

MEMORANDUM

TO: The Honorable Lee H. Rosenthal

FROM: Jonathan M. Redgrave

CC: Peter G. McCabe

DATE: March 18, 2004

RE: Submission of Comments to the Advisory Committee on Civil Rules Concerning Potential Amendments to the Federal Rules of Civil Procedure to Address Electronic Discovery Issues

I write to submit my personal comments regarding the Fordham conference (and the general state of the law in this area), as well as to propose specific alternative language for the Committee to consider in its deliberations concerning these issues. In this regard, I must also note that the views expressed in this submission are mine alone; they do not represent the views of the law firm where I practice or any of its clients, nor do these comments represent the views of anyone associated with The Sedona Conference.

I. Observations Regarding Fordham Conference and Development of the Law

Although various constituencies advocated differing positions concerning potential rules changes at the Fordham conference, the discussion was productive and illustrates the need for the Committee to move forward in its formulation of possible amendments to the Rules of Civil Procedure. In particular, I noted a number of recurring themes (many of which appeared to be consensus views) that, I submit, are particularly important in any consideration of rules amendments addressing electronic discovery issues.

First, the nature of electronic documents is so different from paper that analogies are often imperfect, and as a result, application of rules devised principally for a paper-dominated discovery world cannot fully or even adequately accommodate disputes regarding electronic discovery. More important, however, is the critical need to distinguish the technical ability to act (such as preserve, retrieve and manipulate data to produce information) from the legal obligation to do so.¹ Indeed, I submit that the current rules are subject to an increasingly broad (and unfounded) view that technical feasibility is the *de facto* standard for data preservation and discovery, whereas the touchstone should remain relevance, need and proportionality.

¹ Other pertinent distinguishing characteristics of electronic data are set forth in *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production* (January 2004).

Second, the potential volume of electronic data can pose vexing problems in a wide variety of cases. The dramatic reduction in costs of computer memory and related data storage devices has fostered a similarly dramatic accommodation of data, much of it repetitive or obsolete. While software programs may aid in some aspects of data retrieval and processing in certain circumstances, the reality is that an exponentially larger universe increases the time and cost necessary to identify, review and produce responsive material. Without effective limits on the presumptive scope of electronic discovery, there is a substantial risk that litigation will become too burdensome and expensive for all but a handful of litigants.

Third, the inclusion of procedures that more specifically address the scope and availability of electronic document discovery, including presumptive limitations on such discovery, is entirely consistent with the current construct of the federal rules. For example, depositions presumptively are limited to one day of seven hours and interrogatories presumptively are limited to 25 in number. *See* Fed. R. Civ. P. 30(d)(2) and 33(a). And, of course, all discovery is subject to the restrictions of Rule 26, including the proportionality test of burden and need of Rule 26(b)(2). Thus, there should be no question that document discovery (electronic or otherwise) is not boundless, and focused rules changes that restore a proper balance of relevance, need and proportionality in the area of electronic discovery will aid courts and litigants alike.

Fourth, the discussion (and I submit general consensus) at Fordham mirrors what I have observed in practice, and in my work with The Sedona Conference's Working Group Regarding Electronic Document Retention and Production — parties, whether they be plaintiff or defendant, institutions or individuals, are encountering issues as to which there is little guidance in the developed law. And, though efforts such as The Sedona Working Group or the ABA's task force evaluating possible changes to the ABA's Civil Discovery Standards can assist courts and litigants in navigating the current paradigm, those efforts cannot provide the same direction and consistency that can be provided by the Rules of Civil Procedure. Similarly, while many judges are well equipped to employ the existing rules (such as the proportionality test of Rule 26(b)(2)), the lack of extant rule guidance on electronic discovery issues and the likelihood of differing results in various jurisdictions makes reliance on an eventual accretion of *stare decisis* impracticable.

