MEMORANDUM

To: Advisory Committee on Civil Rules
From: Rick Marcus
Date: Sept. 15, 2003
Re: E-discovery rule discussion proposals

During the May, 2003, meeting, the Committee authorized the Discovery Subcommittee to attempt to draft proposed amendments to address seven concerns. Thereafter, the initial drafting tasks were parceled out among Subcommittee members, working either in tandem or alone. That effort produced a set of initial drafts that I combined into a memorandum attempting to integrate them into one package. In a number of instances, the memorandum (like the initial drafts) had multiple options to deal with specific issues.

On Sept. 5, 2003, the Subcommittee met for a full-day consideration in detail of the various proposals. During the meeting, the Subcommittee selected various proposals for submission for discussion purposes to the full Committee, and modified or refined the language of several of them. It also decided not to present a proposal on one of the topics identified in May -- expanding initial disclosure under Rule 26(a)(1) to include information about computer systems. This memorandum was prepared on the basis of the Sept. 5 discussion. Owing to time constraints, the Subcommittee has not had a chance to review this memorandum, and undoubtedly some mistakes of understanding have crept into it. The presentation proceeds as follows:

It bears emphasis at the outset that these are merely discussion proposals. Whether any actual amendments should be proposed, and what they should be if they are proposed, are questions which the Subcommittee has yet to answer. Indeed, the full Committee is planning to host an important conference on these topics on Feb. 20-21, 2004, at Fordham Law School. That conference will provide an opportunity to examine the proposals set out in this memorandum, modified as needed in light of the Committee discussion on Oct. 2-3, but also to consider the larger question whether any changes are needed. The Subcommittee could

conclude after that consideration that the current rules are adequate to deal with the challenges of this form of discovery, and that no rule changes are needed.

One further introductory matter should be kept in mind: Although these proposals are presented and should be discussed individually, it is important to think of the way in which the aggregation of several of them would fit together as a balanced package. If there are important problems with discovery of electronically-stored materials, it is likely that they affect a number of litigation constituencies, not just one. Thus, one goal would be to develop a balanced set of proposals that would address the concerns of various elements in the litigation system.

Restyled format for proposals: After the preparation of the initial drafts of possible amendment proposals had been completed, the question whether they should be worked into the present rules or the restyled rules arose. As you know, the restyling process for Rule 26-37 and 45 has proceeded apace, and may result in initial publication of preliminary drafts next Summer. In addition, it has been true for some time that when rule subdivisions were amended to accomplish substantive change they were also restyled. Thus, the pending amendment proposals for Rules 27 and 45, which the Committee forwarded to the Standing Committee earlier this year, are in restyled form. Against this background, it seemed wise to try to develop rule change proposals that fit into the restyled format. Otherwise there might be a need to make changes to move into that format later. Accordingly, the discussion proposals included in this memorandum adhere to the current version of the restyled rules, which are the subject of separate discussion during the Oct. 2-3 meeting. Changes to the pending style proposals are indicated by strikeover and underscoring. Further changes to these rules in

the restyling project should be reflected in the e-discovery amendment process as well.

(1) Definition of the subject

This is not one of the seven areas on which the Subcommittee said it would focus, but it emerged from the drafting process as an important one. Working somewhat independently, Subcommittee members developed a variety of sets of words to describe the topic on which we were working: Three years ago, I called it "computer-based or electronically stored information." During the drafting process this year, various Subcommittee members favored various phrases: "information stored on a computer or in electronic form," "documents created or stored electronically," "data from electronic media, including computers," and "electronic documents."

All of these phrases have some appeal, but using different ones in different places seemed undesirable unless it was necessary. Accordingly, at the Sept. 5 meeting the Subcommittee tried to settle on a single phrase to cover the subject. It is not clear that it did so, but for purposes of simplicity the first topic is a rule provision that would attempt to adopt and define a single phrase that could then be invoked throughout the discovery rules:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronically-stored data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on

magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. [This provision will be added later in the memorandum under item (5), and the heading is included here as a placeholder.]

Comments

This is a first effort. It is intended to be broad. As indicated, the catch-phrase "electronically-stored data" could be replaced by other phrases similarly defined. And the definition certainly should be examined with great care. That might be an important focus of the Fordham conference.

A basic question is whether we can devise a definition that will stand the test of time.[1] In this area, change moves fast, and technological evolution can be breathtaking. There is legitimate concern that any definition we fix upon presently

[1] One possible statutory reference would be 15 U.S.C. § 7006, which contains definitions for the Electronic Signatures in Global and National Commerce Act. It includes the following:

> **(2) Electronic**
>
> The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.
>
> **(4) Electronic record**
>
> The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means.

could be rendered meaningless by changes in five or ten years. The goal of this effort is to try to use terms that anticipate technological developments and would be sufficiently flexible to be of use once those occur. Thus, it is hoped that, if current consideration of chemical or biological computing actually leads to innovative techniques, those new techniques would be encompassed within the terms used here. The hallmarks seem to be that information will be in digital format and that the manner of access will in some sense depend on electronic technology.

Another point to be kept in mind is that, particularly under the Style Project, definitions in the rules are not favored. If it is desirable to have this one, it may also be important to emphasize the need for it throughout the rule amendment process.

(2) Including discussion of these issues in the early discovery planning -- Rule 26(f), Rule 16(b), and Form 35

The initial draft presented to the Subcommittee on Sept. 5 contained considerable detail about topics to be discussed regarding discovery of electronically-stored data.[2] The

[2] The proposal for a new (C) was as follows:

> **(C)** whether any party expects to [provide initial disclosure of or] seek discovery of data from electronic media, including computers and, if so, indicate the parties' agreements or proposals concerning:
>
> **(i)** the steps needed to segregate and preserve from alteration or destruction any such data;
>
> **(ii)** the anticipated scope of discovery of [e-mail messages] {data from electronic media}, and the search protocol for such data, including treatment of inadvertent production of privileged materials;
>
> **(iii)** the format, media, and procedures for the production of such data;
>
> **(iv)** whether restoration of deleted data or examination of back-up media may be sought, and [which party should bear] {the appropriate allocation of} the resulting cost;
>
> **(v)** any other issue concerning the [disclosure or] discovery of such data that a party reasonably believes should be addressed in this case;

There was also a proposal to invite counsel to consider the need for a confidentiality order during the conference as a method of raising the possible need for protective provisions regarding proprietary software and the like.

consensus of the Sept. 5 meeting was that a more general description of the topic would be more suitable for the rule, and that the details included in the initial draft should be addressed in the Note.

Rule 26

* * *

(f) Conference of the Parties; Planning for Discovery.

(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 or a scheduling order is due under Rule 16(b).

(2) ***Conference Content; Parties' Responsibilities.*** In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case; make or arrange for the disclosures required by Rule 26(a)(1); 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. The court may order the parties or attorneys to attend the conference in person.

(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 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 management of such disclosure or discovery; and

(D) whether provision should be made to facilitate discovery by protecting the right to assert privilege after the [inadvertent] disclosure or production of a privileged document; and

(E~~C~~) 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~~D~~) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Comment

This sort of amendment to Rule 26(f) to promote early

consideration of e-discovery issues seems likely to be widely acceptable. Such activity already is required by local rule in three districts, and another appears to be adding such a requirement. A number of commentators enthuse about this sort of planning activity. It might be a substitute for trying to adopt specific rules to deal with the myriad things that could be covered by such a discussion. In any event, such specific rules would presumably serve as default settings in the absence of party agreement. On the other hand, having specific rule provisions as well might be a useful addition to the generalized directive in Rule 26(f), as specific rules could give parties and courts a starting point on how to react to various proposals the parties make in with regard to these topics.

The addition of proposed consideration of arrangements regarding privilege waiver also seems a worthwhile thing to raise, and it might tie in directly with one of the possible measures regarding waiver considered below, known as the stipulated order approach.

Form 35. Report of Parties' Planning Meeting

* * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

Discovery will be needed on the following subjects: _____
(brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically-stored data is anticipated, and it should be handled as follows:

_____(brief description of parties' proposals)
_____

A privilege preservation order is needed, 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)_____.]

* * *

Comment

This expansion of the form may be useful to call lawyers' (and perhaps judges') attention to the need to attend to these matters as imposed by proposed Rule 26(f)(1)(C). Note that the Rule 26(f) proposal above mandates discussion of these matters. Indeed, it may be that adding something to Rule 16 is not necessary if parties can be expected to include this material in their discovery plans, and thereby call these topics to the judge's attention.

