Two Tiers and a Safe Harbor:
Federal Rulemakers Grapple with E-Discovery

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Five years ago, in October of 1999, a small group of judges, lawyers, and academics met at a country inn Kennebunkport, Maine and congratulated themselves on a job well done. The little celebration was well-deserved. Federal Circuit Judge Paul Niemeyer of the Fourth Circuit gave the group a step-by-step account of the dramatic and close vote recently taken by the Judicial Conference of the United States, approving all but one of the group's recommended amendments to the Federal Rules of Civil Procedure. These amendments were extensive and years in the making. They represented, at the time, a culmination of efforts to narrow the scope of discovery, which many perceived to be overbroad, and to impose judicial oversight on the discovery process, which many perceived to be burdensome.

The amendments bifurcated the scope of discovery. Discovery of information relevant to the "claims and defenses" of the parties would be allowed as of right, but broader discovery of information "relevant to the subject matter" would be allowed only upon "good cause shown." The amendments instituted pre-discovery disclosure of all documents that the disclosing party may use to support its claims or defenses. And the amendments reminded judges that all discovery requests are subject to limitations that

balanced the likely benefits and burdens. The one proposed amendment that did not get Judicial Conference approval was an explicit reference to "cost bearing" as a mechanism for balancing those benefits and burdens.

But shortly after Judge Niemeyer raised his glass to toast his fellow members of the Civil Rules Advisory Committee on a job well done, they were back at work. The next morning, members of the Discovery Subcommittee met informally at breakfast and discussed a new issue that had emerged from the just-completed round of public comments and testimony on the rules amendments. That issue was the discovery of electronically stored information-- or "electronic discovery," as it was beginning to be called in the literature. Over scrambled eggs and coffee, Discovery Subcommittee members began to focus on the emerging problems related to the volume of electronic data that may be subject to discovery; the inaccessibility of much of the data; the definition of a "document" with reference to computer data; costs, privilege and the potential for privilege waiver; and determining the scope of electronic discovery. They came to the conclusion that this issue needed further study, but promptly. The notes from that meeting say, "Sooner rather than later... 3 years is the fastest track. This should be a 4-5 year project."

During 2000, the Civil Rules Advisory Committee sponsored two "mini-conferences" – one in San Francisco and one in Brooklyn. At these two conferences, the Advisory Committee heard from diverse segments of the bar, technologists, and judges with practical experience in electronic discovery. During 2001 and into 2002, the Federal

Judicial Center surveyed and interviewed federal magistrate judges, who were most likely to have had experience with electronic discovery disputes. During this period a general consensus emerged among the judiciary (although not universally shared with practitioners, especially the corporate defense bar) that rules amendments were not yet in order. The reasons for this hesitation were that the amendments approved in 1999, which went into effect in December 2000, needed to be assimilated by the bar and judiciary alike, and might address many of the concerns raised in the context of electronic discovery. Second, the amendments themselves encouraged judicial management of discovery and a body of case law would likely develop to address electronic discovery concerns. Third, information technology was developing at such a rapid pace that any amendment to the Rules of Civil Procedure related to any specific technology would likely be rendered obsolete by the time it took effect.

During 2002 and 2003, however, events overtook the deliberate pace of the Advisory Committee's study. Local federal district courts and some states began to discuss rules specifically addressing electronic discovery. The American Bar Association and other groups, most notably The Sedona Conference, published recommended "best practices" in the area. The Federal Judicial Center published the Civil Litigation Management Manual and began extensive revision of the Manual for Complex Litigation, both of which contained sections devoted to electronic discovery. Bar associations, legal publishers, and litigation support vendors held scores of conferences and seminars across the country, and many of the Advisory Committee members themselves were invited to participate as panelists and observers. With these developments, along with the increase

in the number of reported cases dealing with electronic discovery increased, the consensus appeared to shift in favor of some recognition within the federal rules that electronic discovery is a unique phenomenon.

In September 2002, the Discovery Subcommittee issued a memorandum and letter to approximately 250 leading practitioners and academics, soliciting their views on electronic discovery. In September 2003 the Subcommittee followed up with a more detailed letter containing a number of "straw proposals" for rules changes in an effort to solicit reaction to specific language. The Subcommittee received more than sixty written responses which overwhelmingly supported amending the federal rules to one degree or another. The responses were also overwhelmingly representative of the organized corporate defense bar. In February 2004 the Advisory Committee organized a final conference at Fordham Law School in New York City, which was on a much larger scale than the earlier "mini-conferences." The Advisory Committee invited more than 200 people and organized two days of panel discussions on every aspect of electronic discovery. The audience was encouraged to participate actively in the discussions and voice its opinions regarding the wisdom of a number of possible amendments to the civil rules. The proceedings were recorded and resulted in a report from the Discovery Subcommittee to the Civil Rules Advisory Committee dated April 6, 2004, followed by a report from the Advisory Committee to the Standing Committee on Rules of Practice and Procedure dated May 17, 2004, which contained, for the first time, proposed amendments. [1] A review of the documentary history of this extraordinary process shows the evolution of the Advisory Committee's thinking on electronic discovery.