Finally, I want to note my belief that it is possible to craft narrowly tailored rules amendments concerning electronic discovery issues that are reasonable and fair to all litigants. In particular, I submit that a polemic "individual plaintiff" versus "corporate defendant" view of the issues is an inaccurate construct. In my practice, it is often a corporation that is seeking electronic discovery from another company or an individual plaintiff. In addition, the preservation and production of electronic data, and the consequences of the failure to do so, affects all sides, regardless of the nature of the controversy or identification of the party. Accordingly, rules amendments in this area should be crafted as the presumptive guidance for the vast majority of civil cases, with adequate provisions for extraordinary circumstances, so that the ideals of Rule 1 (rules should be administered to "secure the just, speedy, and inexpensive determination of every action") can be realized for all parties.

II. Overview of Possible Rules Amendments

With these points in mind, I respectfully submit that there is good reason to amend the Federal Rules of Civil Procedure in targeted ways to provide better guidance to the courts and litigants regarding electronic discovery issues and to amplify the application of the principles of relevance, need and proportionality. In particular, I submit that the Committee should consider limited amendments that:

(1) provide for explicit discussion of electronic discovery issues at the outset of litigation (Rules 16 and 26);

(2) create a two-tiered approach to electronic documents whereby discovery of documents or data that are not accessed in the ordinary course of business (*e.g.*, “inaccessible” or “less accessible” documents and data as well as essential duplicates) are treated as subject to discovery only upon a showing of good cause;

(3) provide a general procedural mechanism whereby inadvertently produced privileged materials are returned and any challenges to these privilege claims are addressed by the court in an orderly manner; and

(4) establish a “safe harbor” whereby the routine or automated deletion or destruction of data in the ordinary course is not subject to sanction under Rule 37, provided certain conditions are met.

I submit proposed language for amended rules below, with additional commentary to explain my suggested language.

III. Proposed Rule Changes and Comments

A. Rule 26(f) (Discussion of Electronic Discovery Issues Early in Discovery Planning Process)

1. Proposed Rule

Rule 26²

(f) Conference of the Parties; Planning

(1) *Conference Timing.* Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(B) or when otherwise ordered, the parties must hold a conference as soon as practicable – and in any event at least 21 days before a scheduling conference is held of a scheduling order is due under Rule 16(b).

² My proposed language here is based upon the language set forth in Prof. Lynk’s and Prof. Marcus’ January 27, 2004 Memorandum, at pages 9-10. My proposed edits to that language are reflected in bold typeface.

- (2) *Conference Content; Parties' Responsibilities.* In conferring, the parties should consider the nature and basis of their claims and defenses and the possibilities of a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); **discuss any pertinent issues regarding preservation of evidence** and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the Court within 14 days after the conference a written report outlining the plan.
- (3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

- (A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a)(1), including a statement of when initial disclosures were made or will be made;
- (B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be completed; and whether discovery should be conducted in phases or be limited to or focused on particular issues;
- (C) **whether any party anticipates disclosure or discovery of electronically stored data, and if so what arrangements should be made to facilitate such disclosure or discovery, including the anticipated form of any such production;**
- (D) **issues regarding the timing and content of privilege logs to be prepared and exchanged under Rule 26(b)(5), as well as whether any specific provisions should be made to facilitate discovery by protecting the right to assert privilege after the disclosure or production of a privileged document;**
- (E) 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

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

2. *Comments*

a. I believe the explicit inclusion of electronic discovery issues is appropriate in the rules. *See The Sedona Principles* (2004), Principle No. 3 (“Parties should confer early in discovery regarding the preservation and production of electronic data and documents when those matters are at issue in the litigation, and seek to agree on the scope of each party’s rights and responsibilities.”).

b. I suggest that Rule 26(B)(2) include a reference to pertinent document preservation issues. In many cases there may be no such issues, but parties should be encouraged to raise any concerns regarding appropriate preservation steps early in the process. In this regard, a “safe harbor” provision in Rule 37 is a necessary corollary to any such provision in Rule 26. At the same time, in the event the case involves extraordinary circumstances where heroic preservation needs may arise, then there is an impetus for early discussion and, in the event of a dispute, early resolution by the Court, so that the case can be decided on the merits and not on the basis of data spoliation accusations.

c. In Rule 26(B)(3)(C) I suggest that the Committee adopt the language essentially as proposed in the memorandum prepared by Prof. Lynk and Prof. Marcus.

d. I suggest that the Committee adopt a slightly modified language regarding privilege issues in Rule 26(B)(3)(D). This proposal is made in conjunction with specific proposed language for inadvertent production situations addressed below.

e. My proposed Rule 26(B)(3)(D) language is broad enough to allow a party to consider the “quick peek” alternative in exigent circumstances, but I do not believe any reference should be made in the rule or commentary to that procedure as I submit it should only be used sparingly and with full consent of the parties. *See The Sedona Principles*, cmt 10.d, discussed *infra*.

f. Form 35 and Rule 16(b) would need to be amended to parallel the changes in Rule 26(f) suggested above.

