckless or intentional failure to preserve information (outside the safe harbor). The text's proposal clearly places actions in the gap outside the safe harbor, as they should be, although the question of culpability could certainly bear on the sanction imposed. The evolution of the sanction issue in the Zubulake case (see pp. 29-30) is an example of this sort of approach. The text's negligence standard is desirable as well because it is objective, and can be tied to the routine operation of the party's computer systems and any policies the entity has adopted for the preservation of information. The footnote uses a subjective standard, which may require greater collateral inquiry into actions of the entity that could be hindered by invocations of the attorney-client privilege. Moreover, the recklessness standard may encourage greater disregard for an entity's obligation to preserve electronically stored information.

ABA Section of Litigation (04-CV-062): The debate about the level of culpability could be resolved by specifying the remedies that courts could impose for each type of conduct. Corporations are alarmed over the prospect that severe sanctions, such as a devastating adverse inference, could be imposed as a result of merely negligent loss of data. A negligent loss of electronically stored information may well justify a search of backup tapes that would otherwise not be required, but it should not ordinarily be a ground for an adverse inference. The Note should specify the range of sanctions available for violations occurring due to negligence, and those available for violations due to intentional and willful spoliation.

Stephen Herman (04-CV-103): The footnote standard of recklessness is contrary to the substantive law of many jurisdictions. Adopting it would also undermine the primary purpose of Rule 37, to focus on effective management of the litigation rather than trial and punishment of discovery malefactors. That philosophy gives judges broad discretion, but this proposal takes that discretion away.

St. Bar of Cal. Comm. on Fed. Cts. (04-CV-174): The Committee believes that the idea of a safe harbor is sound. It concluded that the proper standard is negligence, as in the main proposal. The alternative standard set out in the footnote would unduly restrict the court's discretion. Whether a court chooses to impose -- or not to impose -- sanctions on a party who fails to take reasonable steps to preserve electronically stored information in a timely manner should be the court's decision to make.

Timothy Moorehead (BP America, Inc.) (04-CV-176): BP supports the standard in the footnote on p. 33. It also urges consideration of Sedona Principle 14, which provides that sanctions are appropriate only if there is a showing of a reasonable probability that the loss of the information materially prejudiced the party.

Gary Epperley (American Airlines) (04-CV-177): We support the footnoted version of the rule. But it could be interpreted to permit sanctions for loss of information that is not reasonably accessible. To avoid that, we suggest rewording the rule as follows:

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

American Petroleum Institute (04-CV-178): API favors limiting sanctions to failure to preserve information specified in a court order. As presently written, the proposed rule might permit sanctions for loss of information that is not reasonably accessible, even where there is not applicable court order, if the responding party somehow should have known that it would be discoverable. But how would a party know that inaccessible information is discoverable absent a court order? Proposed 26(b)(2) presumes that inaccessible information is not discoverable absent a finding of good cause. It supports the footnoted version, with its emphasis on a showing of willfulness or intentional destruction. Overall, it proposes that the rule be rewritten as follows:

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

Katherine Greenzang (Assurant) (04-CV-180): It is strong medicine to take a company out of the safe harbor just because an employee in a remote location unknowingly or unwittingly deletes electronic information despite a litigation hold. We urge use of a willfulness or recklessness standard. Indeed, the Committee should consider requiring a showing of malice before sanctions are imposed.

Marion Walker (04-CV-181): The standard should be higher than negligence. Millions of people operate computers and do so without a full comprehension of how the equipment works. It is not feasible for each user to have a full course in the internal computer operations and, as systems become more complicated, it will happen that data will be lost. A party should not be held accountable for such losses.

Steve Berman (04-CV-183): The footnote version would contradict existing precedent which allows sanctions for negligent spoliation.

M. John Carson & Gregory Wood (04-CV-189): The text option places a "perfection" standard into the rule, which unduly narrows the safe harbor. But the footnote alternative opens the door too wide, allowing a safe harbor for all but intentional or reckless loss of data. A middle ground that would expand the safe harbor of the text option to include failure that resulted from the unintentional loss of data whether as a result of the routine operation of the information system or otherwise including human action, would seem to strike a better balance.

Federal Bar Council (04-CV-191): It seems difficult to imagine situations that would lead to sanctions under the current rules that would not also be subject to sanctions were the safe harbor adopted. For the new provision to have actual impact, therefore, it may be necessary for the Committee to be more aggressive. We think that the idea behind the safe harbor is correct -- electronic information systems are complex and dynamic, and automatic deletions features are necessary in order to have systems that are efficient. It would be desirable for the Note to specify that negligence should not lightly be found in this complicated and evolving area if a party has made a good faith effort to preserve potentially relevant information. The Note should also explain that the assessment of the reasonableness of a party's behavior should take account of the complexity of the case and the factual issues it raises. Alternatively, the Committee might want to consider using a culpability standard closer to the one in the footnote. Whether the Committee approaches the problem in one manner or the other, it is likely that both plaintiffs and defendants will benefit. Indeed, a small corporate or individual plaintiff may have fewer means than a large corporation to ensure that automatic deletion mechanisms are disengaged, and may therefore derive greater benefit from adopting our suggestions.

U.S. Chamber Inst. for Legal Reform; Lawyers for Civil Justice (04-CV-192): A high degree of culpability should be required to preclude eligibility for the very narrow safe harbor. The "intentional or reckless" standard is required because of the uncertainties created by the multiplicity of dynamic, continually changing computer systems, and the practical difficulty of keeping track of masses of potentially discoverable electronically stored information.

Francis Ortiz (Stand. Comm., U.S. Courts, St. Bar of Mich.) (04-CV-218): We recommend that text version, not the footnote version. Absent an affirmative obligation to preserve discoverable electronically stored information, routine deletion operations can unintentionally destroy relevant information.

New York City Transit (04-CV-221): Mere negligence should not be sufficient to take a party out of the safe harbor.

Ashish Prasad (04-CV-225): Responding parties should not be subject to open-ended risk of sanctions for post-hoc judgments on the reasonableness of their behavior. Instead, the safe harbor should protect the good faith actions or parties who lose electronically stored information. This would be better than the standards in the principal rule proposal in the text or in the alternative one in the footnote.

Marshon Robinson (04-CV-226): The footnote rule is a much better rule because it gives a clearer indication of what is necessary to be inside the safe harbor. Rule 26 could be amended to require that a party request a litigation hold along with discovery requests. That would give both the parties and the judge a clear starting point on what data should be retained.

