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2007 E-Discovery Seminar:

*E-Discovery Amendments to the
Federal Rules of Civil Procedure*

-Are You Prepared to Comply with the New Rules?

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**E-Discovery Amendments to the Federal Rules of
Civil Procedure –
Are you ready to Comply with the New Rules?**

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**THE MATERIAL USED IN THIS MANUAL IS FOR TEACHING
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January 25, 2007

E-Discovery Seminar

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- Construction Law & Litigation
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- Electronic Discovery Disputes
- Employee Practices Liability Coverage
- Employment Discrimination & Wrongful Discharge
- Employment Practices Litigation Defense
- Environmental Coverage
- Environmental Litigation
- Environmental Subrogation & Recovery
- Errors and Omissions
- Excess and Surplus
- Fidelity
- General Liability
- Healthcare Litigation
- Insurance Coverage Claims/Litigation
- Insurance Insolvency
- Labor & Employment
- Labor & Employment Litigation
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- Life Science & Medical Device Litigation
- Life, Health & Disability
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- Primary/Excess
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Thomas M. Jones joined Cozen O'Connor in January 1986 and is Vice Chair of the firm's National Insurance Department. Tom also heads the firm's e-discovery practice area. Tom's practice spans many areas of law, including, advertising liability, agent/broker liability, appellate practice, arson and fraud, bad faith litigation, business torts, class actions, multidistrict litigation and other consolidated claims, commercial general liability, construction liability, crisis management, directors' and officers' liability, labor and employment, environmental law, e-discovery, excess and surplus lines, fidelity and surety, insurance coverage in the first and third party context, medical device and drug litigation, personal lines, products liability, property insurance, punitive damages, reinsurance, securities, security and premises liability, technology and e-commerce, and toxic and other mass torts.

Tom has acted as lead trial insurer counsel in some of the highest profile insurance coverage cases in the country. Tom was also selected by his peers as a "Super Lawyer" in Washington from 2000-2006 and serves on the electronic discovery advisory panel for ARMA International. Tom is chairman of the Defense Research Institute's E-Discovery Marketing Committee.

Tom has authored several published articles including:

- "Insurance Issues for the Insurer," (supplement) *Washington Real Property Deskbook*, Ch. 135, Washington State Bar Association, 3d Edition, 2001 (environmental issues);
- "An Introduction to Insurance Allocation Issues in Multiple Trigger Cases," *The Villanova Environmental Law Journal*, Vol. 10, Issue 1, 1999;
- "Intellectual Property Coverage," *Insurance Coverage: An Analysis of the Critical Issues*, Continuing Legal Education Committee of the Washington State Bar Association, 1999;
- "Claims for Advertising Injury Coverage: A Primer," *Journal of Insurance Coverage*, Vol. 1, No. 4, Autumn 1998;



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- "Washington State's Insurance Regulation for Environmental Claims: An Overview of Key Provisions and Legal Issues," *Environmental Claims Journal*, Vol. 9, No. 3, Spring 1997; and
- "Reinsurance Issues Arising from the Settlement of Complex Claims," *Insurance Litigation Reporter*, Vol. 17, #12, 590, 1995.

Tom received his bachelor of arts degree from Central State University in 1974 and earned his law degree at Oklahoma City University School of Law in 1976. He was admitted to practice in Oklahoma in 1977 and in Washington in 1983, all U.S. District Courts in Washington and Oklahoma, and the Ninth and Tenth Circuit Courts of Appeal.



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Sarah A. Kelly concentrates her practice in employment law and employment discrimination law and related litigation, sexual harassment law, and in counseling employers on issues in labor and employment law. She has more than 20 years of experience, both at leading law firms and as in-house counsel for two major financial services corporations. Her client-side experience has given her a unique perspective on how to forge workable solutions to real-world problems, enabling clients to avoid litigation or, when that is not possible, to best position themselves for success in the courts. She brings valuable insights for counseling employers on issues in major downsizings, the Americans with Disabilities Act guidelines and the Family and Medical Leave Act. Sarah is also a member of the firm's electronic discovery practice area.

As a member of the Labor and Employment Practice Group at Cozen O'Connor, Sarah provides practical expertise in managing and litigating the full range of employment law issues, from individual cases to class-action suits. She also enjoys an enviable track record in investigating and litigating sexual harassment cases.

Sarah is a 1985 graduate of the University of Pennsylvania Law School, with a B.A. from Tufts University. Her law firm experience includes more than eight years at Morgan Lewis & Bockius, as well as three years at Blank, Rome, Comisky & McCauley, both in Philadelphia. In addition, she was the first employment law counsel for CoreStates Financial Corp., and also served as senior employment counsel for PNC Bank Corp.

Sarah is admitted to practice in Pennsylvania and New Jersey. She is a member of the Equal Employment Opportunity Law Committee of the American Bar Association and a member of the Philadelphia Bar Association. She is a frequent lecturer at the annual PBI Employment Law Institute and often speaks to client groups on how to address discrimination and harassment issues in the everyday workplace. She served as a member of the board of directors of St. Agnes Medical



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PUBLICATIONS

- *Cozen and O'Connor Attorneys Address Employment Law Issues*
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Center from 2000-2006. Sarah has been selected a Pennsylvania "Super Lawyer" by her peers, appearing in *Philadelphia* magazine and *Pennsylvania Super Lawyers*.

PBI Employment Law Institute Presentations:

- 2006 - Difficult Issues in Retaliation Claims
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- J.D., Arizona State University College of Law, 1991
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John F. Mullen joined the firm in March 1992 and practices in the Philadelphia office, where he concentrates his practice in insurance, third party and commercial litigation with a focus on products liability, toxic tort, construction law and employment areas.

John has experience in mass tort litigation/asbestos impact on corporate restructuring under sections 524g and 105 of the U.S. Bankruptcy Code. He has been involved as counsel to insurance companies regarding pre-packaged and standard Chapter 11 filings in the following cases:

- *Dresser Industries v. Federal Mogul Products, Inc., et al.*
- *Harbison-Walker Refractories Company v. Dresser Industries, Inc., et al.*

He has significant additional experience in commercial, insurance and trust and estates litigation. He has handled a variety of matters in the banking, pharmaceuticals, aviation, leather processing, packaging equipment and non-profit fields. John has also handled construction cases, including two separate Tropicana garage collapses in New Jersey, the Parkway garage collapse in Philadelphia and numerous other construction matters.

John is a board member of the World Affairs Council of Philadelphia. Additionally, he is a member of the Pennsylvania, New Jersey and Philadelphia bar associations. He earned his bachelor of science degree at The Pennsylvania State University in 1987 and his law degree at Arizona State University in 1991. John was admitted to practice in Pennsylvania and New Jersey in 1991.

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Julie received an A.A.S. in paralegal studies from Broome Community College in 1989 and a bachelor of science with high honors from SUNY Binghamton in 1992. She earned her law degree from Villanova University School of Law in 1997, where she was a member of the Student Division of the American Bar Association and Environmental Law Society.



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REVIEW OF NEW RULES
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**AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE**

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

* * * * *

(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;
- (2) to file motions; and
- (3) to complete discovery.

The scheduling order also may include

- (4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;
- (5) provisions for disclosure or discovery of electronically stored information;
- (6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;
- (7) the date or dates for conferences before trial, a final pretrial conference, and trial; and
- (8) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be

modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Committee Note

The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. Form 35 is amended to call for a report to the court about the results of this discussion. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise.

Rule 16(b) is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26(f) is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking

production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

An order that includes the parties' agreement may be helpful in avoiding delay and excessive cost in discovery. See *Manual for Complex Litigation (4th)* § 11.446. Rule 16(b)(6) recognizes the propriety of including such agreements in the court's order. The rule does not provide the court with authority to enter such a case-management or other order without party agreement, or limit the court's authority to act on motion.

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

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

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the

FEDERAL RULES OF CIVIL PROCEDURE

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

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

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

* * * * *

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

* * * * *

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought

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

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by

discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

* * * * *

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

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

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

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A

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receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

* * * * *

(f) Conference of Parties; Planning for Discovery.

Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of

the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed discovery plan that indicates the parties' views and proposals concerning:

- (1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;
- (2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;
- (3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

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- (4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;
- (5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and
- (6) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

* * * * *

Committee Note

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

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

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

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

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the (b)(2)(C) limitations that apply to all

discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

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

of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26(b)(2)(C) that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and

costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26(b)(2)(C), through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some

focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

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

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

Subdivision (b)(5). The Committee has repeatedly been advised that the risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can

increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. Rule 26(b)(5)(A) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. Rule 26(b)(5)(B) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

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

agreements and orders ordinarily control if they adopt procedures different from those in Rule 26(b)(5)(B).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material,

and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

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

Subdivision (f). Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to disclosure or discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate disclosure or discovery of electronically stored information, discussion at the

outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26(f) conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

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

Rule 26(f) is also amended to direct the parties to discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This provision applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs

to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. Cf. *Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject

to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator 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 file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (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 or protection — 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 or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of

review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Form 35 is amended to include a report to the court about any agreement regarding protections against inadvertent forfeiture or waiver of privilege or protection that the parties have reached, and Rule 16(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26(b)(5)(B) is added to establish a parallel procedure to assert privilege or protection as trial-preparation material after production, leaving the question of waiver to later determination by the court.

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business

records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Committee Note

Rule 33(d) is amended to parallel Rule 34(a) by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule

33(d) as in Rule 34(a). Much business information is stored only in electronic form; the Rule 33(d) option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33(d) allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33(d) states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33(d) by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or ascertain the answer to the interrogatory. In that situation, the responding

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

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

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents or electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained — translated, if necessary, by the respondent into reasonably usable form, or to inspect, copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are

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in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court

or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for the objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing

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electronically stored information — or if no form was specified in the request — the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

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

- (i) 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;
- (ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained

or in a form or forms that are reasonably usable;
and

(iii) a party need not produce the same electronically stored information in more than one form.

* * * * *

Committee Note

Subdivision (a). As originally adopted, Rule 34 focused on discovery of "documents" and "things." In 1970, Rule 34(a) was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not 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 confirm that discovery of electronically

stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34(a) show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as e-mail. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34(a)(1) is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach. A companion change is made to Rule 33(d), making it explicit that parties choosing to respond to an interrogatory by permitting access to responsive records may do so by providing access to electronically stored information. More generally, the term used in Rule 34(a)(1) appears in a number of other amendments, such as those to Rules 26(a)(1), 26(b)(2), 26(b)(5)(B), 26(f), 34(b), 37(f), and 45. In each of these rules, electronically stored information has the same broad meaning it has under Rule 34(a)(1). References to "documents" appear in discovery rules that are not amended, including Rules 30(f), 36(a), and 37(c)(2). These references should be interpreted to include electronically stored information as circumstances warrant.