B. Rule 26(h) and Rule 34 (Definition of Document; Two-Tiered Approach; Requested for Form of Production)

1. Proposed Rule

Rule 26(h).³ Electronically Stored Information. In complying with discovery obligations, a party need not include electronically stored information that is not reasonably available in the ordinary course of the responding party's business. For good cause, upon a showing of substantial need, the court may order discovery of such electronically-stored information consistent with and upon such terms as the court deems just under Rule 26(b) and Rule 26(c), including the fair and just allocation of the costs of such discovery. Nothing in these rules is intended to require a party to cease or alter the operation of disaster recovery or other routine business systems which overwrite or discard electronic information unless required to do so by agreement of the parties or an order issued by a court identifying the specific steps to be undertaken.

Rule 34.⁴ Producing Documents, *Electronically Stored Information* and Tangible Things, or Entering onto 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, any designated documents or **including electronically-stored information (including** writings, drawings, graphs, charts, photographs, phono-records, **databases** and other data compilations 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 tangible things which constitute or contain matters within the scope of Rule 26(b) **and Rule 26(h)** 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

³ My proposed language does not appear in Prof. Lynk's and Prof. Marcus' January 27, 2004 Memorandum.

⁴ My proposed language is derived from the existing text of Fed. R. Civ. P. 34, with my edits reflected in bold (or italic) typeface.

designated object or operation thereon, within the scope of Rule 26(b) **and Rule 26(h)**.

(b) Procedure.

The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity, **including any request for the production of documents that are not reasonably available or accessed in the ordinary course of the responding party's business.** The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. **The request should specify the form in which the documents, including electronically-stored data, are to be produced.**

The party upon whom the request is served shall serve a written response within thirty (30) days after the service of the request, except that a defendant may serve a response within forty-five (45) days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. 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, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. **If the requesting party seeks the production of documents that are not reasonably available or accessed in the ordinary course of the responding party's business, the response shall state any objections to such request. A party may also object to the requested form of production.**

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. **A party moving for the production of documents that are not reasonably available or accessed in the ordinary course of the responding party's business must show good cause and substantial need for the production.**

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.

(c) Persons Not Parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

2. *Comments*

a. I do not favor the addition of language to Rule 26(h) that defines electronic data or discovery. I suggest instead that the language in Rule 34 be amended to clarify the inclusion of electronically stored information within the definition of a discoverable “document.” I would also modify the title of the rule for this purpose.

b. I believe that a new Rule 26(h) is advisable to address the topic of electronic discovery. This rule can establish the presumptive treatment of electronic discovery, which will provide greater certainty for parties and courts.

c. For Rule 26(h), I propose a two-tiered approach to the discovery of electronically stored information that reflects the approach to discovery generally under the 2000 amendments, as well as the practical discussion at Fordham (and elsewhere) regarding the distinctions between accessible and inaccessible data. *See The Sedona Principles*, Principles No. 8 (“The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate need and relevance that outweighs the cost, burden and disruption of retrieving and processing the data from such sources”) and No. 9 (“Absent a showing of special need and relevance a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents”).

d. I believe that the “safe harbor” concept discussed below is linked to the proposed language in the last sentence of Rule 26(h) above, which generally excludes inaccessible data from the presumptive scope of discovery.

e. I also believe it is advisable to include in Rule 26(h) an express reference to cost allocation concerning any required retrieval, processing, review and production of inaccessible data. *See The Sedona Principles* (2004), Principle No. 13 (“Absent a specific objection, agreement of the parties or order of the court, the reasonable costs of retrieving and reviewing electronic information for production should be borne by the responding party, unless the information sought is not reasonably available to the responding party in the ordinary course of business. If the data or formatting of the information sought is not reasonably available to the responding party in the ordinary course of business, then, absent special circumstances, the costs of retrieving and reviewing such electronic information should be shifted to the requesting party.”).