Heller, White, Ehrman & McAuliffe (04-CV-246): The negligence standard raises risks for large corporate defendants. It would be prohibitively expensive to assure that everyone in offices around the world puts a litigation hold on the document retention policies in those offices. "[I]t would be expensive and burdensome for large corporations with multiple offices to follow up and police each of the offices to assure that each will fulfill its preservation obligation obligations." The rule will therefore impose a significant burden in terms of executive time and also entail significant increases in expenses for large corporations to comply with the standard.

Rule 37(f) -- effect of preservation order

San Francisco

Greg McCurdy (Microsoft Corp.): Preservation orders are often overbroad. Although a specific order can be helpful in identifying exactly what has to be preserved, many orders are not. There is no need to mention orders in the rule, because courts can always sanction for violation of their orders.

Bruce Sewell (Gen. Counsel, Intel Corp), testimony and 04-CV-016: General preservation orders have become commonplace in litigation, and they should not suffice to rob a party of the protections of the safe harbor. Only an order that specifically requires that disaster recovery systems be suspended should qualify if the issue is loss of information on one of those systems.

Michael Brown: There are too many general preservation orders. Accordingly, the protection should apply even if one of those is violated, unless the violation was willful.

Dallas

Anne Kershaw: Blanket preservation orders are very costly. We need to educate the judiciary about this reality. It takes 90 days until the 26(f) conference, and a company that has to stop recycling for that period of time incurs a large cost.

Paul Bland (TLPJ) (testimony and prepared statement): He has never seen a "blanket" preservation order, if that means to keep everything. In a consumer class action, it might require preservation of "all information about consumers charged the challenged fee in 2002."

Washington

Jose Luis Murillo (Philip Morris USA) (testimony and 04-CV-078): Preservation now costs his company over \$5 million per year. There is a risk that this rule will prompt more preservation orders. It should be made clear that preservation orders are for the extraordinary, not the ordinary case.

Jonathan Redgrave (04-CV-048): The rule should require that any order that triggers sanctions be for preservation of this specific type of information and be particularized. This will provide guidance for the parties and the courts.

George Socha (testimony and 04-CV-094): The Note contains the following sentence: "Should such information be lost even though a party took 'reasonable steps' to comply with the order, the court may impose sanctions." This sentence seems designed to discourage parties from entering into preservation orders. It also suggests that parties may be required to take "unreasonable" steps once a preservation order is in place.

Stephanie Middleton (CIGNA) (testimony and 04-CV-010): With this provision, the safe harbor is not a harbor at all. In one case, a federal judge imposed such a broad order on us that we had a choice between violating it and shutting down. It should be made clear that while preservation agreements are desirable preservation orders are not.

M. James Daley (testimony and 04-CV-053): Rule 37 should mandate that only a specific order will take a party out of the safe harbor.

Theodore Van Itallie (Johnson & Johnson) (testimony and 04-CV-096): Broad preservation orders should not trump the safe harbor. We agree that "stop everything" orders should not be entered, and believe that such an order should not trump the safe harbor. Instead, only an order entered after a Rule 26(f) conference should qualify, and only one carefully tailored to suit the needs of the case. Otherwise, there will be a proliferation of requests for broad orders and of "gotcha" litigation. But we have been successful in getting broad orders revised, and there seems to be a growing recognition that such orders are inappropriate for large organizations like ours.

Alfred Cortese (testimony and 04-CV-054): The rule should say that a preservation order should not abrogate the safe harbor unless it is directed to "specified information." The order should be tailored to the case.

Comments

Thomas Burt (V.P., Microsoft Corp.) 04-CV-001: There is no need to except cases in which a court order has been violated. Violations can always be punished. An order may be vague and direct only that a party preserve all relevant documents, essentially the same as the common law duty to preserve, but such an order could neuter the protections of the safe harbor. If a party has reason to fear loss of a particular type of data, then it can request an order addressing that specific problem. Faced with a specific order, the responding party knows what it needs to do. But a vague order does not provide such notice. Particularly in light of our preference for the intentional/reckless standard in the footnote, this order provision seems to us to take away much of the good work done by the new rule. If violation of an order remains as a qualification of that protection, it is important to clarify that the order has that effect if it is "to preserve *specified* information." This clarification is important because some courts tend to enter somewhat vague preservation orders that include broad wording.

Stephen Herman (04-CV-103): In our experience, limiting this provision to an order "in the action" is undesirable. Frequently parties rely on an order 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.

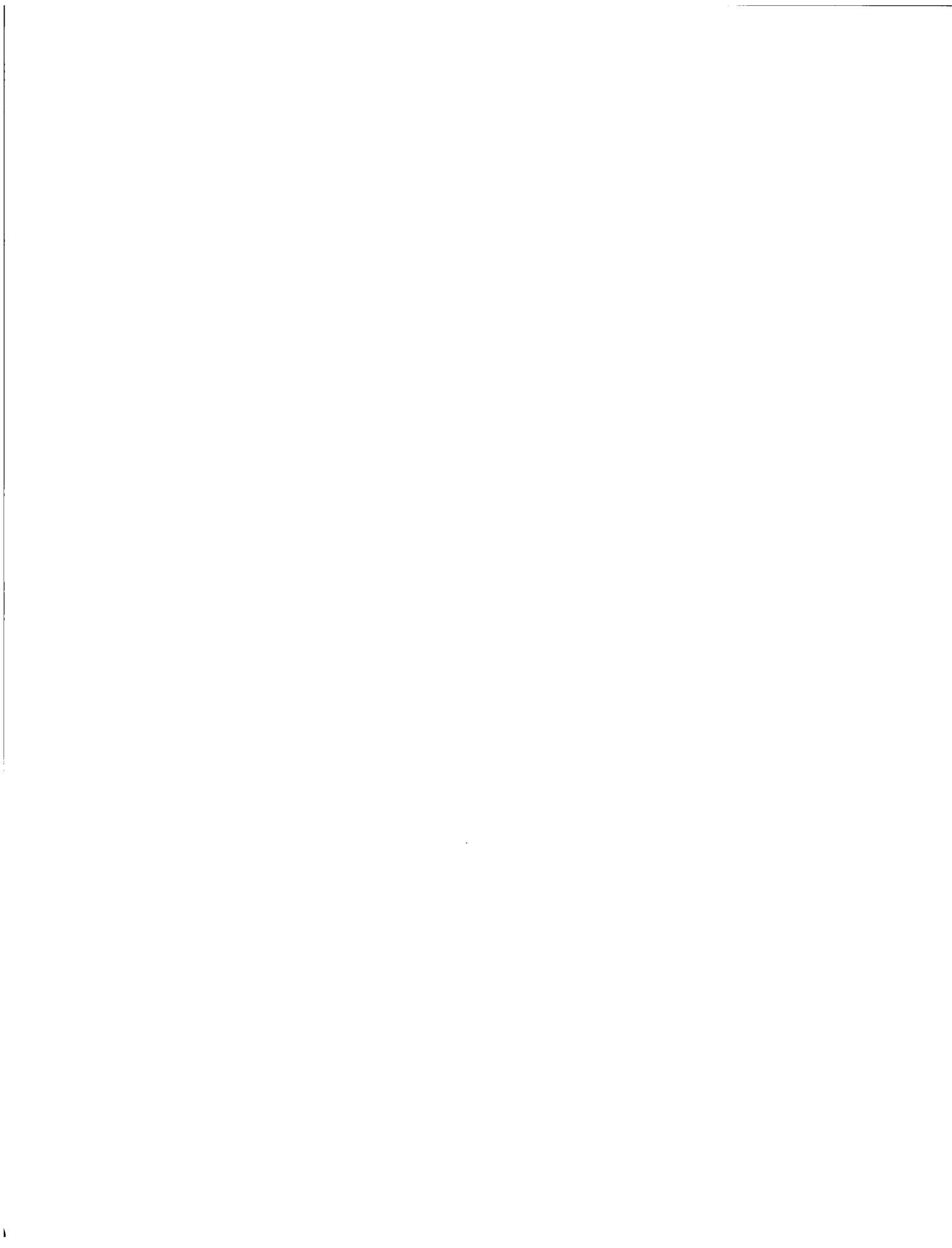
Fed. Civ. Pro. Comm., Amer. Coll. Tr. Lawyers (04-CV-109): The committee supports the concept of providing protection for nonparties from inadvertent waiver of privilege, but we question whether that provision is valid under 28 U.S.C. § 2074. In addition, we question the inclusion here of the right to 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.