The term "electronically stored information" is broad, but whether material that falls within this term should be produced, and in what form, are separate questions that must be addressed under Rules 26(b), 26(c), and 34(b).

The Rule 34(a) requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. See *In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34(a)(1) is also amended to make clear that parties may request an opportunity to test or sample

materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26(b)(2) and 26(c). Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34(a) with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

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

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

amended to ensure similar protection for electronically stored information.

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

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

to call for discussion of the form of production in the parties' prediscovery conference.

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

If the requesting party is not satisfied with the form stated by the responding party, or if the responding party has objected to the form specified by the requesting party, the parties must meet and confer under Rule 37(a)(2)(B) in an effort to resolve the matter before the requesting party can file a motion to compel. If they cannot agree and the court resolves the dispute, the court is not limited to the forms initially chosen by the requesting party, stated by the

responding party, or specified in this rule for situations in which there is no court order or party agreement.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34(a) requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably

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

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

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

* * * * *

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

* * * * *

Committee Note

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

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

Rule 37(f) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a

party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

Whether good faith would call for steps to prevent the loss of information on sources that the party believes are not reasonably accessible under Rule 26(b)(2) depends on the circumstances of each case. One factor is whether the party reasonably believes that the information on such sources is likely to be discoverable and not available from reasonably accessible sources.

The protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not

affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

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

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing,

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or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

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

(2) A subpoena must issue as follows:

* * * * *

(C) for production, inspection, copying, testing, or sampling, if separate from a subpoena

commanding a person's attendance, from the court for the district where the production or inspection is to be made.

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

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

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

(b) Service.

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

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the

court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under

the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not

limited to, lost earnings and a reasonable attorney's fee.

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

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

subpoena written objection to producing any or all of the designated materials or inspection of the premises — or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel shall protect any person who is not a party or an officer of a party from significant expense resulting from the

inspection, copying, testing, or sampling
commanded.

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

(i) fails to allow reasonable time for
compliance;

(ii) requires a person who is not a party or
an officer of a party to travel to a place more
than 100 miles from the place where that
person resides, is employed or regularly
transacts business in person, except that,
subject to the provisions of clause (c)(3)(B)(iii)
of this rule, such a person may in order to
attend trial be commanded to travel from any
such place within the state in which the trial
is held;

FEDERAL RULES OF CIVIL PROCEDURE

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

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a

person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents 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 demand.

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

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

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

because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

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

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the

person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. Failure of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from

which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

Committee Note

Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 34 is amended to provide in greater detail for the production of electronically stored information. Rule 45(a)(1)(C) is amended to recognize that electronically stored information, as defined in Rule 34(a), can also be sought by subpoena. Like Rule 34(b), Rule 45(a)(1) is amended to provide that the subpoena can designate a form or forms for production of electronic data. Rule 45(c)(2) is amended, like Rule 34(b), to authorize the person served with a subpoena to object to the requested form or forms. In addition, as under Rule 34(b), Rule 45(d)(1)(B) is amended to provide that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45(d)(1)(C) is added to provide that the person producing electronically stored information should not have to produce the same

information in more than one form unless so ordered by the court for good cause.

As with discovery of electronically stored information from parties, complying with a subpoena for such information may impose burdens on the responding person. Rule 45(c) provides protection against undue impositions on nonparties. For example, Rule 45(c)(1) directs that a party serving a subpoena "shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena," and Rule 45(c)(2)(B) permits the person served with the subpoena to object to it and directs that an order requiring compliance "shall protect a person who is neither a party nor a party's officer from significant expense resulting from" compliance. Rule 45(d)(1)(D) is added to provide that the responding person need not provide discovery of electronically stored information from sources the party identifies as not reasonably accessible, unless the court orders such discovery for good cause, considering the limitations of Rule 26(b)(2)(C), on terms that protect a nonparty against significant expense. A parallel provision is added to Rule 26(b)(2).

Rule 45(a)(1)(B) is also amended, as is Rule 34(a), to provide that a subpoena is available to permit testing and sampling as well as inspection and copying. As in Rule 34, this change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information. Because testing or sampling may present particular issues of burden or intrusion for the person served with the subpoena,

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

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

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

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)

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, 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) _____.]

Amendments to the Federal Rules of Civil Procedure Pertaining to Electronically Stored Information

January 25, 2007

Coszen O'Connor

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Pending Amendments Cover Five Related Areas

- The pending amendments cover five related areas, which are described in more detail below:
 - Definition of discoverable materials;
 - Early attention to issues relating to electronic discovery, including the format of production;
 - Discovery of electronically stored information from sources that are not reasonably accessible;
 - The procedure for asserting claim of privilege or work-product protection after production; and
 - A "safe harbor" limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine, good faith operation of an electronic information system.

In addition, amendments to Rule 45 correspond to the proposed changes in Rules 26-37.



The New Concept of "Electronically Stored Information" and Recognition That Information Exists Within Enveloping "Systems"

- A fundamental change in the rules is their termination of the practice of considering electronic information as a subset of the concept "document". Instead, throughout the rules an entirely new phrase is given life. This is "electronically stored information".



The Proposed Amendments

- Drive early attention to e-discovery (e.g., duty to preserve) - 16(b), 26(a), 26(f)
- Adopt a two-tiered approach to discovery based on accessibility of data - 26(b)(2)
- Provide a means of addressing assertions of privilege after production - 26(b)(5)
- Distinguish electronically-stored information (ESI) from documents - 34(a)



The Proposed Amendments (cont.)

- Allow interrogatories to be answered by ESI - 33(d)
- Establish procedure for parties to specify form of production of ESI - 34(b)
- Create a "safe harbor" for routine good faith operation of computer systems - 37(f)
- Conforms subpoena practice to party discovery amendments - 45



Early Attention to E-Discovery Matters, Disclosures

- One of the critical amendments in the E-discovery package is reference to collaborative communication about electronic discovery matters early in the case. This will occur in the "Conference of Parties" mandated by Rule 26(f); in the "Required Disclosures" governed by Rule 26(a); and in the Scheduling and Planning aspects of Rule 16(b).



The Meet and Confer Proposals

Rules 26(a) and 26(f)

- Parties must discuss issues relating to the preservation of discoverable information.
- Parties must also discuss issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.
- Parties must also discuss any issues relating to claims of privilege.



Meet and Confer Proposals (cont.)

Rule 16(b)

- Allows the court's initial scheduling order to reflect any of the agreements reached between counsel at the Rule 26(f) conference.



Rules 26(b)(5)(B) and 26(f) Provide a Framework for the Recovery of Inadvertently Produced Protected Information

- A producing party may notify the receiving party, within a reasonable time, of a claim that privileged material or work-product was inadvertently produced. After receiving notification, the receiving party must return, sequester or destroy the information, and may not use or disclose it to third parties until the claim is resolved. If the receiving party discloses the information before being notified, the receiving party must also take reasonable steps to retrieve the information. The receiving party has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether the waiver has occurred.



Conforming Amendments to Rule 33(d)

- Rule 33(d) now allows a party to specify electronically stored information in such a way as to answer an interrogatory



The "Form" of Information is Dynamic

- Rule 34(b) adds an entirely new procedure, necessitated by the use of the concept of electronically stored information.
- Unless there is an agreement or court order, the form of production will either be the form in which the information is ordinarily maintained or a form that is "reasonably usable."



Rule 35

- In addition, Form 35 has been amended to include a section on how the parties jointly propose that the disclosure or discovery of electronically stored information should be handled.



Changes to Rule 45

- Finally, Rule 45 was also amended to conform with the other discovery rules, but particularly Rule 34(b), Rule 26(b)(2), and Rule 26(b)(5). A subpoena may now specifically request ESI, just as in Rule 34, and may specify the form in which ESI is to be produced. Written objection can be made to providing the ESI in the form requested. Just as in Rule 34(b), if the subpoena does not specify the form of the requested ESI, the person responding must produce the information in the form in which the person ordinarily maintains it, or in a form that is reasonably usable. Only one form is required.





ORGANIZING AN EFFECTIVE RESPONSE
TO ELECTRONIC DISCOVERY
IN PREPARATION FOR THE
PROPOSED AMENDMENTS TO
THE FEDERAL RULES OF CIVIL PROCEDURE

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In order to prepare for the proposed amendments to the Federal Rules of Civil Procedure which become effective on 12/1/06, following is an outline of recommendations that you may want to consider. As you know, Rule 26(f) of the proposed amendments requires parties, early in litigation, to discuss the following subjects:

1. The parties' computer systems;
2. Persons with special knowledge;
3. The scope of electronic discovery;
4. Sources of data which are inaccessible and, therefore, which will not be searched for purposes of discovery; and
5. Data which is reasonably accessible.

A. Assembling the Right Team, an Electronically Stored Information (ESI) Team

♦ It may be comprised of:

- (1) A representative from General Counsel's office or Division Counsel's office as the team leader;
- (2) A representative or representatives from the IT Department;
- (3) A representative or representatives from the Records Management Department;
- (4) A representative or representatives from the Claims Department;
- (5) A representative or representatives from the Underwriting Department;
- (6) Outside counsel; and
- (7) Outside vendor(s).

Responsibilities

- ♦ The size of the team needed to preserve, collect, review, and produce data is driven by the scope of the litigation and the discovery requests at issue. The task of the ESI team should include, among other things, developing and implementing a data preservation plan, interviewing

witnesses to identify the location of data responsive to discovery requests; developing and implementing a data collection protocol; reviewing data to determine if it is privileged or entitled to be designated as "confidential" under any applicable confidentiality order; developing form documents such as litigation hold emails; identifying and organizing key data; and supervising the data vendor selected to help manage the data to be produced in the litigation. The General Counsel or Division Counsel can assist with identifying and interviewing key witnesses, opening lines of communication between outside counsel and members of the IT department, helping to identify the proper scope of data preservation and collection, communicating with employees about the duty to preserve documents, and helping identify privileged data.

B. Developing a Project Plan

- ◆ The facts and circumstances of the litigation, the scope of discovery, and a wide variety of other factors will dictate the content and complexity of the project plan. Below, however, are some steps to consider when implementing a typical electronic discovery plan and ideas on how to organize the workload to help the project run efficiently and economically. These steps can be broken generally into three categories: data preservation, data collection, and data review and production.