Some of the proposed amendments, considered noncontroversial, remain virtually unchanged from when they were first floated in the letters and responses. Other proposals have gone through significant changes and are almost unrecognizable from the form in which they first appeared.

But the Standing Committee did not simply approve the Advisory Committee's set of proposed amendments. While the Standing Committee voted in June of 2004 to approve the entire set for publication in August of 2004, the more controversial amendments were sent back to the Advisory Committee for further changes before publication.

This process is far from concluded. The proposed amendments are now published and public comment will be accepted until February 15, 2004, when the Advisory Committee will have the task of synthesizing the comments and reporting back to the Standing Committee with any refinements. While the Standing Committee may then vote to approve the proposed amendments and pass them on to the Judicial Conference, there is a possibility that any of the proposals that generate significant opposition or requests for further revisions may be reformulated and republished for further public comment. Even if the Standing Committee approves the amendments and passes them on to the Judicial Conference, the Conference itself must review them (as it did in 1999) before passing them on to the Supreme Court. After its review, the Supreme Court must submit the Amendments to Congress, which has the power to act on them independently if it wishes. When all is said and done, the earliest that any of these proposed amendments could take effect is December 1, 2006.

Between now and then, much ink (and doubtless many electrons) will be devoted to analysis and critique of the proposed amendments. For the purposes of an introduction and overview, this article will discuss each major proposal, starting with the least controversial and working towards those that will generate the most heat. For each of these, the article will briefly explore the background, set out the proposal verbatim, and then briefly discuss some of the practice and policy questions the proposal raises.

MEET-AND-CONFER PROPOSALS

It was recognized early in the research [2] and acknowledged through the Advisory Committee's investigation that the majority of electronic discovery disputes can be prevented, managed, or resolved through direct communication-- between opposing counsel, between counsel and the court, and between the technology experts often hired by opposing parties. The five federal districts courts that have local rules or guidelines on electronic discovery [3] all feature early "meet and confer" sessions as the centerpieces of their respective strategies. The Advisory Committee has proposed amending Rule 26, Rule 16, and Form 35 to expressly include the discovery of electronically stored data and closely related issues in the discovery planning meeting of counsel, the report to the court, and the pretrial scheduling conference.

The proposed "meet and confer" amendments, in the usual rulemaking style (with new language underlined and language to be removed ~~struck through~~) are as follows. [4]

Rule 16. Pretrial Conferences; Scheduling; Management

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(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

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

(2) to file motions; and

(3) to complete discovery.

The scheduling order may also 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) adoption of the parties' agreement for protection against waiving privilege;

(7~~5~~) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(8~~6~~) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

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Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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(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), <u>to discuss any issues relating to preserving discoverable information,</u> 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 in which it should be produced;

(4) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information;

(5~~3~~) 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~~4~~) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

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Form 35. Report of Parties' Planning Meeting

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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 a privilege protection order, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be competed by _____(date)_____.

[Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

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Taken together, these three amendments require the parties to both discuss electronic discovery in general and three of the hot-button issues associated with electronic discovery in particular: the form of production, data preservation, and privilege waiver. In the Committee Note associated with the proposed Rule 26(f), it is acknowledged that not all cases will involve electronic discovery, but in those that do, addressing the issues at the outset should avoid many of the problems that might otherwise later. Among the issues identified in the Committee Note are the scope of anticipated electronic discovery, the nature of the information systems used by the parties, accessibility of the data that will likely be requested, and the costs and burdens that might be involved in retrieving and reviewing that data.

The proposed rule specifically references, and the Committee notes, that the form of production should also be discussed. This is something that seldom caused problems in the days of conventional, paper-based discovery and document production. Paper was paper. But in the electronic world, the form of production-- whether it be hard copy, electronic images, "native format," direct access to live databases, or some other form—

is directly related to the scope of discovery, and perhaps to privilege, costs, and burdens as well.