Multi-Committee Projects

Two of the projects on the agenda involve joint work with other advisory committees, coordinated through the Standing Committee. Rule 5(e) has been published for comment along with parallel proposals for the Appellate and Bankruptcy Rules. A new Rule "5.2" to implement the E-Government Act is proposed for publication this summer, along with parallel proposals for the Appellate, Bankruptcy, and Criminal Rules.

Coordination of any one committee's work with the progress of these proposals through several advisory committees requires careful attention. With Rule 5(e), for example, the Bankruptcy Rules Committee has proposed an amendment of the rule text, while the Appellate Rules Committee is considering an addition to the Committee Note. There is a natural and proper tendency to defer to the work of the other advisory committees. But each advisory committee has an independent responsibility to treat each proposal as its own responsibility, seeking to craft the very best rule possible. No committee should surrender its responsibilities to whichever committee happens to have met first. As each builds on the work of the others, differences will inevitably emerge. That is as it should be.

Divergent advisory committee recommendations may, in the end, justify adoption of rules that depart from one another in some respects. The approach to redacting electronic case files may properly be different in criminal prosecutions than in civil actions, and so on. One part of the task is to determine whether particular departures from a common text are justified by differences in the underlying needs of appellate, bankruptcy, civil, and criminal practice.

When different recommendations represent different views of what is best for all of the different rules sets, reconciliation cannot easily be accomplished by a joint meeting of all the advisory committees. Instead, reconciliation must occur under Standing Committee auspices. As a practical matter, initial responsibility must lie with the advisory committee chairs and reporters, drawing such support from consulting with their respective committees as is feasible. It may be that the differences are so pervasive that the subject is not yet ready for the next stage in the Enabling Act process. But when the differences are reduced to a manageable level, final responsibility lies with the Standing Committee. Each advisory committee can rest content that the result will embody the best results of the multiple reviews and improvements.

Rule 5(e): Mandatory E-Filing
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I. Rules Published for Comment, 2004

A. Rule 5(e): Mandatory E-Filing

Parallel proposals to authorize adoption of local rules that require electronic filing were published last November. The proposals include the Appellate, Bankruptcy, and Civil Rules; the Criminal Rules incorporate the Civil Rules on filing and will absorb the proposed revision of Rule 5(e).

The published proposal is simple. It adds two words to Rule 5(e), saying that a court “may by local rule to permit or require” filing by electronic means.

Revise To Include Protection for the e-disabled?

Several comments were offered. Many of the comments expressed concern that electronic filing may be difficult or impossible for some litigants, particularly pro se litigants but others as well. They suggested that the national rules should be revised to specify protective provisions that must be incorporated in local rules.

The concerns about affecting court access were considered by the advisory committees in framing the published proposals. A deliberate choice was made to forgo any attempt to incorporate protective requirements in Rule 5(e) or the parallel rules. This decision rested on two main determinations. First, the many local rules already adopted to require electronic filing all include, in one form or another, provisions designed to ensure that electronic filing does not impede access to the courts. Second, there has been no indication that any local rule has been applied to defeat access to the court.

The Bankruptcy Rules Advisory Committee has concluded that proposed Bankruptcy Rule 5005(a)(2) should be revised to reflect the concerns expressed in the public comments. They would add a new sentence:

Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing.

The same thing could be said in fewer words:

A rule that requires electronic filing must reasonably accommodate a party who cannot feasibly comply.

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Still greater variation is possible:

A rule that requires electronic filing must permit paper filing when electronic filing is unreasonably burdensome.

A still more efficient use of words would look like this:

“may by local rule permit or — if exceptions are allowed for good cause — require papers to be filed, signed, or verified by electronic means * * *.

A Committee Note might recognize that reasonable accommodation may include e-filing by using courthouse facilities, with assistance from court officials.

The Appellate Rules Committee agenda materials include a memorandum from Reporter Schiltz that recommends adoption of a “good cause” limit. Excerpts from his memorandum say this:

The commentators make a good case that the national rules should require courts who choose to mandate electronic filing to include a hardship exception. We have been told so often about the many courts that have already adopted mandatory electronic filing that it is easy to forget that the substantial majority of courts have not. Over the next few years, dozens of local rules committees will sit down to draft electronic filing rules, and I think there is some benefit to instructing them that they must include a hardship exception. Also, I think there is some benefit to signaling in the national rule that, as we rapidly evolve into an all-electronic judicial system, the rules committees will not forget those who lag behind.

That said, I do not think that, at this time, the national rules should spell out the precise scope of the hardship exception. Rather, I believe that the national rules should merely require that local rules include *a* hardship exception — and then, after a few years’ experience, we will be in a position to identify and mandate the “best practices” that have emerged from local experimentation.

The Bankruptcy Rules Committee seems to agree. At its meeting this spring, the Committee was persuaded by the comments summarized above to add the following sentence to Bankruptcy Rule 5005(a)(2): “Courts requiring electronic filing shall reasonably accommodate parties who cannot feasibly comply with the mandatory electronic filing rule.” The drafting of this sentence might be improved.