Rule 16. Pretrial Conferences; Scheduling; Management

*** * ***

(b) Scheduling.

(1) ***Scheduling Order.*** Except in categories of actions exempted by local rule as inappropriate, the district judge -- or a magistrate judge when authorized by local

rule--must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail , or other suitable means.

(2) ***Time to Issue.*** The judge must issue the scheduling order as soon as practicable, but in any event within 120 days after any defendant has been served with the complaint and within 90 days after any defendant has appeared.

(3) ***Contents of the Order.***

(A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents.* The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure or discovery of electronically-stored data;[3]

[3] Note that one could include this as a mandatory provision in 16(b)(3)(A). But that would probably be unduly aggressive, even though proposed 26(a)(1)(C) is limited to situations in which discovery of this data is expected.

(iv) provide for protection against [inadvertent] waiver of privilege; and

(~~viii~~) set dates for other conferences and for trial; and

(~~viiv~~) include other appropriate matters.

(4) ***Modifying Schedule.*** A schedule may be modified only for good cause and by leave of the district judge or, when authorized by local rule, of a magistrate judge.

(3) Definition of document -- Rule 34

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) In General. Any party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect and copy -- or to test or sample -- the following items in the responding party's possession, custody, or control:

(A) any designated documents -- including writings, drawings, graphs, charts, photographs, sound recordings, and other data or data compilations in any [magnetic or other][4] media from which information can be obtained or, when necessary, be translated by the responding party into a reasonably usable form, [and including, for electronically-stored data, all data stored or maintained on that document {if the court so orders for good cause},][5] or

(B) any tangible things or;

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[4] Is the bracketed phrase a useful addition?

[5] This phrase raises a question on which the Subcommittee did not reach consensus regarding initial production including metadata and embedded data. The stronger argument for routine production is made for metadata, so that the material may be electronically accessed and searched, than for embedded data. The further phrase making this form of production dependent on court order based on good cause would make this a "second tier" discovery matter available only under the supervision of the court. It probably needs refinement if it is retained to make clear what data the court-order requirement applies to.

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, text, or sample the property or any designated object or operation on it.

Comment

The proposed addition to Rule 34(a)(1)(A) was accompanied by a proposed Committee Note:

> The inclusive description of "documents" is revised to accord with changing technology. For documents created or stored electronically, all data about the creation of the file, such as header information, file size and location, date of creation and author -- commonly known as metadata -- is to be considered part of the document and thus discoverable. Similarly, substantive information hidden within the file itself -- commonly known as embedded data -- is also discoverable. Such data includes, for example, the substance of previous edits, formatting commands, links to other files, hidden rows or columns in spreadsheets, or "electronic stickies," which are notes or reminders that authors and reviewers leave for each other.
>
> When documents are produced as they are ordinarily stored or maintained, meaning the form in which they are created and stored on the computer, rather than in a special format (e.g., .tiff images or .pdf format), both the metadata and the embedded data will be produced with the electronic file. Accessible data is that which is in an immediately usable format, and does not need to be restored or otherwise manipulated. It does not include data that has been deleted and is now available only on backups or through

restoration of deleted files by means of retrieving residual data or file fragments. Those documents, which are retrievable but not ordinarily accessible, may be produced only if a court determines that such production is required and addresses the question of the cost of that production.[6]

There was extended debate during the Sept. 5 meeting on whether inclusion of metadata and embedded data should be routinely required in initial production of documents. Opposition to a routine requirement was based on the low likelihood that this material -- particularly embedded data -- will be used, and on the added cost resulting from mandating that it be included. Support for a broader production requirement emphasized that metadata, at least, may be necessary for the recipient to manipulate the documents using its own computer system. Certain types of electronic production -- .tiff images, for example -- were said to be "no better than paper," requiring time-consuming and costly computer inputting before they could be used effectively. The draft thus has this provision in brackets, with a further possibility of making required production depend on court order. As noted above, it will probably be important to refine this provision, if it is to be retained, to clarify what it applies to.

Note also the overlap between this topic and the next one -- form of production. To the extent the proposed Rule 34(b) provisions there give the requesting party a right to seek production in a specified format (e.g., with metadata), and permit the responding party to object to the requested format only if it produces the electronically-stored data in the form it usually stores the data (presumably with metadata also).

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[6] Note that the question of access to such inaccessible material is addressed under heading (5) below.

(4) Form of production

(a) Documents

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

(1) ***Form of the Request.*** The request must:

(A) describe with reasonable particularity each individual item or category, the items to be inspected; and

(B) specify a reasonable time, place, and manner for the inspection and for performing the related acts. The request may specify the form in which electronically-stored data are to be produced.

[Alternative][7]

(D) specify the form in which documents electronically-stored data are to be produced.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is

[7] This alternative makes it mandatory to specify the form of production. That is more in keeping with the form of the rule, but the question whether this specification should be mandatory or permissive prompted substantial disagreement in the Subcommittee.

directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or stipulated by the parties under Rule 29.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, specifying the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the remainder. A party may object to the requested form for producing electronically-stored data [and to production of electronically-stored data that are not {reasonably} accessible [without undue burden or expense] {reasonably available} in the usual course of the producing party's business {activities}].[8]

(D) *Producing the documents.*

(i) *In general.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to

[8] In the next section, we will see that a Rule 26(h)(2) proposal has emerged as the method for dealing with the inaccessible data problem. Assuming (as is the intent) that this provision can do duty for all forms of discovery, it would seem unnecessary to add a parallel provision here in Rule 34. But the Committee Note should call attention to the application here of the inaccessible-data proposal.

the categories in the request.

(ii) ***Electronically stored materials.*** A party producing electronically-stored data may produce them in the form in which they are ordinarily [created and][9] stored.[10] Unless the court orders otherwise for good cause, a party producing electronically-stored data need only produce it in one form.[11]

Comment

[9] Is this phrase useful here? Unless creation in a certain format makes it easy to put data stored in another format back into the format in which it was created, the phrase might be taken out. If the phrase is retained, should it be "created or"?

[10] This might seem inconsistent with the earlier provision that the party seeking production may request production in a certain format. Perhaps the reconciliation, which could be explored in a Committee Note, is that the right to request production in a certain form gives way if that is not a form in which the producing party ordinarily creates or stores the material. That would seem to mean that the grounds of objection are generally limited to those based on what the producing party ordinarily does to create or store the documents. One complication that might warrant consideration is a situation in which the producing party creates and stores the documents in more than one format, which I would guess can occur. If that is true, should the party requesting production have a right to insist on production in the format most useful to it, or can the responding party choose the format (possibly to frustrate the other side's use of the material)?

[11] This sentence was added after the Sept. 5 meeting to include something that seemed important to some of the participants at that meeting -- that a party should not be able to demand one form of production, perhaps hard copy, and then demand a duplicate production in another form, perhaps electronic. The Subcommittee has not seen or commented on this proposal. It may be important to address the question whether the producing party or the requesting party gets to choose the form of production where the producing party creates or stores the data in multiple forms.

A key question is whether it should be mandatory that the party requesting production specify the form of production it desires. Arguments for required specification include facilitating discovery generally and forestalling demands that material produced in one form be re-produced in another form. An effort has been made to add a provision addressing the latter problem. Arguments in favor of making the request optional include the assertion that the requesting party may often not know what format it wants, or which ones the other parties use. Moreover, technological developments may make this issue less important in the future.

As noted the first footnote accompanying proposed Rule 34(b)(2)(D)(ii), it may be necessary to be more focused, either in the rule or the Note, on how a conflict between the parties about the form of production should be resolved. In general, it would seem that the sensible way is to balance burden on the producing party against utility to the party seeking production. The first major case involving discovery of computer-readable material[12] involved what might partly have been an effort to defeat the other side from using the material to build its case. More recently, there have been repeated suggestions that parties producing materials stored electronically sometimes select a form of production that minimizes their utility to the other side. There probably is often a wide range of reasonably possible forms of production, and we could be more or less directive about the

[12] In National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257 (E.D. Pa. 1980), Judge Becker required production of a computer-readable version of lengthy interrogatory answers initially provided in hard copy form to save the discovering party the burden of inputting the material (in order to analyze it) dealt with a situation of this sort. There the court was confronted with work product objections based on the fact that the computerized version had been created by counsel, and emphasized that the production ordered had the same content, but in a different form.

way in which the court is to oversee the parties' debates about choosing the proper version.