In two other hot-button areas, the proposed rules stop short of providing what many commentators proposed—a clear statement of the duty of preservation and the abolition of the common law rule in some circuits that inadvertent disclosure of privileged information may constitute a waiver of privilege. Both these solutions, it was felt, are beyond the permissible scope of the rulemaking process under the Rules Enabling Act [5], as they would involve modifications of substantive law. Instead, the Committee proposes that the parties discuss these issues, attempt to reach agreement, and come to the court if there is need for a court order to address either preservation or privilege. The Committee Note spells out the various considerations and makes reference to case law and the *Manual for Complex Litigation, Fourth* for guidance.

RE-DEFINING THE DOCUMENT

The definition of a discoverable "document" found in Rule 34(a) and referred to throughout the Rules weathered sixty years of technological change, but by the turn of the millennium it was being stretched to the limit. In the paper world, a document could be defined in easily understood, tangible terms—a piece of paper, a drawing, a chart, a film, and so forth. But in the electronic world, documents appear in a variety of manifestations. The same electronic file can be printed out on paper, imaged, burned onto a CD, migrated to microfiche, or rendered in an endless number of media. Each

manifestation of the file can vary in appearance or convey different information. These facts gave rise to disputes over what the appropriate form of production should be. In addition to appearing in different forms, some electronic "documents," such as dynamic databases, defied all description in reference to Rule 34. The data could not, without great difficulty or expense, be produced in litigation as tangible, relatively immutable artifacts conveying information as it was perceived at some point in the past.

At the same time, the Discovery Subcommittee and the Advisory Committee were struggling over whether Rule 34(a) could be expanded to explicitly reference all the ways in which information is now conveyed. The list of forms, media, and technologies would be ridiculously long and would be superseded by new forms, media, and technologies by the time the reader was finished. A decision was made that Rule 34 needed to be amended, not to expand the definition of "document" by enumerating new technologies, but to streamline the definition by becoming form-, media-, and technology-neutral. Proposed Rule 34(a) shifts the focus from the discovery of artifacts which may convey information to the discovery of information, which may have any number of manifestations. Proposed amendments to Rule 45, governing information requested from non-parties, and Rule 33(d), governing answers to interrogatories derived from business records, reflect the proposed amendment to Rule 34(a).

The proposed definitional amendments, in the usual rulemaking style (with new language underlined and language to be removed ~~struck through~~) are as follows.

Rule 33. Interrogatories to Parties.

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(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 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.

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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, ~~and~~ copy, test, or sample any designated electronically stored information or any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phonorecords~~, and other data or

data compilations in any medium -- from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect, ~~and~~ copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

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

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

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(c) Protection of Persons Subject to Subpoenas

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(2)(A) A person commanded to produce and permit inspection, ~~and~~ 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.

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These proposed amendments do not answer some very important questions (such as the appropriate form of production, which is dealt with by other amendments discussed below) but they do serve to eliminate one of the more vexing issues associated with electronic discovery—whether the elements of an electronic file which are not apparent to the reader on a screen or in a hard-copy printout are nevertheless subject to discovery. The question as to whether these elements, commonly referred to as "metadata" and "embedded edits," are discoverable is answered with a resounding "It all depends." The answer no longer depends on the definition of "document" in Rule 34. Considered in isolation, Rule 34 defines these elements as discoverable information. But whether they must be produced now depends on Rule 26 and the two-tiered considerations of relevance and accessibility.

In similar fashion, the proposed definitional amendment to Rule 34 ends the debate as to whether the bread-and-butter products of computer forensic investigations-- the system-

generated files, "deleted" files, or the scraps of electronic information found on hard drives as "residual data" or in the "slack space" at the end active files—are subject to discovery. If the requesting party meets its burden of showing relevance, demonstrates that the information is accessible, and overcomes objections of burden (as well as any other objections that the responding party might raise), the amended Rule 34 would not restrict discovery.

This proposed amendment, while now considered relatively noncontroversial, was not obvious during the deliberations. Strong arguments were made by several commentators, and even members of the Advisory Committee, that metadata, system data, and other elements of electronic files that are not consciously generated by the user nor apparent to the reader in the ordinary course of business should be excluded from discovery under a restrictive Rule 34 definition. But there was no sustainable constituency for this position, as both plaintiffs and defendants, requesting parties and responding parties, "little" parties and "big" parties, all could see the value of such information if it were relevant, and if the burden and cost associated with accessing, reviewing, and producing the information were justified.