(Several drafting variations, akin to those suggested above, follow. Reporter Schiltz’s memorandum then continues:)

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In fairness, I should point out that the vote in the Bankruptcy Rules Committee was 9 to 5. Prof. Jeff Morris, the Committee's Reporter, informs me that a substantial minority of the Committee felt that the language in the Committee Note was sufficient to protect those for whom mandatory electronic filing would pose a hardship. Moreover, Prof. Cooper has pointed out that none of the commentators on any of the proposed amendments has cited a single local rule that does not include an adequate hardship exception, nor has any commentator cited a single example of a mandatory electronic filing rule creating a problem. (Of course, as Prof. Cooper concedes, those most likely to have encountered such a problem are unlikely to submit a comment on a proposed amendment.)

The Bankruptcy Rule model and the Appellate Rule variations raise two questions for Civil Rule 5(e). The primary question is whether it is desirable to include some parallel exception? We began in the belief that it is better to rely on language in the Committee Note pointing out that courts requiring electronic filing also provide exceptions. The desirability of adopting specific rule text in addition may depend in part on whether we believe that we know enough to draft a useful exception. It also depends on whether there is a real risk that some local rules will be too inflexible, as drafted and as administered. There is ground in experience so far to believe that courts recognize the risk and have proved successful in avoiding it. If there is little reason to fear that present local rules are creating problems, there may be reason to hope that experience with a variety of approaches taken in different districts will show which approach is most effective. If a need should emerge for a uniform national rule, the rule will be the better for awaiting development of local practices.

The comments and Bankruptcy Rule proposal may not reflect new problems that should lead to revision of the published proposal. But if that is the better answer, the second question arises from the desire to adopt uniform e-filing rules. One answer might be that civil actions present opportunities and practices different from the circumstances that arise in bankruptcy practice, so that different rules are appropriate. Another answer may be that this is a close question, and that it is better to follow the Bankruptcy Rules Committee lead for the sake of uniformity. And of course a third answer may be that uniformity is important enough to resist the Bankruptcy Rules proposal. In choosing among these answers, it will be important to determine whether the Civil Rules confront distinctive issues that justify adoption of non-uniform rules.

Authorize Mandatory Double Filing — E- and Paper Filing?

The Appellate Rules Advisory Committee is considering a concern raised by Judge Sandra Lynch, a member of the Court Administration and Case Management Committee. Her concern arises from language in Appellate Rule 25(a)(2)(D) similar to Civil Rule 5(e): "A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." This language might be read to mean that a local rule cannot require that a paper be filed both in electronic and also in paper form. At least in the First Circuit, every judge

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wants to receive a paper brief; some also would like to receive an electronic version. The Appellate Rules Committee is considering how to address this concern. The first proposal is to add a sentence to the Committee Note stating that a local rule may require both forms of filing.

A court that does not want to bother with duplicate filings can easily protect itself by shaping its local rule. Duplicate paper filings could be prohibited; permitted but not required; or required. Any requirement could be limited to designated filings — paper and e-filing might be required for motions and briefs, for example, but only one form or the other for discovery filings. Parties do not have the luxury of shaping local rules to address their own convenience. Much of the argument for authorizing mandatory e-filing rules has been that e-filing is a benefit for the parties as well as for the courts. It can be faster, more convenient, and less expensive. As compared to early concerns, the technology has become so widely adopted that even the smallest law offices are likely to prefer e-filing. A requirement that papers be filed in both paper and electronic form would change the balance of advantage, and in some settings could mean that from the parties' perspective the e-filing requirement is an unwelcome addition to the paper filing requirement.

This question is difficult to resolve without greater experience with e-filing, and particularly with mandatory e-filing. Experience might show that the circumstances confronting district courts differ from those confronting circuit courts. If so, there may be grounds for distinguishing the Civil Rule from the Appellate Rule.

Whatever judgment is made about the desirability of local rules that require both paper and e-filing, it is important to consider the potential ambiguity. Does the provision that a "paper filed by electronic means *in compliance with a local rule* constitutes a written paper for the purpose of applying these rules" prohibit a local rule that requires filing in both forms? If a local rule is written to say that an e-filing is required, and to be effective must be accompanied or followed by a duplicate paper filing, failure to file the paper can mean that the e-filing is not in compliance with the local rule. So too, these words only say that the e-filed paper constitutes a written paper for the purpose of applying the Civil Rules. It does of itself not purport to say whether a local rule can require a real paper. The problem arises rather from the first part of Rule 5(d): "All *papers* after the complaint required to be served upon a party * * * must be filed with the court * * *." The e-filing is, by virtue of Rule 5(e), a "written paper" for Rule 5(d). But so what? Does Rule 5(d) prohibit a local rule that requires that two copies of a paper be filed?

On balance, it may be better to pass by this question for the Civil Rules. A Committee Note is a poor place to reconcile a significant ambiguity in rule text if there is an ambiguity. No one has yet suggested amending the rule text. A duplicate filing requirement may make good sense for appeal briefs, but not for more voluminous filings nor for filings of papers that are not used as intensively as appeal briefs are used. The potential distinctiveness of appeal briefs, indeed, may be

a fine illustration of circumstances that justify authorizing a duplicate filing requirement in the Appellate Rules but omitting the authority from the Civil Rule.

It is recommended that the Committee send the published proposal to the Standing Committee with a recommendation for adoption without change. The published proposal is set out before the summary of comments.

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

Rule 5. Service and Filing of Pleadings and Other Papers

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(e) Filing with the Court Defined. The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local

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

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

Committee Note

Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 5(e).

Summary of Comments: Civil Rule 5(e) — Mandatory E-Filing

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

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

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

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

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

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

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

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

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

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

04-CV-172, HALT (Americans for Legal Reform): HALT “works to reduce and eliminate barriers that might prevent consumers from resolving their legal issues through self-help at the lowest possible cost.” The Note comments about the need to make exceptions for pro se litigants should be included in the Rule text, and most especially

in the Bankruptcy Rule that applies to people who by definition are least likely to have access to effective legal help. Rule 5(e) would include this new sentence and a fraction: “Courts requiring electronic filing must make exceptions for parties such as *pro se* litigants who cannot easily file by electronic means, allowing such parties to file manually upon showing of good cause. In any event, the clerk shall not refuse to accept * * *.” (The comment notes an ABA estimate that 38,000,000 low- and moderate-income Americans are shut out of the legal system each year because they cannot afford to hire lawyers.)