A separate problem initially raised in Shira's article in the Boston College Law Review is that there may be proprietary aspects to the form in which the data are kept. In the Brooklyn memorandum, another provision was added to address that question:

> and the party making the request may not release such information in that form to anyone other than its expert witnesses unless the producing party agrees to such release or the court so orders.

One way of addressing this issue would be to say in the Note that the court should be free with such protection when a proprietary data problem is raised.

In any event, this format problem is one of the topics we want the parties to discuss in their Rule 26(f) conference, and we may want to highlight it somehow in connection with that activity, or with Rule 16(b). As suggested in connection with item (2) above, this confidentiality consideration should probably be mentioned in the Committee Note accompanying an amendment to Rule 26(f) if that is pursued.

If Rule 26(f) is thus amended, is it important also to add these changes to Rule 34(b)? Doing so may be justified on the ground that it is worthwhile to list these specifics about Rule 34 requests in Rule 34. In addition, assuming no agreement between the parties, putting the provision here allows us to have a Note outlining general attitudes toward how to handle these problems if the parties have a dispute about them. That might not so easily fit in a Note to amended Rule 26(f), assuming we were to go forward with that amendment.

(b) Interrogatories

Rule 33. Interrogatories to Parties

* * *

(e) Option to Produce Electronically Stored Information. If the answer to an interrogatory may be determined [by examining, auditing, abstracting, or summarizing] {from}[13] the responding party's electronically-stored data, and if the burden of determining the answer will be substantially the same for either party, the responding party may answer by:

(1) producing the electronically-stored data from which the answer may be determined; and

(2) giving the interrogating party sufficient information [and computer software][14] to enable it to derive or ascertain the desired information.

Comment

It may be that this option should supplant, and not only be added to, current Rule 33(d). Nowadays, it is hard to believe that parties seeking to employ the option offered by 33(d) would

[13] The bracketed phrase borrows from current Rule 33(d), but "from" may be sufficient here.

[14] This bracketed phrase recognizes the possibility that the responding party stores and accesses the information using software that the other side does not have. Almost certainly another phrase would be better, and "computer software" is used to describe what I'm getting at in words that probably are not sufficient for the purpose. If it is added, there might be reason to say either in the rule or in the Committee Note that any proprietary software must only be used for this case.

do so with regard to hard copy information. Indeed, it might be important to find out how parties currently deal with Rule 33(d) for computerized records. Maybe that rule only needs to be tweaked a bit, or the current proposal can be integrated into it.

(5) Addressing the producing party's burden of retrieving, reviewing, and producing inaccessible data.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronic data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. In responding to discovery requests,[15] a party need

[15] Another phrase could be added before "responding to discovery requests" -- "making disclosures under Rule 26(a) and in" -- to exempt parties from including inaccessible materials (within the meaning of this provision) in Rule 26(a) disclosure. The consensus of the Sept. 5 meeting appeared to be that this provision should not be included.

Initially, it would seem that disclosure of inaccessible material should also be excused, since a requirement that a party restore and search out all this stuff to make its initial disclosures would be onerous indeed, and would overwhelm any protection afforded by a provision that the discovery responses need not involve mining such data unless the court so orders. But that disregards the "may use to support its claims or defenses" limitation now included in Rule 26(a)(1)(A) and (B). If a party decides to mine ordinarily inaccessible stuff to get good evidence, should we override the duty to disclose that material under Rule 26(a)(1)(B) (along with the duty to supplement under Rule 26(e))?

637 not include electronically-stored data [from
638 systems] created only for disaster-recovery
639 purposes,[16] [providing that the party preserves a
640 single day's full set of such backup data,][17] or

There are reasons to be wary about limiting disclosure to exclude items retrieved from "inaccessible" sources. For example, in employment discrimination actions an employer may make considerable efforts to locate "inaccessible" information that will support an adverse employment decision in order to use that information in the case. Should it be relieved of the duty to disclose what it finds (even though it plans to use the evidence) because it found the seemingly damning information by searching the residual data on the hard disc of the employee's office computer? How about an employer who installs a device on the employee's computer that makes a record of each keystroke or otherwise engages in some form of surveillance to keep track of employee behavior? This computer forensic activity may be increasingly important in a number of areas of litigation, and removing a disclosure obligation regarding this information seems contrary to the objectives of disclosure and unnecessary to relieve the party of an inappropriate burden. It comes into play only when the party chooses to do what we want to say is not required.

A permutation raised during the Sept. 5 Subcommittee meeting was a situation in which a party dredges up material from inaccessible sources and finds ten pertinent items, one of which it intends to use. Should it still be relieved of the obligation to make the other nine items available through discovery because they are inaccessible? By the time they have been dredged up, they are no longer inaccessible, so it would seem that the exemption specified in the text would not apply.

[16] This is a first-cut effort to exclude backup tapes and the like from the duty to respond to discovery absent a court order. The Subcommittee's resolution of the drafting approach was (1) to put backup tapes and the like off limits absent a court order, and (2) similarly to exclude inaccessible materials from the duty to search absent direction from the court.

[17] This proviso was suggested during the Sept. 5 meeting on the ground that good practice calls for such preservation of a "snapshot" of the material that was backed up. Other places to include such a provision are mentioned later. Whether it should be in a rule is not clear, assuming it would at least be a desirable admonition.

electronically-stored data that are {not [reasonably] accessible without undue burden or expense} [accessible only if restored or migrated to accessible media and format] {not accessible [reasonably available] in the usual course of the responding party's {business} [activities]}. For good cause, the court may order a party to produce inaccessible electronically-stored data subject to the limitations of Rule 26(b)(2)(B), [and may require the requesting party to bear some or all of the reasonable costs of {any extraordinary efforts necessary in} obtaining such information].

Comment

There are a number of choices to be made if the above general approach seems desirable.

Probably the first issue to address is the method of describing the information being excluded from discovery response absent court order. The above draft includes a first-cut attempt to excuse efforts to search backup tapes and the like unless the court so orders. The Sept. 5 meeting produced substantial consensus that such review of backup materials should be categorically exempted from discovery-response efforts absent court order. Care should be taken to refine this rule description, however. In addition, there is a provision to condition this excuse on retaining one day's full set of backup materials for future reference. Whether this sort of thing should be in a rule can be debated.

During the Sept. 5 meeting, there was considerable discussion about whether it is desirable to focus on what is accessed during the usual course of the responding party's

business or activities. That seems, at first blush, a sensible way of determining what is easy or difficult to access. At a minimum, it would seem odd for electronically-stored data that a party accesses routinely to be considered inaccessible when the other side wants it through discovery. The draft suggests that if this approach is taken, the focus should be on the producing party's "activities" rather than "business." If business is defined broadly, as in Fed. R. Evid. 803(6), it covers a lot of things. But there are others that are outside it; most natural persons as litigants would not be able to use it with regard to the hard disks on their home computers. So "activities" is meant to cover a similar focus on everyday activities for non-business litigants.

During the Sept. 5 meeting it was objected, however, that the real question was whether there would be undue burden or expense in accessing the data, without regard to whether the producing party does so for its own purposes. If the data would be easy to access, is there a reason to prevent discovery of it absent court order just because it is not normally accessed? The phrase "not [reasonably] accessible without undue burden or expense" is designed to respond to this point. Whether it is useful to add "reasonably" to this formulation could be debated.

The third phrase -- "accessible only if restored or migrated to accessible media and format" -- may be a more precise way of capturing the idea behind "not accessible without undue burden or expense." Although it may be more precise, that could be a drawback if there are obstacles to access that are not encompassed within "restored or migrated to accessible media and format."

Another issue has to do with providing explicit authority to shift costs in the rule. As we learned in 1999 with the Rule

26(b)(2) amendment that was rejected by the Judicial Conference, more explicit coverage of cost-bearing can be a very controversial subject. That is, of course, not a reason to shrink from a useful proposal. But the upshot of the 1998-99 experience is that the power to require cost-bearing rather than entirely forbidding discovery that would be impermissible under the proportionality principles is implicit in the rule, as the proposed Committee Note to the preliminary draft said. To add explicit cost-bearing authority in a different subdivision of Rule 26 might lend some textual support to arguments that the authority to do shift costs is limited to Rule 26(h)(2), and not available under Rule 26(b)(2) as well, but because this is in a different subdivision that argument seems weak.