The Advisory Committee took this opportunity to clean up some other language in Rule 34(a). The reference to "phonorecords," a term not heard in common parlance since the Truman era, was removed. The proposed amendments to both Rules 34(a) and 45(a) make clear that tangible things must be specifically designated in the request, just like

documents and land, and that Rule 34 authorizes "testing and sampling" of all discoverable material just as it explicitly authorized inspecting and copying in the past.

With respect to producing electronically stored business records under Rule 33(d), the Committee Note states that this option will be available only if the cost and burden of retrieving the requested information is substantially the same for both parties. This option is not meant to be a cost-shifting mechanism. But leveling the cost and burden may mean that the responding party needs to make software, training, or technical support available to the requesting party.

FORM OF PRODUCTION

Whereas the proposed amendments to Rules 34(a) and 45(a) make it clear that all relevant, accessible, and non-privileged electronically stored information is presumed to be discoverable, another set of proposed amendments deal specifically with the vexing question of the appropriate form of production. In world of paper documents, Rule 34(b) gave responding parties two options for producing requested documents: produce them as they are kept in the usual course of business or produce them in a way that they are arranged and labeled to correspond with the categories of the request. For electronic discovery, the proposed amendments recognize that there are infinite choices of form for production. The proposed amendments encourage requesting parties to specify the preferred form of production in their request, allow responding parties to object, and if the parties cannot agree or the court does not order otherwise, gives responding parties

two default options roughly analogous to the options they now have for producing paper documents. Perhaps most important is a feature that reflects several comments received by the Advisory Committee: the proposed rules gives requesting parties only one bite of the apple—either they come to an agreement with the responding party before production, or they take what is offered.

The proposed amendments regarding form of production, in the usual rulemaking style (with new language underlined and language to be removed ~~struck through~~) are as follows.

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

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(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 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 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 for producing electronically stored information, stating ~~in which event~~ the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. 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 party thereof, or any failure to permit inspection as requested.

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

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

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

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Rule 45. Subpoena

(a) Form; Issuance

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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 in which electronically stored information is to be produced.

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(c) Protection of Persons Subject to Subpoenas

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[2](B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, ~~and~~ copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to providing ~~inspection or copying~~ any or all of the designated materials or of the premises -- or to providing information in the form requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, ~~and~~ 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 ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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(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 for producing electronically stored information, a person responding to a subpoena must produce the information in a form in which the person ordinarily maintains it or in an electronically searchable form. The person producing electronically stored information need only produce it in one form.

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During deliberations, there was considerable debate and comment about the form of production, reflecting the unsettled case law on the issue. Several commentators urged that the Rules remain silent or allow virtually unfettered discretion on the part of responding parties to choose the form in which to produce electronically stored information. Complete silence on this issue was not an acceptable solution, however, as it would give no guidance to the court on resolving the potential disputes, and no guidance to the parties on what to expect from the court. In addition, the Advisory Committee received comments that some common forms of production—producing large file collections in hard copy or as static "TIFF" or "PDF" files-- increased the costs and burdens associated with electronic discovery by making it impossible to utilize electronic searching and sorting capabilities to review the produced data. While recognizing that in some instances, hard copy or image production may be the most appropriate form, the Advisory Committee wanted to encourage the parties to agree upon a form that would

reduce burdens and maximize the potential benefits of computer technology for both parties.

Coming up with an exact analogy for electronic production to the existing options for paper production was difficult, and after much discussion the Advisory Committee agreed on language that came as close as possible. Even after the Advisory Committee settled on the proposed language of proposed Rule 34(b)(ii) and Rule 45(d)(1)(B), a few legal technologists commented that it could be interpreted to mean that electronic production is required to be in either "native format" or in word-searchable form, neither of which may be possible and both of which could carry undue costs and burdens. The Committee Note makes it clear that the default options are only options and that the parties may agree on alternative forms of production or, upon motion supported by a showing of good cause, a court may order a specific form of production.

In any event, the phrase "electronically searchable form" is to be interpreted as meaning that the information be reasonably searchable by electronic means, such that it can be found with reference to the categories of the request. That could mean that the information be produced as a word searchable database, if that is reasonable under the circumstances, or produced with an accompanying searchable index of reasonable detail, or produced in some other form that allows reasonable computer-assisted searching and organization.

PRIVILEGE AND PRIVILEGE WAIVER

As promised, this article reviews the proposed amendments to the discovery rules in order of anticipated controversy, and the proposals that follow are likely to generate more public debate.