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

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

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

04-CV-184, California Commn. on Access to Justice: Mandatory e-filing may raise the barriers facing pro se litigants, particularly those with limited English proficiency. The Committee Note should be revised, or — better — the proposed Rule should be amended to make it clear “that an exception to electronic filing should be made

for unrepresented parties. The rule should make clear that local courts have the option of setting up a system that allows unrepresented parties to use the electronic filing system if they prefer to do so.”

04-CV-217, Executive Committee, State Bar of Michigan: “[O]pposes the proposed rule, to the extent that it permits local courts to require e-filing of persons other than attorneys.” The rule would be supported if it applied only to filings by attorneys and assured that local rules must allow an attorney to show good cause for failing to file electronically. (1) Most attorneys use computers and the Internet. Unrepresented persons should be allowed to use e-filing. But they should not be required to do so. Barriers include limited English proficiency, special obstacles for incarcerated persons, costs, unfamiliarity with the process, lack of appropriate software, and the intimidating nature of the process. (2) Attorneys may have good cause for paper filing — lack of access to adobe acrobat software, cost, or the like. (3) Any system must be “Bobby compliant” — it must comply with the guidelines developed by the Center for Applied Special Technology to ensure access for persons with disabilities. (4) Provision must be made to permit payment of filing fees in person because some legal organizations or litigants may not be able to pay by credit card. (5) Provision should be made for forma pauperis paper filings, including waiver of any additional fees charged for e-filing and conditional acceptance of paper filings while the petition for leave to proceed i.f.p. is pending. (6) [Anticipating the E-Government Act rules] Provision must be made to shield various data fields, particularly social security numbers and other account numbers. Information about addresses (domestic violence situations are an example) and medical conditions should not be readily available through the Internet. (7) Advisory bodies should be established, including representatives from organizations representing populations with special needs that affect the ability to file electronically.

04-CV-234, John H. Messing, Esq.: (Mr. Messing speaks only for himself, but is chair of the Electronic Filing Committee of the ABA Science and Technology Law Section.) Endorses the ABA comments in 04-CV-168, and suggests further protections. A court that requires electronic filing is obligated to ensure security on an ongoing basis “because security threats evolve and become more sophisticated at an ever-increasing rate. * * * Electronic court orders [] are often subject to tampering in undetectable ways. Without available standard security protections, it is unfair to require the use of court electronic

systems by all practitioners, who may not understand what must be done from their side properly to protect their computers and the integrity of the documents being exchanged. We see examples in electronic commerce daily of identity theft and electronic document alterations. * * * Just last week some mainland Chinese cryptographers broke the encryption that is used commonly to protect the integrity of electronic court documents in the courthouses of this country.”

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

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

**Rule 5.2. Privacy Protection For ~~a Filings~~ Made with the
Court¹**

- 1 **(a) ~~Limits on Information Disclosed in a Filing~~ Redacted**
2 **Filings**. Unless the court orders otherwise, if an electronic or
3 paper filing ~~made~~ with the court² ~~that~~ includes a social-
4 security number, ~~or an individual's tax-identification number,~~³
5 ~~a minor's name~~ a the name of a person known to be a minor,⁴

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

¹ The Appellate Rules Committee has tentatively determined that it will seek to draft and approve a "piggy-back" version of the template. The piggy back version will provide that if a filing has been made with the lower court, the rules of the lower court would continue to apply to the filing in a court of appeals. With respect to first-time filings in the court of appeals, the parties will have to comply with the e-privacy rule that would have been applicable had the filing been made in the district court. Accordingly, this template provides the basis for the e-privacy projected e-privacy provision in the Bankruptcy, Civil and Criminal Rules.

² "[M]ade with the court" remains in the rule to exclude a filing made by the court. The court should not be required to redact its own orders, opinions, or other filings.

³ The change is made to clarify that corporate tax identification numbers are not subject to the redaction requirement.

⁴ This change was suggested by the Committee on Bankruptcy. The Committee noted that there may be situations in which the filing party may not know that a certain person is a minor. Similar situations may arise in civil actions; the change

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6 a person's birth date, [or] a financial-account number, [or a
7 person's the home address of a person]⁵ the filing may include

seems suitable for the Civil Rule.

⁵ The Criminal Rules Committee will add home addresses to the general redaction requirement. The other Advisory Committees have decided that it is unnecessary, and perhaps problematic, to require that home addresses be subject to a general redaction requirement that applies in all cases. In criminal cases, however, there may be special concerns for protecting victims and witnesses from disclosure of a complete address. The model local rule prepared by CACM imposes a redaction requirement for addresses in criminal cases only.

The Criminal Rules Committee will consider whether the redaction requirement for addresses should be narrowed to cover only the addresses of alleged victims and prospective witnesses. CACM's model rule contains no such narrowing, but it is fair to state that CACM did not consider the possibility of limiting the protection to victims and witnesses.

Redaction of home addresses also may be appropriate in some civil actions. A diversity action for injuries inflicted by domestic violence is a persuasive illustration. A driver's license number may be another illustration. This draft responds to such concerns through the provision in subdivision (e) that allows a court to order additional redactions. This provision was added by the Bankruptcy Rules Committee. The protection, however, might fit better in (a) as a new paragraph, making the present provisions paragraph (1) and adding this as paragraph (2):

(2) The court may order redaction of any other information to protect privacy or security interests.

As compared to the draft in (e), this approach keeps all the redaction provisions together, and limits (e) to a single topic — limits on remote access to the court's electronic records. It also has the advantage of bringing a reference to "security interests" — one of the things the statute says the rule should address — into explicit focus.

8 only;

9 (1) the last four digits of the social-security number and

10 tax-identification number;

11 (2) the minor's initials;

12 (3) the year of birth; [and]

13 (4) the last four digits of the financial-account

14 number.[and]

15 [(5) the city and state of the home address.]

16 **(b) Exemptions from the Redaction Requirement.** The

17 redaction requirement of Rule 5.2(a) does not apply to the

18 following:

19 (1) ~~in a civil [or criminal] forfeiture proceeding; a~~

Capra makes two arguments against this suggested (a)(2). He believes the rule should not include a general open-ended power to order redactions beyond those directed by subdivision (a). He also believes that if there is to be such power, it fits better in subdivision (e). Capra believes that a supplemental general power makes the rule more complicated, and that it will generate more confusion if it is included in (a) rather than combined with the remote-access provisions in (e). He also fears that the additional authority "could be misused as some kind of general authority for protective orders and sealing orders." See footnote 14 for subdivision (e).