f. I believe it would be prudent for the text of Rule 34 to reflect the two-tiered approach of proposed Rule 26(h) above.

g. As I noted at Fordham, I support the addition of language in Rule 34 that requires the requesting party to specify a particular format for production, with provisions for the responding party to object. The above proposed language for Rule 26(f) allows for early resolution of any questions regarding the form of production. I do not believe

the rule or any commentary should state a preference of one form over another. *See The Sedona Principles* (2004), cmt 12.c (“Production of Electronic Data and Documents Should Only be Required in One Format”).

h. I also do not believe the rule need address issues such as metadata and embedded data, the production of which should be addressed on a case-by-case basis depending upon whether there is a need for the production of such data. *See The Sedona Principles*, Principle No. 12 (“Unless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court.”).

i. I do not believe any amendments to Rule 33 are necessary.

C. Rule 26(b)(5) and Rule 34 (Inadvertent Production of Privileged Documents)

1. Proposed Rule Language

Rule 26(b)(5).⁵ Claims of Privilege or Protection from Discovery

When a party identifies information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party should make the claim expressly as follows:

- (A) The party 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) If the party identifies documents, communications, or things that have already been disclosed, provided or produced but which the party claims are privileged or protected, the producing party shall, within a reasonable time of identifying such materials, provide a list to all parties of those particular documents, communications, or things so that other parties can identify the materials at issue. Absent a court order for good cause shown, no other party can make any use of the materials, those parties shall undertake good faith efforts to return or destroy the identified materials within a reasonable time of notification and no party may assert that such production operates as a waiver of any asserted claim of privilege or protection; and**

⁵ My proposed language for Rule 26(b)(5) is derived from the existing text of Fed. R. Civ. P. 26(b)(5).

- (C) **Any challenge under Rule 26(b)(5)(B) to establish good cause can only be raised by the receiving party on the good faith basis that the producing party did not employ reasonable procedures to guard against the production under the circumstances.**

2. *Comments*

a. I believe it is appropriate and advisable to include a procedural rule addressing the return of (and adjudication of any challenges regarding) inadvertently produced privileged material. Without rule guidance, a patchwork of negotiated and standing protective orders have sprouted in those cases where counsel and courts have been aware of necessity for such procedural protections. *See The Sedona Principles* (2004), cmt 10.a. I submit that the sum of these orders reflects a best practice that should be incorporated into the rules so that all parties, regardless of the experience of their counsel, can gain the same benefit to protect their rights.

b. As I noted during the Fordham conference, I think Rule 26 is the best location for a proposed rule on this topic (as opposed to Rule 34). Rule 26 provides the current procedural mechanism for identifying privileged materials withheld from discovery. In addition, privileged information and materials may be inadvertently produced in connection with discovery rules other than Rule 34 (*e.g.*, Rule 33) as well as in general pre-trial exchanges between parties, which weighs in favor of placing the provision in the broader context of Rule 26.

c. I also prefer the Rule 26 placement for it emphasizes that the proposed rule change is addressing the procedure for asserting claims (and not the substantive law of privilege), which falls within the ambit of 18 U.S.C. § 2074(b).

d. I do not believe the rule or commentary should include or reference the “quick peek” concept. In particular, despite the apparent advantage of reducing the costs of pre-production reviews for privilege and confidentiality (and maybe even responsiveness), there are a host of risks and problems that make “quick peek” productions impracticable and, for most cases, ill-advised. First, the voluntary production of privileged and confidential materials to one’s adversary, even in a restricted setting, is inconsistent with tenets of privilege law that, while varying among jurisdictions, usually require the producing party to meticulously guard against the loss of secrecy for such materials. Second, despite the strongest possible language in any “quick peek” rule to protect against waiver, there is no effective way to limit the arguments of non-parties regarding the legal effect of the production in other jurisdictions and forums. Third, counsel has an ethical duty to zealously guard the confidences and secrets of the client and a clawback production could be seen as antithetical to those duties. Fourth, there is a host of issues regarding the possible rights of employees (privacy) and third parties (privacy and commercial trade secrets) that may be implicated in a “quick peek” production. Finally, the “quick peek” production concept (open review of computer systems and files) is inconsistent with the tenet that discovery under Rule 26 that should be focused on the claims and defenses of the parties. *See generally The Sedona Principles* (2004), cmt 10.d.