The burden of reviewing vast electronic files for privilege before production was perceived by nearly all commentators as a major one, and nearly all commentators agreed that something needed to be done to provide relief from this perceived burden. The controversy was, and will remain, whether the Federal Rules of Civil Procedure are an appropriate vehicle for addressing this issue, and even if they are deemed to be appropriate, how far civil procedure rules can go to solve a problem that involves aspects of common law, evidence doctrine, and legal ethics.

The problem of privilege review centers on its corollary in many jurisdictions: the consequences of inadvertent production of privileged information, overlooked in the mass of otherwise relevant and producible data. This problem predates the advent of electronic discovery, of course, but it has been brought into sharp focus in recent years. The volume of electronically stored information has increased exponentially, resulting in productions of e-mail messages, word processing files, and other data equivalent to tens of millions of pages of conventional paper documents. Depending on the jurisdiction and the facts of each case, the consequences of an inadvertent production of privileged information can mean that the privilege is deemed waived as to that document, that

category of privileged documents, all privileged documents related to that issue, or perhaps all privileged documents related to the case.

The privilege is an evidentiary privilege, although the circumstances of the waiver may also raise questions of legal ethics, both for the producing and receiving counsel. Viewed as either an evidence issue or an ethics issue, many commentators questioned whether the rules of civil procedure are the appropriate vehicle for addressing it or whether by doing so, the rules committees might be straying into forbidden areas of substantive law. What resulted from the Advisory Committee's deliberations is a carefully-crafted set of proposed amendments, designed to be a procedural framework in which discovery can proceed in the most efficient way possible, while reserving the substantive evidentiary and ethical decision to the appropriate fora at the appropriate time.

The proposed amendments regarding privilege and privilege waiver, in the usual rulemaking style (with new language underlined and language to be removed ~~struck through~~) are as follows.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

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(b) Discovery Scope and Limits.

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

(A) ***Privileged information withheld.*** When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) ***Privileged information produced.*** When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

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Rule 45. Subpoena

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(d) Duties in Responding to Subpoena

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[2] (B) When a person produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, any party must promptly return, sequester, or destroy the specified information and

all copies. The person who produced the information must comply with Rule 45(d)(2)(A) with regard to the information and preserve it pending a ruling by the court.

The Committee Note stresses that this proposed amendment does not address whether there has been a waiver of privilege by production "without intending to waive a claim of privilege." These words in the proposed amendment are carefully chosen to cover two distinct situations, both of which are fraught with uncertainty at the moment. The first situation is classic inadvertent waiver, in which privileged information has slipped past the review process. The proposed rule codifies a common practice in complex litigation: an agreement between the parties that is often blessed by courts in the form of a case management order. Under these common "claw back" agreements, the parties agree to a procedure for the return of apparently privileged information within a reasonable time of its discovery. If there is a dispute over the privileged nature of the information, the matter is to be resolved by the court in due course under the same procedure as any challenge of items listed on the privilege log.

However, the proposed amendment may also be used to authorize a very different arrangement, which, though less common, has been used to reduce the scope and cost of overall discovery and dramatically reduce the cost of privilege review. This situation does not involve the "inadvertent" production of privileged information, but the purposeful disclosure of information, "without intending to waive a claim of privilege," prior to production, with an express reservation of rights to assert privilege at a later point

in the discovery process. These arrangements, commonly called "quick peek" agreements, work in the following way: The requesting party issues its request, and the responding party responds by making all the potentially relevant information available for inspection and designation for copying. The requesting party reviews the information and designates that which is responsive to its requests. The responding party then reviews the designated information for privilege (or other considerations), and produces that which it believes is relevant and non-privileged.

This sort of procedural high-wire act is eminently civilized and can result in tremendous cost savings for both parties, but it requires an extremely high level of trust between the parties and a strong safety net, because no matter what the parties may agree to and the court may bless, a third party or a litigant in a parallel action can easily make the case that the agreement does not bind them, and the parties have consciously waived any claim to privilege respecting the entire information collection.

Because of the dangers involved in either "claw back" or "quick peek" arrangements--especially with respect to third parties or parallel litigation in other courts-- the Committee Notes make it clear what while the proposed rules authorize such arrangements, they should not be construed as advice to judges to force such arrangements on unwilling parties. A case management order may be useful in shielding the parties from the worst consequences of well-intentioned efforts to reduce the potential cost and delay of privilege screening. The order should not be used to force parties to relinquish privilege rights.