C. Steps to Preserving Electronic Data

- ◆ The ESI team should act quickly to evaluate the proper scope of preservation. In doing so, the team should think more broadly than what is likely to be deemed relevant in the litigation. It should think in terms of what may lead to the discovery of admissible evidence. In assessing what preservation efforts are appropriate in a particular case, consider the following steps:
 - (1) Key employee interviews;
 - (2) Consult organizational charts. Current and historical organizational charts can be helpful in identifying witnesses who know the location of data that should be preserved;
 - (3) Use a checklist to identify sources of data. The team should consider developing a checklist to use when interviewing employees about the sources of electronic data;
 - (4) Network drives and back-up tapes. The team should work with the IT department to address preservation of data on active servers and back-up tapes, when necessary. It may be necessary to suspend rotation of some back-up tapes. The IT department may also need to copy or preserve information on networks that might

otherwise be inadvertently moved, erased, or archived into a less accessible media;

- (5) Departing employees. The team should consider taking special precautions in preserving information in the possession of departing employees. This is particularly true if data would be lost in the routine reassignment of electronic devices serving departing employees;
- (6) Preservation memorandum. A preservation memorandum should be recirculated periodically to remind current employees, and to inform new employees, of the need to preserve potentially relevant data; and
- (7) Network level preservation. While the distribution of a preservation memorandum to individual employees is one tool to preserve information stored on employee-specific local hard drives or other media storage devices, the IT department may also need to preserve data at a network level. For example, email server default stored settings may need to be adjusted to avoid the potential loss of information due to server storage capacity limits. The team should work closely with the IT department to evaluate the impact of preservation efforts on the organization and, whenever possible, develop creative, common sense solutions that protect the information at issue while avoiding unnecessary expense and distribution to the organization.

D. Steps to Collecting Electronic Information

- ◆ Collector Check List – One technique to promote efficient and comprehensive data collection from individual employees is to work from a checklist of examples and potential sources of information that the ESI team should consider. If the team relies on employees to help collect information, it should provide employees with specific instructions on how to search for and retrieve data. Detailed instructions are useful to standardize search efforts between various departments. For example, procedures for email collection may include instructions on how to create a network case folder on the server, and instructions on how to run a full text and advanced search in the user's mailbox that focuses on the in-box, sent items, and deleted items folders.
- ◆ Data Organization – As data is collected, a procedure may need to be established to preserve data as it is maintained in the ordinary course of business. If data is kept in digital form, this may require the maintenance of the file structure from where the data is copied. If data is printed out, slip sheets may need to be placed between data documents so the beginning and end of each document can be readily identified.

- ◆ Security – At every step in the process, the team should consider data security. Security measures may involve data encryption to the extent collected data is transmitted to the email. It may also be advisable to have the IT department assign specific user rights, encryption, and password protection to the directories holding responsive data. The use of a detailed tracking log of what has been preserved, collected, and produced is essential.
- ◆ Quality Control – As with other stages in the document preservation and collection process, a mechanism to audit the data collection may prove to be an invaluable tool for avoiding errors.

E. Steps to Reviewing and Producing Electronic Documents

- ◆ Data Form – After data has been collected, the data must be evaluated for responsiveness and potential privilege issues. The team also has to decide upon what form the production should take. For example, the data collected from an individual's computer may be produced as a digital "picture" of the data in the form of a PDF or TIFF file, or a native application. One advantage to producing data as a TIFF or PDF file is the prevention of post-production modification of the document. The team should carefully evaluate the pros and cons of each data form option.
- ◆ Objective Coding – In addition to reviewing collected data for responsiveness and privilege, the team may elect to objectively code documents to create a searchable database. Objective coding may list for each document the individuals receiving the document, the author, the date, or other objective information.
- ◆ Subjective Coding – Another component of data review and production involves the subjective coding of collected documents. For example, the team can code documents based on key issues selected to assist them with investigating and presenting the issues in the case.
- ◆ Production Organization – A key issue is how to preserve logical page breaks. When digital data is printed out, or converted to TIFF or PDF form, it is sometimes difficult to determine where one page stops and the next page begins. Consideration should be given to how to organize email files with associated individual attachments so as to provide all data related to the email while maintaining a logical file structure consistent with the way the data is kept in the ordinary course of business. Also, the team may want to consider using a chain of custody checklist.
- ◆ Redaction – As with preservation and collection, some method for quality assurance must be built into this stage of data production overflow. This may include a "re-review" of selected data to be produced to ensure that privileged and non-responsive documents are excluded from the production set and that all appropriate redactions have been marked by

attorneys and appear correctly in the production set.

- ◆ Managing Production Information – Various database management software systems are available to manage subjective and objective coding data, in addition to digital images of the production set. Popular software for this purpose includes Concordance, Summation, Ipro, CaseMap, TimeMap, and Microsoft Access. Database management vendors may also offer secure on-line hosting of database information. While on-line database hosting provides the advantage of remote access via the Internet, the team should carefully consider all security issues involved before adopting a remote access strategy.

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CONFERENCE OF CHIEF JUSTICES

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

Approved August 2006

Richard Van Duizend, Reporter

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Introduction¹

Overview of Electronic Discovery

Most documents today are in digital form. "Electronic (or digital) documents" refers to any information created, stored, or best utilized with computer technology of any sort, including business applications, such as word processing, databases, and spreadsheets; Internet applications, such as e-mail and the World Wide Web; devices attached to or peripheral to computers, such as printers, fax machines, pagers; web-enabled portable devices and cell phones; and media used to store computer data, such as disks, tapes, removable drives, CDs, and the like.

There are significant differences, however, between conventional documents and electronic documents—differences in degree, kind, and costs.

Differences in degree. The volume, number of locations, and data volatility of electronic documents are significantly greater than those of conventional documents.

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 [m]illion typewritten pages of plain text.²

One paper document originating from a corporate computer network and shared with other employees who commented on it may result in well over 1,000 copies or versions of that document in the system. A company with 100 employees sending or receiving the industry average 25 e-mail messages a day produces 625,000 e-mail messages a year, generally unorganized and full of potentially embarrassing or inappropriate comments. Document search locations not only include computer hard drives, but also network servers, backup tapes, e-mail servers; outside computers, servers, and back up tapes; laptop and home computers; and personal digital assistants or other portable devices. Electronic documents are easily damaged or altered – e.g., by simply opening the file. Computer systems automatically recycle and reuse memory space, overwrite backups, change file locations, and otherwise maintain themselves automatically—with the effect of altering or destroying computer data without any human intent, intervention, or even knowledge. And, every electronic document can look like an original.

¹ Much of the material in this introduction is condensed directly from a presentation on electronic discovery by Ken Withers, former Senior Judicial Education Attorney at the Federal Judicial Center, to the National Workshop for United States Magistrate Judges on June 12, 2002.

² Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee*, p.3 (Washington, DC: August 3, 2004).

Differences in kind. One difference in kind between digital discovery and conventional paper discovery is that digital transactions (creation of an electronic airline ticket, for example) often create no permanent document in electronic or any other form. There are only integrated databases containing bits and pieces of millions of transactions. After a customer has printed out an e-ticket and moved to a different screen, the e-ticket "disappears." In addition, unlike conventional documents, electronic documents contain non-traditional types of data including metadata, system data, and "deleted" data. Metadata refers to the information embedded in an electronic file about that file, such as the date of creation, author, source, history, etc. System data refers to computer records regarding the computer's use, such as when a user logged on or off, the websites visited, passwords used, and documents printed or faxed. "Deleted" data is not really deleted at all. The computer has merely been told to ignore the "deleted" information and that the physical space that the data takes up on the hard drive is available for overwriting when the space is needed. The possibility that a deleted file can be restored or retrieved presents a temptation to engage in electronic discovery on a much broader scale than is usually contemplated in conventional paper discovery.

Differences in costs. Cost differences are often thought to include differences in the allocation of costs as well as the amount of costs. In conventional "big document" cases, for example, when responding parties simply make boxes of documents available for the requesting party to review, the costs of searching through the boxes typically fall on the requesting parties. On the other hand, the cost to the responding parties of locating, reviewing, and preparing vast digital files for production is perceived to be much greater than in conventional discovery proceedings. One reported case, for example, involved the restoration of 93 backup tapes. The process was estimated to cost \$6.2 million before attorney review of the resulting files for relevance or privilege objections. Complete restoration of 200 backup tapes of one of the defendants in another prominent reported decision was estimated to cost \$9.75 million, while restoration of eight randomly selected tapes to see if any relevant evidence appeared on them, could be done for \$400,000.

The high costs of electronic discovery frequently include the costs of experts. Systems experts know the computers, software, and files at issue in the case. Outside experts are often brought in to conduct electronic discovery. Their role is to take the data collections, convert them into indexed and reviewable files, and ready them for production. Forensic examiners, the most expensive of all, may be brought in to search for deleted documents, missing e-mail, and system data.

On the other hand, electronic discovery can also greatly reduce the costs of discovery and facilitate the pretrial preparation process. When properly managed, electronic discovery allows a party to organize, identify, index, and even authenticate documents in a fraction of the time and at a fraction of the cost of paper discovery while virtually eliminating costs of copying and transport.

Purpose and Role of the Guidelines

Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related ques-

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

tions arise in state courts is increasing rapidly, in all manner of cases. Uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules and standards "exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review."³

Accordingly, the Conference of Chief Justices established a Working Group at its 2004 Annual Meeting to develop a reference document to assist state courts in considering issues related to electronic discovery. The initial draft of the first four Guidelines was sent to each state's chief justice in March, 2005. A Review Draft was circulated for comment in October 2005 to each Chief Justice and to a wide array of lawyer organizations and e-discovery experts. Seventeen sets of comments were received⁴ and were reviewed by the Working Group in preparing the March 2006 version of the Guidelines. The Working Group wishes to express its deep appreciation to all those who took the time to share their experience, insights, and concerns.

These Guidelines are intended to help reduce this uncertainty in state court litigation by assisting trial judges faced by a dispute over e-discovery in identifying the issues and determining the decision-making factors to be applied. The Guidelines should not be treated as model rules that can simply be plugged into a state's procedural scheme. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created and should be considered along with the other resources cited in the attached bibliography including the newly revised provisions on discovery in the Federal Rules of Civil Procedure⁵ and the most recent edition of the American Bar Association Standards Relating to Discovery.⁶

³ *Id.* at 3.