A related issue is whether to tie cost-bearing (if included) to "extraordinary efforts." In Texas Rule 196.4, cost-shifting is tied to "extraordinary steps." Lee Rosenthal and Nathan Hecht offer the following explanation for the introduction of that term there:

> The practitioners thought the words "reasonable" and "extraordinary" were crucial parameters of this cost-shifting mechanism. "Reasonable" focuses not only on amounts but also on the efforts necessarily undertaken to produce the data. "Reasonable" -- a familiar concept in determining attorney fees, medical expenses, and other such issues -- is better understood than "extraordinary," and the practitioners realized that. They thought it was important to state that the producing party must incur ordinary expenses of producing electronic data, the same as in producing documents, and that cost-shifting would be permitted, and required, only for extraordinary measures. What is extraordinary might vary from party to party, for reasons unrelated to the net worth of the party. For

example, a business or agency might have the technical ability readily to access categories of information that another entity might only be able to access with great effort and expense.

Perhaps including "extraordinary efforts" curtails occasions in which cost-bearing can be granted. Thus, if the "ordinary course of business" standard for defining accessibility is used, there could be instances in which electronically-stored data is considered inaccessible but retrieving it would not require extraordinary efforts. Then inclusion of the term might reassure those uneasy about cost-bearing. But if the term does not curtail cost-bearing, it may be daunting to have a term that is not well known doing such important work.

Finally, it should be noted that the invocation of Rule 26(b)(2) seems to address the concerns that should influence the court in deciding whether to require production of this information, and whether order cost-bearing. The proportionality principles seem to provide pertinent guidance on the question whether -- and to what extent -- the court should impose cost-bearing in this context. One of them looks to whether the information can be obtained more readily by another method, and another to whether the effort involved in obtaining it is justified in terms of the importance of the information in this case. Those seem the sorts of things that the court should look to in deciding what to do when trying to assess whether there is good cause within proposed Rule 26(h)(2).

(6) Addressing privilege waiver

(a) The "Quick Peek" Approach

The privilege waiver problem has been on the Subcommittee's agenda for a long time; it may be that the time has come to confront it. The last full Committee discussion occurred during the Fall, 1999, meeting in Kennebunkport. Because many of the issues remain the same, and to provide important background, the agenda materials for that meeting are included as an Appendix to this memorandum. The outcome of the discussion of the topic in Kennebunkport was that the Subcommittee should keep the issue on its agenda, particularly because it appeared likely to be important in the anticipated examination of problems of discovery of electronically-stored data. But the treatment proposed below is not limited to electronically-stored data.

One important consideration in connection with rules about privilege waiver is 28 U.S.C. § 2072(b), which says that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." It appears that there is virtually no caselaw about this limitation, which is not surprising since it could arise only if such a rule were adopted. The questions raised by § 2074(b) are covered in the Appendix. Suffice it to say for current purposes that one could argue that Civil Rules 26(a)(2)(B) and (26(b)(5) might be challenged on this ground if dealing with waiver is forbidden. Both of them affect issues of waiver, and nobody seems to have raised a serious question about that. So there may be some latitude to adopt rules dealing with privilege waiver as a function of discovery.

Nonetheless, there is reason for caution in this area. At the time of the Kennebunkport meeting, therefore, the pending

proposals (quoted in the Appendix) were premised on consent and a court order based on that consent. Something of that sort might be sufficient to do most of the job, in conjunction with addition of the topic to the Rule 26(f) conference. Accordingly, we begin with the "quick peek" approach discussed by the full Committee in 1999.

Rule 34. Producing Documents and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * *

(b) Procedure.

(1) ***Form of the Request.*** The request must:

(A) identify, by individual item or category, the items to be inspected;

(B) describe each item with reasonable particularity; and

(C) specify a reasonable time, place, and manner for the inspection and for performing the related acts.

(2) ***Responses and Objections.***

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be directed by the court or agreed to in writing by the parties under Rule 29.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, specifying the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection and related activities with respect to the remainder.

(D) *Producing the documents.* A party producing documents for inspection must produce them as they are kept in the usual course of business or must organize them and label them to correspond to the categories in the request.

(E) ***[Order Regarding] Privilege Waiver.*** [On stipulation {of the parties},[18] a court may order that][19] A party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege or protection.[20] The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under Rule 34(b)(1).

[18] It is not clear to me whether, as a matter of restyling, these words should appear after "stipulation."

[19] Deleting this phrase would make the "quick peek" applicable without a stipulated order.

[20] The phrase "or protection" is designed to cover work product.

Comment

The purpose of this provision is to facilitate discovery by enabling parties permit adversaries to inspect the their materials without thereby waiving any privileges. For many years, the bar has complained about the practical consequences of the waiver doctrines (1) that any disclosure to anyone waives as to the world, and (2) that any waiver applies not only to the disclosed material but also to any other material on the same subject matter. Because document requests are often very broad, and the responsive material is therefore often of no real interest to the party seeking production, undertaking the laborious task of reviewing all this material before the other side gets to look at it is highly wasteful if the other side then says it is really interested in only 10% of the material. Wouldn't it be more sensible to postpone the privilege review until the 10% had been identified? That could save the producing party money, and save the party seeking discovery time.

We have been informed that parties often agree to such an arrangement and the original proposal therefore was predicated on such a stipulation and the subsequent entry of a court order. The addition of discussion of privilege waiver during the Rule 26(f) conference may facilitate the negotiation of such agreements. In addition, it was thought that relying on a stipulation and court order would fortify arguments that this sort of order could be entered without exceeding the limits of 28 U.S.C. § 2074(b). But one could certainly argue that the parties' agreement cannot expand the Committee's authority or foreclose arguments by third parties about whether a waiver has occurred whatever the parties intended.

As the brackets indicate, however, the approach could be rewritten as a rule that has the specified effect without an

agreement and court order. Deleting the agreement/order requirement could have adverse consequences besides possibly magnifying problems of power. If a party receiving production does not know that the producing party believes it is only doing an initial examination, it might well take the position that the privilege was waived whatever the producing party had in mind. The stipulation approach avoids that contretemps.

Either with or without the stipulation, the objective of the above provision is to foreclose the arguments of third parties that the privilege has been waived in the situation described.

Whether the quick peek will be of much assistance in relation to electronically-stored data is debatable. Unlike the situation in which hard copy materials are made available in a warehouse and the party who asked for them then designates the items it wants copied, thereby focusing the privilege review, with electronically-stored materials the producing party is likely to give the other side a CD containing all the materials. Thus, there seems no obvious occasion for further copying or a further request that would fit the model above.

But it has been suggested that in some instances this model might be of considerable assistance in relation to discovery of electronically-stored data. Discovery regarding electronically-stored materials may involve having one party query its computer system according to directions from the other side. At the time the query is used, the parties don't know what it will elicit, much less whether that might be privileged. So a quick look might be quite helpful in that situation. Presently, courts that order such querying often appoint a neutral (perhaps as a master) to do the query and then deliver the material to the producing party for privilege review. The master is needed so that the court can say this person is an agent of the court and that any

revelation to him or her is not a waiver. With a provision like the one above, it might be possible to "eliminate the middleman."

This quick peek approach may nonetheless be insufficient because it cuts off any privilege objection at the point the copies (or the query results) are delivered to the party seeking production. During the Sept. 5 meeting the Subcommittee considered, but found too difficult, a more aggressive approach to this problem. A version of that approach is provided by footnote, along with some commentary.[21]

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[21] This approach would add a new Rule 34((b)(2)(E) along the following lines:

> **(E)** ***Privileged material.*** If a party produces documents without intending to waive a claim of privilege, that production does not waive the privilege [under these rules or the Rules of Evidence] if, within 10 days of discovering that privileged documents have been produced, the producing party identifies the documents that it asserts are privileged and the grounds for such assertion. The requesting party must promptly return the specified documents [and any copies (electronic or paper)] to the producing party, who must preserve those documents pending a ruling by the court.