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20 financial-account number that identifies the property
21 alleged to be subject to civil [or criminal]⁶ forfeiture;
22 **(2)** the record of an administrative or agency proceeding;
23 **(3)** the official record of a state-court proceeding;
24 **(4)** the record of a court or tribunal whose decision is
25 being reviewed, if that record was not subject to Rule
26 5.2(a) when originally filed;
27 **(5)** a filing covered by Rule 5.2(c) or (d) of this rule;⁷
28 [and]
29 **[(6)** a filing ~~made~~ in an action brought under 28 U.S.C.
30 section 2254 or 2255;⁸ [and]

⁶ There is no apparent need to include criminal forfeitures in the Civil Rule. Reporter Beale says that criminal forfeiture is part of the sentencing process. See Criminal Rule 32.2. The bracketed reference seems to be an artifact of the general template. Absent other advice, it should be deleted.

⁷ This addition is intended to clarify that social security cases, immigration cases, and sealed filings are exempt from the redaction requirements.

⁸ The Criminal Rules Committee has determined, at least preliminarily, that filings in habeas actions should be exempt from the redaction requirement. They note that many of these actions are filed pro se by petitioners who will not be aware of the redaction requirement. The Civil Rules may wish to consider whether to include

31 (7) a filing ~~made~~ in an action brought under 28 U.S.C.
32 section 2241 ~~that~~ if the filing does not relate to the
33 petitioner's immigration rights.^{9]}¹⁰

a reference to habeas actions in the text of its rule, or otherwise in the Committee Note. The argument in favor of including a reference to habeas actions in the text of the rule is that they account for a significant percentage of civil suits.

⁹ It has been noted that some immigration cases are brought under section 2241. The effect of paragraph (7) is to say that a § 2241 proceeding that relates to immigration rights is not exempt from the redaction requirement. But paragraph (5), by exempting from redaction a filing covered by Rule 5.2(c), may exempt such a § 2241 immigration rights proceeding from redaction. Although it is not entirely clear, a § 2241 petition to protect immigration rights may fall within subdivision (c). Subdivision (c) in the current draft bars remote access by nonparties to electronic files "in an action under Title 8 * * * relating to an order of removal, release from removal, or immigration benefits or detention." If (c) protects against nonparty remote access in a § 2241 immigration-rights proceeding, the need for redaction is much diminished, and (b)(5) exempts the proceeding from redaction. All of this creates a drafting dilemma. If we were confident that every § 2241 proceeding relating to immigration rights is covered by (c), we could combine paragraphs (6) and (7): "The redaction requirement of Rule 5.2(a) does not apply to * * * (6) a filing made in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255." A § 2241 proceeding relating to immigration rights would be exempted from redaction under both (5) and (6), but that does not seem to be a problem. It would be protected against remote access by (c).

On the other hand, if we want to require redaction in a § 2241 proceeding that relates to immigration rights, we accomplish that result with the present draft only if Rule 5.2(c) clearly does not apply to such a proceeding. If that interpretation is not clear, we could undertake further work on (b) or (c). Either drafting chore will be awkward. In (c), for example, we could say: "and in an action other than a 28 U.S.C. § 2241 petition under Title 8, United States Code relating to an order * * *." That is not pretty.

34 [(c) **Limitations on Remote Access to Electronic Files;**
35 **Social Security Appeals and Immigration Cases.** Unless
36 the court orders otherwise, ~~in~~ an action for benefits under the
37 Social Security Act, ~~and~~ or in an action under Title 8; of the
38 United States Code relating to an order of removal, release
39 from removal, or immigration benefits or detention, access

¹⁰ Additional exemptions from the redaction requirement are being considered for the Criminal Rules as follows:

~~[(8) a filing in any court in relation that is related~~ to a criminal matter or investigation ~~and~~ that is prepared before the filing of a criminal charge or ~~that~~ is not filed as part of any docketed criminal case;

(9) an arrest warrant;

(10) a charging document—including an indictment, information, and criminal complaint—~~or~~ and an affidavit filed in support of any charging document; and

(11) a criminal-case cover sheet.]

The Department of Justice will supply the Criminal Rules Committee with additional information on the character — and the need for exemption — of criminal case cover sheets. The Committee has not yet determined whether the paragraph (11) exemption is useful. It also is considering deletion from paragraph (10) of "including an indictment, information, and criminal complaint." The language adds nothing, since the identification of charging documents is easy; it also is incomplete.

40 to an electronic file is authorized as follows, ~~unless the court~~
41 ~~orders otherwise:~~

42 (1) the parties and their attorneys may have remote
43 electronic access to any part of the case file, including the
44 administrative record;

45 (2) ~~at~~ any other persons may have electronic access to the
46 full record at the courthouse, but may have remote
47 electronic access only to:

48 (A) the docket maintained under Rule 79(a)¹¹; and
49 (B) an opinion, order, judgment, or other disposition
50 of the court, but not any other part of the case file or
51 the administrative record.]¹²

¹¹ If the Appellate Rule simply incorporates Civil Rule 5.2 for all actions originating in a district court, should Appellate Rule 45(b) be added, either here or in the Appellate Rule that otherwise incorporates Rule 5.2?

¹² This subdivision (c) is intended to be included, if at all, in the Civil Rules only. The Criminal Rules Committee has determined that there is no need for such an exception in the Criminal Rules, and there would appear to be no need for the exception in the Bankruptcy Rules.

52 **(d) Filings Made Under Seal.** The court may order that a
53 filing be made under seal without redaction. The court may
54 later unseal the filing or order the person who made ~~the filing~~
55 it to file a redacted version for the public record.¹³

56 **(e) Protective Orders.** If necessary to protect ~~against~~
57 ~~widespread disclosure of~~ private or sensitive information that
58 is not otherwise protected under Rule 5.2(a), a court may by
59 order in a case ~~to~~ require redaction of additional information,
60 or ~~to~~ limit or prohibit remote access by nonparties to a

The special treatment for immigration cases was added to the template at the request of the Justice Department and tentatively approved by the Civil Rules Committee.

¹³ This subdivision has been added to the template in response to the suggestions of some members of the Advisory Committees that the rule should clarify that redaction is not required for filings that are going to be made under seal in the first instance. The second sentence of the subdivision has been suggested by Judge Levi, to cover the problem of filings that are sealed as an initial matter and unsealed subsequently.

There is an overlap between this subdivision and the concern expressed in footnote 14 that Rule 5.2 should avoid any implicit expansion of current law on sealing orders. This caution is added to the Committee Note; see the text at note 19.

61 document filed with the court.¹⁴

¹⁴ This subdivision has been revised in two ways at the suggestion of the Bankruptcy Rules Committee. One change would strike out "against widespread disclosure of." This change would allow a court to limit remote access by nonparties without finding a risk of widespread disclosure. A risk of access by even one person might suffice. The Criminal Rules Committee Subcommittee also supports this change. This change also ties to the second change, which adds authority to require redactions not required by subdivision (a).