⁴ From: The American College of Trial Lawyers (ACTL); The Association of Trial Lawyers of America (ATLA); Courtney Ingrassia Barton, Esq., LexisNexis® Applied Discovery; Gary M. Berne, Esq., Stoll Stoll Berne Lokting & Shlachter PC, Portland, OR; Richard C. Broussard, Esq., Broussard & David, Lafayette, LA; David Dukes, Esq., President, The Defense Research Institute (DRI); Walter L. Floyd, Esq., The Floyd Law Firm, PC, St. Louis, MO; Thomas A. Gottschalk, Executive Vice President – Law & Public Policy and General Counsel, General Motors; Robert T. Hall, Esq., Hall, Sickells, Frei and Kattenberg, PC Reston, VA; Justice Nathan L. Hecht, Supreme Court of Texas; Andrea Morano Quercia, Eastman Kodak Company; Prof. Glenn Koppel, Western State University Law School; Michelle C. S. Lange, Esq., & Charity J. Delich, Kroll Ontrack Inc.; Lawyers for Civil Justice (LCJ), U.S. Chamber Institute for Legal Reform, DRI, the Federation of Defense and Corporate Counsel, & the International Association of Defense Counsel; Charles W. Matthews, Vice President and General Counsel, Exxon Mobil; Harry Ng, American Petroleum Institute; Clifford A. Rieders, Esq., Rieders, Travis, Humphrey, Harris, Waters & Waffenschmidt, Williamsport, PA.

⁵ The revised rules were approved by the United States Supreme Court on April 12, 2006, and will take effect on December 1, 2006, unless Congress enacts legislation to reject, modify, or defer the amendments."

⁶ American Bar Association Standards Relating to Civil Discovery, (Chicago, IL: August 2004).

Preface

Recognizing that:

- there are significant differences in the discovery of conventional paper documents and electronically stored information in terms of volume, volatility, and cost;
- until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions;
- the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, because of the near universal reliance on electronic records both by businesses and individuals; and
- uncertainty about how to address the differences between discovery of conventional and electronically-stored information under current discovery rules and standards exacerbates the length and costs of litigation; and
- discovery disputes are rarely the subject of appellate review;

the Conference of Chief Justices (CCJ) established a Working Group at its 2004 Annual Meeting to develop a reference document to assist state courts in considering issues related to electronic discovery.

A review draft of proposed Guidelines was widely circulated for comment in October, 2005. Many sets of thorough and thoughtful comments were received and discussed by the Working Group in preparing a final draft for consideration by the members of CCJ at its 2006 Annual Meeting. At its business meeting on August 2, 2006, CCJ approved the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* as a reference tool for state trial court judges faced by a dispute over e-discovery.

These *Guidelines* are intended to help in identifying the issues and determining the decision-making factors to be applied in the circumstances presented in a specific case. They should not be treated as model rules or universally applicable standards. They have been crafted only to offer guidance to those faced with addressing the practical problems that the digital age has created. The Conference of Chief Justices recognizes that the *Guidelines* will become part of the continuing dialogue concerning how best to ensure the fair, efficient, and effective administration of justice as technology changes. They should be considered along with the other resources such as the newly revised provisions on discovery in the Federal Rules of Civil Procedure and the most recent edition of the American Bar Association Standards Relating to Discovery. Although the *Guidelines* acknowledge the benefits of uniformity and are largely consistent with the revised Federal Rules, they also recognize that the final determination of what procedural and

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evidentiary rules should govern questions in state court proceedings (such as when inadvertent disclosures waive the attorney-client privilege) are the responsibility of each state, based upon its legal tradition, experience, and process.

The *Guidelines* are being sent you to because of your interest in the civil justice process generally and electronic discovery issues in particular. Additional copies can be downloaded from the National Center for State Courts' website – www.ncsconline.org.

Conference of Chief Justices

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

1. Definitions

- A. Electronically-stored information is any information created, stored, or best utilized with computer technology of any type. It includes but is not limited to data; word-processing documents; spreadsheets; presentation documents; graphics; animations; images; e-mail and instant messages (including attachments); audio, video, and audiovisual recordings; voicemail stored on databases; networks; computers and computer systems; servers; archives; back-up or disaster recovery systems; discs, CD's, diskettes, drives, tapes, cartridges and other storage media; printers; the Internet; personal digital assistants; handheld wireless devices; cellular telephones; pagers; fax machines; and voicemail systems.
- B. Accessible information is electronically-stored information that is easily retrievable in the ordinary course of business without undue cost and burden.

COMMENT: The definition of electronically-stored information is based on newly revised section 29 of the American Bar Association *Standards Relating to Civil Discovery* (August 2004). It is intended to include both on-screen information and system data and metadata that may not be readily viewable. The list included in the Guideline should be considered as illustrative rather than limiting, given the rapid changes in formats, media, devices, and systems.

The definition of accessible information is drawn pending Federal Rule 26(b)(2)(B) (2006). See also *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 390 (S.D.N.Y. 2003)(*Zubulake III*). What constitutes an undue cost or burden will need to be determined on a case by case basis. However, examples of information that may not be reasonably accessible in all instances include data stored on back-up tapes or legacy systems; material that has been deleted; and residual data.

2. Responsibility Of Counsel To Be Informed About Client's Electronically-Stored Information

In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, a judge should, when appropriate, encourage counsel to become familiar with the operation of the party's relevant information management systems, including how information is stored and retrieved. If a party intends to seek the production of electronically-stored information in a specific case, that fact should be communicated to opposing counsel as soon as possible and the categories or types of information to be sought should be clearly identified.

COMMENT: This provision is drawn from the Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas (para. 1) and is consistent with other rules and proposed rules that place a responsibility on counsel, when appropriate and reasonable, to learn about their client's data storage and management systems and policies at the earliest stages of litigation in order to facilitate the smooth operation of the discovery process. [See e.g., pending Federal Rules of Civil Procedure 26(f) (2006)]. While the manner in which this encouragement should be given will, of necessity, depend on the procedures and practices of a particular jurisdiction and the needs of the case before the court, the court should establish the expectation early that counsel must be well informed about their clients' electronic records. Voluntary resolution of issues involving electronically-stored information by counsel for the parties should be encouraged. Such agreements can be facilitated if the party seeking discovery clearly indicates the categories of information to be sought so that counsel for the producing party may confer with its clients about the sources of such information and render advice regarding preservation obligations.

3. *Agreements By Counsel; Pre-Conference Orders*

- A. In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, a judge should encourage counsel to meet and confer in order to voluntarily come to agreement on the electronically-stored information to be disclosed, the manner of its disclosure, and a schedule that will enable discovery to be completed within the time period specified by [the Rules of Procedure or the scheduling order].
- B. In any case in which an issue regarding the discovery of electronically-stored information is raised or is likely to be raised, and in which counsel have not reached agreement regarding the following matters, a judge should direct counsel to exchange information that will enable the discovery process to move forward expeditiously. The list of information subject to discovery should be tailored to the case at issue. Among the items that a judge should consider are:
 - (1) A list of the person(s) most knowledgeable about the relevant computer system(s) or network(s), the storage and retrieval of electronically-stored information, and the backup, archiving, retention, and routine destruction of electronically stored information, together with pertinent contact information and a brief description of each person's responsibilities;
 - (2) A list of the most likely custodian(s), other than the party, of relevant electronic data, together with pertinent contact information, a brief description of each custodian's responsibilities, and a description of the electronically-stored information in each custodian's possession, custody, or control;
 - (3) A list of each electronic system that may contain relevant electronically-stored information and each potentially relevant electronic system that was operating during the time periods relevant to the matters in dispute, together with a general description of each system;

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- (4) An indication whether relevant electronically-stored information may be of limited accessibility or duration of existence (e.g., because they are stored on media, systems, or formats no longer in use, because it is subject to destruction in the routine course of business, or because retrieval may be very costly);
- (5) A list of relevant electronically-stored information that has been stored off-site or off-system;
- (6) A description of any efforts undertaken, to date, to preserve relevant electronically-stored information, including any suspension of regular document destruction, removal of computer media with relevant information from its operational environment and placing it in secure storage for access during litigation, or the making of forensic image back-ups of such computer media;
- (7) The form of production preferred by the party; and
- (8) Notice of any known problems reasonably anticipated to arise in connection with compliance with e-discovery requests, including any limitations on search efforts considered to be burdensome or oppressive or unreasonably expensive, the need for any shifting or allocation of costs, the identification of potentially relevant data that is likely to be destroyed or altered in the normal course of operations or pursuant to the party's document retention policy.

COMMENT: This Guideline combines the approaches of the pending Federal Rules of Procedure 26(f)(3) (2006) and the rule proposed by Richard Best that relies heavily on the Default Standard for Discovery of Electronic Documents promulgated by the U.S. District Court for the District of Delaware. The Guideline expresses a clear preference for counsel to reach an agreement on these matters. Because not all states follow the three-step process contemplated by the Federal Rules⁷ or require initial party conferences, paragraph 3(A) recommends that trial judges "encourage" counsel to meet in any case in which e-discovery is or is likely to be an issue.

When counsel fail to reach an agreement, the Guideline recommends that judges issue an order requiring the exchange of the basic informational foundation that will assist in tailoring e-discovery requests and moving the discovery process forward. While not all of these items may be needed in every case, the list provides the elements from which a state judge can select to craft an appropriate order.

In order to address concerns regarding the Delaware Default Order expressed by defense counsel, the Guideline inserts a standard of relevance.⁸ For example, unlike the proposed California rule and the Delaware Default Standard, it requires a list of only those electronic systems

⁷ Step 1: Counsel exchange basic information and become familiar with their client's information systems; Step 2: Counsel confer to attempt to resolve key discovery issues and develop a discovery plan; and Step 3: A hearing and order to memorialize the plan and determine unsettled issues.

⁸ Relevance in this context refers to a state's standard of relevance for discovery purposes, not the standard used to determine admissibility at trial.

on which relevant electronically-stored information may be stored or that were operating during the time periods relevant to the matters in dispute, rather than the broader "each relevant electronic system that has been in place at all relevant times." It is hoped that in this way, the burden on the responding party may be reduced by being able to focus solely on the systems housing the actual electronically-stored information or data that is or will be requested. Of course, the best way of limiting the burden is for counsel to agree in advance, thus obviating the need to issue a pre-conference order.