There are a number of issues that could be troublesome with this approach:

(1) If it turns on "intending to waive" the privilege (rather than inadvertent disclosure, discussed below), it could apply in a situation that would be quite difficult to justify -- where the producing party acknowledges that it knew that the item was being produced and that it was privileged, but wanted to have the other side see it without waiving the privilege;

(2) The focus on privileges "under these rules or the Rules of Evidence" might leave out privileges under state law, or limit the protection if waiver were later asserted in relation to an action in state court;

(3) The timing problem is quite great. The proposal ties the producing party's obligation to make the objection to discovery that privileged documents have been produced. Would there be a requirement to make a post-production review

(b) Inadvertent Production

This approach would rely on a different new Rule 34(b)(2)(E):

(E) ***Inadvertent production of privileged material.*** When a party inadvertently produces documents that are privileged, that production does not waive any applicable privilege or protection if waiver would be unfair in light of

(i) the volume of documents called for by the request [given the time available for review of the materials produced]; and

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of documents within a certain time? Does the other side have to give notice of the mistake? (It may be that ethical rules require something like this.) If there is no time cutoff, could the objection be raised for the first time at trial, by which time the other side might have built its case around the document? During the Sept. 5 meeting, all agreed that ordinarily it should not be too late to raise the objection if the document were used in a deposition, but that deferring until the pretrial order (or perhaps a motion for summary judgment) would be too late. Perhaps invoking the "used in the proceeding" phrase from Rule 5(d) could be helpful here, as that excludes use in discovery but seems to include use in court filings.

(4) Should the duty to return the documents include any other documents that refer to them (even work product)?

(5) Should the preservation requirement turn on when the court makes a ruling. If there is no dispute about whether the documents are privileged, there may never be a motion for such a ruling. Perhaps this would best be left to the preservation requirements considered in item (7) below rather than including it in this rule.

(ii) the efforts the party made to avoid disclosure of the privileged materials; and

(iii) whether the party identified the privileged materials within a reasonable time after production and promptly sought return of the materials; and

(iv) the extent of the disclosure; and

(v) the prejudice to any party that would result from finding -- or failing to find -- a waiver;[22] and

(vi) any other matter that bears on the fairness of waiver.]

Comment

The stimulus behind this approach is existing caselaw on inadvertent waiver. That caselaw is not uniform. There are cases saying that only the client can waive the privilege, and that therefore the lawyer's delivery of the material does not waive it. But that is a minority view, and there is another minority view that any disclosure is a waiver, no matter what precautions were taken to avoid it. For examples of recent cases

[22] This factor is not on the usual list of factors mentioned by courts although it presumably is important in making the overall fairness inquiry. It is included due to discussion during the Sept. 5 meeting. The idea is that either or both parties might urge prejudice that bears on whether to find a waiver. The producing party could point out how its understandable mistake would have unfairly broad ramifications if treated as a waiver. The party that obtained the document could emphasize the importance of the document to its case.

adopting these minority views, see 8 Fed. Prac. & Pro. § 2016.2 ftn. 17 and 18 (2003 Pkt. Pt. at 61-62).

If we are going to be aggressive, it might be preferable to pursue the majority position. That position has been summarized as follows:

> Many courts have taken a third position that recognizes the burdens of discovery and the reality that lawyer errors can in some instances waive client privileges. These courts commonly look to a series of factors in deciding whether to hold that a given disclosure should be regarded as waiving the privilege that would otherwise attach to the materials produced. First, they look to the reasonableness of the efforts to avoid disclosure. Second, they look to the delay in rectifying the error. Third, they consider the scope of discovery, particularly as it relates to the burden of preparing for that discovery. Fourth, the examine the extent of the disclosure. There is a relationship among these factors; as the volume of discovery mounts so should the efforts to avoid waiver but so also should the court's understanding that, particularly given the pressures of time, mistakes can happen. Finally, the courts using this middle test consider the "overriding issue of fairness."

8 Fed. Prac. & Proc. § 2016.2 at 242-45.

Given the problem of authority, it might be prudent to adopt the majority view as a rule for the federal courts. We might also adapt that rule to include only certain of the factors that the courts have developed, and could (in a Committee Note) articulate the desired approach to application of those factors. And if the Committee thought it worthwhile to adopt such principles but beyond the rulemaking authority, it could urge the

Standing Committee to seek Judicial Conference approval for endorsing this action by Congress. As the above treatise passage suggests, there is some variation among the expression of these criteria by the courts, and if a rule proposal were to be presented as based on the caselaw considerably more attention should be paid to that caselaw. But it might be a stronger case before Congress if based on the consensus of the majority of the courts.

The above draft largely tracks the majority caselaw. It adds explicit reliance on the prejudice issue, but it may be that some such concern was implicit in the decisions.

(7) Preservation, "Safe Harbor," and Sanctions

(a) Preservation and Safe Harbor

The Sept. 5 discussion of these issues resulted in a combination of two contributions by different Subcommittee members. One was a proposal for a new Rule 34.1 that would specify the affirmative obligation of parties to preserve documents and tangible things. Another began as a Rule 27 proposal that included a "safe harbor" regarding continuing normal operations of computer systems. The consensus of the Sept. 5 meeting was that these two features should be combined in a single rule, initially designated Rule 34.1.

Rule 34.1. Duty to Preserve

Upon commencement of an action, all parties must preserve documents and tangible things that may be required to be produced pursuant to Rule [26(a)(1) and][23] (b)(1), except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court for good cause.[24]

[23] Whether to include disclosure as well as discovery here might be debated. As discussed in connection with proposed Rule 26(h)(2) under heading (5) above, it seems useful to require parties to provide disclosure of any inaccessible materials they access even though we propose to exempt parties from searching such materials in compiling discovery materials. But requiring preservation of such materials would contradict the objective of 26(h)(1) and run counter to the second sentence of proposed 34.1. So it might be best to leave out disclosure here -- the range of things that might be required to be produced pursuant to Rule 26(a)(1) is vast.

[24] This cross-reference is to the proposal (covered in item (5) above) to exempt from the duty of search any inaccessible electronically-stored data. As noted below, if the preservation obligation is limited to electronically-stored data, this provision might better be inserted as a new 26(h)(3).

Nothing in these rules[25] requires a party to suspend or alter the operation in good faith of disaster recovery or other [computer] systems {for electronically-stored data} unless the court so orders for good cause, [providing that the party preserves a single day's full set of such backup data].[26]

Comment

The following Committee Note was proposed:

This rule does not address preservation obligations that may arise prior to the commencement of a civil action. The preservation obligation does not require a party to preserve multiple copies of the same data -- for example, successive backups when a single backup captures the same data. However, because backup data may be required to be produced pursuant to Rule 26(b)(1), as explained in Rule 34, one copy of such data must be preserved.[27]

A prime topic for consideration is whether this proposal

[25] This may generally not be a favored form of saying things in the Civil Rules, but because there are lots of other legal regimes dealing with preservation, particularly of electronically-stored data, it seems a valuable way of putting the point.

[26] This sort of directive to preserve one day's worth of backup data is proposed in item (5) above. Would it be better included in this provision, which is directly addressed to preservation?

[27] During the Sept. 5 meeting, it was mentioned that prudent counsel will direct the client to make a "snapshot" backup tape (or tapes) of all that's on its system on the day it becomes aware of the suit. This snapshot backup can then be stored for possible use if needed, and ordinary operation of the computer system can continue until the court directs otherwise.

strikes the right balance. One starting point is to observe that the preservation proposal reaches all material, not just electronically-stored materials. Whether it is wise to do that could be debated. There is presently no rule provision explicitly addressing preservation of hard-copy materials, and the Committee has not received comments indicating that there is need for rulemaking to deal with this topic. Since the general focus of this amendment package is on electronically-stored data,[28] it may be jarring to introduce a potentially-important rule provision that deals with hard copy materials in this package.

In the same vein, addressing hard copy materials may require considerable inquiry into the exact current treatment of preservation of these materials. The rule presumably is not intended to displace any other legal regimes that address preservation, but that point should be made clear in the Note if this method is pursued. Preservation obligations often arise under those regimes before a suit is filed, and it is presumably not the intention of this provision to alter that.

A similar question is whether this provision should be located near Rule 34. Understandably, it addresses a concern that is likely to be important in regard to document production. But this consideration can also matter in relation to other topics -- interrogatories and depositions (particularly Rule 30(b)(6) depositions of IT people) come to mind. So it might be desirable to locate the provision instead in Rule 26, which deals with discovery generally.