In short, I believe creative approaches for extraordinary circumstances (such as a “quick peek” proposal) are better left to the Manual for Complex Litigation and individual case management orders, although the Rule 26(f) language I propose opens the door for discussion of such creative approaches in appropriate cases. *See Murphy Oil USA, Inc. v. Fluor Daniel, Inc.*, No. Civ. A. 99-3564, 2002 WL 246439, at *7 (E.D. La. Feb. 19, 2002) (noting that court cannot compel the disclosure of privileged communications in clawback (or “quick peek”) arrangement).

e. With respect to inadvertently produced documents, the presumption in the rule proposed above is that the parties have employed good faith efforts to avoid disclosure. The other party can challenge that presumption by motion for good cause, which would require the producing party to demonstrate its good faith efforts and the court would then balance the various factors. In my view, there are many situations where everyone will agree that the documents should be returned and the rule should be built on the presumption that only in exceptional cases should there be challenges.

f. I do not believe the rule needs to articulate a test for adjudicating any challenge but considerations, like those identified in the text on page 32 of the January 27, 2004 memorandum prepared by Prof. Lynk and Prof. Marcus, could be identified in the commentary.

g. Even with an expanded Rule 26(b)(5) as proposed above, I believe that Rule 26(f) should identify privilege issues so the parties can discuss privilege logs and any unique needs or concerns regarding privilege claims. *See The Sedona Principles* (2004), cmt 3.b.

D. Rule 37(f) (Safe Harbor)

1. Proposed Rule

- (f) Failure to Preserve Evidence.⁶ A court may not impose sanctions on a party under Rule 37(b) for failure to preserve evidence without a showing that the party willfully or recklessly deleted, destroyed or otherwise made the evidence unavailable provided that the party undertook reasonable efforts to preserve the evidence it believed in good faith to be subject to preservation.**

⁶ My proposed language here is based in part upon the language set forth in Prof. Lynk’s and Prof. Marcus’ January 27, 2004 Memorandum, at page 39, and also in part on language that has previously been suggested by Thomas Y. Allman.

2. *Comments*

a. I believe that a compelling case has been presented for the adoption of a “safe harbor” rule. Traditional notions of evidence preservation and spoliation fail to distinguish sufficiently between culpable spoliation and the non-culpable loss of electronic data in the ordinary course of affairs of individuals and businesses alike. *See The Sedona Principles*, Principle No. 14 and cmts 14.a-d.

b. Compliance with Rule 26(h) (proposed above) should be a bar to a claim of spoliation of electronic evidence where there has been no court order requiring preservation of information not readily available in the ordinary course of business.

c. Outside the context of proposed Rule 26(h), I submit that the rule should note that any “safe harbor” assumes that the responding party undertook reasonable steps to preserve the evidence it believed in good faith to be subject to preservation. *See The Sedona Principles* (2004), Principle No. 5 (“The obligation to preserve electronic data and documents requires reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.”). I further submit that in the event of a sanctions motion the responding party could make an initial showing of its efforts and the burden of proof would be placed upon to the challenging party to establish that the steps taken were not reasonable with respect to those materials the party believed in good faith to be subject to preservation.

d. This provision, when combined with the provision for early discussion of issues proposed above in Rule 26(f), provides incentives for all parties to focus on the important preservation issues early, secure a court order for any disputed aspects of preservation, and move the case forward without the threat of sanctions for the loss of data due to the normal operations of business systems.

IV. **Conclusion**

I respectfully submit there are good and compelling reasons for the Committee to proceed with development of proposed rules amendments in each of areas addressed above. I further submit that amended rules will better serve and guide all litigants as well as the courts in addressing the reality of the electronic information age in which we live and work.