Subparagraph 2(B)(3) suggests that the parties be required to provide a general description of each electronic system that may contain relevant electronically-stored information. Ordinarily, such descriptions should include the hardware and software used by each system, and the scope, character, organization, and formats each system employs.

Subparagraph 2(B)(7) of the Guideline includes one issue not covered in the proposed California rule or Delaware Default Standard -- the form of production preferred by the party. [See the pending *Federal Rules of Civil Procedure* 26(f)(3) (2006).] Including an exchange of the format preferences early will help to reduce subsequent disputes over this thorny issue.

4. Initial Discovery Hearing Or Conference

Following the exchange of the information specified in Guideline 3, or a specially set hearing, or a mandatory conference early in the discovery period, a judge should inquire whether counsel have reached agreement on any of the following matters and address any disputes regarding these or other electronic discovery issues:

- A. The electronically-stored information to be exchanged including information that is not readily accessible;
- B. The form of production;
- C. The steps the parties will take to segregate and preserve relevant electronically stored information;
- D. The procedures to be used if privileged electronically-stored information is inadvertently disclosed; and
- E. The allocation of costs.

COMMENT: This Guideline is derived from Electronic Discovery Guidelines issued by the U.S. District Court for the District of Kansas. It addresses the next stage of the process, and lists for the trial judge some of the key issues regarding electronic discovery that the judge may be called upon to address. The intent is to identify early the discovery issues that are in dispute so that they can be addressed promptly.

5. The Scope Of Electronic Discovery

In deciding a motion to protect electronically-stored information or to compel discovery of such information, a judge should first determine whether the material sought is subject to production under the applicable standard for discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as:

- A. The ease of accessing the requested information;
- B. The total cost of production compared to the amount in controversy;
- C. The materiality of the information to the requesting party;
- D. The availability of the information from other sources;
- E. The complexity of the case and the importance of the issues addressed;
- F. The need to protect privileged, proprietary, or confidential information, including trade secrets;
- G. Whether the information or software needed to access the requested information is proprietary or constitutes confidential business information;
- H. The breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of additional such information is warranted;
- I. The relative ability of each party to control costs and its incentive to do so;
- J. The resources of each party compared to the total cost of production;
- K. Whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information;
- L. Whether the electronically-stored information is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and
- M. Whether the responding party has deleted, discarded, or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

COMMENT: This Guideline recommends that when a request to discover electronically-stored information is contested, judges should first assess whether the information being sought is subject to discovery under the applicable state code, rules, and decisions (e.g., whether the material sought is relevant to the claims and defenses of the party, or relevant to the subject matter under dispute, or could lead to admissible evidence). Once this question has been answered, the Guideline suggests that judges balance the benefits and burdens of requiring discovery, offering a set of factors to consider derived from the revised American Bar Association *Standards Relating to Civil Discovery*, Standard 29.b.iv. (August 2004). In so doing, it sets out a framework for decision-making rather than specific presumptions regarding "reasonably accessible" vs. "not reasonably accessible" data; active data vs. "deleted" information; information visible on-screen vs. meta-data; or forensic vs. standard data collection. *But see e.g.*, Pending Federal Rule of Civil Procedure 26(b)(2)(2006); The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles*, Principles 8, 9, and 12 (Silver Spring, MD: The Sedona Conference 2004). It is unlikely that all of the factors will apply in a particular case, though the first six will arise in most disputes over the scope of electronically stored information. *See e.g.*, *Public Relations Society of America, Inc. v. Road Runner High Speed Online*, 2005 WL 1330514 (N.Y. May 27, 2005).

Depending on the circumstances and the decision regarding the scope of discovery, the judge may wish to consider shifting some or all of the costs of production and review in accordance with the factors cited in Guideline 7, *infra*.

6. Form Of Production

In the absence of agreement among the parties, a judge should ordinarily require electronically-stored information to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable.

COMMENT: In conventional discovery, the form of production was seldom disputed. In electronic discovery, there are many choices besides paper. While a party could produce hard-copy printouts of all electronic files, doing so would likely hide metadata, embedded edits, and other non-screen information. It also would be voluminous and cumbersome to store, and costly to produce and search. On the other hand, producing all data in "native format" (i.e. streams of electrons on disks or tapes exactly as they might be found on the producing party's computer) would provide all the "hidden" data and be more easily stored, but would be just as difficult to search without the word-processing, e-mail, or database software needed to organize and present the information in a coherent form.

This Guideline is based on pending Federal Rule of Civil Procedure 34(b)(ii) and (iii) (2006). It recommends that parties should not be required to produce electronically-stored information in multiple formats absent a good reason for doing so. See also comment 12.c of *The Sedona Principles*. [The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles* (Silver Spring, MD: The Sedona Conference 2004).] Requests for multiple formats should be subject to the same cost-benefit analysis as suggested in Guideline 5.

The Guideline, like the pending Federal Rule, suggests rendition in the form in which the information is ordinarily maintained or in another form that is reasonably useable. The Guideline, thus, assumes that the information's standard format is reasonably usable or it would be of no benefit to the party who has produced it, but allows substitution of another format that may still be helpful to the requesting party. Whether the production of metadata and other forms of hidden information, are discoverable should be determined based upon the particular circumstances of the case.

7. Reallocation of Discovery Costs

Ordinarily, the shifting of the costs of discovery to the requesting party or the sharing of those costs between the requesting and responding party should be considered only when the electronically-stored information sought is not accessible information and when restoration and production of responsive electronically-stored information from a small sample of the requested electronically-stored information would not be sufficient. When these conditions are present, the judge should consider the following factors in determining whether any or all discovery costs should be borne by the requesting party:

- A. The extent to which the request is specifically tailored to discover relevant information;
- B. The availability of such information from other sources;
- C. The total cost of production compared to the amount in controversy;
- D. The total cost of production compared to the resources available to each party;
- E. The relative ability of each party to control costs and its incentive to do so;
- F. The importance of the issues at stake in the litigation; and
- G. The relative benefits of obtaining the information.

COMMENT: This Guideline reflects the analysis conducted in *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280 (S.D.N.Y. 2003)(*Zubulake III*), the leading federal case on the issue. The Court in *Zubulake* established a three-tiered test for determining when it is appropriate to require a requesting party to pay or contribute to the cost of producing discoverable material. The first tier is a determination of whether the electronically-stored information is accessible. The second tier is a determination that a less-costly method of obtaining the needed information such as restoration of a representative sample of the tapes, disks, or other storage media would not be feasible. The final step is a cost-benefit analysis similar to that recommended in Guideline 5 for determining the appropriate scope of discovery.

The *Zubulake* litigation involved a sex discrimination complaint in which the plaintiff requested e-mail messages beyond the approximately 100 pages produced by the defendants.

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"She presented substantial evidence that more responsive e-mail existed, most likely on backup tapes and optical storage media created and maintained to meet SEC records retention requirements. The defendants objected to producing e-mail from these sources, which they estimated would cost \$175,000 exclusive of attorney review time." Withers, K.J., *Annotated Case Law and Further Reading on Electronic Discovery* 17 (June 16, 2004).

The Court found the requested material to be relevant and ordered restoration of 5 of the total of 77 back-up tapes at a cost of approximately \$19,000. After determining that 600 of the restored messages were responsive to the plaintiff's discovery request, the Court ordered restoration of the remaining tapes at an estimated cost of \$165,954.67 for restoration and another \$107,695 for review, requiring the plaintiff to bear 25% and the defendants 75% of the costs of restoration and the defendants to pay 100% of the costs of reviewing the material for privileged information. *Id.*, 30.

Like Zubulake, the Guideline treats cost-shifting as a matter for the judge's discretion. (*But see* Texas Rule of Civil Procedure 196.4 which requires that whenever a court orders a responding party to produce information that is not 'reasonably available,' the court must require the requesting party to pay "the reasonable expenses of any extraordinary steps required to retrieve and produce the information.") It anticipates that the proposed cost/benefit analysis will both encourage requesting parties to carefully assess whether all the information sought is worth paying for, while discouraging the producing party from storing the information in such a way as to make it extraordinarily costly to retrieve.

8. Inadvertent Disclosure of Privileged Information

In determining whether a party has waived the attorney-client privilege because of an inadvertent disclosure of attorney work-product or other privileged electronically stored information, a judge should consider:

- A. The total volume of information produced by the responding party;
- B. The amount of privileged information disclosed;
- C. The reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information;
- D. The promptness of the actions taken to notify the receiving party and otherwise remedy the error; and
- E. The reasonable expectations and agreements of counsel.

COMMENT: Inadvertent disclosure of privileged information is sometimes unavoidable because of the large amounts of information that are often involved in electronic discovery, and the time and cost required to screen this voluminous material for attorney work product and other privileged materials. As indicated in Guideline 4, the best practice is for the parties to agree on

the process to use if privileged information is inadvertently disclosed and that such a disclosure shall not be considered a waiver of attorney-client privilege. While "claw-back" or "quick peek" agreements⁹ are not perfect protections against use of privileged information by third parties not subject to the agreement or by the receiving party in another jurisdiction, they do allow the litigation to move forward and offer significant protection in many cases, especially when coupled with a court order recognizing the agreement and declaring that inadvertent production of privileged information does not create an express or implied waiver. [See The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles*, Comment 10.d (Silver Spring, MD: The Sedona Conference 2004); and Report of the Judicial Conference Committee on Practice and Procedure, pp 33-34 (September 2005).]

This Guideline applies when the parties have not reached an agreement regarding the inadvertent disclosure of electronically stored information subject to the attorney-client privilege. The first four factors are based on *Allread v. City of Grenada*, 988 F.2d, 1425, 1433, 1434 (5th Cir. 1993). [See also *United States v. Rigas*, 281 F. Supp. 2d 733 (S.D.N.Y. 2003)]. The fifth factor listed by the Court in *Allread* – "the overriding issue of fairness" – is omitted, since the four factors listed help to define what is fair in the circumstances surrounding a disclosure in a particular case, but the reasonable expectations and agreements of counsel has been added to reinforce the importance of attorneys discussing and reaching at least an informal understanding on how to handle inadvertent disclosures of privileged information.

Unlike Texas Rule of Civil Procedure 193.3(d) and the most recent revisions to Federal Rule of Civil Procedure 26(b)(5)(B), the Guideline does not create a presumption against a waiver when, within 10 days after discovering that privileged material has been disclosed, "the producing party amends the response, identifying the material or information produced and stating the privilege asserted." While the Texas rule has apparently worked well, creation of a presumption is a matter for state rules committees or legislatures and goes beyond the scope of these Guidelines.