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[28] The one exception is the treatment of privilege waiver, covered in item (6). On that subject, the Committee received numerous reports of problems with hard-copy documents before attention focused on electronically-stored data, so it is understandable that the discussion proposal reaches hard copy materials.

Putting together the idea that it might be safer to limit the new provision to electronically-stored data and the idea that it would be better to locate it in Rule 26, one could proceed with a new Rule 26(h)(3), to go along with other discussion proposals presented earlier in this memorandum:

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * *

(h) Electronically-stored data.

(1) Scope of electronically-stored data. Electronic data [Digital data] {Computer-based data} includes all information created, maintained, or stored in digital form, on magnetic, optical or other media, accessible by the use of electronic technology such as, but not limited to, computers, telephones, personal digital assistants, media players, and media viewers.

(2) Inaccessible electronically-stored data. In responding to discovery requests, a party need not include electronically-stored data created only for disaster-recovery purposes, or that is {not [reasonably] accessible without undue burden or expense} [accessible only if restored or migrated to accessible media and format] {not accessible [reasonably available] in the usual course of the responding party's {business} [activities]}. For good cause, the court may order a party to produce inaccessible electronically-stored data subject to

the limitations of Rule 26(b)(2)(B), [and may require the requesting party to bear some or all of the reasonable costs of {any extraordinary efforts necessary in} obtaining such information].

(3) Preserving electronically-stored data. Upon commencement of an action, all parties must preserve electronically-stored data that may be required to be produced pursuant to Rule [26(a)(1) and] (b)(1), except that materials described by Rule 26(h)(2) need not be preserved unless so ordered by the court for good cause. Nothing in these rules requires a party to suspend or alter the operation in good faith of disaster recovery or other [computer] systems {for electronically-stored data} unless the court so orders for good cause, [providing that the party preserves a single day's full set of such backup data].

(b) Sanctions

(f) Failure to Produce Electronically-stored Data. A court may not impose sanctions on a party [under Rule 37(b)][29] for failure to produce[30] electronic documents unless [the court

[29] This bracketed phrase may be undesirable. Is it important that this provision apply to other sanctions? Perhaps the sanctions of Rule 37(c)(1) would come to mind, but does this mean that a party that fails to disclose electronic evidence in violation of its obligations under Rule 26(a) may not be sanctioned by exclusion of the evidence? More generally, Rule 37(b) sanctions usually apply only to failure to obey a discovery order under Rule 37(a). Would courts enter 37(a) orders in situations that would be exempted by this rule from imposition of sanctions?

[30] Would this cover failure to provide information sought by interrogatory about electronically-stored data?

finds that][31]

(1) the party deleted, destroyed, or otherwise made unavailable electronically-stored data that were described with reasonable particularity in a discovery request, or

(2) the party willfully or recklessly deleted, destroyed, or otherwise made unavailable electronically-stored data in violation of [Rule 34.1] {Rule 26(h)(3)}.

Comment

This provision is a narrowed version of the proposal that was before the Subcommittee.[32] The eventual reasoning of the

[31] It was proposed that this provision include this finding requirement. Is this necessary? There are no other finding requirements in Rule 37.

[32] The original proposal was as follows:

(f) Failure to Produce Electronic Documents.

(1) ***In General.*** A court may not impose sanctions [under Rule 37(b)] for failure to produce electronic documents unless [the court finds that]

(A) the documents were accessible to the party, or that party declined an offer by the party seeking production to bear or share the expense of making the documents accessible; and

(B) the party deleted, destroyed, or otherwise made unavailable electronic documents that were described with [reasonable] particularity in a discovery request, or electronic documents that were relevant to pending, threatened, or reasonably anticipated litigation; and [or]

(C) the responding party willfully or recklessly failed to preserve the electronic documents; and [or]

Subcommittee on Sept. 5 was that these constraints on sanctions, coupled with the articulation and limitation of a preservation duty described in item (7)(a), would adequately protect against inappropriate imposition of serious sanctions. It was expected, however, that the Committee Note would emphasize the notion that serious sanctions should ordinarily be warranted only where there is serious prejudice as a result of the failure to preserve.

(D) the requesting party is materially prejudiced by the loss of the electronic documents.

(2) ***Continued Normal [Ordinary] {Customary} Operation of Computer Systems.*** Nothing in this rule [these rules] requires the responding party to suspend or alter the good faith operation of the responding party's electronic or computer systems absent a court order.

Proposed (2) was moved to the new preservation rule, now styled 34.1 or 26(h)(3). Proposed (1)(A) was deemed unnecessary due to proposals to deal elsewhere with the problem of inaccessible data. Proposed (D) was deleted due to the view that the sanctions decision itself involves consideration of prejudice, and that stating it as a requirement in the rule would involve double counting. The Note, however, should mention the importance of focusing on this issue in determining whether to impose sanctions.

APPENDIX

Agenda Materials on Privilege Waiver
Fall 1999 meeting

(2) Privilege Waiver

This is an issue the Committee has touched on several times before. Accordingly, it seems that some background on this discussion is in order at the outset. The purpose of raising the question again is to determine whether (a) it is time to proceed to draft a proposal for a rule amendment, (b) the Committee feels that the idea of such an amendment should be dropped, or (c) the question should be deferred (perhaps until other discovery proposals emerge).

The problem of wasting time reviewing large quantities of documents to remove all material that could be withheld on grounds of privilege was first raised by some at the conference the Subcommittee held in San Francisco in January, 1997. In June, 1997, David Levi and I attended the mid-year meeting of the ABA Section of Litigation in Aspen, Colorado, and a session of that meeting was devoted to discovery issues, with an open mike for comments and suggestions from the floor. A number of those who used the mikes during that session urged that something be done to reduce the burden of document review to avoid privilege waiver.

Under date of June 2, 1997, I developed a list of possible ideas for rule amendments, and this list was circulated to the various bar groups that were invited to comment on the question of revising the discovery rules during the Boston conference in Sept., 1997. The list included the question whether a rule change should be made to deal with the waiver problem. There was

nevertheless not much attention to this question in the written submissions from bar groups about the Boston Conference [in September, 1997]. Just to provide a context, herewith a recap of the views expressed (and not expressed):

ABA: Despite the interest of some during the Aspen meeting (noted above), the ABA Section of Litigation did not mention the subject in its submission (which was prepared by the Section's Task Force on Discovery)[33]

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ACTL: The American College of Trial Lawyers limited its submission to scope of discovery.

ATLA: ATLA reported on the reactions of lawyers who participated at a session during its 1997 annual convention, saying that it "see[s] nothing prejudicial in a rule that might insulate the producing party from an inadvertent waiver of privileges." (ATLA submission at 4)

DRI: The Defense Research Institute submitted a number of proposals, including a 17-page discussion of document production under Rule 34, but this did not mention privilege waiver. (DRI tab IV) It also submitted an 8-page discussion of problems with privilege logs, but this paper did not focus on waiver either. (DRI tab VI)

TLPJ: The Trial Lawyers for Public Justice urged that a rule change to deal with the problem of privilege waiver was unnecessary because there is already caselaw on the problem

[33] The question whether such a rule amendment would be desirable is reportedly being discussed at a meeting of a committee of the ABA Section of Litigation in late September [1999], and the insights from that discussion should be available to the Committee at its October meeting.

that adequately handles it. TLPJ suspected, however, that a change would "protect more information than is currently protected," and would also produce litigation about what is "inadvertent" production of privileged material. (TLPJ submission at 21-22.)

PLAC: The Product Liability Advisory Council submitted results of a survey of its members, but there was no substantial attention to privilege waiver problems, although there were some expressed concerns about privilege logs.

During the panel on documents at the Boston Conference [in September, 1997], there was little attention to privilege waiver. Magistrate Judge Zachary Karol said that the fear of inadvertent waiver holds up the discovery process, and he suggested that it would be desirable to devise a method to permit initial review without waiving privilege, leaving the question of assertion of privilege until copying is requested. This would, he said, solve the delay problems and reduce the burden of privilege logs for materials that nobody wants anyway. Chilton Varner questioned whether some anti-waiver provision could be applied in diversity cases. Most of the discussion was about other topics.