TWO-TIERED DISCOVERY

"There may need to be some limits on retrieval efforts," said one of the Discovery Subcommittee members at the start of that fateful breakfast meeting in Maine in 1999. This prescient statement became a central theme of the comments received by the Advisory Committee over the next five years. Time and again, the Committee heard that computers and information technology, for all the wonders they have wrought, have also created a dystopia of information management and retrieval. The available and potentially discoverable electronically stored information may be "active" data that can be retrieved readily from computer hard drives and common storage media, such as floppy disks and CD ROMs, by persons of ordinary skill. However, hidden on that hard drive, or below the surface of the storage media, are deleted files, file fragments, and residual data-- all waiting to be recovered by the skilled computer technologist. In addition, most computer networks are backed up on a regular basis, resulting in closets, storerooms, and sometimes warehouses of backup tapes holding terabytes of undifferentiated data that are difficult and expensive to retrieve but represent tantalizing snapshots of the past. Because of computer data can be copied and transferred quite easily, and few computer files are "sent" anywhere, but are instead replicated on the sender's, recipient's, and intermediaries' computers, potentially discoverable computer data can be found almost everywhere and in vast quantities. Because technology advances so quickly, the data held on computers and storage media that were in common

use just a few short years ago are now as difficult to retrieve as your favorite 8-track tapes from the past are to listen to.

This situation creates a conundrum for discovery rulemaking. On the one hand, there is much more information, and it is probably more accurate than ever before, because it is meticulously recorded by all the objective and indifferent machines around us. According to several commentators, "There is so much more truth to be discovered." On the other hand, the cost of retrieving that information, and distinguishing the relevant and material information from the vast amount of extraneous data, can be astronomical. "How much truth can you afford?" quipped other commentators. [6] Early in its study of the problem the Discovery Subcommittee began to ask questions about the value of what its members called "heroic retrieval efforts."

After energetic and spirited debate in the Discovery Subcommittee that carried over into the Advisory Committee on Civil Rules, the idea emerged of proposing "two-tiered discovery" that would be somewhat parallel to the bifurcated scope of discovery approved in 1999. But instead of distinguishing different levels of discovery on the basis of relevance, this time the scope of discovery would be distinguished in two tiers based on "accessibility," a concept articulated by Judge Shira Scheindlin of the Advisory Committee in the first of her landmark series of decisions in Zubulake v. USB Warburg. [7] Under the proposed amendment to Rule 26(b)(2) and the corresponding amendment to Rule 45, discovery would be available as of right, and without judicial order, into relevant and non-privileged electronically stored information that is "reasonably

accessible," as defined by the responding party. The court may order further discovery if the responding party cannot demonstrate that the information is inaccessible or the requesting party can demonstrate good cause for the production of the requested information.

The proposed amendments setting out the two-tiered approach, in the usual rulemaking style (with new language underlined and language to be removed ~~struck through~~) are as follows.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits.

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

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Rule 45. Subpoena

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(d) Duties in Responding to Subpoena

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(C) A person responding to a subpoena need not provide discovery of electronically stored information that the person identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information sought is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause.

* * * * *

When first introduced, this concept of "two tiered" discovery was considered controversial and threatened to disrupt the consensus that the Advisory Committee was attempting to build. This might have been because early proposals and formulations attempted to exclude from discovery whole categories of electronically stored information on the basis of media or technology, for instance, deleted documents or backup tapes. Only after a full airing of the issues did the dividing line come to be defined in terms of "accessibility," and further refined in discussion as "reasonably accessible in the ordinary course of the responding party's activities." That latter formulation, while dropped from the text of the proposed rule, is reflected in the Committee Note, which explains that this determination will necessarily be case-specific and a technological moving target. As such, a showing of "inaccessibility" would be very similar to the showing of "undue burden" that would trigger the proportionality calculus of the existing Rule 26(b)(2) or ground a motion for a protective order under Rule 26(c). Viewed in that light, the two-tier approach to discovery of electronically stored information becomes noncontroversial.

This begs the question of whether this amendment, as proposed, would actually change anything. The answer to that question uncovers the controversy, which is buried in the subtle nuances of presumptions and the shifting burdens of the parties in discovery.

The amendment would change the current presumption that all relevant information is discoverable unless undue burden is shown, to a presumption -- at least for relevant electronically-stored information— that only "accessible" data, as defined by the responding party, is discoverable.

The current presumption is played out under the current rules with the requesting party having the burden of showing only relevance to support a discovery request. The responding party has the burden of making objections and persuading the court that the objections are genuine and warrant the relief sought.