9. Preservation Orders

- A. When an order to preserve electronically-stored information is sought, a judge should require a threshold showing that the continuing existence and integrity of the information is threatened. Following such a showing, the judge should consider the following factors in determining the nature and scope of any order:
- (1) The nature of the threat to the continuing existence or integrity of the electronically-stored information;
 - (2) The potential for irreparable harm to the requesting party absent a preservation order;

⁹ Claw-back agreements are a formal understanding between the parties that production of privileged information is presumed to be inadvertent and does not waive the privilege and the receiving party must return the privileged material until the question is resolved. Under "quick peek" agreements, counsel are allowed to see each other's entire data collection before production and designate those items which they believe are responsive to the discovery requests. The producing party then reviews the presumably much smaller universe of files for privilege, and produces those that are responsive and not privileged, along with a privilege log. K.J., Withers, "Discovery Disputes: Decisional Guidance," 3 Civil Action No. 2, 4,5 (2004).

- (3) The capability of the responding party to maintain the information sought in its original form, condition, and content; and
- (4) The physical, technological, and financial burdens created by ordering preservation of the information.

- B. When issuing an order to preserve electronically stored information, a judge should carefully tailor the order so that it is no broader than necessary to safeguard the information in question.

COMMENT: One consequence of the expansion in the volume of electronically-stored information resulting from the use of computer systems, is the reliance on automated data retention programs and protocols that result in the periodic destruction of defined types of files, data, and back-up tapes. These programs and protocols are essential for smooth operation, effectively managing record storage, and controlling costs. The factors for determining when to issue a preservation order apply after existence of a threat to the sought information has been demonstrated. They are drawn from the decision in *Capricorn Power Co. v. Siemens Westinghouse Power Corp.*, 220 F.R.D. 429 (W.D. Pa. 2004). They require balancing the danger to the electronically stored information against its materiality, the ability to maintain it, and the costs and burdens of doing so.

Because electronically-stored information, files, and records are seldom created and stored with future litigation in mind, they cannot always be easily segregated. An order directing a business to "halt all operations that can result in the destruction or alteration of computer data, including e-mail, word-processing, databases, and financial information . . . can effectively unplug a computer network and put a computer dependent company out of business." K.J. Withers, "Electronic Discovery Disputes: Decisional Guidance," 3 *Civil Action* No. 2, p.4 (NCSC 2004). Thus, the Guideline urges that when a preservation order is called for, it should be drawn as narrowly as possible to accomplish its purpose so as to limit the impact on the responding party's operations.

10. Sanctions

Absent exceptional circumstances, a judge should impose sanctions because of the destruction of electronically-stored information only if:

- A. There was a legal obligation to preserve the information at the time it was destroyed;
- B. The destruction of the material was not the result of the routine, good faith operation of an electronic information system; and
- C. The destroyed information was subject to production under the applicable state standard for discovery.

Guidelines For State Trial Courts Regarding Discovery Of Electronically-Stored Information

COMMENT: This Guideline closely tracks pending Federal Rule of Civil Procedure 37(f) (2006), but provides greater guidance to courts and litigants without setting forth the stringent standards suggested in the *Sedona Principles* ["a clear duty to preserve," "intentional or reckless failure to preserve and produce," and a "reasonable probability" of material prejudice]. [The Sedona Conference Working Group on Best Practices for Electronic Document Retention and Production, *The Sedona Principles*, Principle 14 (Silver Spring, MD: The Sedona Conference 2004).]

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PRESERVATION OF EVIDENCE AND AVOIDING SPOILIATION SANCTIONS

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Preservation of Evidence and Avoiding Spoliation Sanctions

Presented by: John Mullen, Esq.
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Sanctions

- **Duty:** Arises when party should know litigation is reasonably certain to ensue. (often pre-complaint)
- Affirmative obligation to preserve data. (active, back-up, deleted?)
- Reasonableness Standard (culpability and prejudice)
- Standard of Review: Abuse of Discretion



Sanctions

- Adverse Inferences
 - Content of deleted emails; against interest (Morgan Stanley)
- Exclude Evidence (witnesses, documents)
- Direct Verdict
- Attorney Sanctions (intentionally deleted client files)



Preservation/Avoiding Sanctions

- Litigation Hold (cease deletions and overwriting; freeze data; clear written instructions to client) (repeat....).
- Authorize counsel to meet with key players and IT specialists to implement Hold. (avoid bad faith).



Preservation/Avoiding Sanctions

- Counsel must understand e-discovery rules, client's network/computer system and retention policies (checklists).
- Collect information as early as possible.
- Build e-discovery into litigation management requirements (reporting/budget, avoid bad faith).
- Oversee ongoing compliance with Litigation Hold.



Last Thoughts

- Be proactive/assume the worst.
- Send adversary preservation letter.
- Know how to use e-discovery as a sword. (Plaintiff on earlier notice of likely litigation ?).



Last Thoughts

- Negotiate agreement or petition Court
- Higher costs (client and carrier time; attorney and consultant fees).
- Higher risks (liability (fishing)/bad faith).
- Don't ignore and hope it goes away.





PRODUCTION OF NOT REASONABLY ACCESSIBLE DATA

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Production of Not Reasonably Accessible Data

Presented by: Julie Negovan, Esq.
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Rule 26(b)(2)(B) – The Two-tier System

- Rule 26(b)(2)(B) authorizes a party to not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.
- If the requesting party, upon motion, seeks discovery from an identified source, the responding party must show that the sources are not reasonably accessible. Even if the responding party meets the burden, the court may still order discovery if the requesting party shows good cause.



Rationale of the Rule

- Prevents the cost of discovery from getting out of hand
- Distinguishes for the first time between two types of ESI (accessible and inaccessible) based on a flexible definition



Sources of Data

- Communication systems
- Financial systems
- Facilities/transportation systems
- Application systems
- Back up systems
- Archive systems
- Residual data/metadata throughout all systems



Two Types of Data

- Data that is accessed in the ordinary course of business.
- vs.
- Data that is not routinely retrieved or used for business purposes.

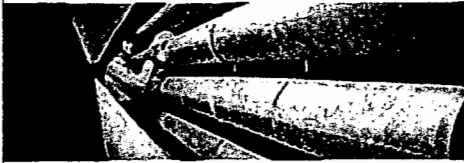


"not reasonably accessible"

- ESI that can only be located and retrieved with substantial effort and expense
- Does not necessarily mean ESI that is not used in the ordinary course of business



The future may not look like this



Substantial Effort

- Measure by computer hours to retrieve
- Measure by hardware needed to be moved, modified
- Measure by software needed to be purchase/modified
- Measure by man-hours needed to review output



Undue Cost

- Measure relative to the value of the case
- Measure relative to likelihood of finding relevant information
- Measure relative to the parties' ability to pay



Responding to an ESI Request Which Includes Inaccessible Data

- Must only identify the sources of inaccessible data requested, *i.e.*, back up tapes, legacy data, deleted data, etc.,
- No need to identify the contents of the inaccessible data.
- State why is it not accessible – substantial effort or undue cost (better say both)



Good Cause Supporting Production of Inaccessible Data

- Good Cause -- the benefits of discovery outweigh the burdens and costs of production
 - specificity of discovery request
 - information available from other sources
 - previous spoliation by a party
 - importance of issues in the litigation
 - respective resources of the parties



Burdens

- Requesting party must be specific as to information required
- Responding party must respond with "sources" of inaccessible, but potentially responsive information and state why it is inaccessible (effort and cost)
- Requesting party must show good cause for requiring the production



Compromises

- Sampling inaccessible data
- Cost sharing
- Cost shifting





COST-SHIFTING: WHO PAYS FOR ALL OF THIS?

written and presented by:

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Cost – Shifting: Who pays for all of this?

Presented by: Sarah Kelly, Esq.
Cozen O'Connor



Cost of E-Discovery:

- 1.8 billion so far in 2006, in commercial litigation
(*National Law Journal* estimate)



Rule 26 (b)(2)(B)

No need to provide ESI that is
"not reasonably accessible."

Test of reasonable accessibility is
"undue burden or cost."

Court may order production, specifying conditions,
"for good cause."



Comment to Rule amendment:

- Produce ESI that is relevant, not privileged and reasonably accessible
- Identify, by category and type, sources of ESI that responding party is not
 - searching
 - producing
- Provide enough detail to evaluate
 - burden/cost of providing the discovery
 - likelihood of finding responsive information



Comment, cont'd

Presumption

- ESI from reasonably accessible sources will satisfy discovery needs, "in many cases."



Comment, cont'd

Upon motion (to compel or for protective order)

- Responding party has burden to show inaccessibility because of undue burden or cost
- Requesting party may then attempt to show "good cause"



Comment, cont'd

Consideration for determining motions:

- (1) specificity of discovery request
- (2) quantity of information available from other, or more accessible, sources
- * (3) failure to produce relevant information that seems likely to have existed, but is no longer available from more accessible sources
 - “the punishment factor”



Comment, cont'd

- (4) likelihood of finding relevant, responsive information that can not be obtained from other more accessible sources
- (5) “predictions” as to the importance/usefulness of the additional information
- (6) importance of issues at stake in the litigation
- (7) parties’ resources



Comment, cont'd

Court may order discovery in order to decide motion!

- Sampling of inaccessible sources
 - To determine burdens/costs of accessing
 - To determine what relevant information may exist in the sources
 - To determine its value to the litigation in light of other sources of information



Comment, cont'd

Court may:

- limit amount, type and sources of information required to be accessed and produced
- require payment by requesting party of part or all of costs of obtaining information from sources not reasonably accessible
- weigh requesting party's willingness to share or bear costs to access information
- weigh producing party's burdens in reviewing information for relevance and privilege



Comment, cont'd

Other limitations of Rule 26(b)(2)(c) apply:

- not if unreasonably cumulative or duplicative
- not if obtainable from another source that is
 - more convenient
 - less burdensome
 - less expensive



Comment, cont'd

- not if seeking party has had ample opportunity to obtain information
- not if burden/expense outweighs benefit, based on
 - needs of case
 - amount in controversy
 - parties' resources
 - importance of issues
 - importance of discovery in resolving issues



Sedona Principles:

- ☐ If e-discovery burdens are not made proportional to amount in controversy and nature of case, transaction costs will overwhelm ability to resolve disputes fairly.
- ☐ This includes consideration of :
 - costs of attorney time for review
 - non-monetary costs such as privacy of business data, legal privileges and the like
 - secondary costs, such as burden on IT personnel



Zubulake factors

1. Extent request is tailored to discovery of relevant information
 - (but if not, why permit at all?)
2. Availability of information from other sources
3. Cost of production v. amount in controversy
4. Cost of production v. resources of party
5. Abilities of and incentives for parties to control costs
6. Importance of issues at stake
7. Benefit to party of obtaining information



Zubulake factors cont'd

- One court has added:
 - Importance of discovery to resolving issues at stake in litigation
 - ☐ (isn't this just relevance, all over again?)