Although there was not much interest expressed in Boston in addressing this problem, the possibility of reducing the risk of privilege waiver was included in the array of possible reforms brought to the Committee at its Oct. 1997 meeting. (Agenda materials at 25-26) At that meeting, there was some discussion of the problem and the Discovery Subcommittee was asked to consider these questions. (Minutes of Oct., 1997, meeting at 16-17) The agenda materials for the Santa Barbara Subcommittee meeting in January, 1998, included considerable discussion of privilege waiver issues (Santa Barbara agenda materials at 57-65), and yielded some alternative proposals that were submitted

to the full Committee during its March, 1998, meeting. (March 1998 agenda materials at 37-39) The subject was again discussed at the Durham meeting, and the conclusion was that the Subcommittee should study these issues further. (Minutes of March, 1998, meeting at 36-37)

Since the Durham meeting, much energy has been invested in considering the amendment proposals that were approved there and (in June, 1998) approved for publication by the Standing Committee. Besides the public hearings and full Committee consideration of these proposals, the Discovery Subcommittee has conferred about them. The Subcommittee has not had further discussion of privilege waiver during this time. Nonetheless, because there appears to be a significant question about whether a rule amendment to deal with this problem is desirable, it seems useful to raise the matter again with the full Committee.

The purpose of this discussion, then, is to introduce the issue. In large measure, this introduction includes points and suggestions already addressed by the Committee, but unlike those earlier occasions the 1997-99 discovery package is no longer before the Committee. Accordingly, this memorandum introduces the subject by addressing three topics: (a) the specific rule proposal previously discussed; (b) the question whether such a change would be helpful; and (c) the question whether such a change can be made through the rules process without affirmative action by Congress.

(a) The specific rule proposal: Actually two different versions of a rule proposal, both focused on Rule 34(b), were presented to the Committee during the March, 1998, meeting at Durham. They both appear below as alternative final paragraphs to Rule 34(b):

(b) Procedure. The request shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, 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 part thereof, or any failure to permit inspection as requested.

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.

On agreement of the parties, a court may order that the party producing documents may preserve all privilege objections despite allowing initial examination of the documents, providing any such objection is interposed as required by Rule 26(b)(5) before copying. When such an

order is entered, it may provide that such initial examination is not a waiver of any privilege.

On agreement of the parties, a court may order that a party may respond to a request to produce documents by providing the documents for initial examination. Providing documents for initial examination does not waive any privilege. The party requesting the documents may, after initial examination, designate the documents it wishes produced; this designation operates as the request under this paragraph (b).

These two alternatives emerged from the Subcommittee's Santa Barbara meeting. Discussion in Kennebunkport could focus on these specifics of these proposals, and the differences between them, but it is probably more fruitful first to consider whether such a change would be desirable.

To introduce that general question, it seems helpful to mention some additional points about what this proposal includes, and what it does not include. *First*, it does not focus on the protective order provisions of Rule 26(c). Because documents are the area where the problem reportedly exists (as opposed to depositions, etc.), Rule 34 seems the proper place to deal with it. It is also true that the Committee voted in Durham not to pursue amendments of a different sort to Rule 26(c), so it might be preferable not to propose different changes to that same rule.

Second, this proposal does not deal with a lot of privilege waiver issues that have been addressed in the caselaw. For a general discussion of those issues, see Marcus, The Perils of Privilege: Waiver and the Litigator, 84 Mich. L. Rev. 1605 (1986). Thus, there is no effort here to deal with privilege waiver that results from putting privileged material "in issue,"

from sharing of privileged materials with other litigants, or from witness preparation using privileged materials.

Most significantly, this proposal does not attempt in any general way to deal with the problem of "inadvertent production." This occurs when a party turns over privileged material without intending to. "The inadvertent production of a privileged document is a specter that haunts every document intensive case." F.D.I.C. v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 479-80 (E.D. Va. 1991). By reducing the document review burden, this sort of proposal might limit this risk, but it does not otherwise alter the way in which actual inadvertent production is handled by the courts. And the federal courts have not spoken with entire clarity on this question, for there seem to be three lines of cases. See 8 Federal Practice & Procedure § 2016.2 at 241-46.

During the [January, 1998] Santa Barbara meeting [of the Discovery Subcommittee to draft rule proposals on the topics that the full Committee determined were worth pursuing during its October, 1997 meeting based in part on the September, 1997, Boston Conference], the Subcommittee did not think that trying to deal generally with inadvertent production would be a fruitful subject of rule amendment. For one thing, it might heighten the problems of authority discussed below under heading (c). For another, it seemed likely to immerse the Committee in a thicket of refining the caselaw. The three lines of cases include two that the Committee would probably not embrace. One makes almost all disclosures a waiver, no matter what, so that adopting such a rule would heighten the risk of waiver. Another makes inadvertent disclosure almost never a waiver, which heightens the sense that the rule change alters privilege law. The third (and majority) view of the courts is to make the question of waiver turn on a variety of circumstances. To "codify" this in a rule

would involve addressing many of the questions addressed by the courts:

> (1) How much effort must the party seeking to "take back" the waiver show that it made to cull privileged documents?
>
> (2) How quickly must the producing party act to undo the mistake, and what it should do?
>
> (3) How should the court deal with further disclosure of the materials in question to others in the interim between the inadvertent disclosure and its discovery?
>
> (4) How, if at all, should the courts apply the "overriding issue of fairness" that courts using this middle view espouse?

Alternatively, the rule could devise a different set of considerations, but undoubtedly this would be something of a challenge. Rather than undertake that challenge, then, the proposal the Subcommittee brought forward in March, 1998, simply affords the parties a chance to get the court's assurance that permitting the other side a "quick look" to determine what it is really interested in copying will not itself work a waiver.

Third, this proposal depends on agreement of the parties. The Subcommittee discussed the alternative of permitting the same thing on motion (i.e., where one party opposes the arrangement). But the situation where there is an agreement between the parties is the most vexing one that has been raised in such comments as the Committee has received about this problem. So far as the party seeking discovery is concerned, to impose such an order might deprive the party of a right to obtain discovery without this concession. More significantly, to impose such an

order on the party permitting inspection might imply the court could deny that party the time needed to screen the documents. Some years ago, a panel of the Ninth Circuit suggested that ordering production on a "Herculean" schedule without insulation against waiver might be an abuse of discretion. See Transamerica Computer Co. v. International Bus. Mach. Corp., 573 F.2d 646 (9th Cir. 1978). But it would seem odd for the court to be able to tell an unwilling party that it could not do as thorough a review as it wanted to do because the court was in a hurry. So the consent of both is required under the proposal.

(b) The question whether such a rule change would be useful: The Committee has had some discussion of this question in the past. To begin with, the reality is that this sort of thing is already being done, seemingly without the court's imprimatur. For a recent published example, consider Walsh v. Seaboard Sur. Co., 184 F.R.D. 494, 495 (D. Conn. 1999):

> On October 29, 1998, Seaboard's counsel reviewed thousands of pages of documents from Garcia's files and identified certain documents that it wished to have copied by Garcia's copying service. On November 9, 1998, plaintiffs' counsel directed Garcia's office not to release the copied documents to Seaboard because he first wanted to inspect them to make sure that they did not contain any additional protected materials. Plaintiffs' counsel subsequently took possession of the copies and removed a number of the documents under claim of attorney-client privilege and work-product doctrine. [The court then addressed and resolved the privilege objections raised in this manner, finding that some privilege objections had been waived due to injection of certain issues into the case, but not inadvertent disclosure.]

Given that such arrangements occur already, one might say that a rule change to make them possible is not necessary. But there is considerable uncertainty about whether such arrangements are currently sufficient to guard against waiver, even when embodied in an order. Assuming that the agreement of the party seeking discovery would estop that party from arguing waiver, there remains the question of waiver with regard to others. Ordinarily waiver is "as to the world," and if privileged materials are once turned over to anyone, all others can claim this disclosure waives privileges as to them. So the basic problem is to insulate the parties against having others use inspection done pursuant to such an agreement as an argument for waiver.