The authority to order redaction in a specific case of information not covered by the general redaction directions in subdivision (a) is discussed in note 5. The discussion in note 5 raises the question whether it would be better to include this authority as part of subdivision (a). That approach would bring both elements of the redaction protection into one place, and maintain subdivision (e) as a provision that deals only with remote nonparty access. It also would make it easier to face directly the question whether to retain the words that authorize a case-specific limitation on nonparty remote access only to protect against widespread disclosure of private or sensitive information. [Subdivision (e) might profitably be interchanged with subdivision (d), so as to follow the remote access provisions in subdivision (c).] As discussed in note 5, the opposing view is that any case-specific redaction authority may prove confusing, and that if it is to be recognized it is less confusing as part of subdivision (e).

Wherever a case-specific redaction authority is located, if it is included in the rule it might include a reference to protecting "security" interests. The E-Government Act, quoted in the first paragraph of the Note, requires the Supreme Court to prescribe rules "to protect privacy and security concerns * * *."

This subdivision runs the risk of conflicting with the burgeoning case law that limits sealing orders. A paragraph has been added to the Committee Note to specify that nothing in this subdivision is intended to affect that case law. Nonetheless, there is a concern that this subdivision could be misused as some kind of general authority for protective orders and sealing orders. The Committee may wish to consider whether to delete this subdivision and rely on other law for protections greater than those provided in subdivision (a). Civil Rule 26(c) would continue to authorize discovery protective orders. The uncertain authority for pseudonymous pleading that has grown up despite Civil Rule 10 would carry forward. More general sealing authority would persist outside the Civil Rules. As suggested in

62 **(f) Option for to File an Additional Unredacted Filing**
63 **Document Under Seal**. A party making a redacted filing
64 ~~under Rule 5.2(a)~~ may also file an unredacted copy under seal.
65 The court must retain the unredacted copy as part of the
66 record.

67 **(g) Option for to Filing a Reference List**. A filing that
68 contains redacted information ~~redacted under Rule 5.2(a)~~ may
69 be filed together with a reference list that identifies each item
70 of redacted information and specifies an appropriate identifier
71 that uniquely corresponds to each item ~~of redacted~~
72 ~~information~~ listed. The reference list must be filed under seal
73 and may be amended as of right. Any references in the case to
74 an identifier ~~included~~ in the reference list will be construed to
75 refer to the corresponding item of information.

note 13, a Committee Note comment may suffice to protect against the risk that a rule provision that in any event says nothing about sealing implies a new source of sealing authority.

76 **(h) Waiver of Protection of Identifiers.** A party waives the
77 protection of Rule 5.2(a) as to the party's own information by
78 filing ~~that information~~ it not under seal and without
79 redaction.¹⁵

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules “to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically.” The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where

¹⁵ This change was adopted in a different form by the Bankruptcy Committee. Its version read: A party waives the protection of (a) as to the party's own information to the extent that such information is filed not under seal and without redaction." The concern expressed was that otherwise a party who filed an unredacted document under seal could be found to have waived the protections of the Rule. The need for this change is unclear. The premise that filing a paper under seal waives the redaction requirement for other papers, filed by any party, is highly questionable. The first question for the Civil Rules Committee is whether to include this variation at all. If we keep this change, it must focus on a filing made by the party; the version first proposed seemed to work a waiver when any party filed unredacted information not under seal. We cannot provide that a party waives when someone else files without redaction. We could add a provision that a party waives when it fails to move within a defined period to redact a filing made by someone else, but that does not seem worth it. (The Committee Note on subdivision (h) correctly states that a party waives by filing.)

they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* <http://www.privacy.uscourts.gov/Policy.htm> The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain “personal data identifiers” are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, the party may seek protection under subdivision (d) or (e).¹⁶ Moreover, the Rule does not affect the protection available under other rules, such as Civil Rules 16 and 26(c), or under other sources of protective authority.¹⁷

¹⁶ This paragraph was added at the suggestion of the Civil Rules Committee, to clarify that the redaction requirement does not establish a presumption that information not redacted should always be exposed to public access.

¹⁷ This sentence was suggested by the Civil Rules Committee, and obviously must be adapted to protective rules that exist in the other rules if this language is to be

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (c) provides for limited public access in Social Security cases and immigration cases. Those actions are entitled to special treatment due to the prevalence of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court unless the court orders otherwise. The rule contemplates, however, that non-parties can obtain full access to the case file at the courthouse, including access through the court's public computer terminal.¹⁸

Subdivision (d) reflects the interplay between redaction and filing under seal. It does not limit or expand the judicially developed rules that govern sealing. But it does reflect the possibility that redaction may provide an alternative to sealing.¹⁹

included in the Note. If part of (e) is transferred to become a new (a)(2) as suggested in note 5, (a)(2) should be added to this sentence.

¹⁸ This paragraph of the Note is for the Civil Rules only.

¹⁹ This new paragraph is intended to pick up and revise the second sentence of the next paragraph, flagged by note 20.

Subdivision (e) provides that the court can by order in a particular case require more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to non-parties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.²⁰

Subdivision (f) allows a party who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

Subdivision (g) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004. In accordance with the E-Government Act, subdivision (g) ~~of the rule~~ refers to “redacted” information. The term “redacted” is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a party to waive the protections of the rule as to its own personal information by filing it unsealed and in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 5.2 to the extent they are filed with the court. Trial exhibits that are not

²⁰ This sentence is needed for (d). See note 19.

initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.²¹

²²The Judicial Conference Committee on Court Administration and Case Management has issued “Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files” (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;
- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation

²¹ This paragraph of the Note was added to clarify the treatment of exhibits. Exhibits need not be treated in the text of the rule, because if exhibits are filed, they must be redacted in the same way as any other filing. Treatment in the note was considered useful, however, because an exhibit that is not initially filed may be filed later as part of the record on appeal. In that case, the exhibits must be redacted accordingly.

²² There is no apparent need to include this in the Civil Rule Committee Note. See note 23.

pursuant to the Criminal Justice Act:

- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation)

The privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d).²³

²³ The underlined material is a new addition to the Committee Note that addresses a CACM commentary concerning certain documents that might be filed but should not be made part of the “criminal case file.” The term “criminal case file” is not defined, and it is difficult to mesh with the E-Government Act and the template, both of which presume that if a document is filed with the court it is subject to remote electronic access. The paragraph tries to solve this disconnect by stating that such documents — even though filed and thus subject to remote access — can be sealed by the court.

III. Future Projects

Time Counting

One new project is under way. The Standing Committee has appointed a subcommittee, chaired by Judge Kravitz, to study the time-counting provisions in the Appellate, Bankruptcy, Civil, and Criminal Rules. Because changes in the methods of calculating time will affect the real meaning of present time periods, the study will include the many different time periods provided in the rules.