Zubulake factors cont'd

- ☐ *Zubulake* court did not think costs of production should include cost of attorney review for privilege, relevance, privacy, etc.
- ☐ But, *Zubulake* also did not include the "punishment factor"
 - ☐ # 3 from Comment to Rule 26
 - ☐ (failure to produce information that once existed in more accessible form)



Rule 45: Cost-shifting in Third Party Discovery

- Subpoena-issuer must avoid imposing undue burden/expense on third party
- Court shall protect from significant expense
- Factors
 - Relevance
 - Need of party for documents
 - Breadth/time period of requests
 - Particularity with which documents are described
 - Burden on producing party to separate responsive from privileged or irrelevant matter



Rule 45: Cost-shifting in Third Party Discovery, Cont'd

- Financial resources of non-party
- Interest of non-party in litigation, if any
- Reasonableness of expense of production



Costs in some cases

- ☐ \$396,000 to select, catalog, restore and process a sampling of email
 - ☐ \$43,000 to \$84,000 to produce requested email
 - ☐ \$395,000 to produce requested email
- Costs did not include time for attorney review

Hopson v. Mayor and City Council of Baltimore, 232 F.R.D. 228 (D.Md. 2005) (citing cases)



- ☐ "No corporate president in her right mind would fail to settle a lawsuit for \$100,000," if cost of e-discovery would be \$300,000.

☐ *McPeck v. Ashcroft*, 202 F.R.D. 31, 35 (D.D.C. 2001)



The Cutting Edge of ESI: Cost-Containment

- Rule amendments will reduce some costs, and increase others
- Real cost containment strategies are:
 - What companies do before litigation to manage ESI
 - What they do in discovery to leverage tools and resources



Cost-Containment, cont'd

- Create greater efficiency and cut costs:
 - Develop document retention policy addressing routine backup-storage and deletion of ESI
 - Has support of proposed Rule 37(f)
- Reduce reliance on expensive back-up tapes:
 - "Proactive On-Line Archiving:" instant archiving of electronic communications as they are sent or received.



Cost-Containment, cont'd

- Reduce costs by internalizing some costs of litigation production and review
- Create internal litigation support unit staffed by attorneys and technical consultants to perform time consuming tasks of collecting electronic data and implementing retention policy or litigation holds
- Internal team creates efficiencies and leverages institutional knowledge by preserving, indexing and managing the source and contents of back-up data



Cost-Containment, cont'd

- New rules promote variation on this approach by placing a premium on early assessment and description of computer systems and ESI
- Companies with dedicated resources will take a consistent, strategic approach





COST EFFECTIVE APPROACHES TO LOCATING RESPONSIVE AND RELEVANT DATA

written and presented by:

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Cost Effective Approaches to Locating Responsive and Relevant Data

Presented by: Christa Iannone, Cozen O'Connor,
Director, Practice Support



Quick Facts

- > 80% of Electronic Documents are never printed. *
- > In 2006, 60 Billion email messages were sent each day. **
- > 1 CD can hold approximately 55,000 – 75,000 pages
- > 1 15 gig hard drive can hold approx. 1.2-1.5 Million pages
- > 1 Back Up (40 gig) Tape can hold 3 - 4 Million pages

* Lending, Jeff Practical Guidance for Conducting Electronic Evidence Discovery.
** Stat Probing, LLC



Defensible Collection

- > Must have data collection plan!
- > Identify all potential Players (prioritize key players and review first which may uncover new strategies)
- > Interview all potential Players and IT Staff (understand how the company network is structured and how each individual creates and saves his/her data)
- > Where is the data located (multiple office sites, storage locations)
- > Proper chain of custody documented
- > Metadata is preserved and not inadvertently altered



DEFENSIBLE COLLECTION
"Avoid Spoliation"

- Harvesting – Captures Active Data by using specific software that preserves metadata. Could be handled by knowledgeable Client IT staff or Outside Expert
- Forensic Image – Uses specific tools to take a bit stream copy "image" of data on hard drive. Allows for recovery of deleted data. Searches slack and unallocated space.



Potential Data Sources

- ✓ Network Servers ("Group Shares", "My Documents", Email)
- ✓ Desktops
- ✓ Laptops
- ✓ Home Computers
- ✓ Backup Tapes
- ✓ Legacy Systems
- ✓ Cell phones
- ✓ Voicemail
- ✓ Personal Digital Assistants (Blackberry's, Palm Pilots)
- ✓ Floppy CDs, DVDs,



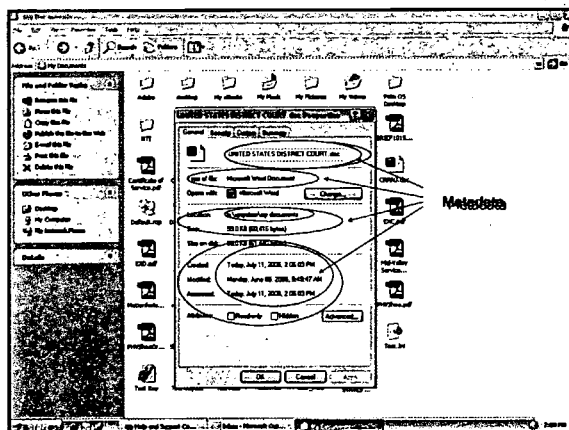
Active Data

- Files created and saved by the user in places such as:
 - ✓ Email (Inbox, Sent Items, Deleted Items, Personal Folders, Calendar, Tasks)
 - ✓ My Documents (Word, Excel, Databases, Powerpoints, pdfs, faxes, CAD drawings, Pictures)
 - ✓ Shared Network Folders (Departments, File/Claim Numbers)



Metadata

- > "Tells the story "What lies beneath"
- > Who, What, Where, When, and How
- > Eliminates questions re: authenticity
- > Streamlines document review and discovery
- > Enables Quick Privilege Review and Log
- > Eliminates Imaging, Coding and OCR
- > Identifies distribution lists and email aliases



Approaches to locating Relevant Data

- > 15-20% of Data Collected is Relevant
- > Remove all system files (*No value to the case, enables the applications and computers to run*)
- > Remove Duplicates "MD5-Hash Value"
- > Filter Data for relevant time period
- > Filter by "agreed upon" Search Terms



Relevancy and Privilege Review Options

- Print and review in hard copy
- Vendor Supported On-Line View Tool (*more collaboration tools, multiple review locations and review teams, easy redactions*)
- Litigation Support Software (*Concordance/Summation; Less functionality but works*)
- Native Review vs. TIFF Image Review



Production Decisions

- Steered by Rule 26F Conference
- Native Production – Files Produced in Same format as original (no applied redactions, no bates, ability to alter data). ****Be Careful, data dump****
- TIFF or PDF Production
- Producing Metadata? If so, which fields



Considerations when Engaging Outside Consultants

- All Parties involved in decision making? - Outside Counsel, In-house Counsel, Practice Support, Client IT, Outside Experts
- Understand their pricing model
- In their best interest to maximize volume
- Forensic or Active Data Collection?
- Will the expert deliver what they've promised and do you understand what your getting in return?
- Understand the experts processing and turnaround time?
- In-house or web hosted review?



10 Effective Measures to Take Right Now to Control Costs

- 1) Data Management must be supported by Corporate Leadership
- 2) Written Document Retention Policy for Electronic and Paper
- 3) Enforce the Document Retention Policy
- 4) Documentation of all hardware ownership and locations
- 5) Proper documentation when employee terminates/transfers
- 6) Establish Records Management Department
- 7) Initiate In-House Litigation Response Team
- 8) Do Not Keep Excessive Back Up Tapes
- 9) Limit Employee Mailbox and Home Directory Sizes
- 10) Seriously Consider Investing in Software that enables you to
Standardize Collection Procedures and Protocols





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THE NEW SAFE HARBOR PROVISION
presented by: David Walton, Esquire

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**E-Discovery Amendments to the Federal Rules
of Civil Procedure –
Are You Prepared?**

The Rittenhouse Hotel
Philadelphia, PA
January 25, 2007

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SAFE HARBOR PROVISIONS

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Rule 26(b)(2)(B)

- The following chart shows the possible impact of the proposed rules regarding preservation and production on typical sources of electronically stored information using current technology.




Information Source	Accessible w/o Undue Burden/ Cost?	Must Intervene to Preserve?	Must Produce w/o Order?
Active e-mail	Yes	Yes (key actors and issues)	Yes
Databases, websites	Not necessarily	Depends	Not necessarily
Near-line archival storage	Probably	Yes (key actors and issues)	Yes
Deleted data on hard drives	No	No	No
Magnetic Disaster Recovery Tapes	No	Not unless known to contain unique information	No
Off-line storage	Probably	Yes (key actors and issues)	No



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


- **(f) Electronically Stored Information.**

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.



Rule 37(f) – Safe Harbor

- In perhaps the most controversial provision of the amendments, proposed Rule 37(f) requires that, absent exceptional circumstances, courts refrain from imposing rules-based sanctions upon a party for the destruction of electronically stored information destroyed due to the "routine-good-faith operation of an electronic information system".
- The possible impact of Rule 37(f) may thus be summarized as follows on the next chart.



Rule 37(f) – Safe Harbor

Information Source	Accessible w/o Undue Burden/ Cost?	Must Intervene to Preserve?	Sanctions if Lost?
Active e-mail accounts	Yes	Yes (for key actors and issues)	Not if lost due to routine operations
Databases, websites	Not necessarily	Depends. Yes, if known to be essential to issue	Not if lost due to routine operations
Near-line archival storage	Probably	Yes (for key actors and issues)	Not if lost due to routine operations
Deleted data on hard drives	No	No	No
Magnetic Disaster Recovery Tapes	No	No, unless known to contain unique information	No
Off-line storage	Probably	Yes (for key actors and issues)	No



- **New Subdivision (f)** focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use.
- Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation.
- As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Absent exceptional circumstances, sanctions cannot be imposed for loss of ESI resulting from routine, good-faith operations.