The law is presently rather murky on whether such agreements do the job, and whether a court order makes a difference in effectuating such arrangements. Although the Manual for Complex Litigation (Second) seemed to endorse agreements to contain any waiver that might otherwise result, the Manual (Third) cautions that courts have refused to enforce such agreements, albeit in situations in which there was no court order. See Manual (Third) § 21.431 n.137. Courts have entered orders purporting to insulate such disclosures from waiver consequences. But there is a question about whether those orders will be effective. The Ninth Circuit, in the Transamerica case mentioned above, ruled that an order preserving privilege does insulate disclosure against this effect, at least where it is in the course of very expedited production of large amounts of material under court order. But more recently that decision has been described as the approach of "a small number of courts." Genetech, Inc. v. U.S. International Trade Comm'n, 122 F.3d 1409, 1417 (Fed. Cir. 1997). So the addition of a provision to Rule 34(b) could either make explicit authority that is already thought to exist by some courts, or supply a procedure that has been thought ineffective

by some courts. This might also encourage more litigants to use this time-saving method.

The question, then, is whether the proposed procedure would save time. When these issues have been discussed in prior Committee meetings, it has not been clear that much time would be saved. Some feel that no careful lawyer would allow the other side to inspect documents, even subject to such provisions, before reviewing them all to remove privileged materials. To this it may be responded that where a document request sweeps over wide ranges of materials, and the producing party is confident that the other side will quickly see that most of the material is irrelevant, there is no reason to await and pay for such a careful review of the documents. In addition, by focusing the parties on what is actually of interest to the party seeking discovery, this procedure may reduce the burden of preparing a privilege log. Even this modest change may work a significant savings in big document cases. But to date it has been unclear whether these prospects warrant making a change in the rules.

(c) The question of authority: This rule change would be useful only if it effectively insulated the "quick look" procedure proposed against being urged as a waiver. The problem is that in 1988 Congress amended the Rules Enabling Act to include the following in 28 U.S.C. § 2074(b):

> Any such rule [adopted pursuant to the Rules Enabling Act] creating, abolishing or modifying an evidentiary privilege shall have no force or effect unless approved by an Act of Congress.

At least some (including one member of the Advisory Committee on Evidence Rules who attended the Boston conference) have argued that the statute prevents this Committee from doing anything

about waiver by rule. There is presently no certain answer to this assertion, but there are reasons to think the statute does not create an insuperable block.

To begin with, even if it applies the statute does not prohibit rule-making but only requires that such a provision be enacted by Congress. Accordingly, the rules process could simply generate the proposal in the hopes that Congress would enact it. That would be consistent with the longstanding view that it is undesirable for Congress to change rules by passing legislation except as a feature of the rulemaking process. Of course, the prospect that affirmative legislation would be required (as opposed to the "pocket approval" that usually attends rule amendments) re-raises the question whether this change is so important as to call for such an undertaking.

The more pertinent point is that there are reasons to believe that a provision like the one proposed above would not require affirmative enactment. Of course, even if the problem were highlighted throughout the rule amendment process and called to the attention of Congress, that would not prevent a party from later arguing that the new provision was ineffective because not adopted by Congress. But there are arguments that this proposal does not do what the statute is requiring a statute to accomplish.

The background is the adoption of the Federal Rules of Evidence, which included detailed privilege provisions when they came before Congress for its review in 1972. That was an extremely contentious time regarding certain privileges, particularly the Executive privilege, and the orientation of some of the proposed rules seemed to curtail personal protections and broaden governmental ones. "As the Watergate scandal began to unravel, the notion of expanded privileges of secrecy for

government and elimination of privileges for citizens seemed less attractive." 21 Federal Practice & Procedure § 5006 at 104. But those seemed the likely consequences of replacing caselaw on privilege with the provisions of the proposed 500 series of the Federal Rules of Evidence, and Congress eventually replaced all those proposed rules with Fed. R. Evid. 501, which makes privilege a matter of state law as to issues governed by state law, and calls otherwise for the development of a federal common law of privilege. Thus when the provision in the 1988 legislation forbids "creating, abolishing or modifying an evidentiary privilege," it seems directed to something different from the proposal above.

A quick look at the legislative history of the 1988 legislation shows that the source is indeed the 1972-75 dispute over the Rules of Evidence. Thus, the pertinent House Report says that "[s]ubsection (b) of proposed section 2074 carries forward current law." H.R. Rep. 99-422 (99th Cong. 1st Sess.) at 27. (When this legislation was adopted in the next Congress, the legislative history explicitly adopted this provision. See H.R. Rep. 100-889 at 26.) The derivation was 28 U.S.C. § 2076, adopted as part of the legislation by which Congress eventually passed the Rules of Evidence, which authorized the Supreme Court to prescribe amendments to those rules. Thus, the basic thrust was to give effect the limitation on Rules of Evidence that alter privileges Congress had embraced in substituting Fed. R. Evid. 501 for the proposed 500 series.

The rejected 500 series included a proposed Rule 511 regarding waiver,[34] so there is at least some basis for worrying

[34] This rejected rule would have provided:

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or

that waiver rules were included in the prohibition now embodied in § 2074(b). But the objections to this rule (as opposed to the proposed rules creating privileges) don't seem addressed to civil cases, and were about overbroad application of waiver under the proposed rule, not unduly narrow application of waiver.[35] In relation to civil litigation, the proposed rule seems to have been taken as uncontroversial. For that reason, a change like the one above -- allowing the judge to regulate the operation of discovery in a civil case -- seems to present quite different problems from the general regulation of the waiver of privileges in a wide variety of circumstances under rejected Rule 511, although counterarguments can be made.

The view that regulation of pretrial litigation can include some provisions that might affect waiver is confirmed by other rulemaking that has occurred. The Rules of Evidence themselves

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consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

[35] As explained in Federal Practice & Procedure § 5721 at 505-06:

> The proposed rule was noncontroversial, but the Justice Department wanted to amend the rule by adding "under such circumstances that it would be unfair to allow the claims of privilege." It was apparently worried that the proposed rule would make it a waiver for the government to share information from an informer with another government. The Advisory Committee left Rule 511 undisturbed in the Revised Draft, but it amended the proposed rule on the informer privilege to resolve the Justice Department complaint. This failed to mollify the Department, which renewed its proposal to amend the rule, this time with the support of a group of Senators who threatened to revoke the Supreme Court's rulemaking powers if the Advisory Committee did not alter the rules to please the Justice Department. The Advisory Committee held fast . . . . The proposed rule was promulgated by the Supreme Court and sent to Congress, but Congress refused to adopt the proposed privilege rules and left the matter to the courts under Evidence Rule 501.

include Evidence Rule 612, regarding materials shown to witnesses, and this rule has been read to abrogate privilege protection when privileged materials are shown to prospective witnesses. Even while it was refusing to adopt Fed. R. Evid. 511, Congress enacted Rule 612. This Committee addressed itself to similar issues in proposing the expert disclosure provisions of Rule 26(a)(2)(B), which calls for disclosure of "the data or other information considered by the witness in forming the opinions," a point made clearer in the Committee Note.[36] So at least some kinds of privilege waiver issues have been addressed by rule.

More pertinent yet is the 1993 addition of Rule 26(b)(5), which requires that a party withholding materials under claim of privilege provide specifics about the basis for the claim. This is the source of the privilege log requirement that was raised by some in 1997. The Committee Note says that "[t]o withhold materials without such notice . . . may be viewed as a waiver of the privilege," and at least some courts have so treated failure to satisfy this requirement. See 8 Federal Practice & Procedure § 2016.1. But if a rule could not modify privilege protection by treating failure to comply as a waiver, this provision would seem invalid under § 2074(b). Nobody has ever so suggested.

To the contrary, all of these provisions seem to be proper subjects for regulation by rule because they relate to the smooth functioning of the civil litigation process. The Supreme Court has recognized the need for the court to have significant latitude in regulating discovery in particular, e.g., Seattle

[36] The Committee Note stated: "Given this obligation of disclosure, litigants should not longer be able to argue that materials furnished to their experts to be used in forming their opinions--whether or not ultimately relied upon by the expert--are privileged or otherwise protected from disclosure when such persons are testifying or being deposed."

Times Co. v. Rhinehart, 467 U.S. 20 (1984), and the focus of the proposal above is therefore on the authority of the court to accomplish just such a result by avoiding needless delay and expenditure in document production. Whether a more ambitious treatment of inadvertent production (mentioned in sub-section (a) above) would similarly be proper by rule is not clear. Indeed, it cannot be said that even the proposed approach would be immune to challenge, but it does seem that a good case can be made for this change being within the scope of rulemaking for civil cases.