The first step in this project is to compile all of the time provisions in each of these four sets of rules. John Rabiej has undertaken this daunting task, and is well on the way toward completion. Once this is done, the Advisory Committee Reporters will begin the task of framing initial recommendations.

Indicative Rulings: New Rule "62.1"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on

the merits of the proposal and on the drafting of the proposed rule,” “the committee concluded unanimously” that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then “a routine motion to remand is made in the appellate court.”

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from “final” judgments.

The following draft is simply a sketch to illustrate the form a rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 62.1 Indicative Rulings

- 1 **(a)** A district court may entertain an otherwise timely motion
- 2 to alter, amend, or vacate a judgment that is pending on
- 3 appeal [and that cannot be altered, amended, or vacated
- 4 without permission of the appellate court] and

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

2 FEDERAL RULES OF CIVIL PROCEDURE

- 5 (1) deny the motion, or
- 6 (2) indicate that it would grant the motion if the appellate
- 7 court should remand for that purpose.
- 8 (b) A party who makes a motion under (a) must notify the
- 9 clerk of the appellate court when the motion is filed and when
- 10 the district court rules on the motion.
- 11 (c) If the district court indicates that it would grant a motion
- 12 under (a)(2), a party may move the appellate court to remand
- 13 the action to the district court. The appellate court has
- 14 discretion whether to remand.
- 15 (d) This rule does not apply to relief sought under Federal
- 16 Rule of Appellate Procedure 8, nor to proceedings under 28
- 17 U.S.C. §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission. It seems likely that the rule text should include some version of the concept included in brackets.]

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]

{The October 2003 agenda, Tab 9, added three items for this topic: (1) May 14, 2001 Letter from Judge Garwood to Judge Levi, recommending Civil Rules Committee study; (2) March 14, 2000 letter from Solicitor General Waxman to Judge Garwood; and (3) excerpts from the April 11, 2001 Minutes of the Appellate Rules Committee -- the first page for identification, and two pages relating to "D. Item No. 00-04 (FRAP 4.1 — Indicative rulings). Let's add them here.}

Rule 48: Polling The Jury

The question of jury polling practices was raised at the June Standing Committee meeting. The suggestion was that the Civil Rules might consider addition of a polling provision similar to Criminal Rule 31(d). Drawing from Style Rule 48, the rule might look like this:

Rule 48. Number of Jurors; Verdict; Polling.

- 1 **(a) Number of Jurors.** A jury must have no fewer than 6 and
- 2 no more than 12 members, and each juror must participate in
- 3 the verdict unless excused under Rule 47(c).

4 FEDERAL RULES OF CIVIL PROCEDURE

4 **(b) Verdict.** Unless the parties stipulate otherwise, the
5 verdict must be unanimous and must be returned by a jury of
6 at least 6 members.

7 **(c) Polling.** After a verdict is returned but before the jury is
8 discharged, the court must on a party's request, or may on its
9 own, poll the jurors individually. If the poll reveals a lack of
10 unanimity, the court may direct the jury to deliberate further
11 or may declare a mistrial and discharge the jury.

On informal inquiry, the Council of the ABA Litigation Section indicated that this approach seems desirable. They seem to prefer this version of new subdivision (c), taken verbatim from Criminal Rule 31(d), which requires a poll only on a party's request. There was some brief but inconclusive discussion of the possibility that a provision might be added to allow the trial judge to conduct the polling "in private."

The question whether to add a polling provision seems direct enough. If the question is pursued further, there is likely to be some pressure to adopt the language of Criminal Rule 31(d), as set out above. But there may be some reason to distinguish between the civil and criminal rules. Civil Rule 49(b) addresses verdicts that include answers to questions that are inconsistent among themselves or inconsistent with the general verdict. When that happens, the court is to "direct the jury to further consider its answers and verdict, or order a new trial." "Deliberate further" seems a good substitute for

“further consider its verdict” because the problem is likely to be lack of unanimity. But “order a new trial” may be better than “declare a mistrial and discharge the jury” for purposes of a civil rule.

The question is whether to add this matter to the agenda for further work.

Rule 30(b)(6): Depositions as Interrogatories

The Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association has provided a report on practice under Civil Rule 30(b)(6), 04-CV-B. The report offers many suggestions to correct what are seen as growing misuses of Rule 30(b)(6) depositions, but only one specific amendment.

The proposed amendment grows from concerns that a Rule 30(b)(6) deposition may be used in various ways to extend beyond fact discovery. A first concern arises from a broad perception that once an organization has been designated as deponent on a described subject and has provided a witness to testify on its behalf, the witness may be asked to take litigation positions that will bind the organization. One example among many: The witness is shown conflicting deposition testimony of three other witnesses, and asked to state which version the corporation adopts. A second concern is that the organization’s duty to prepare the witness to testify to “matters known or reasonably available to the organization” will invade work product. Counsel may be forced to investigate to find matter reasonably available to the organization, and then prepare the witness. The preparation may include protectible work product, creating practical difficulties in protecting the work product “on the wing” when the witness is deposed.

The amendment would address these problems by foreclosing use of a Rule 30(b)(6) deposition to inquire into legal issues. One word would be added: The witness “shall testify as to factual matters known or reasonably available to the organization.”

The many practice suggestions involve at least some matters that could be addressed in rule language. Perhaps the clearest illustration is the suggestion that Rule 30 should be interpreted to apply the presumptive 7-hour limit on a deposition cumulatively to all witnesses designated to testify on behalf of an organization, treating all witnesses together as a single deposition.

Other issues are discussed but without recommendation. One set of issues that may prove particularly knotty on closer examination involves the use of the deposition as an “admission” when the organization is a party.

The overall feel of the report suggests a familiar set of dilemmas. In part, there is a feeling that Rule 30(b)(6) depositions may be coming to be used as a substitute for Rule 33 interrogatories, perhaps in the hope that it will prove easier to provoke unguarded statements at deposition. In part, there are illustrations of specific decisions that seem ill-advised. The challenge for rulemaking is to determine several things: How frequent and severe are the arguable misuses? Is this set of issues something more than an illustration of the proposition that we should not attempt to amend the rules whenever some courts seem to be getting it wrong? Can a way be found to draft amendments that will do more good than harm?

The report is lengthy and will be included in a future agenda when the questions seem more ready for deliberation. The topic is raised now only to provoke reactions — at the meeting or over the next several weeks — on the place these issues should command on the

agenda. If the problems seem worthy of advancing to the near-term agenda, they may benefit from preliminary study by a1 The February 2005 Style Package makes this change.