Under the proposed amendment, the presumptions would be more complicated. The requesting party is only entitled, as of right, to electronically stored information that is both relevant and reasonably accessible. Of course, the requesting party is not in a position to state whether the requested information is readily accessible to the responding party. The responding party objects to the discovery request, stating that the electronically stored information is not reasonably accessible. Then the burden of making a motion to compel on the basis of "good cause" falls on the requesting party. The responding party still has the burden of demonstrating that, indeed, the electronically stored information is not reasonably accessible, but there is no longer any presumption of discoverability to overcome.

This shift in underlying presumptions-- even though limited to the discovery of electronically-stored information-- may generate considerable public comment,

particularly when coupled with the last and most controversial of the proposed amendments—the so-called "safe harbor" against spoliation sanctions.

A SHALLOW "SAFE HARBOR"

As soon as it became known that the Advisory Committee was studying the issue of electronic discovery, members of the corporate defense bar offered a variety of proposals to limit the power of courts to impose sanctions for the inadvertent or nonwillful destruction of electronically stored data. Although these all came under the self-described rubric of "safe harbor" proposals, they varied in approach-- ranging from a rule articulating a narrow definition of the duty to preserve discoverable information, to a requirement of some degree of intent or culpability before the imposition of a sanction, to providing an affirmative defense for responding parties who follow a good-faith records management policy.

All of these efforts stemmed from the corporate defense bar's perception that their clients have been saddled with draconian preservation orders and unfairly sanctioned for violations of those orders, or breaches of ill-defined duties of preservation, stemming from the deletion of data that routinely and automatically occurs in the ordinary course of computer operations. Whether or not these perceptions are accurate or justified, the defense bar argued that they have resulted in tremendous expenditures of time and resources to locate, segregate, and preserve mountains of data, most of which is irrelevant, redundant, and ultimately not requested in discovery.

These proposals illuminated an essential difference between the way information was routinely created, managed, and discovered in the paper economy, and the role of information in the information age. In the days when the Federal Rules of Civil Procedure were first drafted, and into the 1980's, there was a clear distinction in business and industry between the production process and the records management process. While the operations of a smokestack industry or a paper-based government agency might have been meticulously documented, that process was distinct from the actual production or business process. The records were maintained separately and managed separately from the products or services. Preserving the records for the purposes of litigation, segregating them from the ongoing operations of the company or agency, and making them available for inspection or copying when requested, while not always simple and cost-free, seldom crippled the responding party's ability to function. In the information age, information technology is synonymous with the production or business process. Any attempt to isolate, segregate, and preserve a certain set of potentially responsive information for pending or anticipated discovery is likely to throw a wrench into the entire information-processing assembly line. These systems are designed to be dynamic, ever-changing, self-updating, and responsive to immediate business demands, not to collect and preserve historical information. Among the clearest examples of this are enterprise-wide databases, which are constantly being overwritten and updated with current information; and backup systems, which are designed for disaster recovery purposes and routinely recycle outdated storage media.

Balancing the need to maintain the integrity of the discovery process against these new realities of the information economy was not an easy task. The Advisory Committee wrestled with the various proposals and comments received from the bar, and the rapidly-developing case law on preservation and spoliation in the electronic discovery context. And in the end, the Advisory Committee could not achieve complete unanimity. In its report to the Standing Committee on Rules of Practice and Procedure, the Advisory Committee offered two alternative proposals. The Standing Committee rejected the idea of going forward with two proposals, and instead promoted the proposal offered by the majority, with a recommendation that the Advisory Committee go back and draft a footnote setting out the minority position to solicit public comment on that as well.

The proposed amendment limiting the court's power to impose sanctions for the destruction of electronically stored information, in the usual rulemaking style (with new language underlined and language to be removed is ~~struck through~~) is as follows:

> **Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**
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> * * * * *
>
> **(f) Electronically stored information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if

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

(2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

The minority proposal, on which the Advisory Committee is also seeking public comment, would include a requirement that the court make a finding of culpability ("the party intentionally or recklessly failed to preserve the information") before imposing sanctions.

This "safe harbor" proposal may be more notable for what it does not do than for what it does, and the original proponents of "safe harbor" may not be satisfied that their concerns have been met. First, this proposal deals only with sanctions in the event of a failure to produce requested information. It does not attempt to articulate a positive duty of preservation. The majority on both the Advisory Committee and the Standing Committee agreed that the duty of preservation is a subject of substantive law and not appropriate for rulemaking. Second, the proposal does not address the preservation or destruction of information prior to the filing of the lawsuit. Again, the majority on both Committees believed that the rules of civil procedure can only address actions taken once the lawsuit has commenced. [8] Third, the majority proposal does not include a requirement that the court make a finding of culpability, which most of the "safe harbor" commentators believed was essential. But the discussion in the Standing Committee meeting over whether to publish the minority proposal for public comment indicated that the members

felt that an "intent" element would create confusion over the primary purpose behind Rule 37, which is to focus on the effective management of the litigation rather than the trial and punishment of discovery malefactors. Under that guiding philosophy, judges have been afforded broad discretion in imposing sanctions under Rule 37, and state-of-mind has seldom been a controlling factor. [9] Finally, the proposed amendment clearly states that an outright violation of an explicit order of the court to preserve electronically stored information drains the safe harbor.