Rule 37(f)

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



- Routine operations may include grooming, aging or archiving rules.
- Space management considerations perhaps the most common basis for routine deletion. Any file can be set up to purge after a period of time.
- Answer is not always to secure larger hard disks to retain more data.



- "Overwriting" – reuse of tapes may involve full rewrite/erase from beginning to end.
- "Round robin" backup strategy.
- Microsoft Outlook – includes e-mail, calendar, contacts and notes.
- Volume of pre- and post-filtering data (as well as deleted material) on a daily or monthly basis.



Rule 37(f)

- Protection provided by Rule 37(f) applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.
- State based spoliation remedies and other sanctions may still be available.



Rule 37(f)

- For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or provide substitutes or alternatives for some or all of the lost information.



Rule 37(f)

- Rule 37(f) restricts the imposition of "sanctions."
- Does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information.



B

2007 E-Discovery Seminar: E-Discovery Amendments to the Federal Rules of Civil Procedure—Are You Prepared
to Comply with the New Rules?

January 25, 2007

David J. Walton, Esq.

Joy F. Grese, Esq.

State Court and Local U.S. District Court Rules On Electronic Discovery

JURISDICTION	SUMMARY
Eastern and Western Districts of Arkansas Local Rule 26.1	Requires that parties file with the court a Rule 26(f) report that includes the parties' views and proposals regarding whether any party will likely be requested to disclose or produce information from electronic or computer-based media, and, if so, whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business; the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business; the format, media and procedures agreed to by the parties for the production of such data; whether "reasonable measures" have been taken to preserve potentially discoverable evidence; and any problems the parties anticipate with electronic or computer-based discovery.
District of Delaware, <i>Default Standard for Discovery of Electronic Documents</i>	While it is expected that the parties will reach agreement on how to conduct "e-discovery" by the time of the Rule 16 scheduling conference, the default standard shall apply if no agreement is reached. The standard requires that the parties discuss the parameters of anticipated e-discovery at the Rule 26(f) and Rule 16 conferences. Moreover, the standard requires the exchange of information prior to the Rule 26(f) conference, including identification of custodians of relevant electronic materials, electronic systems in place at all relevant times, a "retention coordinator," and an "e-discovery liaison." The standard also requires that the parties provide notice of any anticipated problems in connection with electronic discovery. The standard provides for a sequenced e-discovery process which postpones searches of documents identified of limited

	<p>accessibility until after a search of other responsive electronic documents. On-site inspections of electronic media are not permitted absent exceptional circumstances, where good cause and specific need have been demonstrated. A search methodology, including words, terms, and phrases to be searched, must be agreed upon by the parties. If the parties cannot agree otherwise, electronic files are to be produced as image (PDF or TIFF) files without removal of original formatting, metadata, or revision history. The standard also outlines the steps that retention coordinators should take to segregate and preserve the integrity of all relevant electronic documents. Parties are directed to return inadvertently produced privileged documents. Costs are generally to be borne by each party, but the court will apportion costs upon a showing of good cause.</p>
<p>Middle District of Florida Local Court Rule 3.03(e)</p>	<p>Requires that litigants' counsel should utilize computer technology to the maximum extent possible in all phases of litigation, <i>i.e.</i>, to serve interrogatories on opposing counsel with a copy of the questions on computer disk in addition to the required printed copy.</p>
<p>District of Kansas, <i>Electronic Discovery Guidelines</i></p>	<p>Prior to the Rule 26(f) conference, counsel should become knowledgeable about their client's information management systems and their operation and should make a reasonable attempt to review their client's electronic information files to ascertain their contents. Disclosures pursuant to Fed.R.Civ.P. 26(a)(1) must include electronic information. Counsel shall review with their clients the client's electronic information files to determine what information may be used to support claims or defenses. Counsel shall also identify individuals with knowledge of their clients' electronic information systems who can facilitate the location and identification of discoverable electronic information. A party seeking discovery of computer-based information must notify the opposing party immediately. During the Rule 26(f) conference, the parties shall confer and attempt to reach agreement regarding preservation of information; e-mail discovery and e-mail search protocol; handling of deleted, backup and archival information; allocation of costs; format and media for production; and handling of inadvertently disclosed privileged material.</p>

<p>District of New Jersey Local Civil Rule 26.1(d), <i>Discovery of Digital Information Including Computer-Based Information</i></p>	<p>Prior to the Rule 26(f) conference, counsel must inquire into their client's information management systems in order to understand how information is stored and how it can be retrieved. Counsel must further review with the client the client's information files, including historical and back-up files, in order to determine what must be disclosed. Counsel must also identify a person or persons knowledgeable about the client's information management systems with the ability to facilitate reasonably anticipated discovery. A party seeking electronic discovery must notify the opposing party as soon as possible, but no later than the Rule 26(f) conference, of the categories of information which may be sought. During the Rule 26(f) conference, the parties must also confer and attempt to agree on electronic discovery issues, including: preservation and production of digital information; procedures for dealing with inadvertent production of privileged digital information; whether restoration of deleted digital information may be necessary; whether backup or historic legacy data is within the scope of discovery; the media, format and procedures for producing digital information; and who will bear the cost of preservation, production and restoration (if necessary) of any digital discovery.</p>
<p>Southern and Eastern Districts of New York Local Civil Rule 26.3(c)(2)</p>	<p>Defines "document" to include electronic or computerized data compilations.</p>
<p>Middle District of Pennsylvania Local Rule 26.1, <i>Duty to Investigate and Disclose</i></p>	<p>Prior to the Local Rule 16.3 conference of attorneys, counsel shall inquire into the computerized information management systems used by their clients so that they are knowledgeable of those systems' operation. At the same time, counsel shall inform their clients of the need to preserve electronic information so that relevant information is not destroyed. In making Rule 26(a)(1) disclosures, the parties must disclose information and files stored within their computerized information management systems to the same extent they would be required to disclose information stored by other means. During the Rule 16.3 conference of attorneys, in addition to those matters described in that rule, counsel shall discuss and attempt to reach agreement regarding: preservation of electronic information; scope of e-mail discovery and e-mail search protocol; whether restoration of deleted information is needed and who will bear cost of</p>

	<p>restoration; extent to which back-up and archival data is needed and who will bear cost of obtaining that data; anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business and allocation of costs; format and media for producing electronic information; and how to handle inadvertent disclosure of privileged electronic information. If the parties can't agree on these matters, counsel shall note the disagreement in Section 10 of the joint case management plan.</p>
<p>District of Wyoming Local Civil Rule 26.1(e), <i>Computer- Based Discovery</i></p>	<p>Prior to the Rule 26(f) conference, counsel shall carefully investigate their client's information management system so that they are knowledgeable as to its operation, including how information is stored and how it can be retrieved. Counsel must review their client's computer files to determine the contents, including archival and legacy data, and disclose in initial discovery the computer-based evidence which may be used to support claims or defenses. A party seeking discovery of computer-based information must notify the opposing party immediately, but no later than the 26(f) conference and identify the categories of information which may be sought. During the Rule 26(f) conference, the parties must confer regarding steps they will take to preserve computer-based evidence; scope of e-mail discovery, e-mail search protocols, and inadvertent production of e-mail messages; and whether restoration of deleted or backup data is expected, and the cost of any such restoration.</p>
<p>California Code of Civil Procedure §§ 2016.020, 2017.710, 2017.730. 2017.740</p>	<p>Section 2016.020 defines "document" and "writing" to include "transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing."</p> <p>Section 2017.710 defines "technology" to include "telephone, e-mail, CD-ROM, Internet Web sites, electronic documents, electronic document depositories, Internet depositions and storage, videoconferencing, and other electronic technology that may be used to improve communication and the discovery process."</p> <p>Section 2017.730 states that the parties must agree, or the court must make findings, as to the propriety of electronic discovery before ordering discovery in an electronic format.</p> <p>Section 2017.740 addresses the potential appointment of an electronic discovery "service provider."</p>

Illinois Supreme Court Rules 201(b)(1) and 214	<p>"Document" is defined to include all retrievable information in computer storage. A party responding to a written request for documents must produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form.</p>
Maryland Rule of Civil Procedure 2-504.3	<p>Defines electronic information in terms of "computer-generated evidence," with focus on admissibility at trial, rather than discoverability.</p>
Supreme Court of Mississippi Rule 26(b)(5), <i>Electronic Data</i>	<p>Rule 26(b)(5) requires that, to obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.</p>
New Jersey Rules of Civil Practice, 4:10-2, 4:18-1, 4:23- 6	<p>These provisions are closely patterned after the proposed amendments to the Federal Rules. They provide that a party who asks for electronically-stored data can specify the form of its production but cannot insist it be produced in more than one form. Generally, information should be produced in the form in which it is ordinarily kept or in a "reasonably usable" form. A party is excused from disclosing electronic information that might be technically recoverable but is not reasonably accessible because of undue burden and cost. The rules provide a shield against sanctions for failing to disclose data "lost as a result of the routine, good faith operation of an electronic information system." When privileged information is inadvertently disclosed, the one who made the inadvertent disclosure must notify the recipient and state the basis for the protection. The recipient must return, sequester or destroy the material. The rules provide a procedure for resolving any dispute as to the existence of the privilege or protection. The court is allowed to rein in the frequency or extent of discovery where the burden or expense outweighs the benefit, based on the needs of the case, the parties' resources, the importance of the issues and the importance of the discovery, and when the discovery is unreasonably cumulative or duplicative.</p>

<p>§ 202.70 New York Rules of the Commercial Division of the Supreme Court, Rule 8</p>	<p>This rule requires that, prior to the preliminary conference, counsel shall confer with regard to anticipated electronic discovery issues. Such issues shall be addressed with the court at the preliminary conference and shall include but not be limited to implementation of a data preservation plan; identification of relevant data; the scope, extent and form of production; anticipated cost of data recovery and proposed initial allocation of such cost; disclosure of the programs and manner in which the data is maintained; identification of computer system(s) utilized; identification of the individual(s) responsible for data preservation; confidentiality and privilege issues; and designation of experts.</p>
<p>Texas Rule of Civil Procedure 196.4, <i>Electronic or Magnetic Data</i></p>	<p>To obtain discovery of electronic or magnetic data, a party must specifically request production of electronic or magnetic data and specify the form in which the party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available in its ordinary course of business. If the responding party cannot – through reasonable efforts – retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders production, it must also order that the requesting party pay reasonable expenses of any “extraordinary steps” required for production.</p>



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