Even though it appears that this proposed amendment accomplishes little or nothing that its proponents wanted, there is one important area in which it could have a powerful effect. When considered together with the proposed "two-tiered" approach to the discovery of electronically stored information, a large area in the sea of information is open for dredging and disposal, thus deepening the safe harbor. This area is the data "not reasonably accessible" under the proposed amendment to Rule 26(b)(2) and therefore *presumptively* not subject to discovery. As the current draft of the Committee Note states, "In most instances, a party acts reasonably by identifying and preserving reasonably accessible electronically stored information that is discoverable without court order." But absent a court order to preserve such information, or notice that "inaccessible" electronically stored information will be requested, or reasonable anticipation that it will be requested and that the requesting party will be able to show good cause, "inaccessible" data may be routinely destroyed while litigation is pending without incurring sanctions under Rule 37.

CONCLUSION

Five years in the making, the current proposals to amend the Federal Rules of Civil Procedure to accommodate the discovery of electronically stored information are far from complete. The proposals will be published on the official web site of the federal judiciary (http://www.uscourts.gov) and circulated for public comment through the fall of 2004. Two or three hearings will be held during that public comment period, and there will likely be a steady stream of commentary in the legal press. In the Spring of 2005, some of the proposed amendments will emerged unscathed and go on to the Judicial Conference of the United States for further review before going to the Supreme Court and Congress. Others will be tinkered with in a follow-up meeting of the Advisory Committee, but then will also go to the Judicial Conference with the Standing Committee's approval. There is a distinct possibility that one or two of the most controversial proposals-- and particularly the "safe harbor" proposal-- will require a further redraft and another round of public comment.

Whatever the fate of any particular proposal, this process demonstrates that the important function of rulemaking in our federal courts is open and vibrant. Continued public participation is encouraged and is deeply appreciated by the Committee and staff.

ENDNOTES

[1] The texts of the 2002 and 2003 letters, the 70 written responses, and the reports of the Discovery Subcommittee and Civil Rules Advisory Committee, along with a complete transcript of the February 2004 Fordham Law School conference, are posted at http://www.kenwithers.com/rulemaking/civilrules/index.html.

[2] Molly Treadway Johnson, Kenneth J. Withers & Meghan A. Dunn, A Qualitative Study of Issues Raised by the Discovery of Computer-Based Information in Civil Litigation, September 13, 2002, available at http://156.132.47.230:8081/newweb/jnetweb.nsf/pages/196 (research report submitted to the Advisory Committee on Civil Rules for its October 2002 meeting).

[3] Links to the relevant local rules or guidelines from the Eastern and Western Districts of Arkansas, the District of Delaware, the District of Kansas, the District of New Jersey, and the District of Wyoming are available from the Federal Judicial Center's Electronic Discovery web page at http://156.132.47.230:8081/newweb/jnetweb.nsf/pages/196.

[4] The amendment language quoted throughout this article is taken from a draft report of the Advisory Committee on Civil Rules dated July 1, 2004 and on file with the author. Readers are urged to consult the amendments as published for public comment on the official web site of the federal judiciary, http://www.uscourts.gov/rules/newrules1.html.

[5] 28 USC §§ 2071 – 2077.

[6] See, e.g., Rowe Entertainment v. William Morris Agency, 205 F.R.D. 421, 423 (S.D.N.Y. 2002).

[7] Zubulake v. UBS Warburg, 217 F.R.D. 309 (S.D.N.Y. 2003).

[8] Fed. R. Civ. P. 27, which allows the taking of a deposition before commencement of a suit to perpetuate testimony, is considered the narrow exception which proves the general proposition that the Federal Rules of Civil Procedure can only govern the filing, conduct, and disposition of a lawsuit, and not pre-litigation activity of the parties or counsel.

[9] It is important in this regard to distinguish violations of Rule 37 and sanctions imposed as a result, from the common law tort of spoliation recognized in several states, or the elements needed to support the extreme sanctions of an adverse inference jury instruction or dismissal of the case under the court's inherent authority.